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VERNON'S
CRIMINAL STATUTES OF TEXAS 1916
VOLUME 1

Penal Code



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VERNON'S
CRIMINAL STATUTES
OF
TEXAS

EMBRACING THE PENAL CODE AND THE CODE OF CRIMINAL
PROCEDURE ADOPTED AT THE REGULAR SESSION
OF THE THIRTY-SECOND LEGISLATURE, 1911

INCORPORATING, UNDER APPROPRIATE HEADINGS,
THE LAWS SUBSEQUENTLY PASSED
DOWN TO 1915

ANNOTATED
WITH HISTORICAL NOTES AND NOTES OF DECISIONS

IN TWO VOLUMES

VOLUME I

THE PENAL CODE

KANSAS CITY, MO.
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1916

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(1 PEN.CODE TEX.)

PREFACE

Difficulties Encountered in Compiling the Statute Text. The original design of the Penal Code and the Code of Criminal Procedure was to present the criminal laws with such completeness that they could be administered without it being necessary to refer to the civil statutes. In pursuance of this policy, the original constructors of the Codes gathered together and placed in the Codes every constitutional and legislative enactment which had any bearing on the criminal law of the State. To accomplish this result the Code Commissioners were compelled to dismember acts of the Legislature, placing parts of them in the civil statutes and other parts in the criminal statutes. In a great many cases it was found necessary to place the same provisions in both statutes. The Legislature while sanctioning the establishment of this statutory system failed to observe it and carry it into effect in its subsequent legislation. It failed to legislate separately for the two statutes. It probably was not feasible to do so. Acts were amended *as acts* after they had been dismembered and divided between the civil and criminal statutes. This situation has rendered the work of compiling the text somewhat difficult. The problem of discriminating between the acts which are appropriate for the criminal statutes and those for the civil statutes has not been easy of solution. It has been the aim of the editors to follow the methods employed in the preparation of the Revised Statutes as far as those methods could be determined from an examination of the contents of the revised criminal codes. The editors have been liberal in adding provisions to the compilation and it is their belief that the Codes as compiled contain everything that the practitioner could reasonably expect to find in a criminal statute.

Defects in the Revision of 1911. The Revised Criminal Statutes of 1911 possess so many defects that it is not safe in all cases to rely on them to ascertain the existing law of the State on the subject of crime and criminal procedure. The act adopting the revision contained no clause repealing laws not incorporated therein. In view of the absence of a repealing provision and on account of the serious defects in the work of revision, the courts have deprived the Revised Criminal Statutes of 1911 of much of the usual sanctity accorded to Revised Statutes. Among the decisions bearing on this subject attention is particularly called to *Berry v. State* (Cr. App.) 156 S. W. 626, *Stevens v. State*, 70 App. 565, 159 S. W. 505, *Robertson v. State*, 70 App. 307, 159 S. W. 713, *Williams v. State*, 71 App. 6, 159 S. W. 732.

The defects in the Revised Criminal Statutes are as follows:

(a) The omission of subsisting laws not repealed or held unconstitutional by the courts. A table has been prepared for each Code showing the laws omitted therefrom and which have been carried into the new compilation. This table appears immediately preceding the

Table of Session Laws in each of the Codes. Representative examples of omitted laws appear at articles 220, 664b-664d, 695e, 852a, 1255a and 1521a of the Penal Code, and articles 97a, 109a, 264a, 291a, 632a, 844a, 1105a, 1117h, and 1163a of the Code of Criminal Procedure.

(b) The inclusion of laws which had become obsolete or which had been amended, repealed, or superseded by later legislation. There are a great many instances in which the revisers fell into this error. In each case an explanatory note will be found in this compilation following the repealed or superseded provision. Representative examples will be found by referring to the explanatory notes under articles 109, 111, 150-154, 403, 418, 678, 850, 853, 857, 901, 1054, 1263, 1458, 1464, 1488, 1513 and 1551-1554 of the Penal Code, and articles 140, 165, 302, 646, 648, 963, 1010, and 1129 of the Code of Criminal Procedure.

(c) Failure to observe the changes in the civil statutes involving either the creation of a new offense or repealing or modifying existing provisions of the criminal codes. For representative examples of this defect see the explanatory notes under articles 409, 1278, 1414, 1488, 1491-1503, 1526 and 1531d of the Penal Code, and articles 618, 661a, 889, and 1081 of the Code of Criminal Procedure. The editors who prepared this compilation have carefully examined the civil legislation subsequent to the Revised Statutes of 1895, and in many cases have found provisions affecting the criminal branch of the law which were not carried into the Revised Criminal Statutes of 1911. These have been inserted at their appropriate places in the compilation. Examples of this work appear at articles 115a, 115b, 120, 616, 681, 753, 835, 1252, 1487a, 1487b and 1617a of the Penal Code, and articles 845 and 846 of the Code of Criminal Procedure.

(d) Errors in classification and arrangement of the laws and in the molding of their language in attempting to accommodate them to the revision. This has resulted in many cases in giving a legislative act a wider or a more restricted scope on the face of the revision than was intended by the Legislature when the act was passed. For representative examples see explanatory notes under articles 100, 220, 1256, 1278 and 1284 of the Penal Code, and articles 625, 646, 648, 899, 900, 1117a-1117e, and 1127a of the Code of Criminal Procedure.

(e) Lack of uniformity and coherence in the distribution of laws between the subdivisions of the statutes, and the separation of similar or related laws which should have been gathered together. In an unofficial compilation of the laws it is not possible to correct errors of this nature existing in the basic revised statutes. The editors of this compilation, however, have made many cross-references and explanatory notes tending to remove the misleading effect or inconvenience arising from errors of classification of the laws. For examples of this feature of the work see explanatory notes under articles 593, 622, 712, 730, 836, 850 and 1054 of the Penal Code, and articles 899, 900, and 1117a of the Code of Criminal Procedure.

(f) Failure to refer to the earlier enactments of the laws, and erroneous references to the Session Laws. This information is essential to a correct understanding of the history of the legislation. Many errors in the references have been corrected in this compilation. Examples of this work may be seen by comparing articles 852 and 869 of this compilation of the Penal Code with the corresponding articles in the Revised Penal Code.

The Annotations. Both the Penal Code and Code of Criminal Procedure have been carefully and completely annotated. The annotations extend from the earliest decisions up to and including volume 178 of the Southwestern Reporter. The decisions of the federal courts affecting the criminal statutes of Texas have also been carried into the annotations. The work of annotation has been done by the same editorial staff that prepared the annotations for Vernon's Sayles' Civil Statutes for 1914. In annotating the criminal statutes the publishers have availed themselves of the material found in Willson's Texas Criminal Statutes of 1897 and the supplements thereto. Errors of classification found in the Willson books have been corrected and omitted cases have been supplied. The publishers have endeavored to avoid needless duplication of annotations. To effect this purpose it has not followed the practice heretofore prevailing in Texas of placing notes on matters of practice under the statute article defining the crime, as well as under the article defining the particular practice in question. A decision directly involving a matter of practice defined by statute is placed under the procedure statute. Matters of procedure not directly defined by statute are placed under the article relating to the crime on which the prosecution was based. Thus notes on the sufficiency of an indictment in matters not particularly dealt with by a procedure statute are placed under the statute defining the particular crime, while notes on subjects based on the procedure statutes are placed under those statutes. Liberal cross-references have been made between the various articles of the statutes.

The Index. A separate index has been prepared for each Code in accordance with the plan of the Revised Criminal Statutes. The indices in the new compilation are more complete than those of the Revised Statutes. While the index headings used in the Revised Statutes appear in the indices of the present compilation, many new headings have been added and the old ones have been made more complete. Where the annotations cover subjects extending beyond the literal text of the statute, those subjects have been carried into the index, thus making the annotations more readily accessible and giving them the character of an Index Digest.

Tables of Session Laws. Immediately preceding the index in each of the Codes appears a table showing the place in the new compilation where the new laws passed at the regular and called sessions of 1911, 1913 and 1915, are to be found. Preceding each of these tables is an additional table showing subsisting laws enacted during the period between the revision of 1895 and that of 1911, and carried into the new compilation on account of their omission from the Revised Criminal Statutes of 1911. In these tables of omitted laws appear a few acts relating to criminal matters passed prior to the revision of 1895 which were not carried into that revision, but which survive the repealing clause in the act adopting such revision by having been incorporated in the Revised Civil Statutes of 1895 and 1911.

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A BILL TO BE ENTITLED

“AN ACT to Adopt and Establish a ‘PENAL CODE’ and a ‘CODE OF CRIMINAL PROCEDURE’ for the State of Texas.”

Section 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS, That the following titles, chapters and articles shall hereafter constitute the PENAL CODE of the State of Texas:

1 PEN. CODE TEX.

(xiv)†

THE PENAL CODE

TITLE 1

GENERAL PROVISIONS RELATING TO THE WHOLE CODE

- | | |
|--|--|
| Chap.
1. The general objects of the Code, principles on which it is founded, rules for its interpretation. | Chap.
3. Persons punishable under this Code and the circumstances which excuse, extenuate or aggravate an offense. |
| 2. Definitions. | |

CHAPTER ONE

THE GENERAL OBJECTS OF THE CODE, THE PRINCIPLES ON WHICH IT IS FOUNDED, AND RULES FOR THE INTERPRETATION OF PENAL LAWS

- | | |
|---|--|
| Art.
1. Design of the Code.
2. Object of punishment.
3. All penalties must be affixed by written law.
4. Common law the rule of construction, when.
5. Special provisions control general.
6. Unintelligible law not operative.
7. Judges to report defects in the law.
8. Prosecuting officers to make similar reports.
9. General rule of construction.
10. Words specially defined, how understood. | Art.
11. Innocence presumed.
12. No offense against a law not in force.
13. When criminal laws take effect.
14. Ignorance no excuse.
15. Effect of modification by subsequent law.
16. Repeal, effect of.
17. When new penalty is substituted.
18. Change of definition, effect of.
19. Previous offenses not affected by this Code.
20. No cumulative penalties. |
|---|--|

Article 1. [1] Design of the Code.—The design of enacting this Code is to define in plain language every offense against the laws of this state, and affix to each offense its proper punishment. [P. C. 1.]

Cited, *Leeper and Powell v. State*, 29 App. 63, 14 S. W. 398; *Wilkerson v. State*, 2 App. 255; *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013; *Ex parte Lingenfelter*, 64 App. 30, 142 S. W. 555, Ann. Cas. 1914C, 765; *Essery v. State*, 72 App. 414, 163 S. W. 17.

Construction of Code.—The court will construe the Code so that all its provisions may be upheld if consistent with the intent of the Legislature. *Talley v. State* (Cr. App.) 147 S. W. 255.

Juvenile delinquents.—The statute authorizing the dismissal of indictments against boys under 17 and girls under 13, and the institution of proceedings against them as delinquents, is not in contravention of this article. *Ex parte Bartee* (Cr. App.) 174 S. W. 1051.

Art. 2. [2] Object of punishment.—The object of punishment is to suppress crime and reform the offender. [P. C. 2.]

Cited, *Cockrum v. State*, 24 Tex. 394; *Wilkerson v. State*, 2 App. 255.

Art. 3. [3] All penalties must be affixed by written law.—In order that the system of penal law in force in this state may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this state. [P. C. 3.]

See post, art. 53.

Cited, *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013; *Ex parte Lingenfelter*, 64 App. 30, 142 S. W. 555, Ann. Cas. 1914C, 765.

Art. 3 GENERAL PROVISIONS RELATING TO WHOLE CODE (Title 1

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Enactment of laws. 2. — Special session laws. 3. — Legislative journals. 4. — Emergency clause. 5. — Public and local laws. 6. — Subjects and titles of acts. 7. — Amendments of statutes. | <ol style="list-style-type: none"> 8. Punishable offenses. 9. — Offenses eo nomine. 10. — Constructive offenses. 11. — Previous law. 12. — Criminal contempt. 13. — Juvenile delinquents. 14. Municipal ordinances. |
|---|--|

1. **Enactment of laws.**—Under the previous constitution laws could not depend on the approval of the people at the polls. *State v. Swisher*, 17 Tex. 441.

2. — **Special session laws.**—As to passage of laws at special session, see *Baldwin v. State*, 21 App. 591, 3 S. W. 109; *Brown v. State*, 32 App. 119, 22 S. W. 596; *Long v. State*, 58 App. 209, 127 S. W. 208, 21 Ann. Cas. 405.

3. — **Legislative journals.**—As to legislative journals, see *R'y v. Hearne*, 32 Tex. 547; *Blessing v. Galveston*, 42 Tex. 641; *Usener v. State*, 8 App. 177; *Williams v. Taylor*, 83 Tex. 667, 19 S. W. 156; *Ewing v. Duncan*, 81 Tex. 230, 16 S. W. 1000; *Hunt v. State*, 22 App. 396, 3 S. W. 233.

4. — **Emergency clause.**—As to emergency clause see Const. art. 3, sec. 39; *Ex parte Murphy*, 27 App. 492, 11 S. W. 487; *Giebel v. State*, 28 App. 151, 12 S. W. 591; *Kenyon v. State*, 31 App. 13, 23 S. W. 191; *Williams v. Taylor*, 83 Tex. 667, 19 S. W. 156; *Ewing v. Duncan*, 81 Tex. 230, 16 S. W. 1000; *Graves v. State*, 6 App. 288; *Lanham v. State*, 7 App. 126.

5. — **Public and local laws.**—As to public and local laws, see *Cordova v. State*, 6 App. 207; *Graves v. State*, Id. 228; *Bejarino v. State*, Id. 265; *Handline v. State*, Id. 347; *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Lastro v. State*, 3 App. 363; *Bohl v. State*, Id. 683; *Davis v. State*, 2 App. 425; *Ham v. State*, 4 App. 645; *Ex parte Lynn*, 19 App. 293; *Donaldson v. State*, 15 App. 25; *Beyman v. Black*, 47 Tex. 558; *Baldwin v. State*, 21 App. 591, 3 S. W. 109. See Const., art. 3, secs. 56, 57; art. 16, secs. 20, 22, 23; art. 11, secs. 5, 8; art. 5, sec. 22.

6. — **Subjects and titles of acts.**—As to subjects in titles, see *Nobles v. State*, 38 App. 330, 42 S. W. 978; *Fehr v. State*, 36 App. 93, 35 S. W. 381, 650; *Floock v. State*, 34 App. 314, 30 S. W. 794; *Tabor v. State*, 34 App. 631, 31 S. W. 662, 53 Am. St. Rep. 726; *Ex parte Fagg*, 38 App. 573, 44 S. W. 294, 40 L. R. A. 212; *Gunter v. Mortgage Co.*, 82 Tex. 496, 17 S. W. 840; *Day Co. v. State*, 68 Tex. 526, 4 S. W. 865; *Ry. v. Smith*, 54 Tex. 1; *Holden v. State*, 1 App. 225; *Hasselmeyer v. State*, 1 App. 690; *Ex parte Mabry*, 5 App. 93; *English v. State*, 7 App. 171; *Albrecht v. State*, 8 App. 216, 34 Am. Rep. 737; *Robinson v. State*, 15 Tex. 312; *State v. Shadle*, 41 Tex. 404; *Giddings v. San Antonio*, 47 Tex. 548, 26 Am. Rep. 321; *Stone v. Brown*, 54 Tex. 330; *State v. McCracken*, 42 Tex. 383; *Johnson v. State*, 9 App. 249; *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Breen v. Ry. Co.*, 44 Tex. 302; *R. R. Co. v. Smith Co.*, 54 Tex. 1; *R. R. Co. v. Odum*, 53 Tex. 343; *Tadlock v. Eccles*, 20 Tex. 782, 73 Am. Dec. 213; *Cannon v. Hemphill*, 7 Tex. 184; *Davey v. Galveston County*, 45 Tex. 291; *Woods v. Durrett*, 28 Tex. 429; *Ex parte House*, 36 Tex. 83; *Murphey v. Menard*, 11 Tex. 673; *State v. Deitz*, 30 Tex. 511; *Roddy v. State*, 16 App. 502; *Stone v. Brown*, 54 Tex. 331; *Land Co. v. State*, 68 Tex. 526, 4 S. W. 865. See Const., art. 3, sec. 35, and notes.

Titles must be liberally construed. *Ex parte Segars*, 32 App. 553, 25 S. W. 26; *Nichols v. State*, 32 App. 391, 23 S. W. 680; *Tabor v. State*, 34 App. 631, 31 S. W. 662, 53 Am. St. Rep. 726.

7. — **Amendments of statutes.**—As to mode, see *Hasselmeyer v. State*, 1 App. 690. Const., art. 3, sec. 36.

8. **Punishable offenses.**—It seems to have been the intention, in adopting the Codes, to prevent all future penal enactments unless they were appended to and made parts thereof. *State v. Garcia*, 38 Tex. 543.

Unless the written law makes an act or omission an offense, and affixes thereto a penalty, such act or omission can not be punished. *Rogers v. State*, 8 App. 401; *Smith v. State*, 7 App. 286. The object of this article was to prohibit prosecution for what was an offense at common law, but not made penal by our statutes. *Cain v. State*, 20 Tex. 353; *Allen v. State*, 34 Tex. 230; *State v. Flynn*, 35 Tex. 354; *State v. Randle*, 41 Tex. 292; *Johnson v. State*, 4 App. 63. And see *Ringo v. State*, 54 App. 561, 114 S. W. 119.

If the inculpatory acts enumerated in two different articles of the Code be the same, and the penalties prescribed be different, neither is enforceable because of uncertainty as to penalty. *Cooper v. State*, 25 App. 530, 8 S. W. 654. See in illustration the offenses defined by arts. 269, 477.

Because it fixes minimum penalty only, a penal statute is not vitiated. *Myers v. State*, 51 App. 463, 103 S. W. 859.

Indictment for pandering held insufficient. *Houseman v. State* (Cr. App.) 173 S. W. 1036.

9. — **Offenses eo nomine.**—If an act or omission eo nomine, is made a penal offense, and a penalty is affixed thereto, it becomes an offense punishable under this article. *Robinson v. State*, 11 App. 309; *Ex parte Bergen*, 14 App. 52; *Cross v. State*, 17 App. 476; *Smith v. State*, 7 App. 286.

Sodomy and Fabrication of notarial certificate, formerly "not defined," are now punishable offenses. *Ex parte Bergen*, 14 App. 52; *Cross v. State*, 17 App. 476; *Rogers v. State*, 8 App. 401; *Prindle v. State*, 31 App. 551, 21 S. W. 360, 37 Am. St. Rep. 833. So, also, is fornication. *Kelley v. State*, 32 App. 579, 25 S. W. 425.

Pursuing business of peddling patent medicines without paying occupation tax is a penal offense. *South v. State*, 72 App. 381, 162 S. W. 510.

10. — **Constructive offenses.**—Our statutes are wholly intolerant of constructive offenses and constructive punishments. *Republic v. Bynum*, Dallam, 376; *Mur-*

ray v. State, 21 App. 620, 2 S. W. 757, 57 Am. Rep. 623; Beeson v. State, 23 App. 406, 5 S. W. 118; Terry v. State, 25 App. 715, 8 S. W. 934.

11. — **Previous law.**—Under the previous law "fornication" not being defined in the code, could not be punished. State v. Foster, 31 Tex. 578; State v. Smith, 32 Tex. 167; State v. Rahl, 33 Tex. 76; Wolff v. State, 6 App. 195. Nor for the same reason could "sodomy." Fennell v. State, 32 Tex. 378; Frazier v. State, 39 Tex. 390. But the offense of "establishing a lottery" was held to be sufficiently defined. State v. Randle, 41 Tex. 292.

12. — **Criminal contempt.**—In the absence of statute making a criminal contempt an offense, habeas corpus to review an order committing relator to prison for such a contempt is not a "criminal case." Per Harper and Prendergast, JJ.; Davidson, P. J., dissenting. Ex parte Wolters, 64 App. 238, 144 S. W. 531.

13. — **Juvenile delinquents.**—The statute authorizing the dismissal of indictments against boys under 17 and girls under 18, and the institution of proceedings against them as delinquents, is not in contravention of this article. Ex parte Bar-tee (Cr. App.) 174 S. W. 1051.

14. **Municipal ordinances.**—As to municipal ordinances, see Ex parte Coombs, 38 App. 648, 44 S. W. 854; Ex parte Freeland, 38 App. 321, 42 S. W. 295; Ex parte Fagg, 38 App. 573, 44 S. W. 294, 40 L. R. A. 212; Harris County v. Stewart, 91 Tex. 133, 41 S. W. 650; Leach v. State, 36 App. 248, 36 S. W. 471; Ex parte Bell, 32 App. 308, 22 S. W. 1040, 40 Am. St. Rep. 778.

Art. 4. [4] Common law rule of construction, when.—The principles of the common law shall be the rule of construction, when not in conflict with the Penal Code or Code of Criminal Procedure, or with some other written statute of the state. [Act Feb. 12, 1858, p. 156; P. C. 4.]

Cited, Slack v. State, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112; Ex parte Lingenfelter, 64 App. 30, 142 S. W. 555, Ann. Cas. 1914C, 765.

Rules for construction of Constitution.—A constitution is not to receive a technical construction, like a common law instrument or a statute; it is to be interpreted so as to carry out the great principles of government, not to defeat them. Hunt v. State, 7 App. 212. No principle of construction can empower the courts to treat as mere matter of form any express provision of the constitution. Cox v. State, 8 App. 254, 34 Am. Rep. 746. Constitutional provisions are absolutely mandatory, and can in no case be regarded as directory merely, to be obeyed or not, within the discretion of either or all of the departments of government. Hunt v. State, 22 App. 396, 3 S. W. 233; Holley v. State, 14 App. 505; Cox v. State, 8 App. 254, 34 Am. Rep. 746. Legislative power, except where the constitution has imposed limits upon it, is practically absolute. And where limitations upon it are imposed, they are to be strictly construed, and are not to be given effect as against the general power of the legislature, unless such limitations clearly inhibit the act in question. If the act itself is within the scope of legislative authority, it must stand. Baldwin v. State, 21 App. 591, 3 S. W. 109. Legislatures are not empowered to interpret the constitution, nor to abrogate the settled judicial construction of a constitutional provision. Powell v. State, 17 App. 345. The distinguishing characteristic between the federal and a state constitution is, that the former is but a grant of legislative power, and congress, in framing laws, can exercise only such authority as is granted; whereas, state constitutions are but limitations upon the plenary power with which otherwise the legislative department of the state was originally invested. The congress of the United States can enact no laws but such as the federal constitution, either expressly or by implication, authorizes it to enact. On the other hand, the power of a state legislature to enact laws is absolute, except as restrained by constitutional limitations, and these limitations are created and imposed by express words, or by necessary implication. In construing the constitution, the courts of the state must understand that the framers of the instrument, and the people who adopted it, employed and interpreted the words and language of the instrument in their ordinary sense. The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. In the construction of written laws, it is the intent of the lawmaker that is to be enforced, which intent is to be found in the instrument itself; and it is to be presumed that language has been employed with sufficient precision to convey it, and, unless examination demonstrates that such presumption does not hold good in the particular case, nothing remains but to enforce it. Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature must be understood to mean what they have clearly expressed, and in such case no room is left for construction. The courts are not at liberty to search elsewhere for possible or even probable meanings, when one is plainly declared in the instrument itself. The constitution of the state is simply a chart containing limitations upon power, and when it declares how power may be exercised over any subject, then no power can be exercised over that subject in any manner not clearly within the plain import of the language of the constitution. Mere silence, or failure to provide for some particular feature of the subject, can not be construed into a neglect, omission, or an ignoring of that feature. It is a general rule that when the constitution gives a general power, or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the enjoyment of the other. The implication under this rule, however, must not be conjectural or argumentative. And it is further modified by another rule, that, where the means for the exercise of a general power are given, no other or different means can be implied as being more effective or convenient. And another rule

is, that when the constitution defines the circumstances under which a right may be exercised, or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases. *Holley v. State*, 14 App. 505. In expounding a constitutional provision, such construction should be employed as will prevent any clause, sentence, or word from being superfluous, void, or insignificant. The thing to be sought is the thought expressed. Contemporaneous legislative construction is always considered of force. *Cordova v. State*, 6 App. 207. Effect is to be given, if possible, to the whole instrument, and to every section and clause. *Lastro v. State*, 3 App. 363.

And further on this subject, see *Coombs v. State*, 38 App. 648, 44 S. W. 854; *Thomas v. State*, 40 Tex. 36; *Huntsman v. State*, 12 App. 620; *Trigg v. State*, 49 Tex. 645; *Gordon v. State*, 43 Tex. 330; *Hobbs v. State*, 53 App. 71, 112 S. W. 308, following *Porch v. State*, 51 App. 7, 99 S. W. 1122, overruling *Cline v. State*, 36 App. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850, and *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899; *State v. Sims*, 43 Tex. 521; *Ex parte Brown*, 38 App. 295, 42 S. W. 554; 70 Am. St. Rep. 743; *Smisson v. State*, 71 Tex. 222, 9 S. W. 112; *Holmes v. State*, 20 App. 509; *Leach v. State*, 36 App. 248, 36 S. W. 471.

In interpreting a provision of a Constitution or Bill of Rights, words should be given their natural signification in the order and grammatical arrangement in which they are placed, and if, thus regarded, the words convey a definite meaning involving no absurdity or contradiction between the parts, that meaning must be given effect. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

Construction of statutes.—See as to rules of construction of the Penal Code and the Code of Procedure. *Martin v. State*, 40 Tex. 19; *State v. Randle*, 41 Tex. 292; *Wilkerson v. State*, 2 App. 255 (overruling *Smith v. State*, 43 Tex. 643); *Nelson v. State*, 1 App. 41; *Williams v. State*, Id. 465. See, also, notes to art. 9, post.

Under the rule that, when a provision is adopted from the Constitution or laws of another state or country, the construction placed thereon by the courts of that state or country is also impliedly adopted, the known and the settled construction of English statutes embodied in our own statutes or Constitution was impliedly adopted along with the statutes. *Robertson v. State*, 63 App. 216, 142 S. W. 533, Ann. Cas. 1913C, 440.

Rules for determining constitutionality of laws.—There is no question of the power of the courts to pronounce a statute unconstitutional and invalid. *Lastro v. State*, 3 App. 363. The rule is to ascertain whether the legislature is restricted or limited by the constitution. *Logan v. State*, 5 App. 306. But legislative enactments will not be held invalid unless clearly inconsistent with the constitution. Where there is a reasonable doubt in the judicial mind whether an act of the legislature is in conformity with the constitution, the legislation must be supported. *Lastro v. State*, 3 App. 363; *Cordova v. State*, 6 App. 207; *Ex parte Mabry*, 5 App. 93; *Holley v. State*, 14 App. 505; *Ry. Co. v. Gross*, 47 Tex. 428. See this doctrine criticised by Justice Lipscomb, in *Thomas v. State*, 9 Tex. 335. But where the conviction is clear, the duty of the court to condemn unwarranted legislation is imperative. The obligation of allegiance is to support the constitutive law; and that obligation is rendered eminently imperative upon the courts of last resort, they being the special depositories of the charter of the nation's constitutional will, and its peculiar guardians against all infractions. If a legislative act impugn the principles of the constitution, the act must yield; and, whenever it is brought before the courts, must be declared void. A government can scarcely be deemed free when the rights of the people are left solely dependent on the will of a legislative body, without any restraint. The judiciary is not only a co-ordinate branch of the government, but is a check interposed to keep the other branches within the limitations of the constitution; and the exercise of this great and paramount duty is essential to the existence and transmission of freedom. *Ex parte Mabry*, 5 App. 93. When a penal law prohibits two or more acts, it may be constitutional and valid as to one of the acts, and unconstitutional and invalid as to the other. *Ex parte Kennedy*, 23 App. 77, 3 S. W. 114; *Holley v. State*, 14 App. 506. The constitution of the United States being framed for the establishment of a national government, it is a settled rule of construction of that instrument, that the limitations it imposes upon the powers of government are in all cases to be understood as limitations upon the government of the Union only, except where the states are expressly mentioned. The fifth amendment to the constitution of the United States is not, therefore, a limitation upon the states, and the power to prosecute crime by information, or by other mode than by indictment of a grand jury, not being surrendered by the states, they may, and some of them do, exercise such power. *Pitner v. State*, 23 App. 366, 5 S. W. 210. In all cases involving clearly and unquestionably the constitutionality and validity of state laws, with reference to provisions of the constitution of the United States, the decisions of the supreme court of the United States clearly, certainly, and unequivocally expressed, are binding upon state courts. But see this case for an instance in which a state court declines to follow a decision of the supreme court of the United States, for several reasons. *Asher v. State*, 23 App. 662, 5 S. W. 91, 59 Am. Rep. 783. In determining the validity of a statute, assailed upon the ground that its enactment was not in conformity with some express requirement of the constitution, the courts are not confined to the verity usually imported on the face of the statute, if prima facie valid, but may go behind it to ascertain if the express requirement of the constitution was observed in its enactment. See a discussion of the decisions in *Blessings v. Galveston*, 42 Tex. 641, and *Usener v. State*, 8 App. 177, which hold a contrary doctrine to that just stated. *Hunt v. State*, 22 App. 396, 3 S. W. 233. See, also, *Baldwin v. State*, 21 App. 591, 3 S. W. 109. See, also, *Ex parte Tipton*, 28 App. 438, 13 S. W. 610, 8 L. R. A. 326.

If a provision inconsistent with the constitution be found inserted, it may be invalidated without interference with other provisions. *Albrecht v. State*, 8 App.

216, 34 Am. Rep. 737. It cannot be adjudged unconstitutional merely because it may contravene "public policy" or established customs and traditions, *ib.*; and when duly promulgated as laws, courts have no concern with mere irregularities in the mode of their adoption. *Usener v. State*, 8 App. 177.

— **Legislative policy.**—The courts are not concerned with the policy, expediency, propriety or the wisdom of the law-making power, and will not inquire into such matters. *Engelking v. Von Wamel*, 26 Tex. 469; *Smith v. State*, 18 App. 454; *Davis v. State*, 2 App. 425; *Stapp v. State*, 3 App. 138; *Albrecht v. State*, 8 App. 216, 34 Am. Rep. 737.

Art. 5. [5] Special provisions control general.—In the construction of this Code each general provision shall be controlled by a special provision on the same subject, if there be a conflict. [P. C. 5.]

Cited, *Cockrum v. State*, 24 Tex. 394; *Ex parte Woods*, 52 App. 575, 108 S. W. 1171, 16 L. R. A. (N. S.) 450, 124 Am. St. Rep. 1107; *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013; *Ex parte Lingenfelter*, 64 App. 30, 142 S. W. 555, Ann. Cas. 1914C, 765.

Where there is a conflict between a general and a special provision, the special provision must prevail in respect to the subject matter of it. *Warren v. Shuman*, 5 Tex. 441; *Erwin v. Blanks*, 60 Tex. 583.

Art. 6. [6] Unintelligible law not operative.—Whenever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it can not be understood, either from the language in which it is expressed, or from some other written law of the state, such penal law shall be regarded as wholly inoperative. [P. C. 6.]

Cited, *Augustine v. State*, 41 App. 59, 52 S. W. 77, 96 Am. St. Rep. 765; *French v. State*, 14 App. 76. And see *Ex parte Woods*, 52 App. 575, 108 S. W. 1171, 16 L. R. A. (N. S.) 450, 124 Am. St. Rep. 1107; *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013; *Ex parte Lingenfelter*, 64 App. 30, 142 S. W. 555, Ann. Cas. 1914C, 765.

Definiteness of laws.—The expression "light repairs" is indefinite. *State v. International & G. N. Ry. Co.* (Civ. App.) 165 S. W. 892.

— **License law.**—Peddling patent medicines without paying the occupation tax is punishable. *South v. State*, 72 App. 381, 162 S. W. 510.

— **Punishment.**—Indeterminate sentence law held indefinite. *Ex parte Marshall*, 72 App. 83, 161 S. W. 112.

Art. 7. [7] Judges to report defects in the law.—Whenever a court trying an offense is of opinion that the law is so defective as to have no operation, or when it appears that there has been a failure to provide for any offense, or class of offenses, which ought to be made punishable, the judge of such court shall report the same to the legislature at its next session, after such defect or omission shall have been discovered. [P. C. 7.]

Art. 8. [8] Prosecuting officers to report defects in the law.—It is also declared to be the duty of the attorney general to call the attention of the legislature, in his reports which are required by law to be made to the governor, to any defects or omissions in the penal law which he may observe, and in like manner the district and county attorneys shall communicate to the attorney general such suggestions as they may deem important touching the same subject. [P. C. 8.]

Art. 9. [9] General rule of construction.—This Code, and every other law upon the subject of crime which may be enacted, shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects; and no person shall be punished for an offense which is not made penal by the plain import of the words of a law. [Act Feb. 12, 1858, p. 156; P. C. 9.]

See *Vernon's Sayles' Civ. St.* 1914, art. 5502.

Cited, *Slack v. State*, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112; *Ex parte Spiller*, 63 App. 93, 138 S. W. 1013; *Jaynes v. State* (Cr. App.) 150 S. W. 441; *Esery v. State*, 72 App. 414, 163 S. W. 17.

Art. 9 GENERAL PROVISIONS RELATING TO WHOLE CODE (Title 1

1. Common law rule changed—Legislative intent.
2. Meaning of language.
3. — General and specific words or provisions.
4. — Grammatical errors.
5. Preamble.
6. Construction with reference to other statutes.
7. — Conflicting provisions.
8. — Acts of same session.
9. Provisos and exceptions.
10. Statute adopted from other state or country.
11. Revisions and codes.

1. **Common law rule changed—Legislative intent.**—In the construction of a statute the legislative intent, if that intent can be ascertained, must govern. When that intention is discovered, it will prevail even over the literal import of words. *Cain v. State*, 20 Tex. 355; *Walker v. State*, 7 App. 245, 32 Am. Rep. 595; *Sartain v. State*, 10 App. 651, 38 Am. Rep. 649; *Fowler v. Poor, Dallam*, 401; *Hanrick v. Hanrick*, 54 Tex. 109; *Brooks v. Hicks*, 20 Tex. 666; *Rigby v. State*, 27 App. 55, 10 S. W. 760; *Scoley v. Sweatt*, 28 Tex. 713; *Edwards v. Morton*, 92 Tex. 152, 46 S. W. 792; *Albrecht v. State*, 8 App. 313; *Ex parte Robinson*, 28 App. 511, 13 S. W. 786; *Ex parte Creel*, 29 App. 439, 16 S. W. 256; *Parshall v. State*, 62 App. 177, 138 S. W. 759; *Oliver v. State (Cr. App.)* 144 S. W. 604; *Lee v. State (Cr. App.)* 148 S. W. 567, 40 L. R. A. (N. S.) 1132.

This article does away with the strict construction of penal statutes, and the plain import of language and the legislative intent, when manifest, control. *Gentry v. State (Cr. App.)* 152 S. W. 635; *State v. Forrest*, 30 Tex. 503; *Speer v. State*, 2 App. 246; *Turman v. State*, 4 App. 586; *McGregor v. State*, 4 App. 599; *Graves v. State*, 6 App. 228; *Walker v. State*, 7 App. 245, 32 Am. Rep. 595; *Randolph v. State*, 9 Tex. 521; *Ex parte Gregory*, 20 App. 210, 54 Am. Rep. 516; *Murray v. State*, 21 App. 620, 2 S. W. 757, 57 Am. Rep. 623; *Searcy v. State*, 40 App. 460, 50 S. W. 699, 51 S. W. 1119, 53 S. W. 344; *Bowman v. State*, 38 App. 14, 40 S. W. 796, 41 S. W. 635; *Ex parte Woods*, 52 App. 575, 108 S. W. 1171, 16 L. R. A. (N. S.) 450, 124 Am. St. Rep. 1107; *Williams v. State*, 52 App. 371, 107 S. W. 1125; *Oliver v. State (Cr. App.)* 144 S. W. 604; *Barnes v. State (Cr. App.)* 152 S. W. 1043; *Bradfield v. State (Cr. App.)* 166 S. W. 734.

When a statute is capable of two constructions equally reasonable, that should be adopted which effects the intention of the law-making power, unless qualified or restricted by some patent provision of law rendering a contrary construction imperative. *Albrecht v. State*, 8 App. 313; *Rigby v. State*, 27 App. 55, 10 S. W. 760; *Ex parte Creel*, 29 App. 439, 16 S. W. 256; *Ex parte Murphy*, 27 App. 492, 11 S. W. 487; *Ex parte Evers*, 29 App. 539, 16 S. W. 343; *State v. Connor*, 86 Tex. 133, 23 S. W. 1103; *Oliver v. State (Cr. App.)* 144 S. W. 604.

Penal laws are not to be construed so strictly as to defeat the obvious intention of the Legislature. *Oliver v. State (Cr. App.)* 144 S. W. 604; *Randolph v. State*, 9 Tex. 521.

To arrive at the legislative intention the several parts of the act must be construed together. *Estes v. State*, 10 Tex. 300.

At common law, strict construction was applicable to highly penal statutes. *Estes v. State*, 10 Tex. 300; *Sernett v. State*, 17 Tex. 308.

When the words of a statute are not explicit, the intention is to be collected from the context, the occasion and necessity of the law, the mischief felt, and the remedy in view. *Croomes v. State*, 40 App. 672, 51 S. W. 924, 53 S. W. 882.

The intent of legislative acts is to be gathered from their entire context, as showing their general purpose, and particular words are to be taken in the sense in which, looking at the entire act, they appear to have been used, rather than according to their accepted lexicographic definition. *City of Houston v. Potter*, 41 Civ. App. 381, 91 S. W. 389.

The court, in construing the legislative intent in the adoption of the statute, may take into consideration contemporaneous legislative history. *Williams v. State*, 52 App. 371, 107 S. W. 1121.

To interpret the meaning of a statute, it is to be ascertained what was the fair, natural, and probable intent of the Legislature, taking into consideration contemporaneous history and the habits and activities of the people. *Ex parte Roquemore*, 60 App. 282, 131 S. W. 1101, 32 L. R. A. (N. S.) 1186.

A thing which is within the intention of the Legislature is as much within the statute as if it were within the letter, while a thing which is within the letter is not within the statute, unless it be within its intention. *Oliver v. State (Cr. App.)* 144 S. W. 604.

The intention may be collected from the cause or necessity of the act. *Oliver v. State (Cr. App.)* 144 S. W. 604.

2. **Meaning of language.**—For the purpose of ascertaining the intention of the legislature in enacting a statute the language employed in the act is first to be resorted to. If the words employed are free from ambiguity and doubt, and express plainly, clearly, and distinctly the intent, according to the most natural import of the language, there is no occasion to look elsewhere. *Murray v. State*, 21 App. 620, 2 S. W. 757, 57 Am. Rep. 623; *Smith v. State*, 18 App. 454; *State v. Delesdenier*, 7 Tex. 76; *Engelking v. Von Wamel*, 26 Tex. 469; *Holley v. State*, 14 App. 506; *Dodson v. Bunton*, 81 Tex. 655, 17 S. W. 507; *Ex parte Woods*, 52 App. 575, 108 S. W. 1171, 16 L. R. A. (N. S.) 450, 124 Am. St. Rep. 1107. See, also, *Fire Ass'n v. Love*, 101 Tex. 376, 108 S. W. 158, 810.

Where a statute is ambiguous, remarks in debate made by the person proposing it are admissible to aid in its construction. *Ex parte Peede (Cr. App.)* 170 S. W. 749.

Only where there is ambiguity in the words of a statute may the court leave its strict letter and construe it in accordance with what appears from an examination of the whole act to have been the intention of the Legislature. *Sparks v. State (Cr. App.)* 174 S. W. 351.

3. — **General and specific words or provisions.**—When a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters ejusdem generis, with such class. *Murray v. State*, 21 App. 620, 2 S. W. 757, 57 Am. Rep. 623; *R. v. Bynum, Dallam*, 376; *Ex parte Muckenfuss*, 52 App. 467, 107 S. W. 1131. When there is nothing in the statute to limit its general words, they must have general effect. *Laughter v. Seela*, 59 Tex. 177.

Whenever it is found that an act makes a general provision, apparently for all cases, and at the same time contains a special provision for a particular class of cases, the special provision must govern as to the particular class. *Perez v. Perez*, 59 Tex. 322.

4. — **Grammatical errors.**—“Grammatical errors shall not vitiate a law, and a transposition of words and clauses may be resorted to when the sentence or clause is without meaning as it stands, and in no case shall the punctuation of a law control or affect the intention of the legislature in the enactment.” *Vernon's Sayles' Civ. St.* 1914, art. 5503. This rule, though declared in a civil statute, is applicable and binding in the construction of a penal statute. *Murray v. State*, 21 App. 620, 2 S. W. 757, 57 Am. Rep. 623; *Rigby v. State*, 27 App. 55, 10 S. W. 760; *Bradstreet v. Gill*, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768; *Ex parte Rodriguez*, 39 Tex. 705, compared.

5. **Preamble.**—In the interpretation of a statute, resort may be had to the preamble, but it cannot limit or control the express provisions of the statute. And the statement of legislative reasons in the preamble will not affect the validity of the statute. *Sutherland v. De Leon*, 1 Tex. 250, 46 Am. Dec. 100; *Ex parte Gregory*, 20 App. 210, 54 Am. Rep. 516. And see *Berry v. State* (Cr. App.) 156 S. W. 626.

6. **Construction with reference to other statutes.**—It is a well settled rule in the construction of statutes, and for the purpose of arriving at the legislative intentions, that all laws in *pari materia*, or on the same subject-matter, are to be taken together, examined and considered as if they were one law. *Cain v. State*, 20 Tex. 355; *Napier v. Hodges*, 31 Tex. 287; *Taylor v. State*, 3 App. 169; *Walker v. State*, 7 App. 245, 32 Am. Rep. 595; *Bryan v. Sundberg*, 5 Tex. 418; *Selman v. Wolfe*, 27 Tex. 68; *Hanrick v. Hanrick*, 54 Tex. 101.

Where one statute deals with a subject comprehensively and another statute deals with part of the same subject in a more definite way, the two should be read together if possible with a view to giving effect to both, but, under any necessary conflict, the special act must prevail. *Ex parte Townsend*, 64 App. 350, 144 S. W. 628, Ann. Cas. 1914C, 814.

7. — **Conflicting provisions.**—Where there is an irreconcilable repugnancy between two statutes, or statutory provisions, the rule seems to be, that the statute or provision last enacted controls the former enactment, and is to be regarded as the law. This rule, however, obtains only in cases where there is such absolute repugnancy, as that both statutes or provisions can not stand together, and the court is, of necessity, compelled to give effect to one as expressive of the legislative intention rather than the other. *Cain v. State*, 20 Tex. 355; *Davis v. State*, 2 App. 425; *Chiles v. State*, 1 App. 27; *Ex parte Segars*, 32 App. 553, 25 S. W. 26; *Nobles v. State*, 38 App. 330, 42 S. W. 978; *Ratigan v. State*, 33 App. 301, 26 S. W. 407; *Ragazine v. State*, 47 App. 46, 84 S. W. 832. And see *Gulf Ry. Co. v. Ram-bolt*, 67 Tex. 654, 4 S. W. 356; *Ex parte Wood*, 36 App. 7, 34 S. W. 965.

A construction which repeals former statutes, by implication, is not to be favored; the repugnancy must be plain and unavoidable. *Neill v. Keese*, 5 Tex. 23, 51 Am. Dec. 746; *Bryan v. Sundberg*, 5 Tex. 418; *Williams v. State*, 52 App. 371, 107 S. W. 1121.

Where two statutes can be given a construction to uphold both, it must be done. *Williams v. State*, 52 App. 371, 107 S. W. 1121; *Lovett v. Casey*, 17 Tex. 594.

Where there are several statutes upon the same subject, containing no express provisions of repeal, the presumption is that they are governed by one spirit and policy and are intended to be consistent and harmonious; and it is the duty of the Court, so far as is consistent with the language used, to give effect to that intention. This is most expressly so, in respect to statutes passed at the same session. *Neill v. Keese*, 5 Tex. 23, 51 Am. Dec. 746.

Where a subsequent statute, though not repugnant, in all its provisions, to a prior one, is clearly intended to prescribe the only rule which should govern, or where it is framed from another, some parts being omitted, the subsequent statute must be construed to repeal the prior one. *Bryan v. Sundberg*, 5 Tex. 418.

When the new statute, itself, comprehends the entire subject, and creates a new, entire, and independent system, respecting that subject matter, it repeals all previous laws respecting the same subject matter. *Bryan v. Sundberg*, 5 Tex. 418.

8. — **Acts of same session.**—In the construction of acts of the same session, the whole must be taken and construed as one act. Thus, it would not be a reasonable mode of construing acts of the legislature, so to construe them as to make one act repeal another passed at the same session. It can not be supposed that it was the legislative intention that acts thus passed should abrogate and repeal one another. *Neill v. Keese*, 5 Tex. 23, 51 Am. Dec. 746; *Cain v. State*, 20 Tex. 355; *Austin v. Ry. Co.*, 45 Tex. 234; *Walker v. State*, 7 App. 245, 32 Am. Rep. 595; *Lovett v. Casey*, 17 Tex. 594; *McGrady v. Terrell*, 98 Tex. 427, 84 S. W. 641; *Garrison v. Richards* (Civ. App.) 107 S. W. 861; *Joliff v. State*, 53 App. 61, 109 S. W. 176; *Laughter v. Seela*, 59 Tex. 177; *Barnes v. State* (Cr. App.) 170 S. W. 548, L. R. A. 1915C, 101; *Ex parte Nitsche* (Cr. App.) 170 S. W. 1101.

9. **Provisos and exceptions.**—The office of a proviso, generally, is either to except something from the enacting clause, to restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview. A proviso must be considered in arriving at the intention of the legislature. *Graves v. State*, 6 App. 228. See,

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also, *Campbell v. Wiggins*, 85 Tex. 424, 21 S. W. 599; *Ex parte Wood*, 36 App. 7, 34 S. W. 965.

Exceptions in statute not extended by implication. *Roberts v. Yarboro*, 41 Tex. 449; *Markham v. Carothers*, 47 Tex. 21; *Wallace v. Stevens*, 74 Tex. 559, 12 S. W. 283.

Proviso construed strictly. *Roberts v. Yarboro*, 41 Tex. 450; *Collins v. Warren*, 63 Tex. 311.

State bound by rules of practice when no exception in its favor made by law. *State v. Kroner*, 2 Tex. 493.

Courts have no authority to extend exceptions in an act beyond the cases embraced in a fair construction of the act. *Reynolds v. State*, 1 App. 616.

On exceptions in local option law, see *Gilbert v. State*, 32 App. 596, 25 S. W. 632.

10. **Statute adopted from other state or country.**—The settled construction of English statutes embodied in our own statutes or Constitution was impliedly adopted along with the statutes. *Robertson v. State*, 63 App. 216, 142 S. W. 533, Ann. Cas. 1913C, 440.

11. **Revisions and codes.**—A subsequent statute which revises the entire subject-matter of a prior one, and which is intended as a substitute therefor, repeals the prior one, though it contain no repealing clause. *Bryan v. Sundberg*, 5 Tex. 418; *Holden v. State*, 1 App. 225; *Stirman v. State*, 21 Tex. 734.

The presumption is that the codifiers and the legislature did not intend to change the laws as they formerly stood, and accordingly a statute should be construed in the light of the former law. *Ex parte Muckenfuss*, 52 App. 467, 107 S. W. 1131 (following *Runnels v. State*, 45 App. 446, 77 S. W. 459); *Braun v. State*, 40 App. 236, 49 S. W. 620.

The Legislature, in re-enacting a statute in substantially the same terms, will be considered to intend that it shall be given the same meaning given the former statute by the courts. *Adams v. State* (Cr. App.) 145 S. W. 940.

Where the meaning and intent of a revision or codification of the statutes is not plain, resort may be had to the original acts in order to arrive at a correct construction of the provisions. *Stevens v. State*, 70 App. 565, 159 S. W. 505.

The adoption of the Revised Code constituted a re-enactment of the laws included therein, which are to be construed the same as other acts passed by the Legislature. *Stevens v. State*, 70 App. 565, 159 S. W. 505.

Art. 10. [10] Words specially defined, how understood.—Words which have their meaning specially defined shall be understood in that sense, though it be contrary to their usual meaning; and all words used in this Code, except where a word, term or phrase is specially defined, are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject matter relative to which they are employed. [P. C. 10 and 28.]

This is O. C., arts. 10 and 28, revised and consolidated.

See article 25, C. C. P.; *Lynch v. State*, 32 App. 45, 22 S. W. 47, 26 S. W. 409.

Cited, *Hardeman v. State*, 16 App. 1, 49 Am. Rep. 821; *Hall v. State*, 16 App. 6, 49 Am. Rep. 824; *Anderson v. State*, 17 App. 305; *Bell v. State*, 18 App. 53, 51 Am. Rep. 293; *Loyd v. State*, 19 App. 137; *Murray v. State*, 21 App. 620, 2 S. W. 757, 57 Am. Rep. 623; *Oliver v. State* (Cr. App.) 144 S. W. 604; *Bradfield v. State* (Cr. App.) 166 S. W. 734; *Baskins v. State* (Cr. App.) 171 S. W. 723; *Sparks v. State* (Cr. App.) 174 S. W. 351.

General and specific words.—See note under Art. 9.

Definitions.—“Knowingly” and “pass,” as those words are used in the statute denouncing the offense of uttering a forged instrument, are not words of technical signification, and the omission of the trial court to define the same to the jury was not error. *Peterson v. State*, 25 App. 70, 7 S. W. 530. See, also, *Bautsch v. State*, 27 App. 342, 11 S. W. 414; *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

It is unnecessary to define words generally understood. *Blackburn v. State*, 71 App. 625, 160 S. W. 687. Such as “procured.” *Currington v. State*, 72 App. 143, 161 S. W. 478. And “break.” *Williams v. State*, 24 App. 17, 5 S. W. 655. “Night-time” defined. *Laws v. State*, 26 App. 643, 10 S. W. 220. “Living together” defined. *Bird v. State*, 27 App. 635, 11 S. W. 641, 11 Am. St. Rep. 214. “Meet” as used in article 1133, P. C., defined. *Pitts v. State*, 29 App. 374, 16 S. W. 189. “Money” and “property” in embezzlement defined. *Taylor v. State*, 29 App. 466, 16 S. W. 302.

Definition of terms in charge.—See notes under Art. 735, C. C. P.

Mandatory or directory words.—The word “may” held used in contradistinction to “shall.” *Hahn v. State* (Cr. App.) 165 S. W. 218.

Art. 11. [11] Innocence presumed.—Every person accused of an offense shall be presumed to be innocent until his guilt is established to the satisfaction of those whose province it is to try him. [P. C. 11.]

Cited, *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

Intent presumed.—See Art. 51 and notes thereunder.

Burden of proof on defendant.—See Art. 52 and notes.

Presumption of innocence.—See C. C. P., art. 785 and notes.

Art. 12. [12] No offense against a law not in force.—No act or omission can be punished as an offense unless the law making it penal was in force at the time when such act or omission took place. [P. C. 12.]

See Bill of Rights, §§ 16-19; C. C. P., art. 3. See *Ex parte Allison*, 99 Tex. 455, 90 S. W. 870, 2 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 653.

Ex post facto law.—A statute transferring the power of assessing punishments from the judge to the jury is not *ex post facto*. *Holt v. State*, 2 Tex. 363; *Dawson v. State*, 6 Tex. 347. Nor one changing the death penalty to the alternative punishment of death or imprisonment. *McInturf v. State*, 20 App. 335. Nor one authorizing the amendment of defendant's name in an indictment then pending. *State v. Manning*, 14 Tex. 402. But the legislature can not give a statute of limitation a restorative effect, so as to authorize a prosecution already barred. *State v. Sneed*, 25 Tex. Supp. 66; *De Cordova v. Galveston*, 4 Tex. 470; *State v. Asbury*, 26 Tex. 83; *Carr v. State*, 36 App. 390, 37 S. W. 426. Nor could the accused be deprived of the right to plead in abatement to the grand jury under an indictment found before the Code took effect. *Martin v. State*, 22 Tex. 214. Nor can a conviction be authorized on less or different testimony than was required at the date of the offense. *Calloway v. State*, 7 App. 585; *Hannahan v. State*, 7 App. 664; *Murray v. State*, 1 App. 417; *Holt v. State*, 2 Tex. 363; *Valesco v. State*, 9 App. 76; *Johnson v. State*, 16 App. 402. But see *Mrous v. State*, 31 App. 597, 21 S. W. 764, 37 Am. St. Rep. 834. Nor can cumulative sentences not before authorized be imposed. *Hannahan v. State*, 7 App. 664; *Baker v. State*, 11 App. 262; *Prince v. State*, 44 Tex. 480.

A statute which authorizes a conviction for an offense on a prosecution for another offense is also *ex post facto*. *Simco v. State*, 8 App. 406.

As to law permitting judge to make order in vacation, see *Ex parte Boyd*, 50 App. 309, 96 S. W. 1079.

As to trusts and monopolies, see *Waters-Pierce Oil Co. v. State*, 48 Civ. App. 162, 106 S. W. 918.

As to blacklisting employés, see *St. Louis Southwestern Ry. Co. v. Hixon* (Civ. App.) 126 S. W. 338.

As to intoxicating liquors, see *Ex parte Roper*, 61 App. 68, 134 S. W. 334; *Clark v. State*, 61 App. 597, 136 S. W. 260.

As to seduction, see *Thacker v. State*, 62 App. 294, 136 S. W. 1095.

Art. 13. [13] When laws take effect.—No law of the legislature defining an offense, or affixing a penalty thereto, shall take effect until after the expiration of ninety days from the day of the adjournment of the session at which such penal law was enacted, unless the legislature shall otherwise determine. [P. C. 13.]

See sec. 39, art. 3, Const.; *Johnson v. State*, 35 App. 273, 33 S. W. 232.

Act without emergency clause.—*Belcher v. State*, 39 App. 121, 44 S. W. 1106.

Number of votes required to pass emergency statute.—*Missouri, K. & T. Ry. Co. v. McGlamory*, 92 Tex. 150, 41 S. W. 466.

Computation of 90 days.—*Halbert v. San Saba Springs Land & Live-Stock Ass'n*, 89 Tex. 230, 34 S. W. 639, 49 L. R. A. 193.

Statute operates on the day it becomes a law.—*Galveston, H. & S. A. Ry. Co. v. Lynch*, 22 Civ. App. 336, 55 S. W. 389.

Art. 14. [14] Ignorance no excuse.—After a law has taken effect, no person shall be excused for its violation upon the ground that he was ignorant of its provisions. [P. C. 13.]

Ignorance as excuse.—Ignorance of law is no excuse, and every person is required, at his peril, to take cognizance of it. *Chaplin v. State*, 7 App. 87; *Thompson v. State*, 26 App. 94, 9 S. W. 486; *Hughes v. State* (Cr. App.) 149 S. W. 173; *Collmorgen v. State* (Cr. App.) 168 S. W. 519.

Ignorance of fact is a different matter and may be a defense. *Hailes v. State*, 15 App. 93. Compare with *Jones v. State*, 32 App. 533, 25 S. W. 124.

When the criminality of an act depends solely upon the intention with which it was done, the ignorance of the party charged, or his inability to obtain proper information, may be considered in determining his guilt. *State v. Sparks*, 27 Tex. 705.

Local custom cannot supersede a law. *Lawrence v. State*, 20 App. 536 (overruling *Debbs v. State*, 43 Tex. 650); *McNeely v. State*, 49 App. 286, 92 S. W. 419.

No one is excused by his ignorance of the law; knowledge of the law being conclusively presumed. *Crain v. State* (Cr. App.) 153 S. W. 155.

The acts of every person must be reviewed from the standpoint that he knew the law. *Taff v. State* (Cr. App.) 155 S. W. 214.

Mistake of law.—See post, Art. 46.

Art. 15. [15] Effect of modification by subsequent law.—When the penalty for an offense is prescribed by one law, and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second shall have taken effect. In every such case the offender shall be

tried under the law in force when the offense was committed, and if convicted, punished under that law; except that when by the provisions of the second law the punishment of the offense is ameliorated, the defendant shall be punished under such last enactment, unless he elect to receive the penalty prescribed by the law in force when the offense was committed. [P. C. 14.]

Punishment, and election as to penalty.—See *Greer v. State*, 22 Tex. 588; *Rich v. State*, 9 App. 176.

When the punishment for an offense is ameliorated by statute after its commission, the defendant, upon conviction, must be punished according to the later enactment, unless he elect to receive the penalty affixed by the former law, and such election must be made before verdict. The defendant can not elect, except in case of amelioration. If the later statute increases the punishment, he must be punished according to the former law. *Maul v. State*, 25 Tex. 168; *Veal v. State*, 8 App. 474; *Perez v. State*, Id. 610; *McInturf v. State*, 20 App. 335; *Allen v. State*, 7 App. 298; *Doran v. State*, Id. 385; *Noftsinger v. State*, Id. 301; *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302; *Blount v. State*, 34 App. 640, 31 S. W. 652; *Ledbetter v. State* (Cr. App.) 29 S. W. 479.

The punishments for murder were not ameliorated by the Code, *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302; nor by the amendments of 1858, *Cockrum v. State*, 24 Tex. 394; nor by the Constitution of 1870, Art. V, § 8. The latter only vested in the jury a power of commuting punishment theretofore vested in the executive, *Dawson v. State*, 33 Tex. 491; *Hunt v. State*, 7 App. 212; nor, it seems, was the change effected by the revision of 1879. *Walker v. State*, 7 App. 245, 32 Am. Rep. 595.

Where two offenses are included in the same indictment, and the penalty as to one or more of such offenses has been ameliorated, the defendant has the right to elect as to either or all so ameliorated. If the election be as to the highest offense only, which has been ameliorated and there has been no amelioration as to the lower offenses, on conviction of one of such lower offenses, the punishment must be fixed according to former law. *Maul v. State*, 25 Tex. 166; *Jenkins v. State*, 28 App. 86, 12 S. W. 411; *Johnson v. State*, 28 App. 562, 13 S. W. 1005.

In *Noftsinger v. State*, 7 App. 301, which was a prosecution for murder in the first degree, the defendant elected to be punished under the former law fixing the punishment at death absolutely, which punishment was assessed against him, and on appeal the conviction was affirmed. But had not the defendant elected to be punished under the former law, it would have been the imperative duty of the court to have given him the benefit of the ameliorated punishment. *McInturf v. State*, 20 App. 335.

In *Doran v. State*, 7 App. 385, the conviction was for murder in the first degree. At the time of the commission of the offense the penalty was death absolutely. At the time of the trial the penalty had been changed to the alternative one of death or confinement for life in the penitentiary. Held, that the court should have submitted to the jury the alternative punishment.

One who committed a homicide before the law abolishing the degrees of murder became effective was entitled to be tried and sentenced under the old law. *Hill v. State*, 72 App. 109, 161 S. W. 118. See, also, *Johnson v. State*, 72 App. 178, 161 S. W. 1098; *Ybarra v. State* (Cr. App.) 164 S. W. 10.

The court should charge the jury as to the definition of murder under the old law, but, as to the penalty, under the new law. *Robbins v. State* (Cr. App.) 166 S. W. 528.

Objection to charge with a requested instruction held to constitute an "election" to be tried under the murder law existing when the offense was committed. *Herrera v. State* (Cr. App.) 170 S. W. 719.

Failure to object to instruction may be treated as an election to be tried under the old law. *Echols v. State* (Cr. App.) 170 S. W. 786.

— **Amelioration.**—The offense was committed before the new law took effect but the trial was had after. The old law provided for fine or imprisonment, while the new law provided for fine or imprisonment or both, so that the punishment was not ameliorated, though both fine and imprisonment was less under the new law. Hence the penalty under the old law should have been charged. *Kendall v. State*, 55 App. 139, 114 S. W. 833.

— **Doubt as to penalty.**—If it is doubtful whether the later statute mitigates the penalty, defendant should be permitted to decide for himself. The greater punishment does not necessarily produce the most physical suffering, but that which is most ignominious. *Herber v. State*, 7 Tex. 72; see, also, *Greer v. State*, 22 Tex. 588.

— **Trial.**—An ameliorating statute taking effect after the trial has commenced, is not operative in the case. From beginning to end the case must be tried under the law in force when the trial began. *Simms v. State*, 8 App. 230; *Myers v. State*, Id. 321.

— **Violation of local option law.**—One charged with violating the local option law, prior to the statute making a sale of intoxicating liquor a felony, is properly tried and punished under the statute, making a sale of liquor a misdemeanor, in force at the time of the offense. *Sandoloski v. State* (Cr. App.) 143 S. W. 151.

Art. 16. [16] Repeal, effect of.—The repeal of a law, where the repealing statute substitutes no other penalty, will exempt from punishment all persons who may have offended against the

provisions of such repealing [repealed] law, unless it be otherwise declared in the repealing statute. [P. C. 15.]

Cited, *Ex parte Cassens*, 57 App. 377, 122 S. W. 888; *Cook v. State*, 71 App. 532, 160 S. W. 465; *Johnson v. State*, 72 App. 178, 161 S. W. 1098; *Robbins v. State* (Cr. App.) 166 S. W. 528.

Effect on pending proceedings.—This article applies as well to proceedings in an appellate court, as to the court having original cognizance of the offense. *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302; *Sheppard v. State*, 1 App. 522, 28 Am. Rep. 422; *Hubbard v. State*, 2 App. 506; *Tuxton v. State*, 4 App. 472; *Halfin v. State*, 5 App. 212; *Chaplin v. State*, 7 App. 87; *Monroe v. State*, 8 App. 343; *Fitze v. State*, 13 App. 372; *Mulkey v. State*, 16 App. 53; *Whisenhunt v. State*, 18 App. 491; *Woodlief v. State*, 21 App. 412, 2 S. W. 812; *Boone v. State*, 12 App. 184; *Etter v. R'y Co.*, 2 Willson Civ. Cas. Ct. App. § 58; *Kenyon v. State*, 31 App. 13, 23 S. W. 191.

The repeal of a law substituting no other penalty, operates to nullify convictions under the repealed statute. *Fitze v. State*, 13 App. 372; *Monroe v. State*, 8 App. 343; *Boone v. State*, 12 App. 184; *Kenyon v. State*, 31 App. 13, 23 S. W. 191; *Sullivan v. State*, 32 App. 50, 22 S. W. 44. And see *Dickinson v. State*, 38 App. 472, 41 S. W. 759, 43 S. W. 520; *Ex parte Coombs*, 38 App. 648, 44 S. W. 854; *Hall v. State*, 52 App. 195, 106 S. W. 149, dismissing appeal from conviction under repealed law.

Local option law.—The foregoing rule does not apply to the local option law, nor does the repeal exempt from prosecution those who offended the law while in operation. This statute is constitutional. *Ezzell v. State*, 29 App. 521, 16 S. W. 782.

Effect of repeal of civil statute.—The repeal of a civil statute for the enforcement of which a penalty has been enacted, operates as a repeal of the latter. *State v. Robinson*, 19 Tex. 478.

Mode of repeal.—A statutory provision may be repealed by an amendment of the act which omits the provision. *State v. Andrews*, 20 Tex. 230; *Holden v. State*, 1 App. 225.

The legislature can repeal a definite part of a section or article by omitting and not re-enacting the repealed part. Such mode is constitutional. *Chambers v. State*, 25 Tex. 307. And see *Greer v. State*, 22 Tex. 588, and compare *Chaplin v. State*, 7 App. 87.

A general repealing clause extends only to those acts on the same subject, or parts of such acts, clearly inconsistent with the repealing act, and only to the extent of the conflicting provisions. *Berry v. State* (Cr. App.) 156 S. W. 626.

— **Amendments.**—Where a section of a statute is amended, and the amendment is made in such terms that it stands in the stead of such section, and by a subsequent act the said section is expressly repealed, the amendment is also repealed. *Greer v. State*, 22 Tex. 588.

An enactment which purports merely to amend a repealed act is of no effect. The amendatory act fails when a repealing and an amendatory act, referring to the same law, take effect on the same day. *Robertson v. State*, 12 App. 541.

— **Legislative intent.**—The question of repeal is one of legislative intent. *Berry v. State* (Cr. App.) 156 S. W. 626; *Parshall v. State*, 62 App. 177, 138 S. W. 759.

— **Implied repeal.**—Repeals by implication are not favored. *Hunt v. State*, 7 App. 212; *Thouvenin v. Rodrigues*, 24 Tex. 468; *Napier v. Hodges*, 31 Tex. 287; *Walker v. State*, 7 App. 245, 32 Am. Rep. 595; *Harold v. State*, 16 App. 157; *Frasher v. State*, 3 App. 264, 30 Am. Rep. 131; *Taylor v. State*, 3 App. 169; *Rogers v. Watrous*, 8 Tex. 62, 58 Am. Dec. 100; *Tunstall v. Wormley*, 54 Tex. 476; *Ex parte Keith*, 47 App. 283, 83 S. W. 683. And see also generally, *Cain v. State*, 20 Tex. 355; *Stirman v. State*, 21 Tex. 734; *Ex parte Valasquez*, 26 Tex. 178; *Berry v. State* (Cr. App.) 156 S. W. 626.

To constitute a repeal by implication, the new statute must cover the whole subject-matter of the old one, and prescribe different penalties. There must be an irreconcilable repugnancy between the two acts, and the repugnancy must be plain and unavoidable. *Walker v. State*, 7 App. 245, 32 Am. Rep. 595; *Cain v. State*, 20 Tex. 370; *Austin v. State*, 61 App. 573, 135 S. W. 1167; *Berry v. State* (Cr. App.) 156 S. W. 626; *Morales v. State*, 36 App. 234, 36 S. W. 435, 846.

Where a new law covers the whole subject-matter of an old and prescribes a different penalty, the old law is repealed by implication. *Robertson v. State*, 70 App. 307, 159 S. W. 713; *Stebbins v. State*, 22 App. 32, 2 S. W. 617.

To make a later act repeal a previous one of the same session, there must be an irreconcilable repugnancy. Even if the acts are of different sessions, in the absence of an express appeal they must be reconciled if possible, *Taylor v. State*, 3 App. 169; and the rules laid down in *Rogers v. Watrous*, 8 Tex. 62, 58 Am. Dec. 100, are not applicable in the construction of acts passed at the same session. *Cain v. State*, 20 Tex. 355. But if they are irreconcilably repugnant the later must prevail, *Chiles v. State*, 1 App. 27; and the later statute controls, although it is a municipal charter. *Davis v. State*, 2 App. 425.

When a subsequent statute, revising the subject-matter of a former one, is evidently intended as a substitute for it, although it contains no express words to such effect, it must be held to operate to repeal the former, to the extent to which its provisions are revised and supplied. *Harold v. State*, 16 App. 157; *Holden v. State*, 1 App. 226; *Stirman v. State*, 21 Tex. 734; *Etter v. R'y Co.*, 2 Willson Civ. Cas. Ct. App. § 58; *Cain v. State*, 20 Tex. 355; *Rogers v. Watrous*, 8 Tex. 62, 58 Am. Dec. 100; *Ex parte Valasquez*, 26 Tex. 178.

This rule applies to a subsequent general law and a pre-existing special law— as, for instance, the Terrell election law and the local option law. *Ex parte Keith*, 47 App. 283, 83 S. W. 683; *Arrington v. State*, 48 App. 541, 89 S. W. 643;

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Williams v. State, 52 App. 371, 107 S. W. 1121; Joliff v. State, 53 App. 61, 109 S. W. 176.

Special laws and legislation to be made operative by the voters of a particular locality, and laws of kindred character, are not repealed by general laws unless specially mentioned in such general laws, or the purpose to repeal is clearly manifest. Ex parte Neal, 47 App. 441, 83 S. W. 831.

Revision including repealed laws.—Repealed laws remained repealed though included in the revision by the commissioners. Robertson v. State, 70 App. 307, 159 S. W. 713.

Art. 17. [17] When new penalty is substituted.—When by the provisions of a repealing statute a new penalty is substituted for an offense punishable under the act repealed, such repealing statute shall not exempt from punishment a person who has offended against the repealed law while it was in force, but in such case the rule prescribed in article 15 shall govern. [P. C. 16.]

Cited, Johnson v. State, 72 App. 178, 161 S. W. 1098.

Penalty.—Where the penalty is simply increased by the new law, the prosecution under the old law is not abated. Gill v. State, 30 Tex. 514; Roberts v. State, 17 App. 148.

One charged with homicide committed before the new murder law can be tried and convicted under the old law but he is punishable under the new law. Cook v. State, 71 App. 532, 160 S. W. 465; Ybarra v. State (Cr. App.) 164 S. W. 10; Robbins v. State (Cr. App.) 166 S. W. 528; Herrera v. State (Cr. App.) 170 S. W. 719; Echols v. State (Cr. App.) 170 S. W. 786. And see James v. State, 72 App. 457, 163 S. W. 61; Hill v. State, 72 App. 109, 161 S. W. 118; Jones v. State, 72 App. 504, 163 S. W. 81; Sorrell v. State (Cr. App.) 169 S. W. 299.

See, also, notes under art. 15.

Art. 18. [18] Change of definition, effect of.—If an offense be defined by one law, and by a subsequent law the definition of the offense is changed, no such change or modification shall take effect as to offenses already committed; but all offenders against the first law shall be tried, and their guilt or innocence determined in accordance with the provisions thereof. [P. C. 17.]

Cited, Johnson v. State, 28 App. 562, 13 S. W. 1005; Herrera v. State (Cr. App.) 170 S. W. 719.

Murder.—As to trial and punishment under statute consolidating the offenses of first and second degree murder, and substituting a new penalty. See Cook v. State, 71 App. 532, 160 S. W. 465; Hill v. State, 72 App. 109, 161 S. W. 118; Johnson v. State, 72 App. 178, 161 S. W. 1098; James v. State, 72 App. 457, 163 S. W. 61; Jones v. State, 72 App. 504, 163 S. W. 81; Ybarra v. State (Cr. App.) 164 S. W. 10; Robbins v. State (Cr. App.) 166 S. W. 528; Sorrell v. State (Cr. App.) 169 S. W. 299.

See, also, notes under art. 15.

Art. 19. [19] Previous offenses not affected by this Code.—No offense committed, and no fine, forfeiture or penalty incurred under existing laws, previous to the time when this Code takes effect, shall be affected by the repeal herein of any such existing laws, but the punishment of such offenses, and the recovery of such fines and forfeitures, shall take place as if the law repealed had still remained in force, except that when any penalty, forfeiture or punishment shall have been mitigated by the provisions of this Code, such provision shall apply to and control any judgment to be pronounced after this Code shall take effect, for any offense committed before that time, unless the defendant elect to be punished under the provisions of the repealed law. [P. C. 18.]

See Chaplin v. State, 7 App. 87; Walker v. State, 7 App. 245, 32 Am. Rep. 595; Ybarra v. State (Cr. App.) 164 S. W. 10; Robbins v. State (Cr. App.) 166 S. W. 528.

Change of penalty.—See art. 15 and notes.

Art. 20. [20] No cumulative penalties.—No penalty affixed to an offense by one law shall be considered as cumulative of penalties prescribed under a former law, and in every case where a new penalty is prescribed for an offense, the penalty of the first law shall be considered as repealed, unless the contrary be expressly provided in the law last enacted. [P. C. 19.]

See Goldsticker v. Ford, 62 Tex. 385.

Cited, Roberts v. State, 17 App. 148; Ex parte Spiller, 63 App. 93, 138 S. W. 1013.

Cumulative remedy.—In Bush v. Republic, 1 Tex. 455, it is held that if a statute prohibits an act, under a penalty to be enforced by indictment, and a subsequent statute gives a qui tam action for such penalty, the latter is merely cumulative of, and does not repeal, the remedy given by the former statute.

CHAPTER TWO

DEFINITIONS

Art.	Art.
21. "Whoever," "any person," etc., "he," "they," "man," "woman," defined.	25. "Accused" and "defendant" synonymous.
22. Words expressive of relationship, etc., include what.	26. "Criminal Action" defined.
23. Singular includes plural and masculine feminine.	27. "Convict" defined.
24. "Person" includes the state or any corporation.	28. "Criminal process" defined.
	29. "Preceding" and "succeeding" defined.
	30. "Writing" and "oath."
	31. "Signature" defined.

Article 21. [21] Definition of terms.—The general terms, "whoever," "any person," "any one," and the relative pronouns, "he," and "they," as referring to these terms, include females as well as males, unless there is some express declaration to the contrary. The word "man" is used to signify a male person of any age; and the word "woman" a female person of any age. [P. C. 20.]

Cited, *Cromeans v. State*, 59 App. 611, 129 S. W. 1129.

Man.—See *Holliday v. State*, 35 App. 133, 32 S. W. 538; *White v. State* (Cr. App.) 151 S. W. 826.

Woman.—The woman named as prosecutrix may testify to her age and that she was just past 14 at the time of the offense. *Rogers v. State* (Cr. App.) 143 S. W. 631.

Art. 22. [22] Words expressive of relationship, state, condition, trust, etc., include what.—The use of any word expressive of "relationship," "state," "condition," "office" or "trust," of any person, as of "parent," "child," "ascendant," "descendant," "minor," "infant," "ward," "guardian," or the like, or of the relative pronouns "he" or "they," in reference thereto, includes both males and females. [P. C. 21.]

See *Vernon's Sayles' Civ. St. 1914*, art. 5502, subd. 3; *Willson's Cr. Forms*, 166.

Parent.—An information charging the sale of intoxicating liquor to a minor, without the written consent of the "father" of said minor, was held bad, the statute being without the written consent of the "parent." The use of the word "father," or "mother" is not equivalent to the word "parent" which would include both. *Lantzner v. State*, 19 App. 320.

Child.—See *McGregor v. State*, 4 App. 599; *Allen v. State*, 7 App. 298.

In aggravated assault, see art. 1022 (5) and notes.

Art. 23. [23] Singular includes plural, and masculine feminine.—The use of the singular number includes the plural, and the plural the singular; and words used in the masculine gender include the feminine also, unless, by reasonable construction, it appears that such was not the intention of the language. [P. C. 22.]

See *Vernon's Sayles' Civ. St. 1914*, art. 5502, sub. 3 and 4.

Art. 24. [24] "Person" includes state or any corporation.—Whenever any property or interest is intended to be protected by a provision of the penal law, and the general term "person," or any other general term, is used to designate the party whose property it is intended to protect, the provision of such penal law, and the protection thereby given, shall extend to the property of the state, and of all public or private corporations. [P. C. 23.]

See *Vernon's Sayles' Civ. St. 1914*, art. 5504, sub. 2.

Art. 25. [25] "Accused" and "defendant" synonymous.—The word "accused" is intended to refer to any person who, in a legal manner, is held to answer for any offense, at any stage of the proceeding, or against whom complaint, in a lawful manner, is made, charging the commission of an offense, including all proceedings from the order for arrest to the final execution of the law; and the word "defendant" is used in the same sense. [P. C. 24.]

Definition.—"Accused" and "defendant" defined. *Pierce v. State*, 17 App. 232; *Brown v. State*, 55 App. 572, 118 S. W. 139.

Art. 26. [26] "Criminal action" defined.—A "criminal action," as used in this Code, means the whole, or any part, of the procedure which the law provides for bringing offenders to justice; and the terms "prosecution," "criminal prosecution," "accusation," and "criminal accusation," are used in the same sense. [P. C. 25.]

Cited, *Russell v. State*, 37 App. 314, 39 S. W. 674.

Definitions.—"Criminal action," "prosecution," "accusation," defined. *Bautch v. State*, 27 App. 342, 11 S. W. 414; *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

Art. 27. [27] "Convict" defined.—An accused person is termed a "convict" after final condemnation by the highest court of resort which, by law, has jurisdiction of his case, and to which he may have thought proper to appeal. [P. C. 26.]

See *Pate v. State*, 21 App. 193, 17 S. W. 461; *Kingsbury v. State*, 37 App. 259, 39 S. W. 365; *Underwood v. State*, 38 App. 193, 41 S. W. 618; *Gulf, C. & S. F. Ry. Co. v. Johnson*, 98 Tex. 76, 81 S. W. 4.

Cited, *Arcia v. State*, 26 App. 193, 9 S. W. 685; *Woods v. State*, 26 App. 490, 10 S. W. 108; *Jones v. State*, 32 App. 135, 22 S. W. 404; *Evans v. State*, 35 App. 485, 34 S. W. 285; *Woodmen of the World v. Dodd (Civ. App.)* 134 S. W. 254.

Witness.—Until an accused has accepted sentence or judgment has been affirmed, he is not incompetent as a witness. *Stanley v. State*, 39 App. 483, 46 S. W. 645.

One asking for a rehearing, is not an incompetent witness. *Bowles v. State (Cr. App.)* 150 S. W. 626.

See notes under Code Cr. Proc. arts. 788 (3), 797.

Art. 28. [28] "Criminal process" defined.—The term "criminal process" is intended to signify any *capias*, warrant, citation, attachment, or other written order issued in a criminal proceeding, whether the same be to arrest, commit to jail, collect money, or for whatever other purpose used. [P. C. 27.]

See Const., art. V, sec. 12; C. C. P., art. 19.

Art. 29. [29] "Preceding" and "succeeding" defined.—The word "preceding" means the next preceding, and the word "succeeding" the next succeeding, whenever used, to designate any particular article, chapter or title of the Code. [P. C. 29.]

See *Vernon's Sayles' Civ. St. 1914*, art. 5504, sub. 8 and 9.

Art. 30. [30] "Writing" and "oath."—The word "writing" includes printing; the word "oath" includes affirmation. [P. C. 30.]

See *Vernon's Sayles' Civ. St. 1914*, art. 5504, subs. 3 and 4.

Definitions.—Printed form of indictment may be used, it being the "written" statement of the grand jury. *Winn v. State*, 5 App. 621; *O'Bryan v. State*, 27 App. 339, 11 S. W. 443.

Art. 31. [31] "Signature" defined.—The word "signature" includes the mark of a person unable to write his name. A mark shall have the same effect as a signature, when the name is written by some other person, and the mark made near thereto, by the person unable to write his name. [P. C. 31.]

See *Vernon's Sayles' Civ. St. 1914*, art. 5504, sub. 6.

What constitutes signing.—"Sign" means to subscribe the signer's name at the bottom of a written instrument. *Wade v. State*, 22 App. 256, 2 S. W. 594.

Validity of unsigned instrument.—Not necessary to bind a party to it that a contract or agreement be signed at the end, provided he wrote his name in the body to give it authenticity. *Price v. State*, 12 App. 233, citing *Fulshear v. Randon*, 18 Tex. 275, 70 Am. Dec. 281.

Deed acknowledged but not signed held valid. *Newton v. Emerson*, 66 Tex. 142, 18 S. W. 348.

Will in testator's handwriting, but not signed, is valid. *Lawson v. Dawson's Estate*, 21 Civ. App. 361, 53 S. W. 64.

CHAPTER THREE

OF THE PERSONS PUNISHABLE UNDER THIS CODE,
AND THE CIRCUMSTANCES WHICH EXCUSE,
EXTENUATE, OR AGGRAVATE AN OFFENSE

<p>Art. 32. The persons punishable under this Code. 33. Indians not punishable, except when. 34. Children not punishable. 35. Persons under seventeen years not punishable capitally. 36. Married women, offenses by, etc. 37. Husband, etc., instigating offense, punishment doubled. 38. "Minor" defined. 39. Insanity a defense. 40. Proof of insanity according to common law. 41. Intoxication as a defense.</p>	<p>Art. 42. Officer justified, when. 43. Peace officer justified, when. 44. Duress a defense, when. 45. Accidents excused, when. 46. No mistake of law excuses. 47. Mistake of fact excuses, when. 48. Act done by mistake a felony, when. 49. A misdemeanor, when. 50. Felony committed by mistake, etc., lowest punishment affixed. 51. Intention presumed. 52. Burden of proof on defendant, when.</p>
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Article 32. [32] The persons punishable under this Code.—All persons, whether inhabitants of this state or of the United States, or aliens, are amenable to punishment for offenses which are defined and made punishable under the provisions of this Code. The exceptions to the general rule here laid down are given in the subsequent articles of this title. [Act October 31, 1866, p. 70; P. C. 32.]

See arts. 959, 1431, 1432, post, and notes. See, also, arts. 5275, 5276, Vernon's Sayles' Civ. St. 1914.

Operation of laws as to nonresidents.—The penal laws of the state are operative on nonresidents within the state. *Ex parte Asher*, 23 App. 662, 5 S. W. 91, 59 Am. Rep. 783.

Aliens.—Aliens are subject to the law of the territory wherein the crime is committed. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

Excuse for violation of law.—That third persons have also violated the law is no excuse or justification. *Hickman v. State*, 64 App. 161, 141 S. W. 973.

Art. 33. [33] Indians not punishable, except when.—No act done within the uninhabited portion of the state, by individuals belonging to the several Indian tribes, in their intercourse with each other, or with other tribes, and affecting no other person, is considered an offense against this Code, but in all other respects, such individuals are upon a footing with all other persons, both as to protection and liability to punishment. [Act October 31, 1866, p. 70; P. C. 35.]

Government of Indians.—*Jones v. Laney*, 2 Tex. 342.

Art. 34. [34] Children not punishable.—No person shall in any case be convicted of any offense committed before he was of the age of nine years, except perjury, and for that only, when it shall appear by proof that he had sufficient discretion to understand the nature and obligation of an oath; nor of any other offense committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense. [Act 1905, p. 83; P. C. 36.]

Cited, *Johns v. State*, 63 App. 416, 140 S. W. 1093.

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| <ol style="list-style-type: none"> 1. Discretion. 2. — Evidence. 3. — Non-expert testimony. 4. — Burden of proof. 5. — Question for jury. 6. — Instructions. 7. — No issue as to discretion when accused is over 13. | <ol style="list-style-type: none"> 8. Infancy alone not a defense. 9. — Infancy of person executing fraudulent mortgage. 10. — Minor may plead guilty. 11. Competency as witnesses. 12. Juvenile delinquents. |
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1. **Discretion.**—See *Gardiner v. State*, 33 Tex. 692.

Proof that the defendant knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age, does not fill the

requirements of the statute. It must be shown that he understood the nature and illegality of the act. *Wusnig v. State*, 33 Tex. 651; *Parker v. State*, 20 App. 451; *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *Allen v. State* (Cr. App.) 37 S. W. 757; *Keith v. State*, 33 App. 341, 26 S. W. 412; *Linhart v. State*, 33 App. 504, 27 S. W. 260; *Price v. State*, 50 App. 71, 94 S. W. 901; *Simmons v. State*, 50 App. 527, 97 S. W. 1052; *Ragsdale v. State*, 61 App. 145, 134 S. W. 234; *Scott v. State*, 71 App. 41, 158 S. W. 814; *Smith v. State* (Cr. App.) 164 S. W. 838.

2. — **Evidence.**—Proof of discretion need not be made by direct and positive evidence, but may be shown by circumstances. *Ragsdale v. State*, 61 App. 145, 134 S. W. 234; *Wusnig v. State*, 33 Tex. 651; *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *Allen v. State* (Cr. App.) 37 S. W. 757; *Scott v. State*, 71 App. 41, 158 S. W. 814.

Sufficiency of evidence of felonious intent. See *Gardiner v. State*, 33 Tex. 692; *Rocha v. State*, 38 App. 69, 41 S. W. 611; *Price v. State*, 50 App. 71, 94 S. W. 901; *Binkley v. State*, 51 App. 54, 100 S. W. 780.

3. — **Non-expert testimony.**—*Binkley v. State*, 51 App. 54, 100 S. W. 780.

4. — **Burden of proof.**—Nonage must be proved by the accused; but, when the fact is shown the state must prove discretion. *Scott v. State*, 71 App. 41, 158 S. W. 814; *Wusnig v. State*, 33 Tex. 651; *McDaniel v. State*, 5 App. 475; *Ake v. State*, 6 App. 398, 32 Am. Rep. 586; *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *Ex parte Walker*, 28 App. 246, 13 S. W. 861; *Walker v. State*, 28 App. 503, 13 S. W. 860; *Ellis v. State*, 30 App. 601, 18 S. W. 139; *Parker v. State*, 20 App. 451; *Gardiner v. State*, 33 Tex. 692; *Wilcox v. State*, 32 App. 284, 22 S. W. 1109; *s. c.*, 33 App. 392, 26 S. W. 989; *Binkley v. State*, 51 App. 54, 100 S. W. 780; *Ragsdale v. State*, 61 App. 145, 134 S. W. 234; and, see *Ingram v. State*, 29 App. 33, 14 S. W. 457; *Keith v. State*, 33 App. 341, 26 S. W. 412; *Simmons v. State*, 50 App. 527, 97 S. W. 1052.

5. — **Question for jury.**—See *Allen v. State* (Cr. App.) 37 S. W. 757.

Question for court and not jury. *Freasier v. State* (Cr. App.) 84 S. W. 360.

6. — **Instructions.**—See *Rocha v. State*, 38 App. 69, 41 S. W. 611.

In a prosecution against an infant for the theft of horses, a charge that, if the infant be found to be less than 13 years of age, then he cannot be convicted, unless he has discretion sufficient to understand the nature and illegality of the theft, sufficiently presented the question of the infant's incapacity. *Pyron v. State*, 138 S. W. 705.

7. — **No issue as to discretion when accused is over 13.**—*Neal v. State* (Cr. App.) 101 S. W. 212.

8. **Infancy alone not a defense.**—A minor who has arrived at years of discretion may be convicted of a violation of the local option law. *Brown v. State*, 47 App. 326, 83 S. W. 373.

9. — **Infancy of person executing fraudulent mortgage.**—*Lively v. State* (Cr. App.) 74 S. W. 321.

10. — **Minor may plead guilty.**—See *Ex parte White*, 50 App. 473, 98 S. W. 850.

11. **Competency as witnesses.**—See art. 788, subd. 2, C. C. P., and notes thereunder.

An infant of under 7 years is competent to testify in a capital felony. *Smith v. State* (Cr. App.) 164 S. W. 838. But, see *Freasier v. State* (Cr. App.) 84 S. W. 360.

12. **Juvenile delinquents.**—See C. C. P. art. 1195, et seq. and notes.

Art. 35. [35] Persons under seventeen years not punishable capitally.—A person, for an offense committed before he arrived at the age of seventeen years, shall in no case be punished with death; but may, according to the nature and degree of the offense, be punished by imprisonment for life, or receive any of the other punishments affixed in this Code to the offense of which he is guilty. [P. C. 37.]

Cited, *Wilcox v. State*, 32 App. 284, 22 S. W. 1109; *Smith v. State* (Cr. App.) 164 S. W. 838.

Constitutionality of law.—The statute is constitutional. *Ex parte Walker*, 28 App. 246, 13 S. W. 861.

Evidence of non-age.—See *Binkley v. State*, 51 App. 54, 100 S. W. 780.

The burden of proving nonage rests upon the defendant. The maxim that the burden of proof never shifts from the state, means only that it never shifts in so far as it is necessary to make out the specific crime charged, by establishing the *corpus delicti*, and the constituent elements of the crime. *Ake v. State*, 6 App. 398, 32 Am. Rep. 586; *Jones v. State*, 13 App. 1; *Taylor v. State*, 3 App. 169; *Ellis v. State*, 30 App. 601, 18 S. W. 139; *Wilcox v. State*, 33 App. 392, 26 S. W. 989.

Evidence in a murder trial held sufficient the jury in finding that accused was more than 17 years old. *Williams v. State* (Cr. App.) 177 S. W. 965.

Ball.—A person under the age of seventeen years can not be punished with death. A capital offense is such only as can be punished with death. By force of this statute (art. 35), murder committed by a person under seventeen years old is *per se* bailable. *Ex parte Walker*, 28 App. 246, 13 S. W. 861; *Walker v. State*, 28 App. 503, 13 S. W. 860.

This article does not apply to an application, when accused was committed to an insane asylum after the offense and before conviction, for leave to take him out of the asylum on bond, in the absence of anything to suggest non-age at the time of the offense. *Wilson v. State* (Cr. App.) 149 S. W. 117.

Punishment.—An accused under 17 years old, convicted of a capital offense, can not be punished with death. *Ex parte Walker*, 28 App. 246, 13 S. W. 861; *Walker v. State*, 28 App. 503, 13 S. W. 860; *Ingram v. State*, 29 App. 33, 14 S. W. 457.

Where evidence failed to show defendant seventeen years old, conviction with death penalty was erroneous, see *Wilcox v. State*, 32 App. 234, 22 S. W. 1109. See, also, dissenting opinion of Judge Simpkins, Id.

Minor sixteen years old, violating local option law, shown to have discretion, is punishable. *Brown v. State*, 47 App. 326, 83 S. W. 378.

The punishment for rape is imprisonment for life or for not less than 5 years; the maximum punishment of death not applying where accused is under 17 years. *Munger v. State*, 57 App. 384, 122 S. W. 874.

— **Instructions and verdict.**—If the jury are instructed to find for life imprisonment instead of capital punishment, in case of guilt and that accused was under seventeen, a verdict assessing the former punishment is good, without an express finding as to age. *Taylor v. State*, 3 App. 169.

Accomplice.—See art. 83.

Juvenile delinquents.—See C. C. P., art. 1195 et seq.

Art. 36. [36] Married woman, offenses by, etc.—A married woman who commits an offense by the command or persuasion of her husband shall not, in any case, be punished by death, but may be imprisoned for life, or a term of years, according to the nature and degree of the crime; and, in cases not capital, she shall receive only one-half the punishment to which she would otherwise be liable. [P. C. 38.]

See, post, art. 84.

Married woman as principal.—A married woman may be convicted as principal with her husband in the commission of a crime, such as keeping a bawdy house, where she did not act under coercion or duress. *Barker v. State*, 64 App. 106, 141 S. W. 529.

Art. 37. [37] Husband, etc., instigating offense, double punishment.—When it shall appear that a minor was aided or instigated in the commission of an offense by a relation in the ascending line, or by his guardian, or an apprentice under age by his master, or a wife by her husband, such relation, guardian, master or husband shall, at the discretion of the jury, in capital cases, be punished by death, and, in cases not capital, shall receive double the punishment imposed by law in ordinary cases for the same offense. [Act Oct. 31, 1866, p. 71; P. C. 39.]

See, also, post, art. 84.

Instigating offense.—Information, evidence and charge held to sustain a conviction of instigating a minor to loiter on school grounds. *King v. State* (Cr. App.) 169 S. W. 675.

Art. 38. [38] "Minor" defined.—The word "minor" as here and elsewhere used in this Code signifies a person under the age of twenty-one years. [P. C. 40.]

Cited, *Schenault v. State*, 10 App. 410.

Criminal responsibility.—Minor cannot be convicted of aggravated assault and battery on a female or child. *Schenault v. State*, 10 App. 410; *Henkel v. State*, 27 App. 510, 11 S. W. 671; *White v. State* (Cr. App.) 151 S. W. 826; nor can a minor be held responsible for fraudulent disposition of mortgaged property. *Jones v. State*, 31 App. 252, 20 S. W. 578.

"Adult" defined.—*George v. State*, 11 App. 95; *Schenault v. State*, 10 App. 410; *Henkel v. State*, 27 App. 510, 11 S. W. 671; *Ellers v. State* (Cr. App.) 55 S. W. 813.

Evidence of age.—*Andrews v. State*, 13 App. 343.

Art. 39. [39] Insanity a defense.—No act done in a state of insanity can be punished as an offense. No person who becomes insane after he committed an offense shall be tried for the same while in such condition. No person who becomes insane after he is found guilty shall be punished for the offense while in such condition. [P. C. 41.]

See Code Cr. Proc. § 780.

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| 1. Criminal responsibility in general. | 8. Temporary insanity. |
| 2. Delusion. | 9. Trial of issue of insanity. |
| 3. Partial insanity. | 10. Instructions. |
| 4. Kleptomania. | 11. Bail. |
| 5. Insanity produced by intoxicating liquors or drugs. | 12. Evidence. |
| 6. Moral insanity and irresistible impulse. | 13. Issue on plea of guilty. |
| 7. Somnambulism. | 14. Separate trial of insanity after conviction. |

1. **Criminal responsibility in general.**—The law does not require, as the condition on which criminal responsibility shall follow the commission of crime, the possession of one's faculties in full vigor, or a mind unimpaired by disease or infirmity. The mind may be weakened by disease, or impaired, and yet the accused be criminally responsible for his acts. The accused can only discharge himself from responsibility by proving that his intellect was so disordered that he did not know the nature and quality of the act he was doing, and that it was an act which he ought not to do. If he had sufficient intelligence to know what he was doing, and to know that the act was wrong, and had the will and power to refrain from doing it, he is, in contemplation of law, responsible for the act committed. The rule adopted in this state as to the character of insanity which will exempt from responsibility for crime, is that at the time of committing the crime the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong. The inquiry should be directed to his knowledge of right and wrong, with respect to the very act with which he is charged. *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *Webb v. State*, 5 App. 596; *Williams v. State*, 7 App. 163; *Clark v. State*, 8 App. 350; *King v. State*, 9 App. 515; *Warren v. State*, 9 App. 619, 35 Am. Rep. 745; *Johnson v. State*, 10 App. 571; *Pettigrew v. State*, 12 App. 225; *King v. State*, 13 App. 277; *Thomas v. State*, 40 Tex. 60; *Erwin v. State*, 10 App. 700; *Burkhard v. State*, 18 App. 599; *Powell v. State*, 37 Tex. 348; *Jones v. State*, 31 App. 252, 20 S. W. 578; *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *Walker, Ex parte*, 28 App. 246, 13 S. W. 861; *Evers v. State*, 31 App. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811; *Frizzell v. State*, 30 App. 42, 16 S. W. 751; *Lacy v. State*, 30 App. 119, 16 S. W. 761; *Lovegrove v. State*, 31 App. 491, 21 S. W. 191; *Merritt v. State*, 39 App. 70, 45 S. W. 21; *Lowe v. State*, 44 App. 224, 70 S. W. 206; *Mitchell v. State*, 52 App. 37, 106 S. W. 124; *Rusk v. State*, 53 App. 338, 110 S. W. 58; *McConnell v. State*, 22 App. 354, 3 S. W. 702, 58 Am. Rep. 647; *Massengale v. State*, 24 App. 181, 6 S. W. 35; *Giebel v. State*, 28 App. 151, 12 S. W. 591; *Riley v. State (Cr. App.)* 44 S. W. 498; *Cannon v. State*, 41 App. 467, 56 S. W. 361; *Griffith v. State*, 47 App. 64, 78 S. W. 347; *Kirby v. State*, 49 App. 517, 93 S. W. 1030; *Kelley v. State*, 51 App. 151, 101 S. W. 230; *Hogue v. State (Cr. App.)* 146 S. W. 905; *Roberts v. State (Cr. App.)* 150 S. W. 627; *Woods v. State (Cr. App.)* 150 S. W. 633; *Montgomery v. State (Cr. App.)* 151 S. W. 813; *Witty v. State (Cr. App.)* 171 S. W. 229.

The test of insanity is confined to the capacity to distinguish between the right and wrong of the particular act, and does not go to the capacity and will power of person affected with insanity to restrain his actions. *Hurst v. State*, 40 App. 382, 46 S. W. 635, 50 S. W. 719.

There are no degrees of insanity as a criminal defense; one's guilt being tested by the question whether he knew the nature and quality of his act. *Kirby v. State (Cr. App.)* 150 S. W. 455.

Insanity is "a defect of reason and disease of the mind." *Shaffer v. State (Cr. App.)* 151 S. W. 1061.

Insanity must have controlled the will and taken away the freedom of moral action. *Witty v. State (Cr. App.)* 171 S. W. 229.

Insanity merely exempts the accused from punishment without exonerating him from the charge of committing the offense. *Witty v. State (Cr. App.)* 171 S. W. 229.

2. **Delusion.**—See *Merritt v. State*, 39 App. 70, 45 S. W. 21; *Riley v. State (Cr. App.)* 44 S. W. 498.

There is no difference between delusion and insanity. *Boren v. State*, 32 App. 637, 25 S. W. 775.

3. **Partial insanity.**—In general insanity, where the party claims total irresponsibility, general proof as to his knowledge of right and wrong is the test. If the issue be partial insanity, the inquiry is to his mental status at the time of, and with respect to, the particular act charged. *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539.

This rule applies to the character of evidence to be tendered in the two different cases, and is subordinate to the general test, which is, "a knowledge of right from wrong." *Giebel v. State*, 28 App. 151, 12 S. W. 591. And see *Rusk v. State*, 53 App. 338, 110 S. W. 58.

4. **Kleptomania.**—Kleptomania is an uncontrollable propensity to steal, and is a species of insanity. *Looney v. State*, 10 App. 520, 38 Am. Rep. 646; *Harris v. State*, 18 App. 287; *Massengale v. State*, 24 App. 181, 6 S. W. 35; *Giebel v. State*, 28 App. 151, 12 S. W. 591; *Frizzell v. State*, 30 App. 42, 16 S. W. 751; *Lowe v. State*, 44 App. 224, 70 S. W. 206.

5. **Insanity produced by intoxicating liquors or drugs.**—See art. 41 and notes thereunder.

6. **Moral insanity and irresistible impulse.**—For a discussion of the doctrines of "moral insanity" and "irresistible impulse" the case of *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638, is referred to, from which it would seem that these doctrines are not recognized as law in this state, any farther than is conceded in that case, and in the case of *King v. State*, 9 App. 515. See, also, *Hurst v. State*, 40 App. 378, 46 S. W. 635, 50 S. W. 719; *Lowe v. State*, 44 App. 224, 70 S. W. 206; *Cannon v. State*, 41 App. 467, 56 S. W. 361; *Hogue v. State (Cr. App.)* 146 S. W. 905; *Kirby v. State (Cr. App.)* 150 S. W. 455.

The law of uncontrollable impulse, superinduced by passion, is not recognized. *Anderson v. State (Cr. App.)* 148 S. W. 802.

7. **Somnambulism.**—Somnambulism is not an indication of insanity. *Fisher v. State*, 30 App. 503, 18 S. W. 90.

8. **Temporary insanity.**—Distinction between "temporary" and "settled" insanity. *Kelley v. State*, 31 App. 216, 20 S. W. 357.

9. Trial of issue of insanity.—Procedure after conviction, see Code Cr. Proc. art. 1017 et seq.

The issue of insanity must be tried by the jury on affidavit, and, before trial, on indictment. *Guagando v. State*, 41 Tex. 626.

When one has been tried as to his sanity and found by the jury to be insane, this does not prevent his being tried for an offense and convicted, the plea of insanity being urged on the latter trial. *Chase v. State*, 41 App. 560, 55 S. W. 833.

The issue may be tried under the general plea of not guilty, along with other issues submitted to the same jury impaneled to try the special issue. *Wilson v. State*, 58 App. 596, 127 S. W. 548.

A finding that defendant was guilty of aggravated assault only held conclusive against the issue of insanity. *Hogue v. State* (Cr. App.) 146 S. W. 905.

Where it appears that accused has been adjudged insane, his trial should be continued until the jury has been impaneled to determine the question of sanity at the time of trial. *Witty v. State* (Cr. App.) 153 S. W. 1146. See, also, *Witty v. State* (Cr. App.) 171 S. W. 229.

10. Instructions.—See Willson's Cr. Forms, 929.

Evidence warranting charge, see notes under art. 735, C. C. P.

For approved charges upon this defense, see *Clark v. State*, 8 App. 350; *King v. State*, 9 App. 515; *Massengale v. State*, 24 Tex. 181, 6 S. W. 35; *Frizzell v. State*, 30 App. 42, 16 S. W. 751; *Williams v. State*, 7 App. 163; *Duke v. State*, 61 App. 441, 134 S. W. 705; *Maxey v. State* (Cr. App.) 145 S. W. 952; *Kirby v. State* (Cr. App.) 150 S. W. 455; *Montgomery v. State* (Cr. App.) 151 S. W. 813.

When the defense is the insane propensity to steal known as kleptomania, and there is evidence tending to sustain that defense, the charge should distinctly present and specifically treat of the peculiar issue thus raised, and not stop with submitting the usual test of the defendant's ability in general to distinguish right from wrong. *Looney v. State*, 10 App. 520, 33 Am. Rep. 646.

Charge on issue of insanity produced by use of alcoholic stimulants, approved. *Rather v. State*, 25 App. 623, 9 S. W. 69.

It is proper for the court to charge on insanity generally and then apply the law to particular facts proved by defendant as to delusion. *Merritt v. State*, 40 App. 365, 50 S. W. 384.

It is not error for the court to charge that the issue of insanity must be "clearly proved." *Smith v. State*, 31 App. 14, 19 S. W. 252; *Giebel v. State*, 28 App. 151, 12 S. W. 591; *Smith v. State*, 22 App. 316, 3 S. W. 684.

For criticism of a charge upon insanity, see *Boren v. State*, 32 App. 637, 25 S. W. 775; *Hunt v. State*, 33 App. 252, 26 S. W. 206.

The words "lucid interval", being generally well-understood, need not be defined. *Montgomery v. State* (Cr. App.) 151 S. W. 813.

11. Bail.—One found to have become insane before trial may be restrained in an asylum, until he becomes sane, and he must be returned for trial to the custody of the court having jurisdiction, and he may not be released on bail. *Wilson v. State* (Cr. App.) 149 S. W. 117.

12. Evidence.—See art. 40, and notes.

13. Issue on plea of guilty.—See arts. 565, 566, 781, C. C. P.

14. Separate trial of insanity after conviction.—See arts. 1017-1030, C. C. P. See, also, notes under art. 39, ante.

Art. 40. [40] Proof of insanity according to common law.—The rules of evidence known to the common law in respect to the proof of insanity shall be observed in all trials where that question is in issue. The manner of ascertaining whether the insanity is real or pretended, when it is alleged that the defendant became insane after the commission of the offense, is prescribed in the Code of Criminal Procedure. [P. C. 42.]

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| 1. Presumptions. | 7. Opinion evidence—Nonexperts. |
| 2. Burden of proof. | 8. ——— Experts. |
| 3. ——— Plea of guilty. | 9. ——— Hypothetical questions. |
| 4. Mental condition in general. | 10. Sufficiency of evidence. |
| 5. Reputation. | 11. Charge of court. |
| 6. Medical works. | |

1. Presumptions.—Every person is presumed to be of sane mind, until the contrary is shown. *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *Fisher v. State*, 30 App. 502, 18 S. W. 90 (following *Webb v. State*, 5 App. 596; s. c., 9 App. 490); *King v. State*, 9 App. 515; *Massengale v. State*, 24 App. 181, 6 S. W. 35; *Guerrero v. State* (Cr. App.) 171 S. W. 731.

If insanity be proved to have existed at any particular period, it is ordinarily presumed to have continued. But this is the rule where the insanity proved is of a permanent character. Where the insanity is temporary or recurrent such presumption does not prevail, but, on the contrary, in such case, the law presumes the offense of such persons to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper. *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638; *Webb v. State*, 5 App. 596; *Smith v. State*, 22 App. 316, 3 S. W. 684; *Hunt v. State*, 33 App. 252, 26 S. W. 206; *Nugent v. State*, 46 App. 67, 80 S. W. 84; *Sims v. State*, 50 App. 563, 99 S. W. 555; *Wooten v. State*, 51 App. 428, 102 S. W. 416; *Witty v. State* (Cr. App.) 153 S. W. 1146.

For charge of court on this question, see *Hunt v. State*, 33 App. 252, 26 S. W. 206.

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Judgment in an insanity inquisition is only presumptive or prima facie evidence of insanity as to the time prior and subsequent to the adjudication. *Witty v. State* (Cr. App.) 153 S. W. 1146.

The presumption from such adjudication does not prevent submission of the issue of insanity to the jury. *Witty v. State* (Cr. App.) 171 S. W. 229.

The burden is on the state to prove beyond a reasonable doubt that one proved insane prior to the offense was sane at the time of the offense and responsible for his acts. *Id.*

As to effect of use of whisky containing cocaine, see *Maddox v. State* (Cr. App.) 173 S. W. 1026.

2. Burden of proof.—Accused has the burden of proving insanity by a preponderance of evidence. *Roberts v. State* (Cr. App.) 150 S. W. 627; *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638; *Hurst v. State*, 40 App. 388, 46 S. W. 635, 50 S. W. 719; *Boren v. State*, 32 App. 637, 25 S. W. 775; *Webb v. State*, 5 App. 596; s. c., 9 App. 490; *King v. State*, *Id.* 515; *Johnson v. State*, 10 App. 571; *Jones v. State*, 13 App. 1; *King v. State*, *Id.* 277; *Mendiola v. State*, 18 App. 462; *Smith v. State*, 19 App. 95; *Fisher v. State*, 30 App. 503, 18 S. W. 90; *Lovegrove v. State*, 31 App. 491, 21 S. W. 191; *Stanfield v. State*, 50 App. 69, 94 S. W. 1057; *McCulloch v. State*, 50 App. 132, 94 S. W. 1056; *Fults v. State*, 50 App. 502, 98 S. W. 1057; *Kirby v. State* (Cr. App.) 150 S. W. 455; *Welch v. State*, 71 App. 17, 157 S. W. 946; *Douglass v. State* (Cr. App.) 165 S. W. 933; *Guerrero v. State* (Cr. App.) 171 S. W. 731.

But where accused has been adjudged insane the state must show that he was sane at the time of the offense. *Witty v. State* (Cr. App.) 153 S. W. 1146, 171 S. W. 229; *Morse v. State* (Cr. App.) 152 S. W. 927; *Graham v. State* (Cr. App.) 163 S. W. 726; *Douglass v. State* (Cr. App.) 165 S. W. 933.

It is not error to refuse to instruct for acquittal if there was a reasonable doubt of the defendant's sanity when he committed the homicide. *King v. State*, 9 App. 515; *Webb v. State*, *Id.* 490.

Insanity being established by a judgment of court, it devolves on the state to show its temporary nature. *Hunt v. State*, 33 App. 252, 26 S. W. 206.

It is not necessary that insanity be established beyond a reasonable doubt; it is sufficient if it satisfies the minds of the jury. *Williams v. State*, 37 App. 348, 39 S. W. 687.

Insanity must be clearly proved to authorize the jury to find that question in favor of accused. *Wilson v. State*, 58 App. 596, 127 S. W. 548.

3. — Plea of guilty.—Sanity of defendant is an issue under plea of guilty, and evidence on that issue should be introduced in connection with the plea. *Burton v. State*, 33 App. 138, 25 S. W. 782.

On a plea of guilty, the burden of proof is on the state to show that accused was sane when he committed the offense. *Harris v. State* (Cr. App.) 172 S. W. 975.

4. Mental condition in general.—Evidence of the state of mind of the accused, both before and after the alleged criminal act is admissible. *Webb v. State*, 5 App. 596; *Warren v. State*, 9 App. 619, 35 Am. Rep. 745; *Hunt v. State*, 33 App. 252, 26 S. W. 206; *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638; *Williams v. State*, 37 App. 348, 39 S. W. 687; *Cannon v. State*, 41 App. 467, 56 S. W. 351. See, also, *Maxey v. State* (Cr. App.) 145 S. W. 952.

As to physical tests and evidence, especially expert and non-expert, see *McLeod v. State*, 31 App. 331, 20 S. W. 749; *Shaffer v. State* (Cr. App.) 151 S. W. 1061; *Graham v. State* (Cr. App.) 163 S. W. 726.

Letters written by defendant as evidence of sanity. *Hunt v. State*, 33 App. 252, 26 S. W. 206.

Where defendant tries to show that he acted upon insane delusions, state can show that the facts which he claimed to be delusions were real to rebut his theory of insane delusion. *Merritt v. State*, 40 App. 361, 50 S. W. 384.

General insanity renders the party wholly irresponsible, and general proof as to his knowledge of right and wrong is an appropriate test. In cases of partial insanity, the inquiry must be more particularly directed to the mental status at the time of and with reference to the particular act charged. *Giebel v. State*, 28 App. 151, 12 S. W. 591; *Frizzell v. State*, 30 App. 42, 16 S. W. 751; *Fisher v. State*, 30 App. 503, 18 S. W. 90.

On trial of grandmother for murder of infant grandchild to which she had been devotedly attached, defense was insanity, evidence conflicting. Held, that the judgment should have been set aside. *Newberry v. State*, 32 App. 145, 22 S. W. 412.

Defendant's manner at the trial having been introduced to show his insanity testimony of an expert that he was simulating is admissible. *Burt v. State*, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

Accused's demeanor and appearance during trial may be shown as a circumstance to prove sanity or insanity. *Lane v. State*, 59 App. 595, 129 S. W. 353.

As to self-serving declaration, see *Maxey v. State* (Cr. App.) 145 S. W. 952.

The state may prove in rebuttal acts tending to establish sanity, though such rebuttal evidence shows the commission of other offenses. *Witty v. State* (Cr. App.) 171 S. W. 229.

The state may show that conduct of the accused did not occur when he was not in view of the jury. *Guerrero v. State* (Cr. App.) 171 S. W. 731.

Where accused's defense was that he had been drinking to excess in the near past, was subject to spells of despondency, was of a melancholy and brooding disposition, and at such times did not comprehend the full measure of his acts, and was a paranoiac, though not insane, evidence of his condition six years or more before the homicide would be admissible on the issue of his condition at the homicide, if any facts or circumstances in evidence showed his mental condition to be other than that of a sane man at the homicide. *Myers v. State* (Cr. App.) 177 S. W. 1167.

5. **Reputation.**—Insanity cannot be proved by general reputation. *Cannon v. State*, 41 App. 467, 56 S. W. 351; *Ellis v. State*, 33 App. 86, 24 S. W. 894; *Womble v. State*, 39 App. 24, 44 S. W. 827; *First Nat. Bank of Navasota v. McGinty*, 29 Civ. App. 539, 69 S. W. 495; *Wilson v. State*, 58 App. 596, 127 S. W. 548.

Nor by what third persons have said. *Montgomery v. State* (Cr. App.) 151 S. W. 813.

6. **Medical works.**—A chapter in a standard medical work on mental and nervous diseases not competent. *Montgomery v. State* (Cr. App.) 151 S. W. 813.

7. **Opinion evidence.**—**Nonexperts.**—Upon an issue of insanity, witnesses who are not experts, are permitted to state their opinions and conclusions upon the facts to which they testify. *McClackey v. State*, 5 App. 320; *Webb v. State*, Id. 596; *Thomas v. State*, 40 Tex. 60; *Holcomb v. State*, 41 Tex. 125; *Campbell v. State*, 10 App. 560; *Harris v. State*, 18 App. 287; *Mendiola v. State*, 18 App. 462; *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *Williams v. State*, 37 App. 348, 39 S. W. 687; *Burt v. State*, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330. A contrary doctrine was held in *Hickman v. State*, 38 Tex. 190; but that decision is evidently no longer the rule in this state. In *Gehrke v. State*, 13 Tex. 568, it was held that nonexpert witnesses should not be permitted to testify that they were conversant with persons well known to be insane, and that the conduct and appearance of the prisoner were like such as they had observed in said insane, and that the prisoner, in their opinion, looked and acted like one insane. In *Thomas v. State*, 40 Tex. 60, it is said that the holding in the *Gehrke* case is not in conflict with the rule stated in the first sentence of this note. And in *Webb v. State*, 5 App. 596, the *Gehrke* case is declared overruled upon this point. *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *McLeod v. State*, 31 App. 331, 20 S. W. 749. The opinion of nonexperts is competent evidence only when the facts and circumstances upon which it is based are stated by such witness. *Ellis v. State*, 33 App. 86, 24 S. W. 894; *Merritt v. State*, 39 App. 70, 45 S. W. 21; *Thomas v. State*, 40 Tex. 60; *Holcomb v. State*, 41 Tex. 125; *McClackey v. State*, 5 App. 320; *Webb v. State*, Id., 596; *Harris v. State*, 18 App. 287; *Mendiola v. State*, Id., 462; *Burton v. State*, 33 App. 138, 25 S. W. 782; *Adams v. State*, 34 App. 470, 31 S. W. 372, overruling *Gehrke v. State*, 13 Tex. 568; *Williams v. State*, 37 App. 348, 39 S. W. 687; *Betts v. State*, 48 App. 562, 89 S. W. 413; *Henderson v. State*, 49 App. 478, 93 S. W. 551; *Sims v. State*, 50 App. 563, 99 S. W. 555; *Freeman v. State*, 46 App. 318, 81 S. W. 953; *Williams v. State* (Cr. App.) 53 S. W. 860; *Fults v. State*, 50 App. 502, 98 S. W. 1057; *Wells v. State*, Id., 499, 98 S. W. 851.

A nonexpert may testify as to a mental condition if he has knowledge of the person's habits and conduct. *Key v. State*, 72 App. 129, 161 S. W. 130; *Lane v. State*, 59 App. 595, 129 S. W. 353; *Jordan v. State*, 64 App. 187, 141 S. W. 786; *Maxey v. State* (Cr. App.) 145 S. W. 952; *Kirby v. State* (Cr. App.) 150 S. W. 455; *Witty v. State* (Cr. App.) 153 S. W. 1146; *Brice v. State*, 72 App. 219, 162 S. W. 874.

But such witness cannot give an opinion on a theoretical question, based on facts with which he is not familiar, or give an opinion as to what will be the result of a given course of conduct or disease as producing insanity. *Maxey v. State* (Cr. App.) 145 S. W. 952.

Witnesses who testified that they had been acquainted with accused could testify that they had never noticed anything peculiar about his conduct or appearance or speech which would lead them to conclude that he was insane; such testimony being a statement of facts from which the jury might form their own judgment. *Turner v. State*, 61 App. 97, 133 S. W. 1052; *Rogers v. State*, 71 App. 149, 159 S. W. 40.

Where sheriff gives defendant warning, such sheriff may give his opinion as to the sanity of defendant based on a conversation with him. *Burt v. State*, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

A nonexpert's testimony that he did not believe that accused had mental strength to form and execute a design to take life, held, properly excluded. *Lane v. State*, 59 App. 595, 129 S. W. 353.

A jailer is not disqualified to testify because accused was in jail at the time witness made the observations on which opinion is based. *Kirby v. State* (Cr. App.) 150 S. W. 455.

8. — **Experts.**—The opinion of medical experts is admissible as to the mental state of a person whom they have examined. *Pigg v. State*, 43 Tex. 108; *Thomas v. State*, 40 Tex. 60. They may also state their opinion upon the whole evidence, if they have heard it all, or upon a hypothetical statement which is in conformity with the whole evidence. But it is inadmissible to permit an expert to give his opinion upon anything short of the whole evidence in the case, whether he has personally heard it, or it is stated to him hypothetically. Nor can he be asked as to an hypothesis having no foundation in the evidence in the case, or resting on statements made to him by persons out of court. The proper question to be propounded to an expert to elicit his opinion upon the evidence in the case, or upon a hypothetical statement of it, is, "If the symptoms and indications testified to by the other witnesses are proved, and if the jury are satisfied of the truth of them, was the defendant in your opinion insane?" *Webb v. State*, 9 App. 490; *Thomas v. State*, 40 Tex. 60; *Johnson v. State*, 10 App. 571; *Betts v. State*, 48 App. 522, 89 S. W. 413; *Turner v. State*, Id., 585, 89 S. W. 975.

Where the expert has not heard the evidence, each side has the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence, and, if meagerly presented in the examination on one side, it may be fully presented on the other; the whole examination being within the control of the court, whose duty it is to see that it is fairly and reasonably conducted. He may be asked by either party as to the reasons upon which his opinion is based; or he may, with leave of the court, give such explanation on his own account. Beyond this he can not go in such examination, though he may be examined in details in or-

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der to test his credibility and judgment. *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638.

A minister of the gospel, who had read some authors upon moral and intellectual science, but nothing upon insanity or medical jurisprudence, is not an expert. *Burt v. State*, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

An expert may base his opinion upon the conduct of defendant while in jail, though defendant was unwarned. *Burt v. State*, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

An expert witness must be introduced as such. *Cannon v. State*, 41 App. 467, 56 S. W. 351.

Defendant may show what he said to an expert in order to present the facts on which the opinion was based. *Spivey v. State*, 45 App. 496, 77 S. W. 444.

A physician who was not familiar with accused, having only seen him two or three times, and who had never noticed anything wrong with him except on one occasion, when accused seemed to have been greatly excited, was crying, and complained that deceased had assaulted him a few moments before, was not competent to testify as to accused's sanity or insanity. *Cox v. State*, 60 App. 471, 132 S. W. 125.

After a physician had given expert testimony tending to show that one accused of murder was a monomaniac, it was not error to exclude testimony by him as to various statements made to him by accused concerning past transactions, where such statements were not sought to be shown to establish a basis for the witness' opinion. *Kirby v. State* (Cr. App.) 150 S. W. 455.

9. — Hypothetical questions.—On hypothetical questions, medical and non-medical expert witnesses, see *Burt v. State*, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; *Shaffer v. State* (Cr. App.) 151 S. W. 1061.

Defendant, contending that a question is not full and complete, must submit a proper question. *Shirley v. State*, 37 App. 475, 36 S. W. 267.

10. Sufficiency of evidence.—As to sufficiency of evidence to support plea of insanity, see *Lovegrove v. State*, 31 App. 491, 21 S. W. 191; *Newberry v. State*, 32 App. 145, 22 S. W. 412; *Jordan v. State*, 64 App. 187, 141 S. W. 786; *Woods v. State* (Cr. App.) 150 S. W. 633; *Montgomery v. State* (Cr. App.) 151 S. W. 813; *Lee v. State*, 72 App. 237, 162 S. W. 843.

11. Charge of court.—See notes under art. 39, Penal Code, and art. 735, C. C. P. Willson's Cr. Forms, 929.

Art. 41. [41] Intoxication as a defense.—Neither intoxication nor temporary insanity of mind, produced by the voluntary recent use of ardent spirits, shall constitute any excuse in this state for the commission of crime, nor shall intoxication mitigate either the degree or the penalty of crime, but evidence of temporary insanity produced by such use of ardent spirits may be introduced by the defendant in any criminal prosecution in mitigation of the penalty attached to the offense for which he is being tried, and, in cases of murder, for the purpose of determining the degree of murder of which the defendant may be found guilty. It shall be the duty of the several district and county judges of this state, in any criminal prosecution pending before them, where temporary insanity is relied upon as a defense and the evidence tends to show that such insanity was brought about by the immoderate use of intoxicating liquors, to charge the jury in accordance with the provisions of this article. [Gen. Laws, 17th Leg., p. 9.]

Cited, *Perales v. State*, 72 App. 176, 161 S. W. 482.

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1. Intent and effect of statute in general.—The meaning of our statute regulating intoxication as a defense to crime is: 1. Mere intoxication from the recent use of ardent spirits will not, of itself, in any case excuse crime. 2. Mere intoxication will neither mitigate the degree nor the penalty of crime. 3. Temporary insanity produced by such use of ardent spirits is evidence which may be used in all cases in the mitigation of the penalty, and also in murder, for the further purpose of determining the degree. *Clore v. State*, 26 App. 624, 10 S. W. 242. See, also, *Williams v. State*, 25 App. 76, 7 S. W. 661; *Houston v. State*, 26 App. 657, 14 S. W. 352; *Reagan v. State*, 28 App. 227, 12 S. W. 601, 19 Am. St. Rep. 833; *Ex parte Evers*, 29 App. 539, 16 S. W. 343; *Sherar v. State*, 30 App. 349, 17 S. W. 621. For an elaboration of the doctrine, and on charge of the court with respect thereto, see *Lyle v. State*, 31 App. 103, 19 S. W. 903; *Kelley v. State*, 31 App. 216, 20 S. W. 357; *Ward v. State*, 19

App. 664; Evers v. State, 31 App. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811; Delgado v. State, 34 App. 157, 29 S. W. 1070; De Alberts v. State, 34 App. 508, 31 S. W. 391; Wright v. State, 37 App. 627, 40 S. W. 491; Howard v. State, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812; Little v. State, 42 App. 551, 61 S. W. 483; Cleland v. State (Cr. App.) 65 S. W. 189; Young v. State, 53 App. 416, 110 S. W. 445, 126 Am. St. Rep. 792; Kelly v. State (Cr. App.) 149 S. W. 110; Lucas v. State (Cr. App.) 155 S. W. 527.

2. **Intoxication as defense.**—Intoxication or temporary insanity caused by the voluntary recent use of liquor will constitute no excuse for the commission of crime. Lyles v. State, 64 App. 621, 142 S. W. 592; Wright v. State, 37 App. 627, 40 S. W. 491; Little v. State, 42 App. 551, 61 S. W. 483; Perkins v. State (Cr. App.) 144 S. W. 241; Stevens v. State (Cr. App.) 150 S. W. 944; Brice v. State, 72 App. 219, 162 S. W. 874.

3. — **Delirium tremens or mania a potu.**—Mania a potu or delirium tremens is a species of insanity, and excuses unlawful acts, although the intoxication which caused it may have been voluntary. Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Zembrod v. State, 25 Tex. 519; Erwin v. State, 10 App. 700. See, also, Johnson v. State, 1 App. 146; Wenz v. State, Id. 36; Loza v. State, Id. 488, 28 Am. Rep. 416; Colbath v. State, 4 App. 76; McCarty v. State, Id. 461; Brown v. State, Id., 275; Payne v. State, 5 App. 35; Pugh v. State, 2 App. 539; Walker v. State, 7 App. 627; Thomas v. State, 40 Tex. 36; Farrer v. State, 42 Tex. 265; Ferrell v. State, 43 Tex. 503; Outlaw v. State, 35 Tex. 481; Jeffries v. State, 9 App. 539; Gaitan v. State, 11 App. 544; Scott v. State, 12 App. 31.

Temporary insanity produced by the use of intoxicating liquor is no defense unless the intoxicants have been used so continuously for so long a time and so excessively as to produce delirium tremens or mania a potu, and the criminal act takes place while the person is suffering therefrom. Truett v. State (Cr. App.) 168 S. W. 523. See, also, Kelley v. State, 31 App. 216, 20 S. W. 357, citing Clore v. State, 26 App. 624, 10 S. W. 242; Evers v. State, 29 App. 539, 16 S. W. 343; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Evers v. State, 31 App. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811.

4. **Evidence of intoxication in general.**—Opinion evidence, see Stewart v. State, 38 App. 627, 44 S. W. 505.

That accused took two drinks of cherry bitters shortly before the assault is admissible on the issue of his intoxication. Wrage v. State (Cr. App.) 60 S. W. 55.

5. **Admissibility in mitigation of punishment.**—Evidence of intoxication is admissible in a homicide case in mitigation of the punishment. Lyles v. State, 64 App. 621, 142 S. W. 592.

6. **Admissibility on question of motive and intent.**—See Scott v. State, 12 App. 31; Reagan v. State, 28 App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

Under this article, evidence of the defendant's intoxication is properly limited to mitigation of the punishment to be assessed, and cannot be considered in determining intent. Baldwin v. State (Cr. App.) 148 S. W. 312; Stoudenmire v. State, 58 App. 258, 125 S. W. 399.

Prior to the enactment of the statute drunkenness was admissible on the issue of motive and intent. Wenz v. State, 1 App. 36; Loza v. State, 1 App. 488, 28 Am. Rep. 416.

Where law imputes an intent from the act committed evidence of intoxication to negative intent is not admissible. Little v. State, 42 App. 551, 61 S. W. 483.

Intoxication admissible to show that defendant, prosecuted for breach of the peace in rattling prosecutor's door, thought it was the door of another. Garrett v. State, 49 App. 235, 91 S. W. 577.

7. **Admissibility to determine degree of crime—Decisions prior to statute.**—Ferrell v. State, 43 Tex. 503; Colbath v. State, 4 App. 76; Brown v. State, 4 App. 275; McCarty v. State, 4 App. 461.

8. — **Decisions under the statute.**—Temporary insanity produced by the use of intoxicating liquors will not reduce homicide to manslaughter. Harris v. State (Cr. App.) 169 S. W. 657; Clore v. State, 26 App. 624, 10 S. W. 242; Houston v. State, 26 App. 657, 14 S. W. 352; Gaitan v. State, 11 App. 544; Hernandez v. State, 32 App. 271, 22 S. W. 972; Mays v. State, 50 App. 165, 96 S. W. 329; Truett v. State (Cr. App.) 168 S. W. 523.

Intoxication which does not amount to or produce temporary insanity is not admissible in evidence even for the purpose of determining the degree of murder. Young v. State, 53 App. 416, 110 S. W. 448, 126 Am. St. Rep. 792; Evers v. State, 31 App. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811; Delgado v. State, 34 App. 157, 29 S. W. 1070; Gonzales v. State, 31 App. 508, 21 S. W. 253; Ex parte Evers, 29 App. 539, 16 S. W. 343.

Intoxication or temporary insanity produced by recent use of intoxicating liquors will be considered in passing on the question whether one is guilty of murder in the first or second degree, but it cannot be considered in fixing the grade of offense in any other instance. Lyles v. State, 64 App. 621, 142 S. W. 592; Burkhard v. State, 18 App. 599; Ward v. State, 19 App. 664; Bramlette v. State, 21 App. 611, 2 S. W. 765, 57 Am. Rep. 622.

Degrees of murder having been abolished, temporary insanity from the recent use of intoxicating liquors is available only in mitigation of punishment. Harris v. State (Cr. App.) 169 S. W. 657.

9. **Toxicomania.**—See Otto v. State, 47 App. 128, 80 S. W. 525, 122 Am. St. Rep. 682.

A person rendered temporarily insane by the voluntary recent use of cocaine or morphine cannot, during such insanity, be guilty of an assault with intent to murder. Edwards v. State, 38 App. 386, 43 S. W. 112, 39 L. R. A. 262; Edwards v. State (Cr. App.) 54 S. W. 589.

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The statute does not apply to a morphine fiend, whose mind at the time of an offense was in an unbalanced condition; but if, from the use of morphine, his mind was incapable of rational action, he would not be responsible therefor. *Moss v. State*, 57 App. 620, 124 S. W. 647, 136 Am. St. Rep. 1001. See *Edwards v. State*, 38 App. 386, 43 S. W. 112, 39 L. R. A. 262.

10. **Combination of causes of insanity.**—One insane from the combined use of drugs and intoxicants, so that he did not know what he was doing, cannot be convicted of crime. *Lawrence v. State* (Cr. App.) 143 S. W. 636; *Edwards v. State*, 38 App. 386, 43 S. W. 112, 39 L. R. A. 262; *Cannon v. State*, 41 App. 467, 56 S. W. 351; *Phillips v. State*, 50 App. 481, 98 S. W. 869.

11. — **Evidence.**—As to evidence whether whisky contained so much cocaine as to render accused temporarily insane, see *Maddox v. State* (Cr. App.) 173 S. W. 1026.

Where accused claimed that deceased gave him whisky containing cocaine, and that he was thereby rendered insane, evidence that deceased was drunk on the morning of the homicide was inadmissible. *Maddox v. State* (Cr. App.) 173 S. W. 1026.

12. **Common law rule.**—Prior to the preceding enactment there was no statute relating to intoxication as a defense in criminal trials, but such defense was often interposed, and the courts passed upon it in the light of the common law. It was held that intoxication merely is not insanity, and where it was voluntary, could never afford an excuse nor even a palliation for crime. *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *Zembrod v. State*, 25 Tex. 519; *Colbath v. State*, 2 App. 391.

To preserve his rationality is due from every person to society, and no injustice is done any one by holding him for his acts while voluntarily drunk. *Colbath v. State*, 4 App. 76. Simple voluntary intoxication is no excuse for crime. *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *Outlaw v. State*, 35 Tex. 481; *Payne v. State*, 5 App. 35.

It may be important in determining the character of his acts, as well as the purpose and intent with which they were done, *Ferrell v. State*, 43 Tex. 503; *Wenz v. State*, 1 App. 36; especially when the question is whether the murder is of the first or second degree, *Colbath v. State*, 2 App. 391; s. c. 4 App. 76; *Brown v. State*, 4 App. 275; *McCarty v. State*, 4 App. 461; or the assault was "with intent to murder," *Thomas v. State*, 40 Tex. 36; *Walker v. State*, 7 App. 627; or the "entry" was burglarious, *Johnson v. State*, 1 App. 146; or the "taking" was with fraudulent intent, *Loza v. State*, 1 App. 488, 28 Am. Rep. 416.

It will not reduce a homicide to manslaughter; it can only be regarded in determining between the two degrees of murder. *Farrer v. State*, 42 Tex. 265; *Ferrell v. State*, 43 Tex. 503; *Gaitan v. State*, 11 App. 544; *Fugh v. State*, 2 App. 539.

13. **Charge of court.**—See *Willson's Cr. Forms*, 931; *Navarro v. State* (Cr. App.) 43 S. W. 105.

In a murder case, the following charge upon the issue of intoxication was held to be in accordance with the statute, viz.: "You are charged that intoxication produced by the voluntary recent use of ardent spirits constitutes no excuse for the commission of crime; nor does intoxication mitigate either the degree or the penalty of crime. However, in a case where the defendant is accused of murder, as in the case before you, you may take into consideration the mental condition of the defendant for the purpose of determining the degree of murder, if you should find him guilty of murder." *Charles v. State*, 13 App. 658.

Where, in a prosecution for burglary, defendant claimed to have been so drunk as not to know what he was doing, and there was no evidence of insanity except that produced by use of intoxicating liquors, the court gave proper instructions under the article of the Penal Code as to parties drunk from the recent use of intoxicants, there was no error in refusing other instructions as to the necessity of intent at the time of breaking and entering, and as to intoxication bearing on the question. *Doyle v. State*, 59 App. 39, 126 S. W. 1131.

Where accused was intoxicated at the time of the alleged attempt to rape, a charge on the question of intent should have been given. *Reagan v. State*, 28 App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

On a trial for homicide, where, although the evidence showed that deceased was drunk and somewhat boisterous, no occasion for killing him on that account appeared, it was not error to fail to charge relative to his condition. *Jackson v. State*, 71 App. 297, 158 S. W. 813.

A charge conforming substantially to the language of the statute, is, ordinarily, sufficient. *Williams v. State*, 25 App. 76, 7 S. W. 661.

For a correct charge on drunkenness as a defense in case of assault with intent to rob, see *Scott v. State*, 12 App. 31.

Instruction as to effect of intoxication; held, error, but not reversible error. *Tippett v. State*, 37 App. 186, 39 S. W. 120.

Charge on combined use of drugs and whisky, approved. *Cannon v. State*, 41 App. 467, 56 S. W. 351.

Sufficiency of instruction on temporary insanity, see *Young v. State*, 53 App. 416, 110 S. W. 445, 126 Am. St. Rep. 792.

Where, on a trial for burglary, the undisputed evidence showed that accused entered, in the nighttime, the private residence of prosecutor, and that, if accused intended to steal, he was detected and arrested before accomplishing that purpose, and accused proved that he was so intoxicated that he did not know what he was doing, and the court charged that, if accused was so intoxicated that he did not have sufficient mind to form an intent, he must be acquitted, and that, before conviction, the jury must find that he entered with the intent to steal, a conviction will not be disturbed. *Black v. State* (Cr. App.) 165 S. W. 571.

The charge as to mental condition produced by drugs should be separate and

independent from a charge as to temporary insanity produced by ardent spirits. *Edwards v. State*, 38 App. 386, 43 S. W. 112, 39 L. R. A. 262; *Otto v. State*, 47 App. 128, 80 S. W. 525, 122 Am. St. Rep. 682; *Phillips v. State*, 50 App. 481, 98 S. W. 868; *Burton v. State*, 46 App. 493, 81 S. W. 742.

See, also, notes to Code Cr. Proc. art. 735.

14. — **Inconsistent instructions.**—*Tippett v. State*, 37 App. 186, 39 S. W. 120.

15. — **Request for instructions.**—See C. C. P. art. 737.

16. — **Harmless error.**—See art. 743, and notes.

17. **Bill of exceptions.**—See notes under art. 743 C. C. P.

Art. 42. [42] Officer justified, when.—A person in the lawful execution of a written process or verbal order from a court or magistrate is justified for any act done in obedience thereto. [P. C. 43.]

See, post, arts. 349 and 1092 et seq. C. C. P. arts. 52, 53, 181, 183, 185, 186, and chaps. 1 and 2 of title 5.

Art. 43. [43] Peace officer justified, when.—A peace officer is in like manner justified for any act which he is bound by law to perform, without warrant or verbal order. [P. C. 44.]

See article 42 and citations thereunder.

Art. 44. [44] Duress, a defense, when.—A person forced by threats or actual violence to do an act is not liable to punishment for the same. Such threats, however, must be—

1. Loss of life or great personal injury.

2. They must be such as are calculated to intimidate a person of ordinary firmness.

3. The act must be done when the person threatening is actually present.

The violence intended by this article must be such actual force as restrains the person from escaping, or such ill treatment as is calculated to render him incapable of resistance. [P. C. 45.]

Power of control over accused.—The person threatening must have been so near to accused as to have him under his power and control at the time the offense is committed. *Paris v. State*, 35 App. 82, 31 S. W. 855.

Duress inducing bigamous marriage.—On trial for bigamy it is no defense that defendant's second marriage was entered into under duress to avoid conviction for seduction. *Medrano v. State*, 32 App. 214, 22 S. W. 684, 40 Am. St. Rep. 775.

Instruction.—An instruction held, within the spirit, if not the letter, of this article. *Stanley v. State*, 16 App. 392.

Art. 45. [45] Accidents excused, when.—No act done by accident is an offense, except in certain cases specially provided for, where there has been a degree of carelessness or negligence which the law regards as criminal. [P. C. 46.]

Accident.—See *Dickenson v. State*, 24 App. 121, 5 S. W. 648; *Powell v. State*, 32 App. 230, 22 S. W. 677; *Richards v. State*, 35 App. 38, 30 S. W. 805; *Wheatly v. State* (Cr. App.) 39 S. W. 672; *Clark v. State*, 19 App. 495; *Pierce v. State*, 21 App. 540; *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520. See, also, art. 48.

To kill while playing with a gun believed to be unloaded, held no offense. *McCray v. State*, 63 App. 522, 140 S. W. 442.

Mere evidence that accused did not know that the substance she sold was intoxicating held insufficient to raise the issue that she acted by accident. *Mollenkopf v. State* (Cr. App.) 151 S. W. 799.

Evidence held to require the submission of the question whether the discharge of a pistol was accidental. *Maldonado v. State*, 70 App. 205, 156 S. W. 647.

To strike one so that he falls fracturing his skull is not aggravated assault. *Calvert v. State* (Cr. App.) 170 S. W. 744.

— **Homicide.**—See Art. 1111, post.

Instructions.—Evidence under which this article should have been given in charge. *Miller v. State*, 52 App. 72, 105 S. W. 502.

This and article 46 should be given in charge to jury when there is evidence of mistake, and of good faith in defendant's belief that he was the owner of the timber cut down. *Thomas v. State*, 54 App. 377, 112 S. W. 1049.

Facts held to require charge on accidental assault. *Owens v. State*, 62 App. 129, 136 S. W. 1057. But, see *Jordan v. State* (Cr. App.) 146 S. W. 881.

Charge as to accidental homicide held insufficient. *Hamilton v. State*, 64 App. 175, 141 S. W. 966.

Charge in a case of aggravated assault by driving held not drawn so as to meet this article. *Perkins v. State* (Cr. App.) 144 S. W. 241.

Art. 46. [46] No mistake of law excuses.—No mistake of law excuses one committing an offense; but, if a person laboring under

a mistake, as to a particular fact, shall do an act which would otherwise be criminal, he is guilty of no offense. [P. C. 47.]

See art. 14. Also, *Watson v. State*, 13 App. 76; *Alonzo v. State*, 15 App. 373, 49 Am. Rep. 207; *Price v. State*, 18 App. 474, 51 Am. Rep. 322; *Pressler v. State*, 13 App. 95; *Heskew v. State*, 14 App. 606; *Tardiff v. State*, 23 Tex. 169; *Chaplin v. State*, 7 App. 87; *State v. Sparks*, 27 Tex. 705; *Shaw v. State*, 23 App. 493, 5 S. W. 317; *Weatherford v. State*, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 823; *Thompson v. State*, 26 App. 94, 9 S. W. 486; *Jones v. State* (Cr. App.) 165 S. W. 144; *Baskins v. State* (Cr. App.) 171 S. W. 723.

Ignorance as excuse.—See Art. 14 and notes.

Mistake of law.—On trial for bigamy it is no defense that defendant's first wife had deserted him for more than three years and that he had been informed and believed that he was released from her. *Medrano v. State*, 32 App. 214, 22 S. W. 684, 40 Am. St. Rep. 775.

Evidence that defendant was told that it was no offense to open a saloon on election day, after the polls closed, is no defense. *Steinberger v. State*, 35 App. 492, 34 S. W. 617. Nor was it a defense in a prosecution for unlawfully carrying a weapon that defendant was told by others that it was proper for him to carry the weapon. *Clopton v. State* (Cr. App.) 44 S. W. 173. See, also, *Jones v. State*, 32 App. 533, 25 S. W. 124.

One who shows that he did not know that the act he purposely committed was an offense, does not show a mistake excusing him. *Hickman v. State*, 64 App. 161, 141 S. W. 973.

Accused may not show in defense an absence of intent to violate the law. *Morris v. State*, 64 App. 498, 142 S. W. 876.

Carrying a pistol as a deputy constable under authority conferred by a constable having no authority to appoint deputies, was a mistake of law. *Johnson v. State* (Cr. App.) 164 S. W. 833.

A deputy sheriff's belief that he had a right to carry a pistol in a county other than that of his appointment was a mistake of law, and not of fact, and did not excuse him. *Ransom v. State* (Cr. App.) 165 S. W. 932.

Mistake of fact.—See notes under article 47.

Instructions.—See *Pressler v. State*, 13 App. 95. Evidence under which this article should have been given in charge. *Cornelius v. State*, 54 App. 173, 112 S. W. 1050.

Art. 47. [47] Mistake of fact, excuse, when.—The mistake as to fact which will excuse, under the preceding article, must be such that the person so acting under a mistake would have been excusable had his conjecture as to the fact been correct; and it must also be such mistake as does not arise from a want of proper care on the part of the person committing the offense. [P. C. 48.]

Cited, *Jones v. State* (Cr. App.) 165 S. W. 144; *Baskins v. State* (Cr. App.) 171 S. W. 723.

Perjury.—See Art. 305 and notes.

Mistake of fact.—Information to the accused concerning a matter which, if true, would render it probable that the fact about which he claims to have been mistaken might therefore exist, is not an existing fact, supposed or real, concerning which he could be mistaken. A delusion as to facts, created under such circumstances is a "want of care" on his part. *Tardiff v. State*, 23 Tex. 169.

Articles 46 and 47 of this Code, refer to acts "otherwise criminal" or acts in themselves criminal if unexcused, and not to acts which become criminal only when committed with a fraudulent or felonious intent. *Bray v. State*, 41 Tex. 203; *Neely v. State*, 8 App. 64. See, also, *Pressler v. State*, 13 App. 95.

If a person honestly believes himself entitled to exercise an office, he can not be punished for false personation. *Brown v. State*, 43 Tex. 478.

One who shows that he did not know that the act he purposely committed was an offense, does not show a mistake excusing him. *Hickman v. State*, 64 App. 161, 141 S. W. 973.

Mistake as to age of minor to whom liquor is sold. *Pressler v. State*, 13 App. 95.

Mistaken belief by accused that his certificate to practice medicine had been filed for record. *Pettit v. State*, 28 App. 240, 14 S. W. 127.

Mistake as to age of female abducted. *Mason v. State*, 29 App. 24, 14 S. W. 71.

Mistake as to consent of owner with respect to loosening boards on fence. *Giddings v. State*, 47 App. 360, 83 S. W. 694.

Mistake as to ownership of wood taken. *Donahoe v. State*, 23 App. 457, 5 S. W. 245.

It is no defense that one who sold liquor in a local option district did not know that the liquor was intoxicating. *Penn v. State*, 43 App. 608, 68 S. W. 170; *McDaniel v. State* (Cr. App.) 65 S. W. 1068. See, also, *Phillips v. State*, 29 Tex. 226; *Petteway v. State*, 36 App. 97, 35 S. W. 646; *Pike v. State*, 40 App. 614, 51 S. W. 395; *Allen v. State* (Cr. App.) 59 S. W. 264.

This article is applicable to all offenses unless it be that such offenses are taken out of the statute by some certain provision of the law. If it is applicable to a murder case, it ought certainly to apply to a case of a sale of whisky under a mistake of fact. *Patrick v. State*, 45 App. 587, 78 S. W. 948, overruling *Penn v. State*, 43 App. 608, 68 S. W. 170.

If one is clearly of the impression that he had the right to do what he did, and there are good reasons for this impression he is not guilty of wrongdoing, if

the fact does not exist which he believes to exist. *Giddings v. State*, 47 App. 360, 83 S. W. 694.

Mistake as to intoxicating character of liquor sold in local option territory. *Reed v. State*, 53 App. 4, 108 S. W. 368, 126 Am. St. Rep. 765.

One charged with allowing a minor in a poolroom held entitled to show that he acted in good faith and on mistake of fact as to the parent's consent. *Simpson v. State*, 58 App. 253, 125 S. W. 398.

To kill while playing with a gun believed to be unloaded held no offense. *Mc-Cray v. State*, 63 App. 522, 140 S. W. 442.

An employé must show not only that he did not know that intoxicating liquors were for sale and that he did not knowingly sell them, but also that he could not have known by an exercise of proper care. *Mealer v. State* (Cr. App.) 145 S. W. 353.

As to marriage under a mistake of fact, see *Coy v. State* (Cr. App.) 171 S. W. 221.

Proper care.—Proper care in avoiding mistake of fact, is a question which is controlled by the particular facts of the case, and is an issue which is to be determined by the jury upon the evidence adduced. The court, in its charge upon this issue, should give the two preceding articles, without attempting to define the meaning of the words "proper care." Those words are not technical, having a fixed legal meaning, but are plain, common, well understood words, and need no explanation. *Watson v. State*, 13 App. 76; *Halles v. State*, 15 App. 93; *Guest v. State*, 24 App. 235, 5 S. W. 841; *Mason v. State*, 29 App. 24, 14 S. W. 71; *Weatherford v. State*, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828; *Pettit v. State*, 28 App. 240, 14 S. W. 127.

An employé must show not only that he did not know that intoxicating liquors were for sale and that he did not knowingly sell them, but also that he could not have known by an exercise of proper care. *Mealer v. State* (Cr. App.) 145 S. W. 353.

One must use care to ascertain whether liquor was intoxicating or not before offering to sell it. *Mollenkopf v. State* (Cr. App.) 151 S. W. 799.

Instructions.—Court must charge it in cases in which evidence raises mistake of fact. *Jackson v. State*, 47 App. 85, 79 S. W. 521, 80 S. W. 631; *Mayne v. State*, 48 App. 93, 86 S. W. 329; *Uloth v. State*, 48 App. 295, 87 S. W. 823; *Walker v. State*, 50 App. 495, 98 S. W. 843; *Byrd v. State*, 51 App. 539, 103 S. W. 863; *Busby v. State*, 51 App. 289, 103 S. W. 638.

As to charge on a trial for theft, see *Fields v. State*, 57 App. 613, 124 S. W. 652.

As to charge on a trial for statutory rape, see *Martin v. State* (Cr. App.) 165 S. W. 579.

Art. 48. [48] Act done by mistake, a felony, when.—If one intending to commit felony, and in the act of preparing for or executing the same, shall, through mistake or accident, do another act which, if voluntarily done, would be a felony, he shall receive the punishment affixed by law to the offense actually committed. [P. C. 49.]

Commission of other offense in attempt.—See, post, art. 82.

Homicide.—As to excusable homicide see art. 1111, post.

If A. shoots at B., with express malice, and by accident kills C., the offense is murder in the second degree. *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Bean v. Mathieu*, 33 Tex. 591; *Angell v. State*, 36 Tex. 542, 14 Am. Rep. 380; *Ferrell v. State*, 43 Tex. 503; *Taylor v. State*, 3 App. 387; *Halbert v. State*, Id. 656; *McConnell v. State*, 13 App. 390; *Clark v. State*, 19 App. 495; *Breedlove v. State*, 26 App. 445, 9 S. W. 763; *Musick v. State*, 21 App. 69, 18 S. W. 95; *Miller v. State*, 52 App. 72, 105 S. W. 502; *Thomas v. State*, 53 App. 272, 109 S. W. 155, 126 Am. St. Rep. 786; *Leggett v. State*, 21 App. 382, 17 S. W. 159; *Honeycutt v. State*, 42 App. 129, 57 S. W. 807, 96 Am. St. Rep. 797; *Milo v. State*, 59 App. 196, 127 S. W. 1025; *McCullough v. State*, 62 App. 126, 136 S. W. 1055; *Rainer v. State* (Cr. App.) 148 S. W. 735.

One who, with malice aforethought, shoots at one person and accidentally kills another, is guilty of murder. *Richards v. State*, 35 App. 38, 30 S. W. 805.

Homicide by accidental discharge of defendant's pistol, when deceased was trying to prevent him from killing another, is not excusable. *Wheatly v. State* (Cr. App.) 39 S. W. 672.

As to use of the word "mistake" for "unintentionally" in charge, see *Deneaner v. State*, 58 App. 624, 127 S. W. 201.

— **Manslaughter.**—When the killing intended would have been manslaughter, the accidental killing would not be a higher grade of homicide. *Ferrell v. State*, 43 Tex. 504; *Clark v. State*, 19 App. 495; *McConnell v. State*, 22 App. 354, 3 S. W. 699, 58 Am. Rep. 647.

If the act committed is the unintentional homicide of a different person from the one intended, and is without malice, and done while the mind is under the immediate influence of sudden passion, arising from an adequate cause, rendering the mind incapable of cool reflection, the crime is manslaughter, because the crime intended was manslaughter. *Clark v. State*, 19 App. 495; *Leggett v. State*, 21 App. 382, 17 S. W. 159; *Breedlove v. State*, 26 App. 445, 9 S. W. 763; *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944; *McCullough v. State*, 62 App. 126, 136 S. W. 1055; see, also, *Brailaford v. State*, 71 App. 113, 158 S. W. 541; *Whiten v. State*, 71 App. 555, 160 S. W. 462.

Where accused shot and killed his wife while intending to shoot a third per-

son, the killing could not be reduced to manslaughter, but only to murder on implied malice. *Hill v. State* (Cr. App.) 168 S. W. 864.

— **Assault with intent to murder.**—If one while trying to kill one person unintentionally cuts or stabs another, he is guilty of an assault with intent to murder. *Smith v. State* (Cr. App.) 95 S. W. 1058.

If a person acting with malice express or implied and with an intent to kill shoots at one person and strikes another, he is guilty of assault to murder. *Vining v. State* (Cr. App.) 146 S. W. 909.

Where defendant's firing of the gun was accidental, he could not be guilty of an assault with intent to kill. *Martin v. State*, 71 App. 521, 160 S. W. 968.

— **Self-defense.**—If a party in necessary self-defense accidentally kills a person, it is justifiable homicide. *Plummer v. State*, 4 App. 310, 30 Am. Rep. 165; *Clark v. State*, 19 App. 495; *Ferrell v. State*, 43 Tex. 503; *McCullough v. State*, 62 App. 126, 136 S. W. 1055.

Charge of court.—An instruction that where A. in attempting to kill B. kills C., it is murder in the first degree, is erroneous. But if the defendant was found guilty of murder in the second degree, the error will be immaterial. *Taylor v. State*, 3 App. 387.

Variance.—Under an indictment charging defendant as an accomplice to the murder of A., evidence was inadmissible to show that the plot by defendant and an alleged principal was to kill M., and that A. was killed by mistake. *Cooper v. State* (Cr. App.) 154 S. W. 989.

Art. 49. [49] Same subject, as to misdemeanor.—If one intending to commit a felony, and, in the act of preparing for or executing the same, shall, through mistake or accident, do another act which, if voluntarily done, would be a misdemeanor, he shall receive the highest punishment affixed by law to the offense actually committed. [P. C. 50.]

Commission of other offense in attempt.—Post. Art. 82.

Art. 50. [50] Felony committed by mistake, etc., lowest punishment affixed.—If one intending to commit a misdemeanor, and, in the act of preparing for or executing the same, shall, through mistake, commit an offense which is by law a felony, he shall receive the lowest punishment affixed by law to the offense actually committed. [P. C. 51.]

Commission of other offense in attempt.—Post, art. 82.

Cited, *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

Felony committed by mistake.—The issue of simple assault not in the case, though accused charged with maiming only intended to commit a simple assault. *Key v. State*, 71 App. 642, 161 S. W. 121.

Art. 51. [51] Intention presumed.—The intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act. [P. C. 52.]

See Arts. 1106, 1147, post, and notes.

Presumption of innocence.—See art. 11, ante. See also Code Cr. Proc. art. 785.

Presumption from use of weapon.—See arts. 1106, 1147, post.

A stick about 1 inch in diameter and 2½ feet long, held, not per se a deadly weapon, within the rule as to presumption of intent in the use of a deadly weapon. *Shaw v. State*, 34 App. 435, 31 S. W. 361.

The weapon must be one likely to produce death in order to raise the presumption of felonious intent. *Griffin v. State*, 40 App. 312, 50 S. W. 366, 76 Am. St. Rep. 718; *Griffin v. State* (Cr. App.) 53 S. W. 848; *Connell v. State*, 46 App. 259, 81 S. W. 746.

Where a deadly weapon is used in a deadly manner, the presumption of intent to kill is practically conclusive, but, if the weapon be not dangerous or be not used in a deadly manner, then the intent must be established by the facts. *Grant v. State* (Cr. App.) 143 S. W. 929.

Assault.—See Art. 1009.

This and article 1009 ought very seldom to be given in a charge to the jury and certainly not in a case where the defendant claims an accidental injury. *Acrey v. State*, 51 App. 35, 100 S. W. 954.

An intent to commit a criminal assault can be presumed from the fact of actual injury to prosecutrix. *Miller v. State* (Cr. App.) 150 S. W. 635.

Intent presumed.—A man is always presumed to intend that which is the necessary or even probable consequences of his acts, unless the contrary appears. *McCoy v. State*, 25 Tex. 42, 78 Am. Dec. 520; *Aiken v. State*, 10 App. 610. See, also, *Phillips v. State*, 26 App. 245, 9 S. W. 557, 8 Am. St. Rep. 471; *White v. State*, 29 App. 530, 16 S. W. 340; *Rogers v. State*, 32 App. 447, 24 S. W. 282; *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Wood v. State*, 27 App. 393, 11 S. W. 449; *Shaw v. State*, 34 App. 435, 31 S. W. 361; *Tubbs v. State*, 50 App. 143, 95 S. W. 112; *Smith v. State*, 61 App. 225, 135 S. W. 533; *Perkins v. State* (Cr. App.) 144 S. W. 241; *Rogers v. State*, 71 App. 271, 159 S. W. 44.

It may ordinarily be presumed that one who breaks and enters a house did so

with intent to commit theft. *Vickery v. State*, 62 App. 311, 137 S. W. 687, Ann. Cas. 1913C, 514.

One is responsible for the consequences of his act, whether he shot to kill or only to scare. *Simms v. State* (Cr. App.) 148 S. W. 786.

One who strikes another with a weapon calculated to produce death is presumed to have intended that it shall result. *Crutchfield v. State* (Cr. App.) 152 S. W. 1053. See, also, *Wood v. State*, 27 App. 393, 11 S. W. 449; *Rogers v. State*, 71 App. 271, 159 S. W. 44.

Malice will not be implied from all killings. *Garcia v. State*, 70 App. 485, 156 S. W. 939.

When one puts in motion a set of circumstances, knowing the results to follow, he is responsible for all criminal acts that are the natural and intended results of his action. *Phillips v. State* (Cr. App.) 167 S. W. 353.

In view of this article and article 52, post, evidence of other offenses is not admissible in a prosecution for abortion, where the evidence showed that accused intended to commit an abortion if the woman was pregnant, and the only issue was her pregnancy. *Gray v. State* (Cr. App.) 178 S. W. 337.

Good intent as excuse.—When a person does a prohibited act, with the intent the law forbids, it will not avail him that he also intended an ultimate good, and if he intended to do what the law forbade, there need not be any other intent. *Phillips v. State*, 29 Tex. 226; *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Wood v. State*, 27 App. 393, 11 S. W. 449. See *Clopton v. State* (Cr. App.) 44 S. W. 173.

Reasonable doubt.—See Code Cr. Proc. art. 785 and notes.

Instructions.—See art. 1106, post, and notes.

It has been held improper in a number of instances to give this article in charge to the jury against the defendant, because the presumption of innocence is stronger than any presumption of guilt arising merely from the means used to accomplish the guilty purpose, and the burden rests upon the state, in a criminal trial, to overcome the presumption of innocence, by establishing the guilt of the accused by legal evidence beyond a reasonable doubt. *Black v. State*, 18 App. 124; *Jones v. State*, 13 App. 1; *Thomas v. State*, 14 App. 200; *Brinkoeter v. State*, Id., 67; *Luera v. State*, 12 App. 257; *Bell v. State*, 17 App. 538; *Richardson v. State*, 32 App. 524, 24 S. W. 894.

Abstract charge, held improper. *Floyd v. State*, 29 App. 341, 15 S. W. 819; *Burney v. State*, 21 App. 565, 1 S. W. 458. Especially where accused claimed an accidental injury. *Acrey v. State*, 51 App. 35, 100 S. W. 954 (Henderson, J., dissenting). See, also, *Tubbs v. State*, 50 App. 143, 95 S. W. 112. In this connection, an instruction held not to shift the burden of proof on accused. *Brown v. State*, 4 App. 275; *Leonard v. State*, 7 App. 417.

This article should be given in charge only in those exceptional cases wherein the defensive matter throws the burden of proof on the defendant. *Perry v. State*, 44 Tex. 473; *Ainsworth v. State*, 8 App. 532; *Dubose v. State*, 10 App. 230; *Richardson v. State*, 32 App. 524, 24 S. W. 894 (following *Jones v. State*, 13 App. 1). Also *Lucio v. State*, 35 App. 320, 33 S. W. 358; *Bowman v. State*, 38 App. 14, 40 S. W. 796, 41 S. W. 635; *Snead v. State*, 40 App. 262, 49 S. W. 595.

For correct instruction in a murder case as to the intent deducible from the means used, see *Gatlin v. State*, 5 App. 531.

Ordinarily presumptions of law which are against the defendant should not be given in charge. *Bell v. State*, 17 App. 538; *Shaw v. State*, 34 App. 435, 31 S. W. 361.

When the weapon is used in inflicting a wound which causes death it may be that a charge on the character of the weapon as not being a deadly one, is called for under this article. *Outley v. State* (Cr. App.) 99 S. W. 97.

A charge making sudden passion a controlling factor in determining intent held erroneous. *Grant v. State* (Cr. App.) 143 S. W. 929.

Charge not sufficient for failing to describe weapon, a gun barrel. *Crutchfield v. State* (Cr. App.) 152 S. W. 1053.

Art. 52. [52] Burden of proof on defendant, when.—On the trial of any criminal action, when the facts have been proved which constitute the offense, it devolves upon the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission. [P. C. 53.]

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| 1. Burden of proof on state. | 9. ——— Carrying arms. |
| 2. Burden of proof on defendant and charge of court thereon. | 10. ——— Bigamy. |
| 3. ——— Alibi. | 11. ——— Assault. |
| 4. ——— Nonage. | 12. ——— Sale of intoxicants. |
| 5. ——— Insanity. | 13. ——— Driving stock from range. |
| 6. ——— Self defense. | 14. ——— Abortion. |
| 7. ——— Facts within defendant's knowledge. | 15. ——— Practicing medicine without license. |
| 8. ——— Former jeopardy. | 16. Habeas corpus. |

1. **Burden of proof on state.**—See notes under Code Cr. Proc. art. 785.

2. **Burden of proof on defendant and charge of court thereon.**—For a full exposition of the import and purpose of this article, and an elucidation of the principles which determine whether it should or should not be given in charge to the jury, see *Jones v. State*, 13 App. 1; *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638.

The burden of proof is always on the state to overcome the presumption of innocence and establish the guilt of the accused beyond a reasonable doubt; but when this is done it devolves on the accused to prove any facts in justification or excuse, unless they appear in the state's evidence. *Delany v. State*, 41 Tex. 601; *Leonard v. State*, 7 App. 417; *Lewis v. State*, 7 App. 567; *Hill v. State*, 5 App. 2; *Powell v. State*, 5 App. 234; *Bridgers v. State*, 8 App. 145; *Dubose v. State*, 10 App. 230; *Jones v. State*, 13 App. 1; *Donaldson v. State*, 15 App. 25; *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. St. Rep. 638; *Stilly v. State*, 27 App. 445, 11 S. W. 458, 11 Am. St. Rep. 201. See, also, *Ake v. State*, 6 App. 398, 32 Am. Rep. 586; *Burney v. State*, 21 App. 565, 1 S. W. 458; *Ellis v. State*, 30 App. 601, 18 S. W. 139; *Jones v. State*, 32 App. 108, 22 S. W. 149, following *Reynolds v. State*, 32 App. 36, 22 S. W. 18.

It is error to instruct the jury to the effect that "the burden of proof never shifts from the state to the defendant, but is upon the state throughout to first establish every constituent element of the offense." *Horn v. State*, 30 App. 541, 17 S. W. 1094; *Phillips v. State*, 26 App. 229, 9 S. W. 557; *Conner v. State*, 24 App. 245, 6 S. W. 138; *Guajardo v. State*, 24 App. 603, 7 S. W. 331.

It is frequently an error to give the preceding article in charge to the jury, as it only devolves upon the defendant to show excuse or justification when it fails to appear in the evidence for the prosecution. *Delany v. State*, 41 Tex. 601; *Perry v. State*, 44 Tex. 473; *Brown v. State*, 4 App. 275; *Ake v. State*, 6 App. 398, 32 Am. Rep. 586; *Leonard v. State*, 7 App. 417; *Ainsworth v. State*, 8 App. 532; *Guffee v. State*, Id. 187; *Jones v. State*, 13 App. 1; *Brinkoeter v. State*, 14 App. 67; *Thomas v. State*, Id. 200; *Burney v. State*, 21 App. 565, 1 S. W. 458. See, also, *Stilly v. State*, 27 App. 445, 11 S. W. 458, 11 Am. St. Rep. 201; *Ellis v. State*, 30 App. 601, 18 S. W. 139.

The burden of proof is never on the defendant, as in civil cases and never shifts from the state to him, and the court should ordinarily so charge on request. *Perry v. State*, 44 Tex. 473; *Black v. State*, 1 App. 368; *Phillips v. State*, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; *Horn v. State*, 30 App. 541, 17 S. W. 1094. But, see *Slade v. State*, 29 App. 392, 16 S. W. 253, and *Lewis v. State* (Cr. App.) 59 S. W. 886, where it is held that the charge as given sufficiently protected the rights of accused.

The burden is upon the defendant to show the relation and circumstances which justify the violence. *State v. Stephenson*, 20 Tex. 151.

Where a breach of duty has been established it devolves on defendant to show justification or excuse. *Sennett v. State*, 17 Tex. 308; *Sigler v. State*, 17 Tex. 304.

This article should not be indiscriminately given in charge, as it applies only in those exceptional cases wherein the burden of proof is on the accused to establish his defense. *Thomas v. State*, 14 App. 200. See, also, *Brown v. State*, 4 App. 275; *Ainsworth v. State*, 8 App. 532; *Dubose v. State*, 10 App. 230; *Luera v. State*, 12 App. 257; *Jones v. State*, 13 App. 1.

An accused is entitled to a distinct and affirmative presentation of the issues which arise upon his evidence to prevent their ignorment by the jury. *Freeman v. State*, 52 App. 500, 107 S. W. 1127.

Defendant is not required to show mitigating facts unless they fail to appear from the evidence adduced against him. *Guffee v. State*, 8 App. 187.

Where the evidence raises the question of innocent intention or accidental shooting, it is error to charge that the burden of proving accident or innocent intention is on the defendant. *Richardson v. State*, 32 App. 524, 24 S. W. 894.

When the state shows the taking up and using of an estray, the burden is on the defendant to justify his action. *Asheroft v. State*, 32 Tex. 108.

Requested charges in a case of assault by driving against a person, held improper. *Perkins v. State* (Cr. App.) 144 S. W. 241.

3. — **Alibi.**—Alibi merely traverses the issues tendered in the indictment, and is not a special defense, nor, in its nature, an independent exculpatory fact, and, therefore, the burden of proof is not upon the defendant to establish it. *Ayres v. State*, 21 App. 399, 17 S. W. 253.

A charge that alibi is a special plea, independent of a plea of not guilty is not improper. *Callaher v. State*, 28 App. 247, 12 S. W. 1087; *Saenz v. State* (Cr. App.) 63 S. W. 316; *Young v. State* (Cr. App.) 79 S. W. 34.

An instruction on alibi held to improperly place on defendant the burden of proving the defense beyond a reasonable doubt. *Henderson v. State*, 51 App. 193, 101 S. W. 245.

4. — **Nonage.**—See notes under arts. 34, 35 ante.

5. — **Insanity.**—See notes under art. 40 ante.

6. — **Self-defense.**—The state has the burden of proving that defendant has lost his right of self-defense. *Johnson v. State* (Cr. App.) 149 S. W. 165.

The burden of proving self-defense is not upon the defendant. *Lyons v. State*, 71 App. 189, 159 S. W. 1070.

Defendant does not have the burden of showing that he went on a peaceful mission. *Mason v. State*, 72 App. 501, 163 S. W. 66.

7. — **Facts within defendant's knowledge.**—Where the defensive fact relied upon is peculiarly within the knowledge of the defendant, the burden of proving it rests on him, and the court should so instruct. *Leonard v. State*, 7 App. 417; *Lewis v. State*, Id. 567; *Bridgers v. State*, 8 App. 145; *Caldwell v. State*, 5 Tex. 18; *Crow v. State*, 41 Tex. 468; *Forrest v. State*, 3 App. 232; *Burton v. State*, 3 App. 408, 30 Am. Rep. 146; *Jones v. State*, 13 App. 1; *Thomas v. State*, 14 App. 200; *Donaldson v. State*, 15 App. 25; *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638; *Asheroft v. State*, 32 Tex. 108; *Wilcox v. State*, 33 App. 392, 26 S. W. 989; *Skeen v. State*, 34 App. 308, 30 S. W. 554; *Evans v. State*, 40 App. 54, 48 S. W. 194; *Bedford v. State*, 44 App. 97, 69 S. W. 158.

Accused must prove that he bona fide owned the property alleged to have been

stolen. *Stoneham v. State*, 3 App. 594; though if defendant's account of his possession is reasonable, the state has the burden of disproving it. *Hampton v. State*, 5 App. 463.

8. — **Former jeopardy.**—See notes to Code Cr. Proc. art. 572.

9. — **Carrying arms.**—The burden is on defendant to show exemption from prosecution for carrying pistol. *Stoneham v. State*, 3 App. 594; *Lewis v. State*, 7 App. 567; *Bridgers v. State*, 8 App. 145; *Stilly v. State*, 27 App. 445, 11 S. W. 458, 11 Am. St. Rep. 201; *Williams v. State*, 42 Tex. 466; *Stanfield v. State* (Cr. App.) 34 S. W. 116; *Williams v. State* (Cr. App.) 169 S. W. 1154; *Hunter v. State* (Cr. App.) 166 S. W. 164.

10. — **Bigamy.**—One charged with bigamy has the burden of proving that he contracted the second marriage under a mistake of fact, but proof beyond a reasonable doubt is not required. *Coy v. State* (Cr. App.) 171 S. W. 221.

Or that the first wife was dead. *Hull v. State*, 7 App. 593.

11. — **Assault.**—Defendant has the burden of proving that the gun, with which the alleged assault was committed, was unloaded. *Caldwell v. State*, 5 Tex. 18; *Crow v. State*, 41 Tex. 468; *Forrest v. State*, 3 App. 232; *Burton v. State*, Id. 408, 30 Am. Rep. 146.

12. — **Sale of intoxicants.**—The burden is on accused to show any excuse or justification, as that the sales were made under a license for selling upon prescription. *Dozier v. State*, 62 App. 258, 137 S. W. 679; *Bell v. State*, 62 App. 242, 137 S. W. 670, 36 L. R. A. (N. S.) 98, Ann. Cas. 1913C, 617.

The burden is on accused to produce legal written consent to sale of liquor to minor. *Reynolds v. State*, 32 App. 36, 22 S. W. 18; *Jones v. State*, 32 App. 108, 22 S. W. 149; *Kuhn v. State*, 34 App. 85, 29 S. W. 272; *Partin v. State* (Cr. App.) 30 S. W. 1067.

13. — **Driving stock from range.**—See art. 1358 and notes.

14. — **Abortion.**—In view of this article and article 51, ante, evidence of other offenses is not admissible in a prosecution for abortion, where the evidence showed that accused intended to commit an abortion if the woman was pregnant, and the only issue was her pregnancy. *Gray v. State* (Cr. App.) 178 S. W. 337.

15. — **Practicing medicine without license.**—Defendant, on a prosecution for practicing medicine without a license, is obliged, on the state proving that he practiced, to show a license and the registration thereof. *Collins v. State*, 152 S. W. 1047.

16. **Habeas corpus.**—See notes to Code Cr. Proc. art. 6 (Bill of Rights § 11).

TITLE 2

OF OFFENSES AND PUNISHMENTS

Chap.	Chap.
1. Definition and division of offenses.	2. Punishments in general.

CHAPTER ONE

DEFINITION AND DIVISION OF OFFENSES

Art.	Art.
53. "Offense" defined.	57. Petty offenses.
54. How divided.	58. Subdivision and classification of offenses.
55. Felonies and misdemeanors defined.	
56. Felonies subdivided.	

Article 53. [53] "Offense" defined.—An offense is an act or omission forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed in this Code. [P. C. 54.]

See, ante, arts. 1, 3, 6, 7, 8. *Russell v. State*, 37 App. 314, 39 S. W. 674; *Ringo v. State*, 54 App. 561, 114 S. W. 119.

Statutory definition of offense controlling.—The offending party must be brought within the very terms of the statute under which conviction is sought. *Strong v. State*, 52 App. 133, 105 S. W. 785. Citing *Mitchell v. State*, 34 App. 311, 30 S. W. 811; *Flynn v. State*, 35 App. 220, 32 S. W. 1041; *Cook's Case*, 42 App. 539, 61 S. W. 307; *Hamilton's Case* (Cr. App.) 60 S. W. 40.

What constitutes "offense."—See *Hardin v. State*, 39 App. 426, 46 S. W. 803, 806.

What constitutes offense of malicious prosecution for purpose of determining venue of civil suit. *Hubbard v. Lord*, 59 Tex. 384. See, also, *Illies v. Knight*, 3 Tex. 312.

Negligent homicide as "offense" within meaning of statutory definition, see *Austin v. Cameron*, 83 Tex. 351, 18 S. W. 437.

Distinct and continuous offenses.—See *Day v. State*, 27 App. 143, 11 S. W. 36.

Exhibition of gaming table is not an offense continuous in its nature. *Kain v. State*, 16 App. 282.

One offense nullifying another.—Where the forgery of a note also constitutes a swindle, the two offenses do not nullify each other. *Abel v. State* (Cr. App.) 97 S. W. 1055.

When intent immaterial.—Under a statute which does not make an intent to violate it a necessary ingredient, defendant would be guilty if he violated it, whether he intended to do so or not. *Hughes v. State* (Cr. App.) 149 S. W. 173.

Willingness to comply with law and not offend again.—After the unquestioned commission of a statutory offense, the fact that defendant on the next day was willing to comply with the law and not commit the offense again was no defense. *Hughes v. State* (Cr. App.) 149 S. W. 173.

Reference to other offense for penalty.—*Barfield v. State* (Cr. App.) 43 S. W. 333.

Art. 54. [54] How divided.—Offenses are divided into felonies and misdemeanors. [P. C. 55.]

Russell v. State, 37 App. 314, 39 S. W. 674.

Art. 55. [55] Felonies and misdemeanors defined.—Every offense which is punishable by death or by imprisonment in the penitentiary, either absolutely or as an alternative, is a felony; every other offense is a misdemeanor. [P. C. 56.]

See *Ex parte Walker*, 28 App. 246, 13 S. W. 861; *Walker v. State*, 28 App. 503, 13 S. W. 860.

Cited, *Welsh v. State*, 3 App. 114.

Alternative punishment in penitentiary.—It is the capacity of an offense to be punished by confinement in the penitentiary, and not that such punishment of necessity follows conviction, that distinguishes crime and separates felonies from misdemeanors; and hence the offenses created by statute, falling precisely within the definition of a felony given by statute—a public offense which may (not must) be punished by confinement in the penitentiary—are felonies, although under the statute persons convicted thereof may be fined or imprisoned in the county jail. If by the terms of the statute the jury is at liberty to inflict some milder punishment than death or imprisonment in the penitentiary, this discretion does not prevent the offense from being a felony. *Campbell v. State*, 22 App. 262, 2 S. W. 825. The case of *Sisk v. State*, 9 App. 90, in which it was held that the distinction between a felony and a misdemeanor after conviction, was determinable by the punishment assessed by the jury, is expressly overruled in *Campbell v. State*, supra. See *Woods v. State*, 26 App. 490, 10 S. W. 108; *Kinley v. State*, 29 App. 532, 16 S. W. 339; *Beard v. State*, 45 App. 522, 78 S. W. 348.

The offense of which one was convicted, being punishable in the alternative by

imprisonment in the penitentiary, was, under this article a felony, though the penalty imposed was a fine. *Huff v. McMichael* (Civ. App.) 127 S. W. 574.

Seduction.—The punishment for seduction (art. 1447, post) formerly was by confinement in the penitentiary or fine. This made the crime a felony. *Ex parte Biela*, 46 App. 487, 81 S. W. 739. See *Ward v. White*, 86 Tex. 170, 23 S. W. 981.

Forgery.—See *Pitner v. State*, 23 App. 366, 5 S. W. 210.

Altering mark on animal.—See *Barfield v. State* (Cr. App.) 44 S. W. 1104.

Hiring out convicts for felony.—The statute does not provide for the hiring out of convicts for felony, and release cannot be had through habeas corpus because of inability to pay a felony fine. *Ex parte Biela*, 46 App. 487, 81 S. W. 739.

"Offense" as implying felony or misdemeanor.—See *Waters-Pierce Oil Co. v. State*, 48 Civ. App. 162, 106 S. W. 918.

Art. 56. [56] Felonies subdivided.—Felonies are either capital or not capital. An offense for which the highest penalty is death is a capital felony. [P. C. 57.]

Minor as subject to capital punishment.—See art. 35, ante, and notes.

Art. 57. [57] Petty offenses.—An offense which a justice of the peace, or the mayor or other officer of a town or city, may try and punish is called a petty offense. [P. C. 58.]

See *Bautsch v. State*, 27 App. 342, 11 S. W. 414; *Ward v. White*, 86 Tex. 170, 23 S. W. 981.

Art. 58. [58] Subdivision and classification of offenses.—Offenses are again subdivided and classed as follows; they are—

1. Offenses against the state, its territory, property and revenue.
2. Offenses affecting the executive, legislative and judicial departments of the government.
3. Offenses affecting the right of suffrage.
4. Offenses which affect the free exercise of religious opinion.
5. Offenses against public justice.
6. Offenses against the public peace.
7. Offenses against public morals, decency and chastity.
8. Offenses against public policy and economy.
9. Offenses against public health.
10. Offenses affecting property held in common for the use of the public.
11. Offenses against trade and commerce, and the current coin.
12. Offenses against the persons of individuals.
13. Offenses against reputation.
14. Offenses against property.
15. Miscellaneous offenses. [P. C. 59.]

CHAPTER TWO

OF PUNISHMENTS IN GENERAL

Art.	Art.
59. Punishments.	67. Increase of punishment one-half.
60. Continuous offenses, suppressed.	68. Decrease of punishment one-half.
61. No forfeiture in capital cases.	69. Diminution of punishment, what rule.
62. No forfeiture in any criminal case.	70. Capital cases, etc., not included.
63. Political rights, what are.	71. Death, how inflicted.
64. Double punishment, how fixed.	72. Hard labor intended.
65. Double punishment in misdemeanors.	73. Officer to be removed, when.
66. Same subject.	

Article 59. [59] Punishments.—The punishments incurred for offenses under this Code are—

1. Death.
2. Imprisonment in the penitentiary for life or for a period of time.
 - 2a. Imprisonment in the house of correction and reformatory.
3. Imprisonment in the county jail.

4. Forfeiture of civil or political rights.

5. Pecuniary fines. [P. C. 60.]

See *ex parte* Wood, 36 App. 7, 34 S. W. 965.

Reformatory.—The provision for imprisonment in the house of correction and reformatory must be viewed in the light of the subsequent amendments of the acts of 1887 and 1889. See C. C. P. art. 1195, *et seq.*

Cumulative punishment.—The statute regulating cumulative punishment refers only to cases in which imprisonment is part of the penalty, and refers to misdemeanors as well as felonies. It has no reference to pecuniary fines. *Ex parte* Banks, 41 App. 201, 53 S. W. 689.

Fines in two cases.—Where one has been fined in two cases and is hired out and is allowed fifty cents a day on the fines and costs, the cases do not run concurrently. He is not compelled to serve more than a year for one of such fines and the accompanying costs. *Ex parte* Banks, 41 App. 201, 53 S. W. 689.

Art. 60. [60] Continuous offenses, suppressed.—When an offense of which a person is convicted is in its nature continuous, there shall also be judgment for its suppression. [P. C. 61.]

Continuous offenses.—See notes under art. 53, *ante*.

Art. 61. [61] No forfeiture in capital cases.—In case of the execution of a convict under sentence of death, or where he is imprisoned for life, there shall be no forfeiture of any kind to the state, nor shall any cost of the prosecution be collected from his estate. [P. C. 62.]

See Willson's Cr. Forms, 963.

Costs in capital case.—Costs may be adjudged against a convict in a capital case, without vitiating the judgment of conviction, but it is better practice not to enter judgment for costs. *Lanham v. State*, 7 App. 126; *Jackson v. State*, 25 App. 314, 7 S. W. 872.

— **Liability of owner of slave executed for murder.**—The owner of a slave executed for murder was not liable for costs. *Grinder v. State*, 2 Tex. 338.

Taxation of costs in general.—See C. C. P. art. 1164 *et seq.*

Art. 62. [62] No forfeiture in any criminal case.—When a convict is imprisoned in the penitentiary, his property shall be controlled and managed in the manner directed by law; but there shall, in no criminal case, be a forfeiture of property of any kind to the state. [P. C. 63.]

Forfeiture of weapons.—By a former act regulating the keeping and bearing of deadly weapons, it was provided that the weapon found on or about the convicted person should be forfeited to the county. This portion of the act was declared to be in violation of sec. 25 of the Bill of Rights of this state. *Hudeburgh v. State*, 38 Tex. 535; *Jennings v. State*, 5 App. 298.

Art. 63. [63] Political rights, what are.—When the penalty affixed to the commission of an offense is deprivation of political rights, such rights are intended to include the rights of holding office, of serving on juries, and of suffrage. [Act Feb. 12, 1858, p. 156; P. C. 64.]

Due process of law.—See C. C. P. arts. 3 and 4 and notes.

Art. 64. [64] Double punishment, how fixed.—Whenever a minimum or maximum punishment is fixed by law, and by reason of any aggravation of the offense, or the existence of any circumstance on account of which the law directs that the punishment be doubled, this shall be construed to mean that the jury shall not inflict less than double the smallest punishment incurred by the law, nor more than double the greatest punishment so incurred. [P. C. 65.]

See *post*, arts. 82-84.

Art. 65. [65] Double punishment in misdemeanor.—If fine and imprisonment are the punishments to be incurred for any offense, and it is provided that the punishment be doubled in any particular case, then the jury are to assess not less than double the smallest, and not more than double the largest, fine prescribed by law, and not more than double the longest period of imprisonment, nor less than double the shortest period of imprisonment, so prescribed. [P. C. 66.]

See *post*, arts. 83-84.

Art. 66. [66] Same subject.—When an offense is punishable by either fine or imprisonment, and, as an alternative, it is declared that the punishment shall be double in any particular case, the jury are to assess not less than double the amount of the smallest fine, nor more than double the amount of the largest fine, or, as an alternative, they shall not assess less than double the shortest period of imprisonment, nor more than double the longest period. This rule applies where there may be more than two kinds of punishment prescribed as alternatives. [P. C. 67.]

Art. 67. [67] Increase of punishment one-half.—Where it is directed by law that in any particular case the punishment shall be increased one-half, it is to be construed to mean that the jury may, beside the punishment ordinarily prescribed by law, assess such additional punishment as shall not be less than one-half the penalty in ordinary cases; and all the rules before prescribed with respect to offenses, which by law incur alternative punishments, are applicable to cases where the penalty is to be so increased. [P. C. 68.]

Art. 68. [68] Decrease of punishment one-half.—When it is provided that the punishment in any given case, on account of mitigating circumstances, shall be diminished one-half, the jury shall assess one-half of the penalty fixed by law for the offense under ordinary circumstances, and so with regard to any other proportion in which the penalty is directed to be diminished. [P. C. 69.]

Art. 69. [69] Diminution of punishment, what rule.—In the diminution of punishments, the same rule as to two or more penalties, or as to alternative penalties, shall apply which are prescribed with regard to the increase of punishment. [P. C. 70.]

Art. 70. [70] Capital cases, etc., not included in foregoing rules.—The foregoing rules as to increase or diminution of punishments have no application to cases where the highest penalty may be death, nor to any case where the penalty is total deprivation of civil or political rights. [P. C. 71.]

Art. 71. [71] Death, how inflicted.—The punishment of death is inflicted by hanging, as prescribed in the Code of Criminal Procedure. [P. C. 72.]

See C. C. P., art. 883, et seq.

Recital of mode of execution in judgment.—Judgment in capital conviction need not recite the mode of execution. *Steagald v. State*, 22 App. 464, 3 S. W. 771.

Art. 72. [72] Hard labor intended.—Whenever the penalty prescribed for an offense is imprisonment for a term of years in the penitentiary, imprisonment at hard labor is intended. [P. C. 73.]

Verdict of imprisonment at hard labor.—Verdict of imprisonment "at hard labor in the state prison" is good. *Moore v. State*, 7 App. 14; *Wilson v. State*, 12 App. 481; *Harris v. State*, 8 App. 90. See, also, *McCoy v. State*, 7 App. 379.

Art. 73. [73] Officer to be removed, when.—Whenever an offense is committed by an officer, and the same appears to the jury to be a wilful violation of duty, they shall so find, and such officer shall be removed from office. [P. C. 75.]

See *Vernon's Sayles' Civ. St.* 1914, arts. 6017-6077.

Legislative power.—Where the constitution prescribes a mode for removing officers the legislature may not authorize a removal in another mode. *Griner v. Thomas*, 101 Tex. 36, 104 S. W. 1058, 16 Ann. Cas. 944.

Necessity of indictment.—Officer removable without previous conviction under indictment; Const. art. 1, § 10, not applying. *Bland v. State (Civ. App.)* 38 S. W. 252.

TITLE 3

OF PRINCIPALS, ACCOMPLICES AND ACCESSORIES

Chap.

1. Principals.
2. Accomplices.
3. Accessories.

Chap.

4. Trial of accomplices and accessories.

CHAPTER ONE

PRINCIPALS

Art.

74. Who are principals.
75. Same subject.
76. Same subject.

Art.

77. Who are principals.
78. Same subject.

Article 74. [74] Who are principals.—All persons are principals who are guilty of acting together in the commission of an offense. [P. C. 214.]

See notes under articles 79 and 1437, post, and art. 791, C. C. P.
Cited, *Fondren v. State* (Cr. App.) 169 S. W. 411.

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| 1. Acting with others and presence at commission of crime in general. | 14. ——— Disorderly house. |
| 2. Act and intent. | 15. ——— Forgery. |
| 3. Distinguished from accomplice. | 16. ——— Gift or delivery of liquors to minors. |
| 4. Knowledge and concealment of crime. | 17. ——— Homicide. |
| 5. Crime committed primarily in foreign country. | 18. ——— Obstructing railroad track. |
| 6. Misdemeanors in general. | 19. ——— Taking fish and dragging seines in prohibited waters. |
| 7. Specific crimes—Abortion. | 20. ——— Theft. |
| 8. ——— Assault. | 21. ——— Violations of local option laws. |
| 9. ——— Assault with intent to murder. | 22. ——— Violation of Sunday law. |
| 10. ——— Assault with intent to rape. | 23. Indictment, proof and variance. |
| 11. ——— Assault with intent to rob. | 24. Evidence. |
| 12. ——— Bribery. | 25. Question for jury. |
| 13. ——— Burglary. | 26. Instructions. |

1. Acting with others and presence at commission of crime in general.—All persons are principals who act together in the commission of an offense, although all may not have been actually present when the offense was committed. *Corn v. State*, 41 Tex. 301; *Welsh v. State*, 3 App. 412; *Wells v. State*, 4 App. 20; *Berry v. State*, 4 App. 492; *Templeton v. State*, 5 App. 398; *Scales v. State*, 7 App. 361; *Truitt v. State*, 8 App. 148; *Heard v. State*, 9 App. 1; *Brown v. State*, 9 App. 81; *Cohea v. State*, 9 App. 173; *Cook v. State*, 14 App. 96; *O'Neal v. State*, 14 App. 582; *Bean v. State*, 17 App. 60; *Wright v. State*, 18 App. 358; *Smith v. State*, 21 App. 107, 17 S. W. 552; *Watson v. State*, 21 App. 598, 1 S. W. 451, 17 S. W. 550; *Phillips v. State*, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; *Mason v. State*, 31 App. 306, 20 S. W. 564; *Mason v. State*, 32 App. 95, 22 S. W. 144, 408; *Blain v. State*, 33 App. 236, 26 S. W. 63; *Trimble v. State*, 33 App. 397, 26 S. W. 727; *McDonald v. State*, 34 App. 556, 35 S. W. 286; *Goode v. State*, 57 App. 220, 123 S. W. 597; *Bass v. State*, 59 App. 186, 127 S. W. 1020; *Sheppard v. State*, 63 App. 569, 140 S. W. 1090. All who, by acts, words or gestures, being present, participate in the commission of the offense though they took no actual part in it, are principal offenders. *Blain v. State*, 33 App. 236, 26 S. W. 63; *Lyons v. State*, 30 App. 642, 18 S. W. 416; *Walker v. State*, 29 App. 621, 16 S. W. 548; *Fernandez v. State*, 25 App. 538, 8 S. W. 667; *Mason v. State*, 31 App. 306, 20 S. W. 564. If accused is shown to have been present, and to have acted with and encouraged others in the commission of a crime, he is deemed a principal in such crime, although the act constituting such crime was actually committed by another. *Sharp v. State*, 6 App. 650; *Mills v. State*, 13 App. 487; *Dunman v. State*, 1 App. 593. Any person who advises or agrees to the commission of an offense and is present at its commission is a principal thereto, whether he aids or not in the commission of the illegal act. *Sheppard v. State*, 63 App. 569, 140 S. W. 1090. But one is not a principal merely because he was present at the commission of the offense, though that is a circumstance which, in connection with other circumstances, may constitute the party a participant. *Burrell v. State*, 18 Tex. 713; *Ring v. State*, 42 Tex. 282; *Truitt v. State*, 8 App. 148; *Golden v. State*, 18 App. 637; *Jackson v. State*, 20 App. 190; *Sharp v. State*, 29 App. 211, 15 S. W. 176; *Floyd v. State*, 29 App. 349, 16 S. W. 188; *Walker v. State*, 29 App. 621, 16 S. W. 548; *Campbell v. State*, 63 App. 595, 141 S. W. 232, Ann. Cas. 1913D, 858. In order to constitute a person a principal in a crime when he is not personally present at the time and place of its commission, he must at the time of the commission of the offense be doing some act in furtherance of the common design. *Tittle v. State*, 35 App. 96, 31 S. W. 677; *Dawson v. State*, 38 App. 50, 41 S. W. 599; *Starks v. State*, 38 App. 233, 42 S. W.

379; *Eddens v. State*, 47 App. 529, 54 S. W. 828; *Tally v. State*, 49 App. 91, 90 S. W. 1113; *Silvas v. State*, 71 App. 213, 159 S. W. 223. Hence, an instruction which authorizes the jury to convict the defendant as a principal if he acted with others in the commission of the offense charged and the act was done in pursuance of a common intent, whether the defendant was in fact actually present, is erroneous, as authorizing a conviction as principal on facts which make the defendant guilty only as an accomplice. *Silvas v. State*, 71 App. 213, 159 S. W. 223.

Each party to a conspiracy to commit a crime is responsible for the acts of any or all pending the consummation of the common design and in furtherance thereof. *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Mills v. State*, 13 App. 487; *Blum v. State*, 20 App. 578, 54 Am. Rep. 530; *Kirby v. State*, 23 App. 13, 5 S. W. 165; *Phillips v. State*, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; *Blain v. State*, 30 App. 702, 18 S. W. 862; *Mason v. State*, 32 App. 95, 22 S. W. 144, 408; *English v. State*, 34 App. 190, 30 S. W. 233; *Burriss v. State*, 34 App. 387, 30 S. W. 785; *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456; *Jenkins v. State*, 45 App. 173, 75 S. W. 312; *Lott v. State*, 58 App. 604, 127 S. W. 191. Otherwise if the undertaking was lawful. *Mercersmith v. State*, 8 App. 211. A person who persuades others to commit a crime and is present when the conspiracy is entered into, even though he intends to apprehend the others and have them arrested in the act of the commission of the offense is a principal conspirator. *Dever v. State*, 37 App. 396, 30 S. W. 1071. Where a crime committed is not in any way connected with a conspiracy, but is the independent act of one of the conspirators, though done while he was engaged in the common purpose, the others are not legally responsible therefor, but if the crime is in furtherance of the common purpose, and is such an offense as might have been and should have been contemplated would result from the execution of the conspiracy, and it was so executed, then all engaged in the unlawful purpose are equally guilty, though at the time they may have been engaged in some other part of the common purpose. *Serrato v. State* (Cr. App.) 171 S. W. 1133. See, also, *Mercersmith v. State*, 8 App. 211; *Lyons v. State*, 30 App. 642, 18 S. W. 416. If accused was present and took part with others in the crime so as to make him a principal, a charge requiring a prior agreement between accused and the others, to commit the crime or a conspiracy to do so, was not necessary; such a charge only being necessary if accused was present when the crime was committed, but took no part therein. *Ross v. State*, 60 App. 547, 132 S. W. 793.

To convict a person as principal in the second degree, the evidence must show knowledge on his part of the intention of the principal actor, and a participation in the act. If he was present, consenting, and the act was the result of a common design, he is equally guilty with the real perpetrator. *Burrell v. State*, 18 Tex. 713; *Espinoza v. State* (Cr. App.) 165 S. W. 208. Mere knowledge that an offense is about to be committed will not make the party a principal. *Tullis v. State*, 41 Tex. 598; nor will the mere presence of the accused at the commission of the offense, his failure to give the alarm, his silence, inaction, and supposed concealment of the offense. *Ring v. State*, 42 Tex. 282. But if he was near enough to keep watch, and was acting with others who perpetrated the offense, he is a principal. *Selvidge v. State*, 30 Tex. 60; or if he was present encouraging others. *Sharp v. State*, 6 App. 650. His complicity cannot always be determined by his actual corporeal presence, for the offense may consist of a series of acts, performed by different persons, apart from the others; but if done in furtherance of the common design, all are principals. *Berry v. State*, 4 App. 492. The true test is, "Did the parties act together?" See discussions and illustrations. *Welsh v. State*, 3 App. 413; *Wells v. State*, 4 App. 20; *Scales v. State*, 7 App. 361; *Corn v. State*, 41 Tex. 301.

If an illegal military order be executed, and its execution results in an offense against the law, the officer who gave the order will be deemed the principal offender. *State v. Sparks*, 27 Tex. 627.

If one knows the unlawful intent of another and joins with him in the enterprise, both are principals, no matter what the relation between them. But if one brother finds another in a conflict and rushes to his aid, his amenability to punishment depends on his own act and intent, and not upon that of his brother. *Guffee v. State*, 8 App. 187.

To render a principal criminally liable for an act of his agent, committed in the absence of the principal, there must be some sort of complicity. *Oilre v. State*, 57 App. 520, 123 S. W. 1117.

Where a father ordered his son to get some whisky which belonged to the father and sell it to the purchaser, the father participated in the sale and was a principal in the transaction. *Albright v. State* (Cr. App.) 164 S. W. 1001.

2. Act and intent.—To constitute one a principal with others in the commission of a crime there must be a combination of both act and intent. He must act together with the others in the commission of the offense, knowing their unlawful intent. *Welsh v. State*, 3 App. 413; *Rountree v. State*, 10 App. 110. In the case of co-principals, the intent of one may not be the intent of the other, and the issue as to the intent of each must be clearly and distinctly submitted to the jury. The court must not assume that the intent of both was the same. *Leslie v. State*, 42 App. 65, 57 S. W. 661. But each conspirator is liable for whatever act of his confederates that follows incidentally, or in the natural or probable consequence of the common design though not originally intended. *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Bowers v. State*, 24 App. 542, 7 S. W. 247, 5 Am. St. Rep. 901; *McKenzie v. State*, 32 App. 568, 25 S. W. 426, 40 Am. St. Rep. 795; *Blain v. State*, 33 App. 236, 26 S. W. 63; *Rix v. State*, 33 App. 353, 26 S. W. 505; *Smith v. State*, 46 App. 267, 81 S. W. 936, 108 Am. St. Rep. 991. A party's liability may, however, under certain circumstances depend upon his own act and intent, and not those of the other parties. *Guffee v. State*, 8 App. 187; *Trimble v. State*, 33 App. 397, 26 S. W. 727 (following *Smith v. State*, 21 App. 107, 17 S. W. 552;) *Blain v. State*, 33

App. 236, 26 S. W. 63; Lyons v. State, 30 App. 642, 18 S. W. 416; Tittle v. State, 35 App. 96, 31 S. W. 677; Chapman v. State, 43 App. 328, 65 S. W. 1098, 96 Am. St. Rep. 874; Franklin v. State, 45 App. 470, 76 S. W. 473. If, in a joint unlawful undertaking, one commits a felony beyond the purview of the original enterprise, without the foreknowledge of his confederates, the others are not liable therefor, although the act was done to facilitate the escape of all. Mercersmith v. State, 8 App. 211. See, also, Snell v. State, 29 App. 236, 15 S. W. 722, 25 Am. St. Rep. 723; Walker v. State, 29 App. 624, 16 S. W. 548; Blain v. State, 30 App. 702, 18 S. W. 862.

An instruction that all persons are principals who acted together in the commission of an offense, and that where an offense is committed by one or more persons, and others are present, and, knowing the unlawful intent, aid those actually engaged in the unlawful act, such persons are principals, who may be prosecuted as such, followed by an instruction that, before defendant could be convicted, it must be found beyond a reasonable doubt that he was present "knowing the unlawful intent and aided the persons committing the offense," aptly presents the issue as to intent. Dowling v. State, 63 App. 366, 140 S. W. 224.

3. **Distinguished from accomplice.**—The distinction between a principal and an accomplice is stated as follows: The facts constituting an accomplice are auxiliary only, all of which may be, and are performed by him, anterior and as inducements to the crime about to be committed, whilst the principal offender not only may perform some antecedent act in furtherance of the commission of the crime, but, when it is actually committed, is doing his part of the work assigned him in connection with the plan and furtherance of the common purpose, whether he be present where the main fact is to be accomplished, or not. When the offense is committed by the perpetration of different parts which constitute one entire whole, it is not necessary that the offenders should be in fact together at the perpetration of the offense, to render them liable as principals. In other words, an accomplice, under our statute, is one who has completed his offense before the crime is actually committed, and whose liability attaches after its commission by virtue of his previous acts in bringing it about through the agency of, or in connection with third parties. The principal offender acts his part individually, in furtherance of and during the consummation of the crime. The dividing line between the two is the commencement of the commission of the offense. If the parties acted together, in the commission of the offense, they are principals. If they agreed to commit the offense together, but did not act together in its commission, the one who actually committed it, is the principal, while the other, who was not present at the commission, and who was not in any way aiding in its commission, as by keeping watch, or by securing the safety or concealment of the principal, would be an accomplice. To constitute a principal, the offender must either be present where the crime is committed, or he must do some act during the time when the offense is being committed which connects him with the act of commission in some of the ways named in the statute. Where the acts committed occur prior to the commission of the principal offense, or subsequent thereto, and are independent of, and disconnected with, the actual commission of the principal offense, and no act is done by the party during the commission of the principal offense in aid thereof, such party is not a principal offender, but is an accomplice or accessory according to the fact. Heard v. State, 9 App. 1; Cohea v. State, 9 App. 173; Cook v. State, 14 App. 96 (approving Scales v. State, 7 App. 361); Hancock v. State, 14 App. 392; O'Neal v. State, 14 App. 582; Bean v. State, 17 App. 60; Phillips v. State, 17 App. 169; O'Quinn v. State, 55 App. 18, 115 S. W. 39; Parker v. State, 24 App. 61, 5 S. W. 653; Buchanan v. State, 26 App. 52, 9 S. W. 57; Phillips v. State, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; Dugger v. State, 27 App. 95, 10 S. W. 763; Medis v. State, 27 App. 196, 11 S. W. 112, 11 Am. St. Rep. 192; Crook v. State, 27 App. 198, 11 S. W. 444; West v. State, 28 App. 1, 11 S. W. 635; Elizando v. State, 31 App. 237, 20 S. W. 560; Dawson v. State, 38 App. 50, 41 S. W. 599; Serrato v. State (Cr. App.) 171 S. W. 1133.

4. **Knowledge and concealment of crime.**—Knowledge and concealment of the crime do not make the party either a principal or an accomplice. Burrell v. State, 18 Tex. 713; Tullis v. State, 41 Tex. 598; Ring v. State, 42 Tex. 282; Noffsinger v. State, 7 App. 301; Rucker v. State, 7 App. 549; Golden v. State, 18 App. 637; Smith v. State, 28 App. 309, 12 S. W. 1104; Floyd v. State, 29 App. 349, 16 S. W. 188; Prewett v. State, 41 App. 262, 53 S. W. 879; Scott v. State, 46 App. 536, 81 S. W. 294, 108 Am. St. Rep. 1032. See, also, Wood v. State, 28 App. 14, 11 S. W. 678; Watson v. State, 28 App. 34, 12 S. W. 404; Sharp v. State, 29 App. 211, 15 S. W. 176; Walker v. State, 29 App. 621, 16 S. W. 548. To constitute a principal there must be a knowledge of the unlawful intent of the other parties, and an "acting together." Welsh v. State, 3 App. 413; Rountree v. State, 10 App. 110. Confederates in an unlawful undertaking are not liable for a felony committed by one, without their knowledge, and which did not enter into the original design. Mercersmith v. State, 8 App. 211; Harris v. State, 15 App. 629; Blain v. State, 30 App. 702, 18 S. W. 862.

5. **Crime committed primarily in foreign country.**—A principal offender under the law of this state is one who, being present when the offense is actually committed by another, and knowing the unlawful intent of such other, aids by acts or encourages by words the party engaged in the commission of the unlawful act. Would the state, in prosecuting such an aider and abettor as the principal offender, for an offense committed primarily in a foreign country, and consummated in this, be required to show a similar or analogous provision of the law of the foreign country? Fernandez v. State, 25 App. 538, 8 S. W. 667.

6. **Misdemeanors in general.**—In misdemeanors there are no accomplices; in such cases ordinarily all parties are principals. Schwartz v. State, 38 App. 26, 40 S. W. 976; Strong v. State, 52 App. 133, 105 S. W. 785; Huffman v. State, 57 App.

399, 123 S. W. 596; *Ollre v. State*, 57 App. 520, 123 S. W. 1117; *Lott v. State*, 53 App. 604, 127 S. W. 191; *Oliver v. State* (Cr. App.) 144 S. W. 604; *Albright v. State* (Cr. App.) 164 S. W. 1001.

Where an absent person is sought to be held guilty of a misdemeanor, there must be some complicity in some manner with the act of the one who committed the offense. *Ollre v. State*, 57 App. 520, 123 S. W. 1117.

7. **Specific crimes—Abortion.**—One who provides means to procure an abortion is a principal and not an accomplice. *Watson v. State*, 9 App. 237; *Willingham v. State*, 33 App. 98, 25 S. W. 424. A person prescribing and furnishing medicine or an instrument to a woman for the purpose of producing an abortion is a principal offender. *Moore v. State*, 37 App. 552, 40 S. W. 287.

8. — **Assault.**—All who are present and participating in an assault are principals. *Dunman v. State*, 1 App. 593. But a party cannot be guilty of assault as a principal from the fact of his knowledge that somebody was making an unlawful attack on a third party. He must do something. He must aid and encourage by words or gestures, or do some act in order to make him guilty as a principal. *Smith v. State*, 61 App. 349, 135 S. W. 152.

9. — **Assault with intent to murder.**—In a prosecution for assault with intent to murder, where the two defendants claimed that they were acting in self-defense, their lives being threatened by the other four men who engaged in the affray, and the prosecuting witnesses contended that defendants brought on the difficulty and forced the fight, charges on the question of principal and accessory were improper, not being warranted by the evidence. *Black v. State* (Cr. App.) 145 S. W. 944.

10. — **Assault with intent to rape.**—All persons who are present and co-operated in assaulting a girl with intent to rape her are guilty as principals. *White v. State*, 60 App. 559, 132 S. W. 790. So, where accused took any part in the stopping of prosecutrix's buggy and the assault of her with intent to rape, and did anything in furtherance of the criminal acts of others, in that respect he would be a principal whether he had agreed with the others before he came to the place of assault to do anything or not. *Ross v. State*, 60 App. 547, 132 S. W. 793.

Where two or more who act together with an unlawful intent and common design in committing an offense are each guilty as principals, and the previous acts and declarations of either tending to show their motive in committing the offense are admissible against the others, whether they are prosecuted jointly or separately, so that where several acted together with a common design, in committing an assault with intent to rape, the prior acts and declarations of either were admissible in evidence in a prosecution of any of the others. *White v. State*, 60 App. 559, 132 S. W. 790.

11. — **Assault with intent to rob.**—Under this article accused was a principal and not an accomplice where he was present and assisted in an assault with an intent to commit robbery, although he claimed that he thought his codefendant was a detective and that he was helping him to arrest the prosecuting witness. *Drysdale v. State*, 70 App. 273, 156 S. W. 685.

12. — **Bribery.**—A party is not guilty of bribery as principal, because he pays a witness in a criminal case to take his daughter, who is also a witness, away from the county. *Harrison v. State* (Cr. App.) 151 S. W. 552.

13. — **Burglary.**—Where one person plans a burglary, and defendant and another agreed to assist in the commission of the offense, all are guilty. *Attaway v. State*, 35 App. 403, 34 S. W. 112; *Lewis v. State*, 72 App. 377, 162 S. W. 866. The possession of a harness by defendant and another, half an hour after a burglary in which two persons participated, attempted to be explained only by a statement of defendant that they were selling it for a stranger, and their then attempting to sell it, warrants a charge on the law of principals, on a prosecution for burglary. *Dowling v. State* (Cr. App.) 145 S. W. 606.

14. — **Disorderly house.**—On a trial for keeping a house where prostitutes resorted and resided for the purpose of plying their vocation, and where men and women met for sexual intercourse, evidence that accused's husband took men and women there to engage in unlawful cohabitation was admissible, since such acts rendered him liable as a principal offender. *Farris v. State* (Cr. App.) 170 S. W. 310.

15. — **Forgery.**—See notes under art. 932, post.

16. — **Gift or delivery of liquors to minors.**—See art. 593, post.

17. — **Homicide.**—The law of principals in crime applies as well to manslaughter as to any other offense. Though there can be no accomplice in manslaughter, several persons may so act together as to become principals in its commission. *Cartwright v. State*, 16 App. 473, 49 Am. Rep. 826; *Ogle v. State*, 16 App. 361; *Burnam v. State*, 61 App. 616, 135 S. W. 1175. One is responsible for a homicide whether he fired the fatal shot or not, if he was present aiding and assisting. *Butler v. State*, 61 App. 133, 134 S. W. 230; *Goode v. State*, 57 App. 220, 123 S. W. 597; *Condron v. State*, 62 App. 485, 138 S. W. 594; *Castillo v. State* (Cr. App.) 172 S. W. 788. But the mere presence of accused at the time a homicide was committed is not sufficient to make him a principal. *Burnam v. State*, 61 App. 616, 135 S. W. 1175; *Patton v. State*, 62 App. 71, 136 S. W. 459. He must say or do something to encourage the third person to do the killing, or the killing must have occurred because of a previous agreement, and, if the third person acted in self-defense, accused could act with him, without becoming guilty as a principal. *Patton v. State*, 62 App. 71, 136 S. W. 459; *Castillo v. State* (Cr. App.) 172 S. W. 788. But such presence is a circumstance which, in connection with others, may warrant a conclusion that he was a participant. *Burnam v. State*, 61 App. 616, 135 S. W. 1175. A defendant, in order to be held as a principal and rendered guilty of

murder in the first degree, must have been present, knowing the unlawful intent of the person actually committing the murder, and have aided and encouraged him by acts or words in committing the homicide. *Menefee v. State* (Cr. App.) 149 S. W. 138; *Maxwell v. State* (Cr. App.) 149 S. W. 171. See, also, *Goode v. State*, 57 App. 220, 123 S. W. 597; *Castillo v. State* (Cr. App.) 172 S. W. 788. So, where deceased was killed by a third person under the advice of defendant who furnished him the means by which it was done, but was not present and not doing anything in furtherance of the common design so as to make him constructively present, defendant is not guilty as a principal. *Menefee v. State* (Cr. App.) 149 S. W. 138. And one who furnished a gun to a third person to kill decedent, but who was not present at the time the third person killed decedent, and who did not actually participate therein, was not a principal, but only an accomplice. *Clark v. State*, 60 App. 173, 131 S. W. 556. But, where a person accused of murder confessed that he was present at the killing of the deceased, and, while he did not strike the blows which resulted in the death, he did take a watch off the deceased's person, he was not an accomplice, but was liable as a principal. *Williams v. State* (Cr. App.) 144 S. W. 622.

When two persons are acting together in resisting arrest, with the common purpose to resist to the death, it is immaterial which of them fired the fatal shot. *English v. State*, 34 App. 190, 30 S. W. 233.

Where defendant with others provoked the difficulty that brought about the murder, and defendant fled, but his co-conspirators killed deceased, they were his agents in the matter, and he is equally guilty with them. *Burris v. State*, 34 App. 387, 30 S. W. 785.

Every defendant on trial for homicide is to be judged according to his own intent, and where there is a principal in the second degree, if the facts call for it, he is not to be tried solely according to the intent of his principal in the first degree, but according to the intent with which he may have participated. *Leslie v. State*, 42 App. 65, 57 S. W. 660.

Where, on a trial for homicide, committed by third persons, the evidence showed a conspiracy between accused and the third persons to rob, in the attempted perpetration of which the homicide occurred, and that it was the duty of accused to go to the place where the persons to be robbed were, and to ascertain their unprepared condition and to give notice to the third persons, and that he did so, he was a "principal" to the killing, though he was 100 or 200 yards from the scene of the difficulty. *Bass v. State*, 59 App. 186, 127 S. W. 1020.

Where the state in the trial of one as principal in a murder puts in the confession of a third person that he did the killing and fails to show defendant's presence, defendant is entitled to an acquittal. *Menefee v. State* (Cr. App.) 149 S. W. 138.

Where one person killed another under a belief that he was making or about to make an attack upon a third person, the latter could not be convicted of the homicide. *Maxwell v. State* (Cr. App.) 149 S. W. 171.

In a prosecution for murder, evidence held sufficient to warrant the jury in finding that defendant held deceased while another struck the fatal blow, so that defendant was guilty as principal. *Castillo v. State* (Cr. App.) 172 S. W. 788.

All persons forming a conspiracy to march into a foreign country at all hazards and overcome all resistance, and arming themselves for that purpose, are equally principals in a murder committed by some of them in furtherance of the conspiracy. *Vasquez v. State* (Cr. App.) 171 S. W. 1160. And this is true though some members of the conspiracy were not engaged in the killing nor present when it was committed. *Gonzales v. State* (Cr. App.) 171 S. W. 1146; *Serrato v. State* (Cr. App.) 171 S. W. 1133. So, where decedent was killed as an incident to a conspiracy to commit another crime, and accused, one of the conspirators, was but a few yards away at the time of the killing, engaged in the furtherance of the common purpose, the fact that he was not bodily present at the exact spot where decedent was killed did not prevent his being a principal. *Gonzales v. State* (Cr. App.) 171 S. W. 1146. And where a company illegally organized in Texas to invade Mexico, arming and equipping themselves to engage in war and agreeing to resist all interference, the killing of a deputy sheriff, captured while attempting to investigate the camp, was within the accomplishment of the common purpose, and this being a felony, all engaged therein were guilty of murder as principals. *Gonzales v. State* (Cr. App.) 171 S. W. 1146. But, the members of the conspiracy not immediately concerned in the killing could only be convicted of homicide on proof that the killing was incidental to a conspiracy to do an unlawful act and was within the scope thereof. *Martinez v. State* (Cr. App.) 171 S. W. 1153. See, also, *Serrato v. State* (Cr. App.) 171 S. W. 1133.

The failure to indict for murder a member of a conspiracy to rob, in the attempted perpetration of which the murder was committed, does not prejudice the rights of the state to secure a conviction of the other members of the conspiracy, and the fact that one member was not indicted did not prevent the court from submitting the case as justified by the evidence with reference to a conspiracy to which he was a party. *Bass v. State*, 59 App. 186, 127 S. W. 1020.

Where the one actually committing the homicide is guilty of murder in the second degree, a principal cannot be guilty of a higher grade of offense. *Menefee v. State* (Cr. App.) 149 S. W. 138.

In a murder case, a charge that all persons are principals who act together in committing an offense; and that, when an offense is actually committed by one or more persons, but others are present, and, knowing the unlawful intent, aid by acts or encourage by words or gestures those actually engaged in committing the unlawful act, such persons so aiding are "principals," as are all who endeavor at the time of the offense to secure the safety or concealment of the offenders, and one who is present when the offense is committed is a principal whether he aids or not in the illegal act; and that, if decedent was killed on the date charged, and accused was present, and, knowing the unlawful intent, aided by acts or encouraged

by words or gestures those actually engaged in killing decedent, or advised or agreed to the killing, and was present when it was done, whether she aided or not in the killing, or endeavored to secure the safety or concealment of the ones doing the act, she would be a principal, and subject to the same punishment as those actually engaged in the killing is a sufficient charge on the law of principals. *Goode v. State*, 57 App. 220, 123 S. W. 597. Where, in a prosecution for murder, the court properly instructs that defendant would be guilty if he had formed a conspiracy with the one doing the killing, and that if he aided and abetted such person, or if he stood watch to avoid interruption, he would be guilty, though not present, defendant is entitled to a converse instruction presenting the defense that, though he had formed an intention to get deceased out of a house, still if the intent to kill was formed by the other party during an altercation between him and deceased, and even if he had entered into a conspiracy to run down deceased and thereafter the other party killed him in an altercation, he would not be guilty; the evidence tending to show such defense. *Goodwin v. State*, 53 App. 496, 126 S. W. 582. In a prosecution for homicide, the clause in an instruction on the law of principals, "and did aid them, or either of them, by acts, or encourage them, or either of them, by words or gestures," should have been amended by eliminating the words "or gestures." *Deneaner v. State*, 58 App. 624, 127 S. W. 201. Where the state relied on circumstantial evidence, indicating that accused furnished a gun to a third person to shoot decedent, but the circumstances showing accused's presence at the time of the killing were no stronger than those showing that he was not present, a charge that the criterion for determining who are principals is, did the parties act together in the commission of the offense, and was the act done in pursuance of a common intent, and of a previously formed design, and, if so, the parties are alike guilty, whether all were actually bodily present at the time of the commission of the offense, unaccompanied by a charge submitting the issue of accomplice, was erroneous as authorizing a conviction, though accused was not present, and did not actually participate in the killing. *Clark v. State*, 60 App. 173, 131 S. W. 556. An instruction in the trial of one indicted as a principal in a murder that, if defendant with express malice aforethought with a gun, being a deadly weapon well calculated to produce death by the manner in which it was used, with deliberate mind and formed design, acting together with a certain named person, unlawfully shot and killed deceased, he was guilty of murder in the first degree was erroneous as excluding the question of defendant's presence. And an instruction in the trial of one charged as a principal in a murder that, if defendant with malice aforethought with a gun, being a deadly weapon calculated to produce death by the manner in which it was used, with deliberate mind and formed design, acting together with a third person, unlawfully shot and killed deceased, he was guilty of murder in the first degree was erroneous as leaving the jury to ascertain what the court meant by "acting together with." *Menefee v. State* (Cr. App.) 149 S. W. 133.

18. — **Obstructing railroad track.**—See note under article 735 of Code Criminal Procedure.

19. — **Taking fish and dragging seines in prohibited waters.**—Where several parties were acting together in taking fish and dragging seines in prohibited waters, they were all principal offenders, and an instruction to that effect was proper. *Gavina v. State* (Cr. App.) 145 S. W. 594.

20. — **Theft.**—In order to be a principal accused must be connected with the original taking. *Buchanan v. State*, 26 App. 52, 9 S. W. 57; *Roman v. State*, 64 App. 515, 142 S. W. 912; *Pendley v. State*, 71 App. 281, 158 S. W. 811; *Harris v. State*, 71 App. 463, 160 S. W. 447. If he did not take the property himself, he must have acted together with the person committing the theft, knowing at the time of the fraudulent intent. *Anderson v. State*, 8 App. 542; *Gentry v. State*, 24 App. 478, 6 S. W. 321. And see *Slain v. State* (Cr. App.) 145 S. W. 366. If not present at the time of the taking, he must have been acting with the person committing the theft at the very time of the commission, in pursuance of a common design existing between them to commit the theft. *Gentry v. State*, 24 App. 478, 6 S. W. 321. If he was not present at the time of the theft, but advised it and the property was taken pursuant to his advice, he would by the express terms of the statute be an accomplice. *Pendley v. State*, 71 App. 281, 158 S. W. 811. It does not suffice to prove that, subsequent to the taking and without complicity therein, but with knowledge that the property had been stolen, he aided the taker to dispose of it, or fraudulently disposed of it himself. See the opinion for a summary of proof which demanded of the trial court a charge in harmony with this rule. *Buchanan v. State*, 26 App. 52, 9 S. W. 57; *Pendley v. State*, 71 App. 281, 158 S. W. 811. After defining theft and principals, the court properly instructed that, if the prosecutor's hog was taken under circumstances amounting to theft, and defendant and F. acted together in such taking, with a common purpose and intent fraudulently to take such hog, knowing it not to belong to either of them, and with intent to deprive the owner of its value, or that F. had such knowledge and intent, and defendant, knowing F.'s unlawful intent, aided him in taking the hog, in either case defendant would be principal in the offense; but if defendant shot the hog at the instance of F., believing it to be F.'s hog, then defendant would not be guilty, whether F. believed it to be his hog or not. *McCoy v. State*, 58 App. 252, 124 S. W. 921. If accused's son and grandson took possession of another's cow from the range, and drove her away, with the intention of appropriating her to their own use, and accused was not present, he would not be guilty of the theft as a "principal," though he may have agreed that the animal should be stolen and subsequently butchered, and that he would participate in the butchering and would conceal the meat. Where accused was prosecuted under an indictment charging the committing of cattle theft as a principal, he was entitled to a clear-cut charge that if he was not a principal under the statute he should be acquitted, and that the fact that he was an accomplice or a receiver of the stolen animal would not authorize his conviction.

Jones v. State, 57 App. 144, 122 S. W. 31. If the original larceny of cattle in F. county was in accordance with a plan formed by accused and third persons, and the third persons drove the cattle to accused's pasture in F. county and then to T. county, and shipped and sold them, accused was a principal in the concealment of the cattle in T. county, though he was not present in T. county and did not aid in the concealment therein. Davis v. State, 61 App. 611, 136 S. W. 45. A hired hand may be guilty of theft of cattle if he received a certain sum per capita for gathering cattle, and the taking was otherwise fraudulent. Corn v. State, 41 Tex. 301.

An employer may be guilty though not present at the taking. Welsh v. State, 3 App. 413; Wells v. State, 4 App. 20; Scales v. State, 7 App. 361. But it devolves upon the state to prove that the accused knew that the taking was illegal, or the circumstances were such as to charge him with notice. Ivey v. State, 43 Tex. 425. Guilt is dependent on guilty knowledge. Taylor v. State, 5 App. 529.

On trial for theft of hogs, where defendant in furtherance of the common design built a pen while his confederates took the hogs and brought them to the pen, he was a principal in the crime. Trimble v. State, 33 App. 397, 26 S. W. 727 (following Smith v. State, 21 App. 107, 17 S. W. 552).

When an agreement is made between two persons to steal horses and one of them pursuant thereto steals a horse, the other is not a principal offender unless he was at the time doing some act in furtherance of the common design. And where one of such persons afterwards refuses to assist he cannot be convicted for theft of horses stolen by other parties to the agreement. Sessions v. State, 37 App. 62, 38 S. W. 623.

21. — **Violations of local option laws.**—In a prosecution for violation of the local option law, it is not essential to charge on the subject of principals, since in misdemeanor cases the distinction between principals and accomplices does not apply. Lott v. State, 58 App. 604, 127 S. W. 191; Creed v. State (Cr. App.) 155 S. W. 240.

The evidence showed that defendant kept watch over a lot of negro bartenders selling whisky in a local option district, that when the parties to whom he was charged with selling came to the door, defendant objected to one of them coming in because he had been giving parties away. Defendant stepped outside of the door and stood out there with such person; held, the evidence was sufficient to support a conviction under the theory that he was keeping watch. Wolfe v. State, 38 App. 537, 43 S. W. 997.

22. — **Violation of Sunday law.**—This article, and articles 75 and 79, were intended to apply to every subsequent enactment; and hence apply to article 302 of the Penal Code, making it an offense to permit a public theatrical performance on Sunday, and make all aiding in the commission of the offense principals. Oliver v. State (Cr. App.) 144 S. W. 604. And in Gould v. State (Cr. App.) 146 S. W. 172, it was held that evidence that the defendant sold tickets, and, in the literature distributed, was held out as the manager of the theater kept open for public amusement on Sunday, justified a finding that he was guilty of opening or permitting the theater to be opened on Sunday, though he was not the proprietor.

23. **Indictment, proof and variance.**—See Willson's Cr. Forms, 733.

The indictment need not allege the facts constituting accused a principal. Williams v. State, 42 Tex. 392; Bell v. State, 1 App. 598; Gladden v. State, 2 App. 508; Davis v. State, 3 App. 91; Tuller v. State, 8 App. 501; Mills v. State, 13 App. 487; Oliver v. State (Cr. App.) 144 S. W. 604. It need not allege that the parties impleaded as principals "acted together." Bell v. State, 1 App. 598; Watson v. State, 28 App. 34, 12 S. W. 404; Finney v. State, 29 App. 184, 15 S. W. 175; Loggins v. State, 32 App. 358, 24 S. W. 408; Gallagher v. State, 34 App. 306, 30 S. W. 557. Or that they conspired together to commit the offense. Williams v. State, 42 Tex. 392; Bell v. State, 1 App. 598; Tuller v. State, 8 App. 501; Loggins v. State, 32 App. 358, 24 S. W. 408. It is not necessary to allege the facts relied upon to show the defendants to be principals, although the offense with which they are charged may not have actually been committed by them. But if they are principals by reason of the parts performed by them in the commission of the offense, they may be convicted under an indictment charging them directly with its commission. If, however, the pleader charges each of the defendants with the particular acts done, or part performed by them respectively, and the facts alleged as to some of them be insufficient, the indictment as to them must be held bad. Williams v. State, 42 Tex. 392; Gladden v. State, 2 App. 508. It is proper to charge one as the actual perpetrator and the others as present and knowing the unlawful intent, aided, abetted, encouraged, etc. Gladden v. State, 2 App. 508; Davis v. State, 3 App. 91. The indictment must allege that principal in first degree of his malice aforethought committed the homicide and that the principal in the second degree of his malice aforethought, etc., was present, aiding, etc., and this must be proved and submitted in the same measure by the charge to the court. Leslie v. State, 42 App. 65, 57 S. W. 661.

Persons charged as principals may be convicted of different degrees of homicide. Red v. State, 39 App. 667, 47 S. W. 1003, 73 Am. St. Rep. 965.

Where one is a principal by reason of the part performed by him in the commission of an offense, he may be convicted under an indictment charging him with actual commission; hence an averment that accused passed a forged instrument through and by an agent is surplusage, and the indictment is not defective because not alleging that the agent was innocent. Dillard v. State (Cr. App.) 177 S. W. 99.

If a principal only by reason of his co-operation with the party who actually committed the crime he may be convicted under an indictment charging him directly as principal. Tuller v. State, 8 App. 501; Mills v. State, 13 App. 487; Gladden v. State, 2 App. 508; Davis v. State, 3 App. 91. There is no variance where the parties, being indicted as principals, if the proof shows that but one of them alone

committed the crime. Such one could be convicted under that indictment. *Finney v. State*, 29 App. 184, 15 S. W. 175; *Watson v. State*, 28 App. 34, 12 S. W. 404; *Loggins v. State*, 32 App. 358, 24 S. W. 408; *Gallagher v. State*, 34 App. 306, 30 S. W. 557.

Inasmuch as the statute creates a difference between principals and accomplices, an indictment must follow this distinction in charging one as an accomplice; and he cannot be convicted as an accomplice under an indictment charging him as principal, nor as principal under a charge as accomplice. *McKeen v. State*, 7 App. 631; *Truitt v. State*, 8 App. 148; *Simms v. State*, 10 App. 131; *Mills v. State*, 13 App. 487; *Bean v. State*, 17 App. 60; *Trimble v. State*, 18 App. 632; *Golden v. State*, 18 App. 637; *Phillips v. State*, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; *Armstrong v. State*, 28 App. 526, 13 S. W. 864; *Rix v. State*, 33 App. 353, 26 S. W. 505; *Dawson v. State*, 38 App. 50, 41 S. W. 599; *Criner v. State*, 41 App. 290, 53 S. W. 873; *McAlister v. State*, 45 App. 258, 76 S. W. 760, 108 Am. St. Rep. 958; *Cooper v. State* (Cr. App.) 154 S. W. 989; *Silvas v. State*, 71 App. 213, 159 S. W. 223; *Serrato v. State* (Cr. App.) 171 S. W. 1133.

Where the count of an indictment on which he was tried charged accused as principal in committing a robbery, and did not name any other person, the fact that persons named in other counts as principals were shown not to have participated does not constitute a variance. *Collins v. State* (Cr. App.) 178 S. W. 345.

24. Evidence.—In the following cases the evidence was held insufficient to support allegations charging accused as a principal. *Smith v. State*, 23 App. 358, 5 S. W. 219, 59 Am. Rep. 773; *Collins v. State*, 24 App. 141, 5 S. W. 848; *Gentry v. State*, 24 App. 478, 6 S. W. 321; *Bowers v. State*, 24 App. 542, 7 S. W. 247, 5 Am. St. Rep. 901; *Blain v. State*, 24 App. 626, 7 S. W. 239; *Fernandez v. State*, 25 App. 538, 8 S. W. 667; *Phillips v. State*, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; *Knowles v. State*, 27 App. 503, 11 S. W. 522; *Floyd v. State*, 29 App. 349, 16 S. W. 188; *Menefee v. State* (Cr. App.) 149 S. W. 138.

Evidence of acts and declarations, see notes under article 783, Code Cr. Proc.

25. Questions for jury.—See notes under Code Crim. Proc. art. 786.

26. Instructions.—Necessity of instructions as called for by evidence, etc., see notes under article 735, Code Crim. Proc.

Art. 75. [75] Same subject.—When an offense is actually committed by one or more persons, but others are present, and, knowing the unlawful intent, aid by acts, or encourage by words or gestures, those actually engaged in the commission of the unlawful act, or who, not being actually present, keep watch so as to prevent the interruption of those engaged in committing the offense, such persons so aiding, encouraging or keeping watch are principal offenders, and may be prosecuted and convicted as such. [P. C. 215.]

See notes under preceding article.

Cited, *Oliver v. State* (Cr. App.) 144 S. W. 604; *Fondren v. State* (Cr. App.) 169 S. W. 411.

Indictment of aider or abettor.—The indictment against an aider or abettor need not allege the acts or words of encouragement. *Davis v. State*, 3 App. 91.

Offense directly accomplished by another.—Under articles 75 to 78, all persons who are present and participate by acts, or encourage by words or gestures in the commission of the offense, are principals, though the act directly accomplishing the offense is the act of another. *Davis v. State*, 61 App. 611, 136 S. W. 45.

Woman as guilty of rape.—Under this article a woman may be guilty of rape.—*Campbell v. State*, 63 App. 595, 141 S. W. 232, Ann. Cas. 1913D, 858.

Giving encouragement.—While mere presence at a homicide will not render one a principal, it may have that effect where there is evidence of a previous conspiracy, his presence then constituting an encouragement to the offense. *Leslie v. State*, 42 App. 65, 57 S. W. 659.

Indictment.—Willson's Cr. Forms, 733.

Art. 76. [76] Same subject.—All persons who shall engage in procuring aid, arms or means of any kind to assist in the commission of an offense, while others are executing the unlawful act, and all persons who endeavor at the time of the commission of the offense, to secure the safety or concealment of the offenders, are principals, and may be convicted and punished as such. [P. C. 216.]

See notes under the two preceding articles.

Cited, *Phillips v. State*, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471.

Homicide.—A requested charge that the mere presence of a person at the committing of an offense, or his mere knowledge that an offense is about to be committed, will not make him a principal, nor will his failure to give alarm or supposed concealment of the offense and the offenders make him such, but, to constitute one a principal with others in the commission of a crime, there must be a combination of both acts and intent, and he must act together with the others in the commission of the offense, knowing their unlawful intent, and that, unless the jury believe beyond a reasonable doubt that accused was present when decedent was killed, and knew both of the act of the killing and of the intent of the person

who committed the act, and did some overt act in connection with such person, and had a guilty knowledge and conspired with the person doing the killing before the act was done, the mere presence at decedent's house on the night of the killing, and the mere fact that she may have falsified and may have concealed those who killed decedent, will not render her a principal, was properly refused, since if accused concealed those who killed decedent, she would be a principal under this article. The charge was also erroneous because, if theretofore accused had consented to the murder, and was present when it was committed, she would be a principal, though at the moment of the killing she did no overt act. *Goode v. State*, 57 App. 220, 123 S. W. 597.

Forgery.—One who aids in passing forged checks by advising and keeping watch while a confederate passed the paper, may be treated as a principal. *Mason v. State*, 32 App. 95, 22 S. W. 144, 408.

Abortion.—Where a defendant has furnished the means for procuring an abortion, knowing the purpose intended, and the abortion is in fact procured, he is an accomplice if the crime is accomplished or a principal if the attempt fails. *Willingham v. State*, 33 App. 98, 25 S. W. 424.

Indictment.—Willson's Cr. Forms, 733.

Art. 77. [77] Same subject.—If any one, by employing a child or other person, who can not be punished, to commit an offense, or by any means, such as laying poison where it may be taken, and with intent that it shall be taken, or by preparing any other means by which a person may injure himself, and with intent that such person shall thereby be injured, or, by any other indirect means, cause another to receive an injury to his person or property, the offender, by the use of such indirect means, becomes a principal. [P. C. 217.]

See notes under articles 74-76 ante.

Employing a person not punishable.—One using an innocent to consummate a crime is a principal, whether present or not, under this article. So, where one points out an animal that does not belong to him on the range and sells it to another as his own, he is guilty of theft. *Farris v. State*, 55 App. 481, 117 S. W. 798, 799, 131 Am. St. Rep. 824.

Where cattle stolen in one county were placed in a pasture of accused in that county, with knowledge that they were stolen, and he employed an innocent third person to drive them to another county, and there conceal them by shipping them, accused was a principal in the concealment in such second county, within this article and T. county could prosecute him. *Davis v. State*, 61 App. 611, 136 S. W. 45.

Suicide.—This article does not apply to a case where accused directly or indirectly furnished poison to one who took it voluntarily, and thereby became a suicide. *Grace v. State*, 44 App. 193, 69 S. W. 530; *Sanders v. State*, 54 App. 101, 112 S. W. 69, 22 L. R. A. (N. S.) 243. And an indictment is insufficient which does not negative the idea that deceased voluntarily took the poison and fails to allege deceased's want of knowledge, or that defendant, in some manner, by force, threats or fraud, caused deceased to take the poison. *Sanders v. State*, 54 App. 101, 112 S. W. 68, 22 L. R. A. (N. S.) 243.

Passing forged check.—Where accused, in an action against him on a note, handed to his attorney, and his attorney offered in evidence, a check which, after it had been paid, had been so altered as to apparently evidence a payment on such note, and it did not appear that the attorney knew or suspected that the check was forged, while the evidence showed that accused did know that fact, and that he testified to the genuineness of the check, the act of passing the forged instrument was that of accused, and not of his attorney. *Bunker v. State* (Cr. App.) 177 S. W. 108.

Indictment.—Willson's Cr. Forms, 733.

Art. 78. [78] Same subject.—Any person who advises or agrees to the commission of an offense, and who is present when the same is committed, is a principal thereto, whether he aids or not in the illegal act. [P. C. 218.]

Accessory before the fact.—See notes under articles 74 and 75, ante, and 79, post. The difference between accessories before the fact, who are accomplices under the Texas statute, and principals has not been abolished. *Cooper v. State* (Cr. App.) 154 S. W. 989.

In a prosecution for murder by aiding and abetting another to kill, whether defendant entered into a conspiracy to kill deceased, and whether he aided and encouraged the one doing the killing by standing watch so as to avoid interruption, the evidence held sufficient to take such questions to the jury. *Goodwin v. State*, 126 S. W. 582.

— **Accomplishment of crime other than that intended.**—See *Blain v. State*, 30 App. 702, 18 S. W. 862; *Isaacs v. State*, 36 App. 505, 38 S. W. 40; *Schackey v. State*, 41 App. 225, 53 S. W. 877; *Renner v. State*, 43 App. 347, 65 S. W. 1102.

Qui facit per alium, facit per se.—The maxim, "qui facit per alium, facit per se," obtains no less in criminal than in civil cases. *Carlisle v. State*, 31 App. 537, 21 S. W. 358; *Strang v. State*, 32 App. 219, 22 S. W. 680; *Willingham v. State*, 33 App. 98, 25 S. W. 424.

Aggravated assault.—Under this article mere presence when an offense is committed, does not make one a principal unless he advises or agrees thereto, so that if accused took a girl to a certain place where she was afterwards assaulted by others who met them there, according to agreement without any purpose of having her assaulted, but, as accused understood, for the purpose of seeing her about a letter, he would not be guilty as a principal, and it was error to refuse an instruction to that effect. *Nowlin v. State*, 60 App. 356, 132 S. W. 800.

Charge on circumstantial evidence under the statute.—In view of this article held that where an issue whether defendant advised or agreed to commission of an offense is raised, and this is shown by circumstantial evidence alone, it is proper for the court to charge on circumstantial evidence on that particular issue. *Burnam v. State*, 61 App. 616, 135 S. W. 1175.

Indictment.—Willson's Cr. Forms, 733.

CHAPTER TWO

ACCOMPLICES

Art.	Art.
79. Accomplice, who is.	83. If principal is under seventeen, punishment doubled.
80. Precise offense need not be committed.	84. If accomplice is parent, master, guardian or husband to principal, punishment increased.
81. Punishment.	85. No accomplice in manslaughter or negligent homicide.
82. When one offense is attempted and another committed.	

Article 79. [79] Accomplice, who is.—An accomplice is one who is not present at the commission of an offense, but who, before the act is done, advises, commands or encourages another to commit the offense; or,

Who agrees with the principal offender to aid him in committing the offense, though he may not have given such aid; or,

Who promises any reward, favor or other inducement, or threatens any injury in order to procure the commission of the offense; or,

Who prepares arms or aid of any kind, prior to the commission of an offense, for the purpose of assisting the principal in the execution of the same. [P. C. 219.]

Cited, *Shrewder v. State*, 62 App. 403, 136 S. W. 461, 1200; *Oliver v. State* (Cr. App.) 144 S. W. 604; *Cooper v. State* (Cr. App.) 177 S. W. 975.

See, also, notes under article 78, ante.

1. Accomplice in general.	18. ——— Forgery.
2. Actual complicity between accomplice and principal necessary.	19. ——— Gambling.
3. Distinct offense.	20. ——— Homicide.
4. Distinguished from principal.	21. ——— Incest.
5. Distinguished from conspiracy.	22. ——— Pandering or procuring female for immoral purposes.
6. Accomplices within provision requiring corroboration.	23. ——— Rape.
7. Accessory before the fact.	24. ——— Receiving deposit during bank's insolvency.
8. No accomplices in misdemeanors.	25. ——— Receiving stolen property.
9. Detective or officer.	26. ——— Seduction.
10. Wife as accomplice.	27. ——— Theft.
11. Particular crimes—Adultery.	28. ——— Violations of liquor laws.
12. ——— Betting at election.	29. ——— Violations of Sunday law.
13. ——— Bringing stolen property into state.	30. ——— Suppressing prosecution.
14. ——— Burglary.	31. ——— Bigamy.
15. ——— Disorderly house.	32. Indictment.
16. ——— False swearing as to age.	33. Evidence.
17. ——— Abortion.	34. Questions for jury.
	35. Instructions.

1. Accomplice in general.—An accomplice is a person who knowingly, voluntarily, actively, and with criminal intent unites with the principal offender in the commission of a crime. *Tate v. State* (Cr. App.) 151 S. W. 825; *Holmes v. State*, 70 App. 214, 156 S. W. 1173; *Minter v. State*, 70 App. 634, 159 S. W. 286; *Liegeois v. State* (Cr. App.) 164 S. W. 382. The test is whether the alleged accomplice could be indicted and punished for the crime for which the accused is being tried. *Liegeois v. State* (Cr. App.) 164 S. W. 382. He must, in some way, be connected with the crime charged. It is not sufficient that he may have been connected with a defendant in a prior transaction, even though violative of law. *Warren v. State*, 60 App. 468, 132 S. W. 136. Mere knowledge that a crime is to be committed does not make one an accomplice. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

An accomplice must be either a principal, accomplice, or accessory, technically speaking. *Parker v. State*, 40 App. 123, 49 S. W. 80.

To constitute an accomplice, it must be charged and proved, first, that an agreement has been entered into (that is, the principal has been advised and commanded to commit the crime); second, that he committed the offense; third, that, before its commission, the accomplice advised or commanded the principal to do the particular overt act, or some act within the purview of the original design; and, fourth, that these acts were within the terms of the agreement between the principal and accomplice. *Cooper v. State* (Cr. App.) 154 S. W. 989.

In order to make one guilty as an accomplice, it is not necessary that he and the principal should have entered into an agreement to commit the offense, but only that, before the act was done, he advised, commanded, or encouraged the principal to commit the offense. *Bragg v. State* (Cr. App.) 166 S. W. 162.

There must be a principal guilty of the main offense. *Arnold v. State*, 9 App. 435; *Armstrong v. State*, 28 App. 526, 13 S. W. 864; *Armstrong v. State*, 33 App. 417, 26 S. W. 829; *Isaacs v. State*, 36 App. 505, 38 S. W. 40; *Kaufman v. State* (Cr. App.) 159 S. W. 58.

One is not an accomplice merely because he conceals his knowledge of a crime. *Noftinger v. State*, 7 App. 301; *Rucker v. State*, 7 App. 549; *Smith v. State*, 23 App. 357, 5 S. W. 219, 59 Am. Rep. 773; *Smith v. State*, 28 App. 309, 12 S. W. 1104; *Sharp v. State*, 29 App. 211, 15 S. W. 176; *Floyd v. State*, 29 App. 349, 16 S. W. 188; *Elizando v. State*, 31 App. 237, 20 S. W. 560; *Alford v. State*, 31 App. 299, 20 S. W. 553.

The acts of an accomplice are all done before the commission of the offense. An accomplice is necessarily absent. *Hamlin v. State*, 39 App. 579, 47 S. W. 656; *Criner v. State*, 41 App. 290, 53 S. W. 874; *Cain v. State*, 42 App. 210, 59 S. W. 277; *Gonzales v. State* (Cr. App.) 171 S. W. 1146. He, at the time of the offense must have done nothing in furtherance of the common purpose and design. *Gonzales v. State* (Cr. App.) 171 S. W. 1146.

A joint offender testifying at the trial is not an accomplice. *Day v. State*, 27 App. 143, 11 S. W. 36.

A co-conspirator is an accomplice and his evidence alone will not support a conviction. *Sessions v. State*, 37 App. 62, 38 S. W. 623.

If by his acts and conduct one person encourages another to commit a crime he is an accomplice even though he intended to have the other persons punished for the commission of the offense. *Dever v. State*, 37 App. 396, 30 S. W. 1071; distinguished from *Woodworth v. State*, 20 App. 375.

Where witness agrees that if defendant will pay a debt which he owes him that he will not testify against him, and it does not appear that defendant accepted the offer, the witness is not an accomplice so as to require corroboration. *Robertson v. State*, 45 App. 441, 80 S. W. 1000.

Offer to pay fine for committing assault will not render the offerer an accomplice where the actual assault was made by the principal without knowledge of the offer. *Mahaney v. State*, 48 App. 348, 88 S. W. 223.

Whether or not a child seven years old can be an accomplice is suggested, but not decided in *Mason v. State*, 2 App. 192.

2. **Actual complicity between accomplice and principal necessary.**—See *Mahaney v. State*, 48 App. 348, 88 S. W. 223.

3. **Distinct offense.**—Accomplice to crime is a distinct offense. *Crook v. State*, 27 App. 198, 11 S. W. 444; *Carlisle v. State*, 31 App. 537, 21 S. W. 358; P. C. art. 81.

4. **Distinguished from principal.**—See notes under article 74, ante.

5. **Distinguished from conspiracy.**—Where a party is charged as an accomplice, under the statute, with the commission of a felony, the case assumes the nature to some extent of a conspiracy, though the statute makes a distinction between a conspiracy as an offense and an offense committed by a principal instigated by an accomplice; a conspiracy being complete when a positive agreement has been made between the parties to commit a felony, while to be an accomplice the crime must have been actually committed by the principal. *Cooper v. State* (Cr. App.) 154 S. W. 989.

6. **Accomplices within provision requiring corroboration.**—See notes to articles 791, 801, C. C. P.

7. **Accessory before the fact.**—There is no practical difference between accomplice under our Code and the common law accessory before the act. *McKeen v. State*, 7 App. 631; *Vincent v. State*, 9 App. 46; *Cook v. State*, 14 App. 96; *Hancock v. State*, 14 App. 392; *Ogle v. State*, 16 App. 361; *Strong v. State*, 52 App. 133, 105 S. W. 785; *Fondren v. State* (Cr. App.) 169 S. W. 411. The difference between accessories before the fact, who are accomplices under the Texas statute, and principals has not been abolished. *Cooper v. State* (Cr. App.) 154 S. W. 989.

8. **No accomplices in misdemeanors.**—See *Schwartz v. State*, 38 App. 26, 40 S. W. 976.

9. **Detective or officer.**—See *Marmar v. State*, 47 App. 424, 84 S. W. 830.

One who originates a crime or is instrumental in its initiation, even though a detective or other officer, is an "accomplice"; but if he is approached, and all his steps are taken with a view of detecting the crime, or to get evidence thereof, he is not an "accomplice" to such crime. *Holmes v. State*, 70 App. 214, 156 S. W. 1173; *Minter v. State*, 70 App. 634, 159 S. W. 286; *Savage v. State* (Cr. App.) 170 S. W. 730. And see *Clay v. State*, 40 App. 559, 51 S. W. 212. Where, however, an assistant county attorney made the first proposition and induced accused to offer a bribe, even though he did not intend to accept it, and was merely seeking to entrap or detect accused in the commission of an offense, he was an accomplice. *Davis v. State*, 70 App. 524, 158 S. W. 288. And where the prosecuting witness encouraged the conspiracy and helped prepare for the commission of the offense, even though he was informing the officers of the same, his testimony would be that of an accomplice. *Dever v. State*, 37 App. 396, 30 S. W. 1071.

10. **Wife as accomplice.**—The wife cannot be the accomplice of one stealing community property. *Warren v. State*, 51 App. 616, 103 S. W. 853.

11. **Particular crimes—Adultery.**—In a prosecution for adultery with a female the prosecuting witness is an accomplice, whether under or over 15 years of age. *Price v. State*, 64 App. 448, 142 S. W. 586.

In the offense of adultery both parties are accomplices. *Merritt v. State*, 12 App. 203; *Merritt v. State*, 10 App. 402.

12. — **Betting at election.**—In the offense of betting at an election a stakeholder is not an accomplice. *Schwartz v. State*, 38 App. 26, 40 S. W. 976.

13. — **Bringing stolen property into state.**—In a prosecution for bringing stolen cattle into the state, an instruction that, if the jury believed that L. committed the offense alleged, if it was committed, then, before they could convict defendant, they must believe from the evidence beyond a reasonable doubt that he was present at the time and knew of the unlawful acts and intentions of L., and, with such knowledge, aided him therein, and, unless they so believed, they should acquit accused, was proper. *Gorrell v. State* (Cr. App.) 164 S. W. 1012.

14. — **Burglary.**—An employé who was approached by accused, and who agreed to let accused know when his employer received a car of feed and to leave the warehouse door open, and who was instructed by his employer to inform accused of the car's arrival, leading to the arrest of accused and to a charge of burglary, is not an accomplice. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

15. — **Disorderly house.**—A state's witness who rented a room in the house from the actual manager and controller of the house is not an accomplice. *Stone v. State*, 47 App. 575, 85 S. W. 808. Where accused was charged with knowingly permitting a house of which she was lessee to be disorderly, a prostitute to whom accused sub-rented a room, which the tenant used for prostitution, was not an accomplice, since such inmate could not have been convicted of the same crime of which accused was charged. *Liegeois v. State* (Cr. App.) 164 S. W. 382.

16. — **False swearing as to age.**—In a prosecution for false swearing as to the age of a girl in obtaining a marriage license the girl is an accomplice. *Smith v. State*, 37 App. 488, 36 S. W. 586.

17. — **Abortion.**—See *Moore v. State*, 37 App. 552, 40 S. W. 287.

Under this article, considered in connection with articles 1071, 1072, post, one, who, before the act was done, advised, commanded, or encouraged another to commit an abortion, is guilty as an accomplice though he did not furnish the means therefor. *Fondren v. State* (Cr. App.) 169 S. W. 411.

A woman permitting another to commit an abortion on her is not an accomplice. *Gray v. State* (Cr. App.) 178 S. W. 337. Where an abortion was performed on prosecutrix at the alleged instance of defendant and a physician, prosecutrix was not an accomplice. *Fondren v. State* (Cr. App.) 169 S. W. 411. That prosecutrix willingly submitted to an abortion performed on her did not render her an accomplice. *Shaw v. State* (Cr. App.) 165 S. W. 930. And see *Watson v. State*, 9 App. 237; *Freeman v. State*, 11 App. 92.

18. — **Forgery.**—Where a party pays a forged note for the forger and tries to keep the crime a secret and afterwards becomes angry with defendant and prosecutes, he is an accomplice. *Nelson v. State* (Cr. App.) 57 S. W. 645. Where, on the trial of an accomplice to a forgery of checks forged by a third person, the undisputed evidence showed that the third person forged each of the checks and that accused was not present at the time, and the third person testified as to the proximity of accused to her when the checks were passed, a charge that, if the accused was a principal, he could not be convicted as an accomplice was properly refused. *Warren v. State* (Cr. App.) 149 S. W. 130.

19. — **Gambling.**—Mere participants with accused in a gambling game, concerning which he was charged with falsely testifying, are not accomplices. *Warren v. State*, 60 App. 468, 132 S. W. 136.

20. — **Homicide.**—One who, with malice aforethought, aids, advises or assists in the commission of a murder, not being present when it is committed, is an accomplice. *Crook v. State*, 27 App. 198, 11 S. W. 444; *Wilkerson v. State* (Cr. App.) 57 S. W. 962. See, also, *Gossett v. State*, 57 App. 43, 123 S. W. 428; *Menefee v. State* (Cr. App.) 149 S. W. 138. One who furnished a gun to a third person to kill decedent, but who was not present at the time the third person killed decedent, and who did not actually participate therein, is an accomplice. *Clark v. State*, 60 App. 173, 131 S. W. 556. Defendant having helped to set in motion that which resulted in another's death is guilty of murder, he is an accomplice whether he instigated the act himself or his co-conspirators instigated it. *Isaacs v. State*, 36 App. 505, 38 S. W. 40. One, who, after accused struck deceased with an iron bar, stabbed deceased, is an accomplice. *McCue v. State* (Cr. App.) 170 S. W. 280. Where decedent was killed by a company of armed men, illegally organized to invade Mexico, and accused was with the company from the time of decedent's capture until long after he was killed in order that he might not inform against the party accused was a principal and not an accomplice, though he was some distance away when the killing occurred and did not participate in it. *Serrato v. State* (Cr. App.) 171 S. W. 1133. Evidence that D. came up with accused and another on the evening of the homicide, but some time before it was committed, and, after they had all drunk whisky, accused, referring to the place where the homicide was committed, remarked, "There is where I will do the work to-night," to which D. replied, "Uh huh," and left and at the time of the killing was conclusively shown to have been at a point in the country where it would have been impossible for him to have taken any part in the murder or to have done any act in furtherance of the crime, was insufficient to make him an accom-

pllice, under the rule that concealment of knowledge that a crime is to be committed will not make the concealing party an accomplice or accessory before the fact. *Spates v. State*, 62 App. 532, 138 S. W. 393. Where parties, after committing a homicide, went to the home of a woman from whom they had rented rooms, and while there told her the facts concerning the killing, it not appearing that she was paid the room rent with the money stolen from deceased, she was not an accomplice, though she concealed her knowledge of the killing for some time. *Jones v. State* (Cr. App.) 163 S. W. 75. See, also, *Dugger v. State*, 27 App. 95, 10 S. W. 763; *Condron v. State*, 62 App. 485, 138 S. W. 594; *Jones v. State*, 63 App. 394, 141 S. W. 953; *Espinoza v. State* (Cr. App.) 165 S. W. 208.

Where accused was prosecuted as an accomplice to a murder by agreeing to take certain steps to divert suspicion from others, it was necessary to prove that the others were principals as a prerequisite to showing that accused was an accomplice. *Beard v. State*, 57 App. 323, 123 S. W. 147.

One who merely overheard a brief portion of the conversation of persons about taking some one out of jail, which they subsequently did, afterwards killing him, but who was not party to their enterprise and had no portion or part in it, was not an accomplice, though, over his protest and against his wishes, they took from the house where he was working the gun with which they did the killing. *Chandler v. State*, 131 S. W. 598.

21. — **Incest.**—See *Gillespie v. State*, 49 App. 530, 93 S. W. 556.

If the female in incest is shown to have knowingly, voluntarily, and with the same intent which actuated accused, united with him in the offense, she is an accomplice, but if, in commission of the incestuous act, she was the victim of force, threats, fraud, or undue influence, so that she did not act voluntarily, and did not join in the act with the same intent which actuated accused, she is not an accomplice. *Mercer v. State*, 17 App. 452; *Skidmore v. State*, 57 App. 497, 123 S. W. 1129, 26 L. R. A. (N. S.) 466.

22. — **Pandering or procuring female for immoral purposes.**—In a prosecution for pandering, the female procured is not an accomplice. *Smith v. State* (Cr. App.) 164 S. W. 825; *Hewitt v. State* (Cr. App.) 167 S. W. 40.

A female inducing accused for a money consideration to procure men to visit her room for an immoral purpose, is an accomplice of accused, and he cannot be convicted on her uncorroborated testimony. *Denman v. State* (Cr. App.) 178 S. W. 332. A prostitute, who came to a hotel with a man as her husband and so registered, and who remained after he left, and who then employed for a money consideration a porter in the hotel to locate men in the hotel with whom she could have sexual intercourse, and who located men and directed them to her room, is an accomplice of the porter, indicted for alluring a female to visit a room for immoral purposes. *Dooms v. State* (Cr. App.) 178 S. W. 334.

Under Penal Code, art. 506b, making it a felony to procure a female to leave the state for the purpose of prostitution, the female so induced to leave is not an accomplice, even though she went voluntarily. *Hewitt v. State*, 167 S. W. 40.

23. — **Rape.**—Prosecutrix cannot be an accomplice in rape case. *Hamilton v. State*, 36 App. 372, 37 S. W. 431; *Keith v. State* (Cr. App.) 56 S. W. 628; *Price v. State*, 64 App. 448, 142 S. W. 586; *Melton v. State*, 71 App. 130, 158 S. W. 550.

24. — **Receiving deposit during bank's insolvency.**—One who was the manager of the bank of which accused was president, and had personal charge of its business, receiving all moneys and paying all checks, and knew that the bank was insolvent, is an accomplice to the crime of receiving money on deposit during the bank's insolvency, charged against accused. *Brown v. State* (Cr. App.) 151 S. W. 561.

25. — **Receiving stolen property.**—The thief is an accomplice in the offense of receiving stolen property. *Miller v. State*, 4 App. 251.

Where there was evidence that accused, charged with receiving stolen goods, was informed of the intended larceny, and that his horse and the horse of a witness were hitched to a hack and turned over to negroes, that accused and the witness remained together, and that during the night the negroes came back and said to accused, in the presence of the witness, that they had some stuff from a third person, and that the same was brought into the house in the presence of the witness, there was evidence that the witness was an accomplice. *Barker v. State* (Cr. App.) 175 S. W. 151.

26. — **Seduction.**—Prosecutrix in a case of seduction is an accomplice. *McCullar v. State*, 36 App. 213, 36 S. W. 585, 61 Am. St. Rep. 847. A witness who, learning that defendant had had intercourse with prosecutrix, concealed himself and saw them in the act, and then with defendant's consent compelled her to have intercourse with him by threatening to divulge what he had seen, is not an accomplice in the seduction. *Anderson v. State*, 39 App. 83, 45 S. W. 15.

27. — **Theft.**—Mere concealment of stolen property does not make one an accomplice. *Erwin v. State* (Cr. App.) 60 S. W. 961. But one who receives stolen money from accused for the purpose of concealment, may be an accomplice. *Kelley v. State*, 34 App. 412, 31 S. W. 174; *Walker v. State* (Cr. App.) 37 S. W. 423; *Guitierrez v. State* (Cr. App.) 173 S. W. 1025.

A witness who agrees with defendant not to prosecute if he will pay for the stolen property, is an accomplice. *Gatlin v. State*, 40 App. 117, 49 S. W. 87. Where the owner of goods taken promises defendant that if he will return them he will let him go, but if not he will prosecute him, he is an accomplice in law. *Campbell v. State*, 42 App. 27, 57 S. W. 288.

An accomplice cannot be convicted on the same facts that would make him guilty as principal, or as receiver of stolen property. *Criner v. State*, 41 App. 290, 53 S. W. 874.

In a prosecution for hog theft, where it appeared that the hogs were taken from their accustomed range, so that whoever took them, by driving them or re-

ducing them to actual possession, was guilty as an original taker, and any one who had connection with the hogs subsequent to such taking was not a principal, but there was no evidence showing how the hogs disappeared from the range, or who took them, and it was sought by circumstantial evidence to connect accused and another with the possession of the hogs, though they were never seen in accused's possession, a charge that all persons are principals who are guilty of acting together in the commission of an offense, and that if the jury believed that one or more of the hogs in question were fraudulently taken as charged, and that accused, with one or more others, acted together in such taking, accused would be a principal, and that by acting together was meant that accused was present, and that the persons acted in concert towards the accomplishment of a common purpose, one performing one part and another another part in aid of its accomplishment at the time of its perpetration, was erroneous, as permitting accused to be convicted as principal, whether he participated in the original taking or not. *McClure v. State*, 59 App. 287, 128 S. W. 386. Where accused had no connection with the original larceny of cattle, but received them in F. county with knowledge that they were stolen and employed third persons to drive them to T. county, and to ship them in his name, and the third persons knew that the cattle were stolen at the time they took them from accused, accused was at most an accomplice to the concealment of the cattle in T. county. *Davis v. State*, 61 App. 611, 136 S. W. 45.

Evidence held to sustain a conviction of accused as an accomplice in a horse theft, but insufficient to show that a purchaser of the horse from the principal was an accomplice. *Bailey v. State* (Cr. App.) 155 S. W. 536.

In order to be a principal, accused must be connected with the original taking; and if he was not present at the time of the theft, but advised it and the hogs were taken pursuant to his advice, he would by the express terms of the statute be an accomplice. *Pendley v. State*, 71 App. 281, 158 S. W. 811.

In a prosecution for hog theft, the owner testified that he found that his hogs had disappeared and had been tolled away by corn by two and possibly three persons, and followed the tracks some distance in the direction where accused and others lived, and, failing to find the hogs, procured a search warrant, and investigated the houses of several people living in the neighborhood, and in three or four places found fresh hog meat corresponding in size to his own hogs. Accused denied that he had taken the hogs, or that he was where the hogs were taken, and gave evidence that he worked on a certain house on a chimney until about noon, when, the work having stopped, he and others killed two of his own hogs, and sold some of them to his neighbors. Held, that the evidence required a charge on principals and accomplices or accessories, and on the question whether accused was merely the receiver of stolen property, so as to prevent his conviction as a principal. *Pendley v. State*, 71 App. 281, 158 S. W. 811.

Evidence that the wife of one of the parties to the killing and theft of a yearling heard them talking about the theft, but advised against it, and after it was killed and part of it brought to her house refused to have anything to do with it, did not raise the issue whether she was an accomplice. *Elmore v. State*, 72 App. 226, 162 S. W. 517.

28. — **Violations of liquor laws.**—See *Fox v. State*, 53 App. 150, 109 S. W. 370.

The party to whom whisky is given on election day is not an accomplice. *Keith v. State*, 38 App. 680, 44 S. W. 847.

The fact that a person induces another to purchase liquor from one who sells it in violation of law does not make either the one who bought or the one who induced him to buy an accomplice. *Walker v. State*, 72 S. W. 401.

Local option laws, see *Sears v. State*, 35 App. 442, 34 S. W. 124; *Terry v. State*, 46 App. 75, 79 S. W. 320; *Morrow v. State*, 56 App. 519, 120 S. W. 492; *Trinkle v. State*, 59 App. 257, 127 S. W. 1060; *Ray v. State*, 60 App. 138, 131 S. W. 542; *Moreno v. State*, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863; *Neal v. State*, 70 App. 584, 157 S. W. 1192; *Creech v. State*, 70 App. 229, 158 S. W. 277; *Albright v. State* (Cr. App.) 164 S. W. 1001; *Hightower v. State* (Cr. App.) 165 S. W. 184; *Looper v. State* (Cr. App.) 167 S. W. 342.

Gift or delivery of liquor to minors, see notes under art. 593, post.

Purchaser of intoxicating liquors, see notes under art. 602, post.

Transportation, delivery, etc., of liquors, see notes under art. 606, post.

29. — **Violations of Sunday law.**—This article applies to article 199, making it an offense to permit a public theatrical performance on Sunday. *Oliver v. State* (Cr. App.) 144 S. W. 604.

30. — **Suppressing prosecution.**—See *Morawietz v. State*, 46 App. 436, 80 S. W. 997.

31. — **Bigamy.**—See *Burton v. State*, 51 App. 196, 101 S. W. 226.

32. **Indictment.**—Willson's Cr. Forms, 734-739.

An accomplice must be indicted as such. *McKeen v. State*, 7 App. 631; *Simms v. State*, 10 App. 131; *Truitt v. State*, 8 App. 148; *Bean v. State*, 17 App. 60; *Golden v. State*, 18 App. 637; *Phillips v. State*, 26 App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; *Armstrong v. State*, 28 App. 526, 13 S. W. 864; *Rix v. State*, 33 App. 353, 26 S. W. 505; *Davis v. State*, 61 App. 611, 136 S. W. 45. The indictment should charge the principal with the crime, and then the accomplice with the statutory prior acts constituting him an accomplice. *Poston v. State*, 12 App. 408; *McKeen v. State*, 7 App. 631; *Scales v. State*, Id. 361; *Simms v. State*, 10 App. 131; *Crook v. State*, 27 App. 198, 11 S. W. 444.

Where accused was charged as an accomplice to commission of abortion by a physician, the indictment need not allege that the physician knew that the woman was pregnant when he operated on her. *Fondren v. State* (Cr. App.) 169 S. W. 411.

The second count of the indictment (being the count upon which this conviction was had) charges that certain persons, to the grand jurors unknown, and whom the grand jurors are unable to describe, did kill and murder one Ellick Brown, and that defendant, prior to the commission of said murder by said unknown persons, did unlawfully, willfully, and of his malice aforethought advise, command, and encourage said unknown persons to commit said murder, said defendant not being present at the commission of said murder by said unknown persons. It was objected to the indictment that it neither named nor gave a description of the unknown persons who committed the murder of Brown. Held, that the objection is not sound, and the indictment is sufficient, its purpose and effect not being to charge the unknown persons as the "accused" in this case, but to charge the defendant as an accomplice to the murder of Brown. *Crook v. State*, 27 App. 198, 11 S. W. 444.

An indictment charging that on a specified date S. forged her father's name to a check on a specified bank for an amount named, and, in proper language, further that before this forgery accused advised, commanded, and encouraged her to commit the forgery, he not being personally present when the forgery was committed, is a sufficient indictment of accused as accomplice to the forgery. *Warren v. State* (Cr. App.) 149 S. W. 130.

See, also, notes under article 74, ante.

33. Evidence.—Confession of principal as evidence against accomplice, see notes under C. C. P. art. 809.

34. Questions for jury.—The best way is to charge what constitutes an accomplice and leave to jury whether he is an accomplice or not. *Preston v. State*, 40 App. 83, 48 S. W. 581; *Bell v. State*, 39 App. 680, 47 S. W. 1010.

35. Instructions.—As to alibi. *Hamlin v. State*, 47 S. W. 656, 664. See notes under art. 735, C. C. P.

Art. 80. [80] Precise offense need not be committed.—To render a person guilty as an accomplice, it is not necessary that the precise offense which he may have advised, or to the execution of which he may have given encouragement or promised assistance, should be committed; it is sufficient that the offense be of the same nature, though different in degree, as that which he so advised or encouraged. [P. C. 220.]

Cited, *Cooper v. State* (Cr. App.) 177 S. W. 975.

See notes under art. 78, ante.

Commission of homicide.—A person going with defendant to arrest persons for vagrancy without lawful authority is not an accomplice to a homicide committed by defendant, not within the contemplation of the parties, nor directly connected with the unlawful act. *Scott v. State*, 46 App. 536, 81 S. W. 294, 108 Am. St. Rep. 1032.

Evidence inadmissible under indictment.—Under this article, and article 48 ante, and article 82 post, in a prosecution under an indictment charging defendant as an accomplice to the murder of A., evidence is inadmissible to show that the plot by defendant and an alleged principal was to kill M., and that A. was killed by mistake. *Cooper v. State* (Cr. App.) 154 S. W. 989.

Indictment.—Willson's Cr. Forms, 734, 738, 739.

Art. 81. [81] Punishment.—Accomplices shall, in all cases not otherwise expressly provided for, be punished in the same manner as the principal offender. [P. C. 220a.]

Jurisdiction.—Where a murder is committed in one county the district court of that county has jurisdiction to try an accomplice thereto, though all the acts constituting defendant an accomplice were committed in another county. *Carlisle v. State*, 31 App. 537, 21 S. W. 358.

Verdict.—An accomplice is punished in the same manner as the principal and in a murder case the verdict must specify the degree as it must in a case of murder. *Thomas v. State*, 43 App. 20, 62 S. W. 920, 96 Am. St. Rep. 834.

Indictment.—Willson's Cr. Forms, 734, 738, 739.

Art. 82. [82] Where one offense is attempted and another committed.—If in the attempt to commit one offense the principal shall by mistake or accident commit some other under the circumstances set forth in articles 48, 49 and 50, the accomplice to the offense originally intended shall, if both offenses are felonies by law, receive the punishment affixed to the lower of the two offenses; but, if the offense designed be a misdemeanor, he shall receive the highest punishment affixed by law to the commission of such misdemeanor, whether the offense actually committed be a misdemeanor or a felony. [P. C. 221.]

See note under article 80, ante.

Indictment.—Willson's Cr. Forms, 734, 738, 739.

Instructions.—Where, on the trial of an alleged accomplice to a homicide, in which it was the state's contention that accused hired R. to kill M., and that R.

killed A. by mistake, believing that he was M., the court charged in the language of this article, except that he substituted for the quoted words "murder in the second degree," and also correctly told the jury what the punishment was for murder in the second degree, the instruction could not have misled the jury; accused, if guilty at all, being guilty of murder in the second degree. *Cooper v. State* (Cr. App.) 177 S. W. 975.

Art. 83. [83] If principal is under 17, punishment doubled.—If the principal in an offense less than capital be under the age of seventeen years, the punishment of an accomplice shall be increased so as not to exceed, however, double the penalty affixed to the offense in ordinary cases. [P. C. 222.]

Receiver of goods stolen by minor.—The punishment for an adult receiver of goods stolen by a minor under sixteen years old is confinement in the penitentiary for from two to ten years. *Ramsey v. State*, 34 App. 16, 28 S. W. 808.

Indictment.—Willson's Cr. Forms, 734, 738, 739.

Art. 84. [84] If accomplice is parent, master, guardian or husband to principal, punishment increased.—If the accomplice stands in the relation of parent, master, guardian or husband to the principal offender, he shall, in all such cases, receive the highest punishment affixed to the offense, and the same may, in felonies less than capital, be increased by the jury to double the highest penalty which would be suffered in ordinary cases. [P. C. 223.]

See article 37, ante.

Indictment.—Willson's Cr. Forms, 734, 739.

— **Indictment not alleging relation.**—This article is not applicable where the indictment does not allege that the defendant stood in the relation of parent to the principal offender. *Bragg v. State* (Cr. App.) 166 S. W. 162.

Art. 85. [85] No accomplice in manslaughter or negligent homicide.—There may be accomplices to all offenses except manslaughter and negligent homicide. [P. C. 224.]

Offenses without accomplice.—Manslaughter and negligent homicide are the only offenses to which there can be no accomplice. *Ogle v. State*, 16 App. 361; *Cartwright v. State*, Id., 473, 49 Am. Rep. 826; *Austin v. Cameron*, 83 Tex. 351, 18 S. W. 437.

Indictment.—Willson's Cr. Forms, 734.

See notes to article 79, ante.

CHAPTER THREE

ACCESSORIES

Art.
86. Who is an accessory.
87. Who cannot be.

Art.
88. How punished.

Article 86. [86] Who is an accessory.—An accessory is one who, knowing that an offense has been committed, conceals the offender, or gives him any other aid in order that he may evade an arrest or trial, or the execution of his sentence. But no person who aids an offender in making or preparing his defense at law, or procures him to be bailed, though he afterwards escapes, shall be considered an accessory. [P. C. 225.]

Cited, *Tullis v. State*, 41 Tex. 598; *Robertson v. State*, 46 App. 441, 80 S. W. 1000.

In general.—No one can be an accessory after the fact, unless he comes within the letter or spirit of this article; that is he must give some aid and assistance to the principal before he can be guilty. *Schackey v. State*, 41 App. 255, 53 S. W. 878; *Caylor v. State*, 44 App. 118, 68 S. W. 982; *Chenault v. State*, 46 App. 351, 81 S. W. 971; *Harrison v. State* (Cr. App.) 153 S. W. 139. The test is that he renders his principal some personal help to elude punishment; the kind of help is unimportant. *Street v. State*, 39 App. 134, 45 S. W. 577; *Schackey v. State*, 41 App. 255, 53 S. W. 878; *Gann v. State*, 42 App. 133, 57 S. W. 837; *Chenault v. State*, 46 App. 351, 81 S. W. 971; *Smith v. State*, 51 App. 137, 100 S. W. 924; *Harrison v. State* (Cr. App.) 153 S. W. 139. It is not essential that the aid rendered shall be of a character to enable the criminal to effect his personal escape or concealment. It is sufficient if it enables him to elude present arrest and prosecution. *Blakely v. State*, 24 App. 616, 7 S. W. 233, 5 Am. St. Rep. 912. A person can never become an accessory until there has been an offense committed, and the accessory then becomes criminally connected with the principal and not the offense by reason.

of the fact that he is assisting the principal in some of the methods specified in the statute. *Schackey v. State*, 41 App. 255, 53 S. W. 879; *Figaroa v. State*, 58 App. 611, 127 S. W. 193. One who spirits away or hires material witnesses to leave, so that they cannot be had before the grand jury or trial court, is an accessory. *Harrison v. State* (Cr. App.) 153 S. W. 139. That one compounds a felony does not make him an accessory to the felony compounded. *Chenault v. State*, supra, overruling *Gatlin v. State*, 40 App. 116, 49 S. W. 87. See, also, *Davis v. State*, 52 App. 332, 107 S. W. 855. That accused gives a witness property to secure his departure from the state, in order to get rid of his testimony does not render the witness an accessory. *Chitister v. State*, 33 App. 635, 28 S. W. 683. Inducing prosecutrix in a rape case to leave the state does not make the person holding out the inducement an accessory after the fact. *Caylor v. State*, 44 App. 118, 68 S. W. 982. Concealment of knowledge that a felony is to be committed does not make the party concealing it an accessory before the fact. *Noftsinger v. State*, 7 App. 301.

Distinguished from accomplices.—To constitute one an “accessory,” his participation in the crime and acts must all have occurred subsequent to the commission of the offense, while to constitute one an “accomplice,” his acts must have occurred prior to the commission, and he at the time of the offense must have done nothing in furtherance of the common purpose and design. *Gonzales v. State* (Cr. App.) 171 S. W. 1146.

See, also, notes under article 79, ante.

Particular crimes—Aiding escape of prisoner.—This and the following article are not applicable to the offense defined by article 329, post. *Peeler v. State*, 3 App. 533.

— **Burglary or theft.**—The bare fact of receiving stolen property knowing it to be stolen does not make one accessory to burglary or theft. *Street v. State*, 39 App. 135, 45 S. W. 577. When one does no more than purchase and receive stolen property, he is not guilty of aiding one to evade arrest—he not having rendered any personal aid to enable the party to escape. *Gann v. State*, 42 App. 133, 57 S. W. 538.

Since by statute one who steals property in another state and brings it into this state is guilty of theft in this state, one who aids the thief after the property is brought into this state is an accessory. *West v. State*, 27 App. 472, 11 S. W. 482.

In a prosecution for hog theft, the owner testified that he found that his hogs had disappeared and had been tolled away by corn by two and possibly three persons, and followed the tracks some distance in the direction where accused and others lived, and, failing to find the hogs, procured a search warrant, and investigated the houses of several people living in the neighborhood, and in three or four places found fresh hog meat corresponding in size to his own hogs. Accused denied that he had taken the hogs, or that he was where the hogs were taken, and gave evidence that he worked on a certain house on a chimney until about noon, when, the work having stopped, he and others killed two of his own hogs, and sold some of them to his neighbors. Held, that the evidence required a charge on principals and accomplices or accessories, and on the question whether accused was merely the receiver of stolen property, so as to prevent his conviction as a principal. *Pendley v. State*, 71 App. 281, 158 S. W. 811.

— **Homicide.**—Where, immediately after the commission of a homicide by the principal, he and defendant had a retired private consultation, after which the principal mounted a horse and disappeared, and the defendant charged the only two other witnesses present to testify on the inquest to a statement fabricated by himself, to the end that, upon final trial, the principal might be acquitted or released on nominal bond, defendant was an accessory. *Blakely v. State*, 24 App. 616, 7 S. W. 233, 5 Am. St. Rep. 912. That a witness stated to the prosecuting attorney that accused was at home on the night of the killing, and denied any knowledge of the killing, when he afterwards testified that accused admitted the killing to him before such statement was made to the prosecuting attorney, would not constitute him an accessory after the fact. *Hargrove v. State*, 63 App. 143, 140 S. W. 234. Where, in a prosecution for homicide committed as an incident to a conspiracy to organize an armed force to invade Mexico, accused at the time of the killing was a member of the company and was then engaged in the furtherance of the conspiracy, he was a principal and not an accessory, though he was not engaged in the killing nor present when it was committed. *Gonzales v. State* (Cr. App.) 171 S. W. 1146.

Indictment.—Willson's Cr. Forms, 740.

An indictment against one as accessory to another in the commission of an offense must charge the accessory as such, and must charge the principal with the offense committed. *Poston v. State*, 12 App. 408. It should state acts done by the accessory in aid of principal and not legal conclusions that he did aid, etc. It should also allege that he knew the crime with which he is charged had been committed by his principal. *Street v. State*, 39 App. 134, 45 S. W. 577. It need not allege the means by which he gave aid. *Gann v. State*, 42 App. 133, 57 S. W. 538; *Dent v. State*, 43 App. 126, 65 S. W. 627. It need not negative inclusion of the accused in the latter clause of the article. *State v. Smith*, 24 Tex. 285. An indictment charging that defendant, knowing of the commission of a murder, concealed and aided the murderer in order that he might evade an arrest and trial for the offense is sufficient. *Blakely v. State*, 24 App. 616, 7 S. W. 233, 5 Am. St. Rep. 912. An indictment which properly charged the principal with seduction, and that defendant was an accessory in that, knowing that said W. had committed said offense of seduction, with the purpose and in order that the principal might evade a trial for said offense so committed by him, did unlawfully and willfully conceal and give aid to him, is sufficient. *Harrison v. State* (Cr. App.) 153 S. W. 139.

See, also, notes to article 74, ante.

Art. 87. [87] Who can not be.—The following persons can not be accessories:

1. The husband or wife of an offender.
2. His relations in the ascending or descending line by consanguinity or affinity.
3. His brothers and sisters.
4. His domestic servants. [P. C. 226.]

Relatives.—See *Moore v. State*, 40 App. 389, 51 S. W. 1108.

A mother can not be an accessory to her son in the commission of crime. *Gray v. State*, 24 App. 611, 7 S. W. 339. Nor can the grandmother or brother-in-law be accessory. *Adcock v. State*, 41 App. 288, 53 S. W. 845. A wife does not become an accessory after the fact because after the arrest of her husband and defendant she told persons, who inquired, that she knew nothing of the offense charged against them, though she was cognizant of their criminal acts, for an accessory is one who conceals the offender or gives him aid. *Pinckard v. State*, 62 App. 602, 138 S. W. 691. Nor can a stepfather, in the commission of an abortion on his stepdaughter. *Fondren v. State* (Cr. App.) 169 S. W. 411. Where defendant was charged with procuring another to burn his building, a brother of the one who set the fire, who was a material witness for the prosecution, and whose only connection with the prosecution was that after his brother's arrest he aided in procuring an attorney and induced defendant to pay the attorney's fees as part of the amount he agreed to pay for starting the fire, was not an accomplice of the defendant, whose testimony must be corroborated to sustain a conviction under this article. *Arnold v. State* (Cr. App.) 168 S. W. 122.

Children of deceased and defendant are not accessories, though they were present at the crime and concealed the killing. *Martin v. State*, 44 App. 279, 70 S. W. 973.

Prosecutrix in rape case and her husband as accessories. *Smith v. State*, 51 App. 137, 100 S. W. 924.

Domestic servants.—Domestic servant is a servant who resides in the house and not one whose service is outside of the house. *Wakefield v. State*, 41 Tex. 556; *Waterhouse v. State*, 21 App. 663, 2 S. W. 889; *Peters v. State*, 33 App. 170, 26 S. W. 61.

Aiding escape.—None of the parties named in this article are immune from prosecution for conveying articles into a jail to aid in the escape of a prisoner charged with a felony. *Peeler v. State*, 3 App. 533.

Negating exceptions in indictment.—An indictment need not negative the exceptions contained in this article. *State v. Smith*, 24 Tex. 285.

Art. 88. [88] How punished.—Accessories to offenses shall be punished by the infliction of the lowest penalty to which the principal in the offense would be liable. [P. C. 227.]

Indictment.—Willson's Cr. Forms, 740.

CHAPTER FOUR

TRIAL OF ACCOMPLICES AND ACCESSORIES

Art.	Art.
89. Accomplice may be tried before principal.	91. Can not be witnesses for each other, but may sever.
90. Accessory also, unless principal is arrested.	

Article 89. [89] Accomplice may be tried before principal.—An accomplice may be arrested, tried and punished before the conviction of the principal offender, and the acquittal of the principal shall not bar a prosecution against the accomplice, but, on the trial of an accomplice, the evidence must be such as would have convicted the principal. [P. C. 228.]

Order of trial.—*Arnold v. State*, 9 App. 435; *Kingsbury v. State*, 37 App. 259, 39 S. W. 365.

Evidence.—An accomplice can be tried and convicted before the principal is, and the acquittal of the principal is no bar to the prosecution of the accomplice. However, he can be convicted only upon such evidence as would convict the principal. *Arnold v. State*, 9 App. 435; *Poston v. State*, 12 App. 408; *Crook v. State*, 27 App. 198, 11 S. W. 444; *Bluman v. State*, 33 App. 43, 21 S. W. 1027, 26 S. W. 75; *Armstrong v. State*, 33 App. 417, 26 S. W. 829; *Isaacs v. State*, 36 App. 505, 33 S. W. 40; *Gibson v. State*, 53 App. 349, 110 S. W. 41; *Richards v. State*, 53 App. 400, 110 S. W. 432; *Black v. State*, 143 S. W. 932; *Thomason v. State*, 71 App. 439, 160 S. W. 359. The burden is on the state to prove the guilt of the principal to the same extent as if the principal himself was on trial, and hence all evidence to establish the principal's guilt is admissible against the accomplice. *Gibson v. State*, 53 App. 349, 110 S. W. 50; *Fondren v. State* (Cr. App.) 169 S. W. 411; *Aven v. State* (Cr.

App.) 177 S. W. 82. But only for the purpose of proving the guilt of the principal. *Gibson v. State*, 53 App. 349, 110 S. W. 50, 51.

Where in the prosecution of accused as an accomplice to murder it appeared that the principal claimed that he did the killing in self-defense, evidence of the principal's physical condition is competent, but proof of his mental condition showing that he could be influenced is incompetent. *Millner v. State*, 72 App. 45, 162 S. W. 348. And where, the state proved that the principal after being warned had made a statement or confession admitting the killing of deceased, such statement is admissible against accused to prove the guilt of the principal. *Millner v. State*, 72 App. 45, 162 S. W. 348. See, also, *Bluman v. State*, 33 App. 43, 21 S. W. 1027, 26 S. W. 75. Where the confession of the principal was admitted only as tending to show his guilty participancy in the killing, and not as evidence against accused, evidence that the principal, while in jail, told a witness that he killed deceased to get his money, that he thought he had about \$600 when he killed him, that he turned his pockets all wrong side out and found he had no money, is properly excluded. And evidence that the principal, who had voluntarily executed a written confession, told witness in jail that the confession was false is admissible. Also evidence that the person alleged to have committed the act, when arrested, had defendant's watch on his person is admissible. And evidence that a witness attempted to borrow money from another in order that he might loan the same to accused, who stated he wanted the money to give it to the person who committed the killing in order to help him off, is admissible. And where the state claimed that defendant was an accomplice to the killing of deceased, and that he desired decedent's death because of intimacy with decedent's wife, certain letters written by the wife to defendant and found in his suit case within two hours after it had been left by him at the house of S., when it was taken charge of by the sheriff, are admissible. *Millner v. State*, 72 App. 45, 162 S. W. 348. Where there was evidence that defendant had borrowed a \$10 bill to aid a friend, who was in trouble, to get out of the country, evidence that when the principal was arrested he had a \$10 bill and defendant's watch on his person is admissible. *Millner v. State* (Cr. App.) 169 S. W. 899.

To convict one of being an accomplice to a forgery, the state must prove the forgery and that accused was an accomplice thereto. The state may show what was done at the same time in forging other checks, and in negotiating them and procuring goods and money thereon, to show both the forgery and accused's connection therewith as an accomplice. *Warren v. State* (Cr. App.) 149 S. W. 130.

In a prosecution of accused as an accomplice to arson, evidence showing the principal's guilt which had no application to accused is properly received, without an instruction that it could not be considered against accused or for any other purpose than to show the principal's guilt. *Thomason v. State*, 71 App. 439, 160 S. W. 359.

— Acts and declarations of conspirators.—See notes under art. 783, C. C. P.

— Judgment of conviction of principal.—*Dent v. State*, 43 App. 126, 65 S. W. 627.

Form of verdict.—See notes under C. C. P. art. 770.

Indictment.—Willson's Cr. Forms, 739.

Art. 90. [90] Accessory also, unless principal is arrested.—An accessory may in like manner be tried and punished before the principal, when the latter has escaped; but, if the principal is arrested, he shall be first tried, and, if acquitted, the accessory shall be discharged. [P. C. 229.]

Arrest or escape of principal.—An accessory may be tried before his principal only when the principal has escaped. *State v. McDaniel*, 41 Tex. 229; *Ray v. State*, 43 App. 234, 64 S. W. 1057; *Zweig v. State* (Cr. App.) 171 S. W. 747. See, also, *Crook v. State*, 27 App. 198, 11 S. W. 444; *Williams v. State*, 27 App. 466, 11 S. W. 481; *West v. State*, 27 App. 472, 11 S. W. 482. And where the principal has been arrested this article controls the general provisions of Code Cr. Proc. art. 727, relating to the severance on trial of defendants, *Ray v. State*, 43 App. 234, 64 S. W. 1057; *Zweig v. State* (Cr. App.) 171 S. W. 747.

Death of principal.—The death of the principal is not equivalent to an escape, and in such a contingency the accessory must be discharged. *State v. McDaniel*, 41 Tex. 229; *Moore v. State*, 40 App. 391, 51 S. W. 1108.

Confinement of principal in penitentiary as abating prosecution.—A conviction of the principal for another offense and his confinement in the penitentiary does not entitle the accessory to a discharge. *Hernandez v. State*, 4 App. 425.

Conviction or proof of guilt of principal.—The guilt of the principal must be first established before a conviction can be had of an accessory. *Arnold v. State*, 9 App. 435; *Simms v. State*, 10 App. 131; *Poston v. State*, 12 App. 408; *Armstrong v. State*, 23 App. 526, 13 S. W. 864; *Id.*, 33 App. 417, 26 S. W. 829; *Kingsbury v. State*, 37 App. 264, 39 S. W. 365; *Crook v. State*, 27 App. 198, 11 S. W. 444; *Williams v. State*, 27 App. 466, 11 S. W. 481; *West v. State*, 27 App. 472, 11 S. W. 482; *Leeper v. State*, 29 App. 154, 15 S. W. 411; *Isaacs v. State*, 36 App. 505, 38 S. W. 40. See, also, *Dent v. State*, 43 App. 126, 65 S. W. 629. If there be a reasonable doubt as to the guilt of the principal the accessory can not be held guilty. It is therefore the duty of the court to charge the law of reasonable doubt as to the guilt of the principal as well as to that of the accessory. *Poston v. State*, 12 App. 408. The principal has not been convicted where sentence has not been pronounced, though he has been found guilty and judgment has been rendered. *Kingsbury v. State*, 37 App. 259, 39 S. W. 365. Or until judgment is affirmed if appeal has been perfected. *Id.*

It is proper to read in evidence, on the trial of an accessory, the verdict and judgment convicting the principal. *West v. State*, 27 App. 472, 11 S. W. 482; *Dent v. State*, 43 App. 126, 65 S. W. 629. But such evidence is only prima facie evidence of the guilt of the principal when it is introduced on the trial of the accessory after the fact and it may be combated by evidence on part of accessory, and the innocence of the principal shown thus securing an acquittal of the accessory. *Dent v. State*, 43 App. 126, 65 S. W. 630.

Sufficiency of evidence. *Bluman v. State*, 33 App. 43, 21 S. W. 1027, 26 S. W. 75; *Dugger v. State*, 27 App. 95, 10 S. W. 763.

Jurisdiction.—*Carlisle v. State*, 31 App. 537, 21 S. W. 358.

Principal's acts and declarations.—See notes under art. 783, C. C. P.

Indictment.—Willson's Cr. Forms, 739.

Art. 91. [91] Can not be witnesses for each other, but may sever.—Persons charged as principals, accomplices or accessories, whether in the same indictment or by different indictments, can not be introduced as witnesses for one another, but they may claim a severance; and, if any one or more be acquitted, they may testify in behalf of the others. [P. C. 230.]

See C. C. P. arts. 785, 788 (subd. 3), 791, 797, and 801, and notes thereunder; Willson's Cr. Forms, 739.

TITLE 4

**OF OFFENSES AGAINST THE STATE, ITS TERRITORY,
PROPERTY AND REVENUE**

Chap.		Chap.	
1. Treason.			in local option districts; cold storage and C. O. D. shipments.
2. Misprision of treason.		7.	Occupation tax on dealers in non-intoxicating malt liquor.
3. Misapplication of public money.		8.	Dealing in fraudulent land certificates.
4. Illegal contracts affecting the State.		9.	Dealing in public land by officers.
5. Collection of taxes and other public money.		10.	Personal property of the State.
6. Occupation tax on soliciting orders		11.	The state flag.

CHAPTER ONE

TREASON

Art.		Art.	
92.	"Treason" defined.	93.	Punishment.

Article 92. [92] "Treason" defined.—Treason against the state shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort. [Const., Art. 1, Sec. 22; P. C. 231.]

Indictment.—Willson's Cr. Forms, 10, 11.

Art. 93. [93] Punishment.—If any citizen of this state shall be guilty of treason he shall suffer death, or imprisonment in the penitentiary for life, at the discretion of the jury. [P. C. 232.]

CHAPTER TWO

MISPRISION OF TREASON

Art.		Art.	
94.	"Misprision of treason" defined.	95.	Punishment.

Article 94. [94] "Misprision of treason" defined.—Whoever shall know that any person has committed treason, or is intending so to do, and shall not, within five days from the time of his having come to such knowledge, give information of the same to the governor, or to some magistrate or peace officer of the state, shall be deemed guilty of misprision of treason. [P. C. 233.]

Indictment.—Willson's Cr. Forms, 12.

Art. 95. [95] Punishment.—The punishment for misprision of treason is confinement in the penitentiary for a term of not less than two nor more than seven years. [Act Feb. 12, 1858, pp. 157-8; P. C. 234.]

CHAPTER THREE

MISAPPLICATION OF PUBLIC MONEY

Art.		Art.	
96.	Officer fraudulently taking or misapplying public money.	102.	"Officer of the government" defined.
97.	"Misapplication" defined.	103.	State treasurer improperly receiving private funds.
98.	Donation of taxes by state to city of Galveston.	104.	Diverting special funds.
99.	Diversion of same a misapplication of public money.	104a.	City and county treasurers custodian of funds, exclusive use of.
100.	What not included.	105.	Misapplication of county or city funds.
101.	Receiving or concealing misapplied public money.		

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| Art. | Art. |
| 106. Fraudulently receiving misapplied county or city funds. | 113a. Compensation for ex-officio services, when may be allowed by commissioners' court; proviso. |
| 107. Officer failing to pay over public money. | 113b. Officials named in article 110 to keep accounts; duty of grand jury and district judge as to. |
| 108. Venue. | 113c. Monthly report; statement of expenses; audit, etc. |
| 108a. Payment of moneys. | 113d. Collector and assessor to file with comptroller copies of sworn statements. |
| 108b. Same. | 114. Clerk issuing attachment or subpoena without authority, penalty for. |
| 109. Collector failing to pay. | 115. Amounts allowed officers may be retained; state or county not responsible for fees or compensation, when; officers to make sworn statements of fees collected, inform the person for whom collected and pay over same. |
| 110. Maximum amount of fees allowed. | 115a. Fees, how disposed of; excess fees, etc. |
| 110a. County attorney, compensation in certain counties. | 115b. Certain officers not required to report fees or keep statement; proviso as to district attorney. |
| 110b. District attorney, compensation of. | 115c. Fiscal year defined, and regulation of reports. |
| 110c. County judge, compensation as superintendent of public instruction. | 116. Officers to make quarterly reports of moneys in their hands uncalled for. |
| 110d. Officer not collecting maximum fees, etc., may retain out of delinquent fees collected, remainder paid to treasurer. | 117. Moneys not called for to be paid over to county treasurer. |
| 110e. Delinquent fees, collection of, commissions on, remainder paid to treasurer. | 118. Penalty for violating three preceding articles. |
| 110f. Officers to make sworn statement, etc., to show what. | |
| 110g. Officer may appoint deputies, how; county judge not to influence appointment, etc.; compensation, how paid. | |
| 111. Fees of district clerk. | |
| 112. Fees of county clerk. | |
| 113. Penalty for failing to charge up fees, to make report, to remit fees or to receive back any part allowed deputy. | |

Article 96. [96] Officer fraudulently taking or misapplying public money.—If any officer of the government, who is by law a receiver or depository of public money, or any clerk or other person employed about the office of such officer, shall fraudulently take, or misapply, or convert it to his own use, any part of such public money, or secrete the same with intent to take, misapply or convert it to his own use, or shall pay or deliver the same to any person, knowing that he is not entitled to receive it, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years. [Act Feb. 12, 1858, p. 158; P. C. 235.]

Defenses.—Accused could not be convicted for embezzlement by his deputies or the depository banks. *Ferrell v. State* (Cr. App.) 152 S. W. 901.

Indictments.—Willson's Cr. Forms, 13–21.

Description of money, see Code Crim. Proc. art. 468.

Requisites, see Code Crim. Proc. art. 467.

Evidence.—See notes under Code Crim. Proc. art. 783.

Art. 97. [97] Using public funds.—Within the term, “misapplication of public money,” are included the following acts:

1. The use of any public money, in the hands of any officer of the government, for any purpose whatsoever, save that of transmitting or transporting the same to the seat of government, and its payment into the treasury.

2. **Exchanging public funds.**—The exchange, by any officer, of one character of public funds in his hands, for those of another character; the purchase of bank checks, or postoffice orders, in exchange, for transmission to the treasury, is not included in this class.

3. **Depositing public funds elsewhere than in treasury.**—The deposit, by any officer of the government, of public money in his hands, at any other place than the treasury of the state, when the treasury is accessible and open for business, or permitting the same to remain on deposit at such forbidden place, after the treasury is open.

4. **Officer purchasing warrants.**—The purchase of state warrants, or other evidence of state indebtedness, by any officer of the government, with public money in his hands.

5. **Retaining funds after notice from comptroller.**—The retention in his hands, by any collector of taxes, of any funds belonging to the state, for thirty days after receiving notice from the comptroller of public accounts to pay the same over to the treasurer.

6. **Failing to pay into treasury at proper time.**—The wilful failure of any officer to pay into the state treasury, at the time prescribed by law, whatever funds he may have on hand.

7. **Other cases.**—The special enumeration of cases of misapplication above set forth shall not be understood to exclude any case which, by fair construction of language, comes within the meaning of the preceding language; provided, that this article shall not be construed to prevent collectors of taxes from paying warrants drawn by the comptroller in favor of officers living in their district or county, as may be provided by law.

Venue.—The offenses defined in subdivisions 5 and 6 of this article, when committed in any county in this state, may be prosecuted in the district court of Travis county, or in the county where the money was received. [Acts 1879, ch. 150, p. 165.]

Indictment.—Willson's Cr. Forms, 16-21.

Art. 98. Donation of taxes to City of Galveston.—For a period of fifteen years, commencing with the fiscal year beginning September 1, 1903, there be and hereby are donated and granted by the state of Texas to the city of Galveston, the net amounts of money collected from the following taxes:

1. The state ad valorem taxes collected upon property and from persons in the county of Galveston, including the rolling stock belonging to railroad companies, which shall be ascertained and apportioned as now provided by law.

2. Three-fourths of all moneys collected from state occupation taxes received from persons, firms, companies or associations of persons doing business in the county of Galveston.

3. All state poll taxes collected from persons in the county of Galveston, except that belonging to the public school fund. [Act 1903, p. 10.]

Art. 99. Diversion of same a misapplication of public money.—The moneys herein and hereby granted and donated to the city of Galveston are declared to be a trust fund for the purpose of aiding the city of Galveston in paying the interest and sinking fund upon an issue or issues of bonds, the proceeds of which bonds are to be used exclusively for the elevation and raising of the streets, avenues, alleys, sidewalks and lots in said city above calamitous overflows, and for securing and protecting such filling. The use or diversion of such moneys for any other purpose whatsoever is hereby prohibited; provided, that whenever the moneys in the hand of the city treasurer, received from the state under the provisions of this or any previous law, shall exceed the sum of one year's interest, and two per cent. sinking fund, on the bonds herein referred to that have been issued and are then outstanding, such excess shall be invested by said city in the purchase of said bonds, or bonds of the United States, the state of Texas, or the bonds of any county, city or town, of the state of Texas, bearing interest at a rate of not less than four per cent. per annum; and provided, further, that the entire sinking fund, when received by the city treasurer of said city, shall be invested by the municipal authorities of said city, as received, in the bonds herein referred to, or bonds of the United States, the state of Texas, or the bonds of any county, city or town

of the state of Texas, bearing interest at a rate of not less than four per cent. per annum. A violation of the provisions of this section shall constitute a misapplication of public money, and the person or persons so offending shall be punished as provided for in article 96 of this Code. [Act 1903, p. 10.]

Art. 100. [98] **What not included.**—Nothing in the two preceding articles [Arts. 96, 97] contained shall apply to the sale or exchange of one kind of money for another by the financial officers of the state, when done in pursuance of law. [Act March 15, 1875, p. 180.]

Explanatory.—The words “two preceding articles” have reference to the situation of the articles as they appeared in the Revised Statutes of 1895. Articles 98 and 99 were inserted in the revision of 1911 following art. 97 without changing the references in the surrounding text..

Art. 101. [99] **Receiving or concealing misapplied public money.**—If any person shall knowingly and with fraudulent intention receive or conceal any public money which has been taken, converted or misapplied by any officer or employé as set forth in the two preceding articles, [Arts. 97, 100] he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years. [Act Feb. 5, 1875, p. 12; P. C. 236.]

Explanatory.—The bracketed numbers following the words “two preceding articles” are explained in the note under the preceding article.

Indictment.—Willson's Cr. Forms, 22.

Description of money, see Code Crim. Proc. art. 468.

Art. 102. [100] **“Officer of the government” defined.**—Under the term, “officer of the government,” as used in this chapter, are included the state treasurer and all other heads of departments who by law may receive or keep in their care public money of the state; tax collectors, and all other officers who by law are authorized to collect, receive or keep money due to the government. [P. C. 237.]

Deputy sheriff.—A deputy sheriff is an “officer of the government” when he is authorized to collect taxes. *State v. Brooks*, 42 Tex. 62.

Justice of the Peace.—A justice of the peace is an officer. *Crump v. State*, 23 App. 615, 5 S. W. R., 182.

Art. 103. [101] **State treasurer improperly receiving private funds.**—If the treasurer of this state shall knowingly keep or receive into the building, safes or vaults of the treasury, any money, or the representative of money, belonging to any individual, except in cases expressly provided for by law, he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years. [Act May 3, 1873, pp. 61–2.]

Indictment.—Willson's Cr. Forms, 23.

Art. 104. [102] **Diverting special funds.**—If any person shall knowingly and wilfully borrow, withhold or in any manner divert from its purpose, any special fund, or any part thereof, belonging to or under the control of the state, which has been set apart by law for a specific use, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years. [Const., Art. 8, § 7.]

Indictment.—Willson's Cr. Forms, 24.

Art. 104a. **City and county treasurers custodian of funds, exclusive use of.**—All funds, revenues and moneys derived from the sale of the bonds herein authorized, [Vernon's Sayles' Civ. St. 1914, arts. 5585–5594] and from the sale or rent of reclaimed or other lands acquired under this act, and from additional uses of said works as herein authorized, shall be deposited with the county or city treasurer, as the case may be, and shall be held in trust exclusively for the construction and maintenance of seawalls and breakwaters, including the purchase of the right of way therefor, and all moneys derived from the assessment and levy of taxes as aforesaid are declared to

be a trust fund for the payment of interest and principal of bonds to be issued under this act; and the use or diversion of such moneys for any other purposes whatsoever is hereby prohibited, and a violation of this section shall constitute a misapplication of public money, and the person or persons so offending shall be punished as provided in article 96, of the Penal Code of the State of Texas. [Act 1901, 1st S. S., p. 25, ch. 12, § 9.]

Explanatory.—The above act was omitted from the revised Penal Code, and is inserted in this compilation in view of the decision in *Berry v. State* (Cr. App.) 156 S. W. 626.

Art. 105. [103] Misapplication of county or city funds.—If any officer of any county, city or town in this state, or any clerk or other person employed by such officer, shall fraudulently take, misapply or convert to his own use any money, property or other thing of value belonging to such county, city or town, that may have come into his custody or possession by virtue of his office or employment, or shall secrete the same with intent to take, misapply or convert it to his own use, or shall pay or deliver the same to any person knowing that he is not entitled to receive it, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years.

In general.—County treasurer's relation to the county is not, under this article, that of a debtor, nor is it, under the Revised Statutes, that of a bailee. He is the bonded custodian of the county funds, and failure from any cause to produce is a breach of his bond. *Poole v. Burnet County*, 97 Tex. 77, 76 S. W. 425.

He cannot be removed from his office under this article until he has been convicted on a trial before a jury. *Bland v. State* (Civ. App.) 38 S. W. 252.

Where a public officer charged with the embezzlement of public funds is shown to have received money on account of his office, it is incumbent on him to show that he paid it over in accordance with the obligation assumed by him. *Busby v. State*, 51 App. 289, 103 S. W. 638.

Money.—Money, within the meaning of this article, is legal tender metallic coins, or legal tender currency of the United States. *Lewis v. State*, 28 App. 140, 12 S. W. 736.

Charge of court was not too restrictive that the defendant, as treasurer, was "only authorized to receive on behalf of, and pay to the county, legal tender metallic coin or legal tender notes, and current money of the United States of America." *Butler v. State*, 46 App. 287, 81 S. W. 743.

Persons liable.—A justice of the peace is a county officer within the purview of the article, distinguishing between *Edwards v. State*, 2 App. 525, and *Crump v. State*, 23 App. 615, 15 S. W. 182.

County judge not being authorized to receive public school money cannot be indicted for its conversion. *Warswick v. State*, 36 App. 63, 35 S. W. 386.

A subordinate police officer or jailer, not being an officer contemplated by this article, cannot be prosecuted for embezzlement under it. *Hartnett v. State*, 56 App. 281, 119 S. W. 855, 23 L. R. A. (N. S.) 761, 133 Am. St. Rep. 971.

A city secretary cannot be convicted of misapplying funds of the city, where the charter does not require him to handle any such funds, since they do not come into his custody by virtue of his office. *Dickey v. State* (Cr. App.) 144 S. W. 271.

A city secretary cannot be convicted of misapplying a warrant belonging to the city, where he actually deposited the warrant in a bank to the credit of the city, although he deposited it to the credit of a wrong fund for the purpose of covering up a shortage in that fund. *Dickey v. State* (Cr. App.) 144 S. W. 271.

Repayment no defense.—*Busby v. State*, 51 App. 289, 103 S. W. 638.

Evidence.—See *Busby v. State*, 51 App. 289, 103 S. W. 638, and see notes under art. 783, C. C. P.

Evidence of restitution held not admissible in mitigation. *Butler v. State*, 46 App. 287, 81 S. W. 743.

Indictment.—Willson's Cr. Forms, 25, 26.

General requisites, see Code Crim. Proc. art. 467.

Description of money, see Code Crim. Proc. art. 468.

Indictment for fraudulent misapplication of city funds, held sufficient. *Steiner v. State*, 33 App. 291, 26 S. W. 214.

Must allege ownership of money by county, city, or town. *Crane v. State*, 26 App. 482, 9 S. W. 773.

Allegation that defendant was a specified officer and also a clerk and employe of such officer, held, not repugnant. *Busby v. State*, 51 App. 289, 103 S. W. 638.

Charge of court.—See *Busby v. State*, 51 App. 289, 103 S. W. 638. See, also, notes under C. C. P. art. 735.

Mitigation of punishment.—See *Butler v. State*, 46 App. 287, 81 S. W. 743.

Art. 106. [104] Fraudulently receiving misapplied county or city funds.—If any person shall, knowingly and with fraudulent intention, receive or conceal any money or property which has been

taken, misapplied or converted by any officer or employé, as set forth in the preceding article, he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years.

Indictment.—Willson's Cr. Forms, 27, 28.

Art. 107. Officer failing to pay over public money.—Every tax collector, or other officer or appointee, authorized to receive public moneys, who shall wilfully and negligently fail to account for all moneys in their hands belonging to the state, and pay the same over to the state treasurer whenever and as often as they may be directed so to do by the comptroller of public accounts, [Art. 108a, post] and all tax collectors and other officers or appointees authorized to receive public moneys, who shall fail to account for all moneys in their hands belonging to their respective counties, cities or towns, and pay the same over to the respective county treasurers, or city treasurers, whenever and as often as they may be directed so to do by the respective county judges, or county commissioners, courts, or mayor or board of aldermen, [Art. 108b, post] shall be deemed guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than three nor more than ten years; provided, that tax collectors shall have thirty days from the date of such direction within which to comply with the same. [Act 1879, Extra Session, ch. 8, § 4.]

Art. 108. Venue.—Prosecutions for failing to account for, and pay over money belonging to the state, under the provisions of the preceding article, shall be conducted in Travis county; and prosecutions for failing to account for, and pay over, moneys belonging to the counties, cities and towns, shall be conducted in the county to which such money may belong, or in the county where such city or town is situated. [Id., §§ 5, 6.]

Art. 108a. Payment of moneys.—All tax collectors and other officers or appointees authorized to receive public moneys shall account for all moneys in their hands belonging to the state, and pay the same over to the state treasurer whenever and as often as they may be directed so to do by the comptroller of public accounts; provided, that tax collectors shall have thirty days from the date of such direction within which to comply with the same. [Act 1879, S. S., p. 5.]

Explanatory.—This article and art. 108b constitute arts. 7658, 7659 of Vernon's Sayles' Civ. St. 1914, and were a part of the act from which art. 107, Penal Code, was taken. They are here inserted for convenience and in order to supplement art. 107.

Reports and remittances.—See notes under art. 957, Vernon's Sayles' Civ. St. 1914.

The collector's reports and remittances of taxes collected on account of the state and the county are independent of each other. *T. L. & C. C. v. Hemphill County* (Civ. App.) 61 S. W. 334.

After the collection, the collector is required under penalties to promptly report and remit all taxes collected by him to the state and county treasurers without excepting cases in which suits, however promptly filed, may be instituted for the recovery thereof. *Id.*

Certain facts held not to excuse a county tax collector disobeying an order of the commissioners' court to make a payment. *Bailey v. Aransas County*, 46 Civ. App. 547, 102 S. W. 1159.

Art. 108b. Same.—All tax collectors and other officers or appointees authorized to receive public moneys shall account for all moneys in their hands belonging to their respective counties, cities or towns, and pay the same over to the respective county treasurers or city treasurers, whenever and as often as they may be directed so to do by the respective county judges, or county commissioners' courts, or mayor or board of aldermen; provided, that tax collectors shall have ten days from the date of such direction within which to comply with the same. [Act 1879, S. S., p. 6, sec. 2.]

See note under art. 108a.

Art. 109. [105] Collector failing to pay.—The collectors of taxes shall, at the close of each month, pay over to the state treasurer all moneys collected by them during the month for the state, excepting such amounts as they are allowed by law to pay in the counties, reserving only their commissions on the same; and to enable them to do so, they may, at their own risk, secure and send the same to the treasurer by express, or in postoffice orders, at not more than the usual rate of exchange, to be paid by the state; that the collectors of taxes shall pay over to the state treasurer all balances in their hands belonging to the state, and finally adjust and settle their accounts with the comptroller on or before the first day of May of each year; that the treasurer, whenever he may receive from the collectors of taxes postoffice orders, shall collect the same and pay the money so collected into the treasury on the deposit warrant of the comptroller, and the money when so deposited shall be a credit to the tax collector. It shall be the duty of the comptroller to enforce a strict observance of the provisions of this article, but no public moneys shall be paid to the comptroller except such as are made payable directly to him as collector of the same under existing statutes, and expressly provided by law to be paid to him as receiver of taxes; and, in addition to the reports required by law to be made by tax collectors, they shall make a monthly statement under oath, on forms to be provided by the comptroller, showing the amounts collected each month and the funds to which they belong. Any collector of taxes failing to comply with the provisions of this article shall be fined in a sum not less than five hundred and not more than one thousand dollars, and each failure to make the required report shall constitute a separate offense; and it shall be the duty of the comptroller to notify the county attorney, or district attorney, of the county in which the collector resides, and the sureties on the bond of said collector, of any failure to comply with the provisions of this law. [Act March 30, 1887, p. 67.]

Explanatory.—The above article, at the time it was incorporated into the revised Penal Code, had been superseded by Laws 1893, p. 90 (Vernon's Sayles' Civ. St. 1914, arts. 7618-7620). The superseding act, however, was carried into the Penal Code as arts. 144-146, post.

Indictment.—Willson's Cr. Forms, 21, 28.

Art. 110. Maximum amount of fees allowed.—Hereafter the maximum amount of fees of all kinds that may be retained by any officer mentioned in this section (article) as compensation for services shall be as follows: County judge, an amount not exceeding two thousand two hundred and fifty dollars per annum; sheriff, an amount not exceeding two thousand seven hundred and fifty dollars per annum; clerk of the county court, an amount not exceeding two thousand two hundred and fifty dollars per annum; county attorney, an amount not exceeding two thousand two hundred and fifty dollars per annum; clerk of the district court, an amount not exceeding two thousand two hundred and fifty dollars per annum; collector of taxes, an amount not exceeding two thousand two hundred and fifty dollars per annum; assessor of taxes, an amount not exceeding two thousand two hundred and fifty dollars per annum; justices of the peace, an amount not exceeding two thousand dollars per annum; constables, an amount not exceeding two thousand dollars per annum; provided, that this Act shall not apply to justices of the peace or constables except those holding offices in cities of more than twenty thousand inhabitants, to be determined by the last United States census.

Maximum fees in certain counties.—In any county shown by the last United States census to contain as many as twenty-five thousand inhabitants the following amounts shall be allowed, viz:

county judge, an amount not exceeding twenty-five hundred dollars per annum; sheriff, an amount not exceeding three thousand dollars per annum; clerk of the county court, an amount not exceeding twenty-four hundred dollars per annum; county attorney, an amount not exceeding twenty-four hundred dollars per annum; district attorney, an amount not exceeding twenty-five hundred dollars per annum, inclusive of the five hundred dollars allowed by the constitution and paid by the state; clerk of the district court, an amount not exceeding twenty-four hundred dollars per annum; collector of taxes, an amount not exceeding twenty-four hundred dollars per annum; assessor of taxes, an amount not exceeding twenty-four hundred dollars per annum.

Maximum fees in counties containing city of 25,000 inhabitants, etc.—In counties containing a city of over twenty-five thousand inhabitants, or, in such counties as shown by the last United States census, shall contain as many as thirty-eight thousand inhabitants, the following amount of fees shall be allowed, viz: county judge, an amount not exceeding thirty-five hundred dollars per annum; sheriff, an amount not exceeding thirty-five hundred dollars per annum; clerk of the county court, an amount not exceeding twenty-seven hundred and fifty dollars per annum; county attorney, an amount not exceeding thirty-five hundred dollars per annum; district attorney, an amount not exceeding twenty-five hundred dollars, inclusive of the five hundred dollars allowed by the constitution and paid by the state; clerk of the district court, an amount not exceeding twenty-seven hundred and fifty dollars per annum; collector of taxes, an amount not exceeding twenty-seven hundred and fifty dollars per annum; assessor of taxes, an amount not exceeding twenty-seven hundred and fifty dollars per annum; provided, the compensation fixed herein for sheriffs and their deputies shall be exclusive of any rewards received for the apprehension of criminals or fugitives from justice.

Last United States census to govern in all cases.—The last United States census shall govern as to population in all cases. [Act 1897, S. S. p. 9; Act 1897, S. S. p. 43; Act 1913, p. 246, amending arts. 3881–3883, 3887, Rev. St. 1911.]

See arts. 1106–1192, C. C. P.

Explanatory.—Art. 110, Pen. Code 1911, was derived from the same act which made up arts. 3381–3383, 3387, of the Revised Statutes. The named articles of the Revised Statutes were amended by Acts 1913, p. 246, as given above, and hence art. 110, Pen. Code, was thereby superseded. By section 2 of Acts 1913, p. 246, the act takes effect December 1, 1914.

Constitutionality.—This article is not repugnant to article 5, section 21, state constitution. *Hare v. Grayson County* (Civ. App.) 51 S. W. 656.

Repeal of former act.—Acts 17th Leg. c. 87, providing that county clerks shall receive certain sums for ex officio services, in so far as it was mandatory, is repealed by Acts 25th Leg. Ex. Sess. c. 5, entitled "An act to fix certain civil fees to be charged by certain county officers, * * * to limit and regulate the compensation of the * * * clerk of the county court * * * and to repeal all laws in conflict herewith," fixing, by section 10, the maximum fees that may be retained by the clerk of the county court at \$2,500 per annum, and, in addition thereto, one-fourth of the excess fees collected by him, but providing in section 15 that the commissioners' court shall not be debarred from allowing compensation for ex officio services not to be included in estimating the maximum provided in the act when, in their judgment, such compensation is necessary; such compensation not to exceed the amount now provided by law for such services. *Navarro County v. Howard* (Civ. App.) 129 S. W. 857.

"Fees of all kinds."—The phrase "fees of all kinds" embraces every kind of compensation allowed by law to a county clerk unless excepted by some provision of the statute. *Ellis County v. Thompson*, 95 Tex. 22, 64 S. W. 927, 66 S. W. 49.

In Acts 25th Leg. Ex. Sess. c. 5, § 10, fixing the maximum amount of fees of all kinds that may be retained by any officer as compensation for his services, the phrase "fees of all kinds," as applied to the clerk of the county court embraces every kind of compensation allowed by law to him, unless excepted by some provision of the act. *Navarro County v. Howard* (Civ. App.) 129 S. W. 857.

District and County Attorneys.—See arts. 363, 365, *Vernon's Sayles' Civ. St.* 1914. In counties that cast 7,500 votes or more in presidential elections, the county

attorney is entitled to retain for his individual services fees to the extent of \$2,500 and one-fourth of the excess. *Hare v. Grayson County* (Civ. App.) 51 S. W. 656.

Art. 110a. County attorney, compensation in certain counties.—The county attorney in those counties having no district attorney, where he performs the duties of district attorney, may receive the same compensation as provided for the district attorney. [Act 1897, S. S. p. 44, sec. 10; Rev. Civ. St. 1911, art. 3884.]

See arts. 1117a–1117c, 1117f, 1117h, 1118, 1131, C. C. P.

Explanatory.—Certain provisions of Act 1897, S. S. p. 5, constituting a qualification or amplification of the offenses denounced in art. 113, post, were omitted from the revised Penal Code. These omitted provisions are inserted in this compilation as arts. 110a–110g, 113a–113d, 115a–115c, in view of the decision in *Berry v. State* (Cr. App.) 156 S. W. 626.

Art. 110b. District attorney, compensation of.—The maximum fixed for the compensation of the district attorney shall be construed to be the amount which that officer is authorized to retain of fees allowed such officer in his district, whether composed of one or more counties. [Act 1897, S. S. p. 44, sec. 10; Rev. St. 1911, art. 3885.]

See note under art. 110a; see arts. 1117a–1117c, 1117f, 1117h, 1118, 1131, C. C. P.

Art. 110c. County judge, compensation as superintendent of public instruction.—In counties where a county judge acts as superintendent of public instruction, he shall receive such other salary as may be provided by the commissioners' court, not to exceed the sum of six hundred dollars per annum. [Id. sec. 10, Rev. St. 1911, art. 3886.]

See note under art. 110a.

Salary of county judge as county superintendent.—This article empowers the commissioners' court to allow county judges for services as county superintendents of public instruction a salary not to exceed \$600 per annum. This precludes the idea that they are any longer entitled to commissions as provided by the old law. *Stevens v. Campbell*, 26 Civ. App. 213, 63 S. W. 162.

Art. 110d. Officer not collecting maximum fees, etc., may retain out of delinquent fees collected, remainder paid to treasurer.—Any officer mentioned in section 10 of this act [art. 110, ante], who does not collect the maximum amount of his fees for any fiscal year and who reports delinquent fees for that year, shall be entitled to retain, when collected, such part of such delinquent fees as is sufficient to complete the maximum compensation for the year in which delinquent fees were charged, and also to retain the one-fourth of the excess belonging to him, and the remainder of the delinquent fees for that fiscal year shall be paid as herein provided for when collected. [Act 1897, S. S. p. 9, sec. 11; Act 1907, p. 50; Rev. St. 1911, art. 3890.]

Explanatory.—See note under art. 110a. Acts 1907, p. 50, purports to amend "section 2" of Act 1897, S. S. p. 5. From a consideration of the subject-matter of the amendment it is apparent that section 11 was intended, and it was so treated by the revisers of both the Civil and Criminal Statutes.

Art. 110e. Delinquent fees, collection of, commissions on, remainder paid to treasurer.—All fees due and not collected as shown in the report required by section 11 of this act [art. 110f, post] shall be collected by the officer to whose office the fees accrued; and, out of such part of delinquent fees as may be due the county, the officer making such collection shall be entitled to ten per cent of the amount collected by him, and the remainder shall be paid into the county treasury, as provided in section 11 of this act [art. 115a, post]. It shall not be legal for any officer to remit any fee that may be due under the law fixing fees. [Act 1897, S. S. p. 10, sec. 13; Rev. St. 1911, art. 3892.]

See note under art. 110a.

Cannot remit fees.—Since the statute prescribes the county clerk's fees for transcribing the records and making new indexes, a contract between the county clerk and county commissioners fixing the clerk's compensation for such work

even for less than the legal amount was invalid; the county clerk under Pen. Code 1911, art. 113, and this article, having no right to remit any part of his fees. *Russell v. Cordwent* (Civ. App.) 152 S. W. 239.

Collection of fees after expiration of term.—After a county officer has gone out of office he has no right to collect the fees that accrued to his office while he was the incumbent. *Ellis County v. Thompson*, 95 Tex. 22, 64 S. W. 927, 66 S. W. 48.

Art. 110f. Officers to make sworn statement, etc., to show what.—Each officer mentioned in the preceding section [art. 110, ante], and also the sheriff, shall, at the close of each fiscal year, make to the district court of the county in which he resides a sworn statement showing the amount of fees collected by him during the fiscal year, and the amount of fees charged and not collected, and by whom due, and the number of deputies and assistants employed by him during the year, and the amount paid, or to be paid each. [Act 1897, S. S. p. 10, sec. 11; Act 1907, p. 50; Rev. St. 1911, art. 3895.]

See note under art. 110a. See, also, note under art. 110d.

Art. 110g. Officer may appoint deputies, how; county judge not to influence appointment, etc.; compensation, how paid.—Whenever any officer named in articles 3881 to 3886 [Rev. St. 1911; art. 110 of this compilation] shall require the service of deputies or assistants in the performance of his duties, he shall apply to the county judge of his county for authority to appoint same; and the county judge shall issue an order authorizing the appointment of such a number of deputies or assistants as in his opinion may be necessary for the efficient performance of the duties of said office. The officer applying for appointment of a deputy or assistant, or deputies or assistants, shall make affidavit that they are necessary for the efficiency of the public service, and the county judge may require, in addition, a statement showing the need of such deputies or assistants; and in no case shall the county judge attempt to influence the appointment of any person as deputy or assistant in any office. Provided, that in all counties having a population in excess of 100,000 inhabitants, the district attorney of any district, or the county attorney of any county where there is no district attorney, is authorized, with the consent of the county judge of the county for which such appointment is intended, to appoint not to exceed two (2) assistants in addition to his regular deputies or assistants, the number of said deputies not to exceed two for the entire district, regardless of the number of counties it may contain, which two assistants shall not be required to possess the qualifications prescribed by law for district or county attorneys, and who shall perform such duties as may be assigned to them by the county attorney of such county, or the district attorney of such district, and who shall receive as their compensation \$100.00 per month, to be paid in monthly installments out of the county funds, of the county for which such appointment is made, by warrants drawn on such county funds; and provided, further, that in counties having a population in excess of one hundred thousand inhabitants, the district attorney in the county of his residence or the county attorney where there is not a district attorney, shall be allowed by order of the commissioners court of the county where such official resides, as in the judgment of the commissioners court may be necessary, to the proper administration of the duties of such office, not to exceed, however, the sum of \$50.00 per month. Such amount as may be thus necessarily incurred shall be paid by the commissioners court upon affidavit made by the district attorney or the county attorney, showing the necessity of such expense and for what same was incurred. The commissioners court may also require any other evidence as in their opinion may be necessary to show the necessity of such expenditure but they shall be the sole judge as to the necessity for such expenditure and their judgment allowing same shall be final. The maximum amount al-

lowed for deputies or assistants for their services shall be follows, towit:

First assistant or chief deputy, a sum not to exceed a rate of twelve hundred dollars per annum; others not to exceed a rate of nine hundred dollars per annum.

Provided, however, that in counties having a population of 37,500 or over, the maximum salaries allowed for deputies or assistants for their services shall be as follows:

First assistant or chief deputy, a sum not to exceed a rate of eighteen hundred dollars per annum; heads of each department not to exceed the sum of fifteen hundred dollars per annum; others, not to exceed a rate of twelve hundred dollars per annum.

The county judge in issuing his order granting authority to appoint deputies or assistants, shall state in such order the number of deputies or assistants authorized and the amount to be paid each; and the amount of compensation allowed shall be paid out of the fees of office to which said deputies or assistants may be appointed, and shall not be included in estimating the maximum salaries of officers named in articles 3881 to 3886. [Act 1897, S. S. p. 10, sec. 12; Act 1913, p. 286, sec. 1, amending art. 3903, Rev. St. 1911.]

See note under art. 110a.

Explanatory.—Art. 3903, Rev. St. 1911 (Vernon's Sayles' Civ. St. 1914, art. 3903), was amended by Acts 1913, p. 246, approved April 3, 1913, the amendment to take effect December 1, 1914. Such article was again amended at the same session of the legislature (Acts 1913, p. 286) so as to read as above, but the act was made to take effect from and after its passage. The later amendment was approved April 7, 1913.

Art. 111. Fees of district clerk.—The clerks of the district court shall hereafter receive the following fees for the following services: For recording return of any writs when any such return is required by law to be recorded, the amount of fifty cents; when the return exceeds three hundred words, for each one hundred words in excess of three hundred words, ten cents. [Act 1897, S. S. p. 44.]

Explanatory.—The above article, prior to its insertion in the revised Penal Code, had been superseded by Laws 1901, ch. 21, § 1. The superseding act was carried into the Revised Statutes of 1911 as articles 3855, 3856 (same articles in Vernon's Sayles' Civ. St. 1914), which read as follows:—

Fees of clerks of the district courts.—The clerks of the district courts shall receive for the following services in civil cases the following fees, to-wit:

For copy of petition, including certificate and seal, each one hundred words.....	\$ 20
Each writ of citation.....	75
Each copy of citation.....	50
Docketing each cause, to be charged but once.....	20
Every other order, judgment or decree, not otherwise provided for.....	75
Docketing each rule or motion, including rule for cost.....	15
Filing each paper.....	15
Entering appearance of each party to a suit, to be charged but once.....	15
Each continuance.....	20
Swearing each witness.....	10
Administering an oath, affirmation, or taking affidavit, certificate and seal; provided, that he shall only be allowed pay for one certificate to each witness claim for attendance in behalf of plaintiff, and one each in behalf of defendant, at any one term of the court.....	50
Each subpœna issued.....	25
Each additional name inserted in subpœna.....	15
Approving bond (except for cost).....	1 50
Swearing and impaneling a jury.....	35

Receiving and recording a verdict of a jury.....	\$ 35
Assessing damages in each case not tried by a jury.....	50
Each commission to take depositions.....	75
Taking depositions, each one hundred words.....	15
Issuing copies of interrogatories with certificate and seal, per one hundred words.....	15
Each final judgment.....	1 00
Where judgment exceeds three hundred words, the additional fee for each one hundred words in excess of three hundred words shall be.....	15
For each order of sale.....	1 00
For each execution.....	75
For each writ of possession or restitution.....	75
For each injunction writ.....	75
Each copy of injunction writ.....	75
For every other writ not otherwise provided for.....	75
For each copy of writ not otherwise provided for.....	50
Recording returns of any writ, where such return is required by law to be recorded, including the return on all writs, except subpoenas.....	50
Each certificate to any facts contained in his office.....	75
Making out and transmitting the records and proceedings in a cause to any inferior court, for each one hundred words..	10
Making out and transmitting mandate or judgment of the district court upon appeal from the county court.....	1 00
Filing a record in a cause appealed to the district court.....	50
Transcribing, comparing and verifying record books of his office, payable out of the county treasury, upon warrants issued upon the order of commissioners' court, each one hundred words.....	15
Making transcript of records and papers in any cause upon appeal, or writ of error, with certificate and seal, each one hundred words.....	15
Making copy of all records of judgments or papers on file in his office, for any party applying for same, with certificate and seal, each one hundred words.....	15
Taxing the bill of costs in any case with copy of same.....	25
Filing and recording the declaration of intention to be a citizen of the United States.....	2 00
Issuing certificate of naturalization.....	2 50

[Act 1901, p. 24.]

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| 1. Constitutionality. | 6. One order for several cases. |
| 2. Fees for transcript. | 7. Subpoena. |
| 3. Fee for recording return of citation. | 8. Discrimination. |
| 4. Fees in receivership proceedings. | 9. Clerk of criminal district court. |
| 5. Commission on penalties collected. | 10. Fees in criminal cases. |

1. **Constitutionality.**—The provisions in the law limiting the fees and compensation of officers in counties less than 30,000 in population is not a local or special law. A law which relates to persons or things as a class is a general law, while a law which relates to particular persons or things of a class is special and comes within the constitutional prohibition. *Kabelmacher v. Kabelmacher*, 21 Civ. App. 317, 50 S. W. 1118, 51 S. W. 353.

The act of 1897, page 5, in so far as it regulates the compensation of officers and their fees is not unconstitutional. If a law contains more than one subject not expressed in the title the law is void only as to that subject not expressed. *Id.*

2. **Fees for transcript.**—District clerks are entitled to 10 cents per 100 words for making transcripts on appeal. Section 7 of the act of the called session of the 25th legislature, page 12, does not apply. *Kabelmacher v. Kabelmacher*, 21 Civ. App. 317, 50 S. W. 1118, 51 S. W. 353.

District clerks cannot charge more than 10 cents per 100 words for making transcripts in civil cases on appeal. *McLennan County v. Graves*, 26 Civ. App. 49, 62 S. W. 122.

3. **Fee for recording return of citation.**—A clerk cannot charge a fee for recording return of citation, because there is no law requiring such return to be recorded. *Texas M. Ry. Co. v. Parker*, 28 Civ. App. 116, 66 S. W. 583.

4. **Fees in receivership proceedings.**—In railroad receivership proceedings, an allowance to the clerk of court held an allowance for a special duty imposed by the court. *St. Louis Union Trust Co. v. Texas Southern Ry. Co.* (Civ. App.) 126 S. W. 296.

5. **Commission on penalties collected.**—This statute regulates the fees of the clerk in civil actions, and he is not entitled to 5 per cent. commission on moneys collected for the state as penalties for violating the anti-trust laws. Article 1193 of the Code of Criminal Procedure does not apply to civil actions in behalf of the state to recover penalties. *State v. Hart*, 96 Tex. 102, 70 S. W. 948, 949.

6. **One order for several cases.**—Where by agreement of parties one order is to apply to a number of cases, and but one order is entered upon the minutes of the court, the clerk is entitled to a fee but for one order. *Hanrick v. Ake*, 75 Tex. 142, 12 S. W. 818.

7. **Subpœna.**—The insertion of a name in a subpœna, within the statute fixing fees for the district court clerk, held only to be made by the clerk or his deputy. *Altgelt v. Callaghan* (Civ. App.) 144 S. W. 1166.

8. **Discrimination.**—The clerk cannot discriminate between litigants and charge fees against one at a higher rate than he would be entitled to charge the other if the latter had been cast in the suit. *Wichita Mill & Elevator Co. v. State*, 57 Civ. App. 165, 122 S. W. 427.

9. **Clerk of criminal district court.**—See art. 2213, *Vernon's Sayles' Civ. St.* 1914.

10. **Fees in criminal cases.**—See arts. 1106-1192, C. C. P.

Clerk shall compare and certify copies, etc.; fees.—Whenever, in any suit, a certified copy of any petition or any other instrument is necessary in the district court, it shall be lawful for the plaintiff or defendant to prepare such true and correct copy thereof, and submit the same to the clerk of the district court, whose duty it shall be to compare the same with the original instrument, and, if found to be correct, he shall attach his certificate of true copy. For such services he shall receive fifty cents for each certificate and seal, and, in addition thereto, the sum of ten cents per page, three hundred words to the page, for each page of each copy. But nothing in this or the preceding article shall be construed as repealing the maximum fixed by existing law upon the total compensation allowed to district clerks. [Act 1901, p. 24. Act 1897, S. S. p. 44. Act 1897, S. S. p. 12. Act 1895, p. 170.]

Certified copies of petitions.—Under this and the preceding article, where a clerk received and used printed matter prepared by plaintiff to obtain the benefit of such section, from which, by pasting sheets together and filling blanks, he made copies of a petition, he is estopped to claim the larger fee, under section 1, for making copies of such petition. *Wichita Mill & Elevator Co. v. State*, 57 Civ. App. 165, 122 S. W. 427.

Art. 112. Fees of county clerk.—The clerks of the county court shall hereafter receive for the following services the following fees: For recording return of any writ, when any such return is required by law to be recorded, fifty cents; where the return exceeds three hundred words, for each one hundred words in excess of three hundred words, ten cents. [Act 1897, 1st S. S. p. 44.]

For other provisions fixing the fees of the clerks of the county court, and to which art. 113 is applicable, see *Vernon's Sayles' Civ. St.* 1914, arts. 3860-3863.

Art. 113. Penalty for failing to charge up fees, to make report, or to receive back any part allowed deputy.—Any officer named in the three preceding articles [art. 110, ante], and also the sheriff, who shall fail to charge up the fees or costs that may be due under existing laws, or who shall remit any fee that may be due under the laws, or who shall fail to make the report required by this law, or who shall pay his deputy or assistant a less sum than the amount specified in his sworn statement, or receive back any part of such compensation allowed such deputy or assistant, as a rebate, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not less than twenty-five dollars nor more than five hundred dollars. Each act forbidden in this article shall constitute a separate offense. [Act 1897, 1st S. S. p. 5.]

See arts. 1106-1192, C. C. P.

For particular provisions relating to the fees of officers named in arts. 110-110b, see the index to *Vernon's Sayles' Civ. St.* 1914, and Title 15, C. C. P.

Explanatory.—In the original act the words "Section 10 of this act" are used instead of the words "three preceding articles." Section 10 of the act, as amended, appears in this compilation as art. 110.

Contract for compensation.—Since the statute prescribes the county clerk's fees for transcribing the records and making new indexes, a contract between the county clerk and county commissioners fixing the clerk's compensation for such work for less than the legal amount was invalid. *Russell v. Cordwent* (Civ. App.) 152 S. W. 239.

Indictment.—See Willson's Cr. Forms, 183-186.

Art. 113a. Compensation for ex-officio services, when may be allowed by commissioners' court; proviso.—The commissioners' court is hereby debarred from allowing compensation for ex-officio services to county officials when the compensation and excess fees which they are allowed to retain shall reach the maximum provided for in this chapter. In cases where the compensation and excess fees which the officers are allowed to retain shall not reach the maximum provided for in this chapter, the commissioners' court shall allow compensation for ex-officio services when, in their judgment, such compensation is necessary; provided, such compensation for ex-officio services allowed shall not increase the compensation of the official beyond the maximum amount of compensation and excess fees allowed to be retained by him under this chapter. [Act 1897, S. S. p. 10, sec. 15; Act 1913, p. 246, sec. 1, amending art. 3893, Rev. St. 1911.]

See note under art. 110a.

Art. 113b. Officials named in article 110 to keep accounts; duty of grand jury and district judge as to.—It shall be the duty of those officials named in articles 3881 to 3886 [Rev. St. 1911; art. 110 of this compilation], and also the sheriffs, to keep a correct statement of the sums coming into their hands as fees and commissions, in a book to be provided by them for that purpose, in which the officer at the time when any fees or moneys shall come into his hands shall enter the same; and it shall be the duty of the grand jury (and the district judge shall so charge the grand jury) to examine these accounts at the session of the district court next succeeding the first day of December of each year, and make a report on same to the district court at the conclusion of the session of the grand jury. [Act 1897, S. S. sec. 16; Rev. St. 1911, art. 3894.]

See note under art. 110a.

Art. 113c. Monthly report; statement of expenses; audit, etc.—At the close of each month of his tenure of such office each officer whose fees are affected by the provisions of this Act shall make as a part of the report now required by law, an itemized and sworn statement of all the actual and necessary expenses incurred by him in the conduct of his said office, such as stationery, stamps, telephone, traveling expenses and other necessary expense. If such expense be incurred in connection with any particular case, such statement shall name such case. Such expense account shall be subject to the audit of the county auditor, and if it appear that any item of such expense was not incurred by such officer, or that such item was not necessary thereto, such item may be by such auditor or court rejected. In which case the correctness of such item may be adjudicated in any court of competent jurisdiction. The amount of such expense, referred to in this paragraph, shall not be taken to include the salaries of assistants or deputies which are elsewhere herein provided for. The amount of such expense shall be deducted by the officer in making each such report, from the amount, if any, due by him to the county under the provisions of this Act. [Act 1897, S. S. p. 11, sec. 20; Act 1913, p. 246, sec. 1, amending art. 3897, Rev. St. 1911.]

See note under art. 110a.

Art. 113d. Collector and assessor to file with comptroller copies of sworn statements.—The tax collector and tax assessor, at the time of their settlement of accounts with the comptroller, shall file with him a copy of the sworn statement required under section 11 of this act [art. 110f, ante]. [Act 1897, S. S. p. 11, sec. 18.]

See note under art. 110a.

Art. 114. Clerk issuing attachment or subpoena without authority.—Any district clerk who shall issue any attachment or subpoena for any witness, except upon an order of court or upon the written application, signed and sworn to by the defendant or state's counsel, stating that such witness is believed to be a material witness, shall be deemed guilty of a misdemeanor, and, upon conviction, fined in any sum not less than twenty-five dollars and not more than five hundred dollars. [Act 1897, 1st S. S. p. 5.]

See arts. 1137a, 1138, C. C. P.

Explanatory.—Acts 1897, 1st S. S. p. 5, purports in section 1, to apply only to counties having 3000 voters or over. Art. 1577, post, is a general act, not limited to a particular class of counties.

Art. 115. Amounts allowed officers may be retained; state or county not responsible for fees or compensation, when; officers to make sworn statements of fees collected.—The amounts allowed to each officer mentioned in articles 110, 111 and 112 may be retained out of the fees collected by him under existing laws; but in no case shall the state or the county be responsible for the payment of any sum when the fees collected by any officer are less than the maximum compensation allowed by this law, or be responsible for the pay of any deputy or assistant. Each officer mentioned in article 110, and also the sheriff, shall, at the close of each fiscal year, make to the district court of the county in which he resides a sworn statement, showing the amount of fees collected by him during the fiscal year and the amount of fees charged and not collected, and by whom due, and the number of deputies and assistants employed by him during the year, and the amount paid or to be paid each; *and all fees collected by officers named in article 110 during the fiscal year in excess of the maximum amount allowed and of the one-fourth of the excess of the maximum amount allowed for their services, and for the services of their deputies or assistants hereinafter provided for, shall be paid to the county treasurer of the county where the excess accrued;* provided, that any officer in article 110 who does not collect the maximum amount of his fees for any fiscal year and who reports delinquent fees for that year, shall be entitled to retain, when collected, such part of such delinquent fees as is sufficient to complete the maximum compensation for the year in which delinquent fees were charged, and also to retain the one-fourth of the excess belonging to him, and the remainder of the delinquent fees for that fiscal year shall be paid as hereinbefore provided for when collected; provided, that in all counties in this state having more than one judicial district, the district clerks thereof shall in no case be allowed fees in excess of the maximum fees allowed clerks in counties having only one district court. [Act 1897, S. S. p. 9, § 11. Act 1907, p. 50.]

Explanatory.—The words in italics were carried into Rev. St. 1911 as art. 3889. That article was amended by Act 1913, p. 246, so as to read as set out below in art. 115a.

Quarterly bill of fees due officer.—See arts. 1132-1134, 1137a, C. C. P.

Art. 115a. Fees how disposed of; excess fees, etc.—Each officer named in this chapter [Art. 110, ante] shall first, out of the fees of his office, pay or be paid, the amount allowed him, under the provisions of this chapter, together with the salaries of his assistants or deputies. If the fees of such office collected in any year be more

than the amount needed to pay the amount allowed such officer and his assistants and deputies, same shall be deemed excess fees, and of such excess fees such officer shall retain one-fourth; and in counties having between 25,000 and 38,000 inhabitants until such one-fourth amounts to the sum of twelve hundred and fifty dollars; and counties containing a city of more than 25,000 population, or in which county the population exceeds 38,000, until such one-fourth amounts to the sum of fifteen hundred dollars, such population to be based on the United States census last preceding any given year. All amounts received by such officer as fees of his office beside those which he is allowed to retain by the provisions of this chapter, shall be paid into the county treasury of such county. [Acts 1897, S. S. p. 9, sec. 11. Acts 1907, p. 50. Acts 1913, p. 246, sec. 1, amending art. 3889, Rev. St. 1911.]

See *Dallas County v. Bolton*, 158 S. W. 1152.

Explanatory note.—The subject-matter of art. 3889, Rev. St. 1911, of which the above provision is an amendment, was carried into the revised Penal Code as a part of art. 115, ante. This part is printed in italics. It is necessarily superseded by this article.

Amount which might be retained.—The term "maximum" means the specified sum, \$2,500 (in this case), and the phrase, "The excess of the fees collected by the said officers" signifies that sum which remains after taking from the whole the maximum and the amount paid to deputies. Hence the officer is entitled to retain one-fourth of the amount he receives above the maximum after he has paid his deputies. *Ellis County v. Thompson*, 95 Tex. 22, 64 S. W. 927, 66 S. W. 48.

Art. 115b. Certain officers not required to report fees or keep statement; proviso as to district attorney.—The officers named in articles 3881 to 3886 [Rev. St. 1911] in those counties having a population of twenty-five thousand inhabitants or less shall not be required to make a report of fees as provided in article 3895, or to keep the statement provided for in article 3894; the population of the county to be determined by the last United States census; provided, that all district attorneys shall be required to make the reports and keep the statements required in this chapter. [Act 1913, p. 246, sec. 1, amending art. 3898, Rev. St. 1911.]

Explanatory.—Laws 1913, ch. 121, p. 246, amends art. 3898, Rev. St. 1911, which was made up of section 17 of Acts 1897, S. S. p. 11. This provision of the act of 1897 was not carried into the revised Penal Code, and it is now, in its amended form, inserted in this compilation as set forth above. The provisions of arts. 3881-3883, 3887, *Vernon's Sayles' Civ. St. 1914*, are included in this compilation as art. 110, ante.

Indictment.—An indictment charging the tax assessor of D. county with failing to make a report of the fees collected by him, required by law to be made in counties having more than 15,000 population (the number as fixed in the former act) should have alleged that D. county had such population. *Bolton v. State* (Cr. App.) 154 S. W. 1197.

Art. 115c. Fiscal year defined, and regulation of reports.—A fiscal year, within the meaning of this act, shall begin on December 1 of each year; and each officer named in section 10 of this act [art. 110, ante], and also the sheriff, shall file the reports and make the settlement required in this act on December 1 of each year. Whenever such officer serves for a fractional part of a fiscal year, he shall nevertheless file his report and make a settlement for such part of a year as he serves, and shall be entitled to such proportional part of the maximum allowed as the time of his services bears to the entire year. However, an incoming officer elected at the general election, who qualifies prior to December 1 next following, shall not be required to file any report or make any settlement before December 1 of the following year; but his report and settlement shall embrace the entire period dated from his qualification. This act shall take effect and be in force from and after December 1, 1897. [Act 1897, S. S. p. 11, sec. 19.]

See note under art. 110a.

Art. 115d. County and precinct officers to inform persons for whom money is collected; payment of same.—It shall be the duty

of every county and precinct officer in the state of Texas who shall, in his official capacity, collect or receive any money or fees belonging to any witness, officer or other person, to inform such person of the collection of such money or fees, and to promptly pay the same over on demand to the person entitled thereto, taking receipt therefor, which shall be entered or noted in the fee book of such officer. [Act 1907, p. 120.]

Explanatory note.—This provision was inadvertently made a part of art. 115 of the revised Penal Code, and erroneously credited to Act 1907, p. 50. Inasmuch as amendatory provisions have been added to the remaining part of art. 115, and designated as arts. 115a-115c, this part of art. 115 is denominated as art. 115d, so as to place it in proximity with the related provisions included in arts. 116-118.

Art. 116. Officers to make quarterly statements of moneys in their hands uncalled for.—On or before the second Mondays in February, May, August and November of each year, said officers shall make report in writing and under oath to the commissioners' court of their respective counties of all such moneys and fees so collected by them during the quarter last preceding and remaining in their hands uncalled for, giving the number and the style of each cause in which said moneys or fees accrued and the name of the person entitled thereto, which report shall be filed with the county clerk of said county, and the same shall be by him kept and preserved for future reference and examination. [Act 1907, p. 120.]

Art. 117. Moneys not called for to be paid over to county treasurer.—Every officer collecting or having the custody of any money or fees embraced within the provisions of this law at the expiration of four years from the time of collecting or receiving such money or fees, in all cases where the same have not been paid over to the person or persons entitled thereto, shall pay the same to the county treasurer of his respective county, accompanying the same by an itemized statement, as provided in Article 115 [115d] hereof, which statement shall be filed and kept by said treasurer, and said money or fees shall be by him placed to the credit of the road and bridge fund of the county; and the treasurer shall issue to the said officer his receipt for said money or fees, itemizing the same as above provided, which receipt shall be filed by said officer with the county clerk of his respective county; provided, that any officer, upon retiring from office, having any money or fees in his hands embraced within the provisions of this law, and which are not due to be turned over to the county treasurer as herein provided, shall turn the same over to his successor in office, together with an itemized list of the same as hereinbefore provided, taking proper receipt therefor, and his successor shall report and pay over the same to the county treasurer in accordance with the provisions hereof. [Id., p. 120.]

Art. 118. Penalty for violating three preceding articles.—Any person violating any of the provisions of the three preceding articles [115, 116, 117] shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars. [Id., p. 120.]

CHAPTER FOUR

OF ILLEGAL CONTRACTS AFFECTING THE STATE

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| <p>Art.
119. Contract to charge the state, without authority.</p> <p>119a. Regents, etc., of eleemosynary institutions not to make purchases unless expressly authorized by legislature.</p> <p>119b. Same; penalty.</p> <p>120. State purchasing agent shall not be interested in any contract with state, or accept or receive from any person to whom contract has been awarded, rebate, gift, money, etc.; penalty for.</p> | <p>Art.
121. Storekeepers and accountants, appointment of; interest in contracts for supplies; reports; excess of supplies; providing penalty.</p> <p>122. Such officers or employes shall not use or receive provisions, clothing, merchandise or other articles furnished by the state; penalty for so doing.</p> <p>122a. Institutions included; proviso.</p> |
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Article 119. [106] Contract to charge the state, without authority.—If any person or officer in this state shall contract with any other person for his services or labor, or for any property of any kind, with intent to charge the state of Texas with the same, and to do which, such person or officer has no authority by law, he shall be fined in any sum not less than one hundred dollars and not more than two thousand dollars. [Act May 4, 1874, pp. 221–2.]

See art. 376 and notes.

Indictment.—Willson's Cr. Forms, 29.

Art. 119a. Regents, etc., of eleemosynary institutions not to make purchases unless expressly authorized by legislature.—That it shall hereafter be unlawful for any regent, or regents, director or directors, officer or officers, member or members, of any educational or eleemosynary institution of the State of Texas, to contract or provide for the erection or repair of any building, or other improvement or the purchase of equipment or supplies of any kind whatsoever for any such institution, not authorized by specific legislative enactment, or by written direction of the Governor of this State acting under and consistent with the authority of existing laws, or to contract or create any indebtedness or deficiency in the name of or against this State, not specifically authorized by legislative enactment, or to divert any part of any fund provided by law to any other fund or purpose than that specifically named and designated in the legislative enactment creating such fund, or provided for in any appropriation bill. [Act 1913, 1st S. S., p. 32, ch. 22, § 1.]

Art. 119b. Same; penalty.—That any regent, director, officer or member of any governing board of any educational or eleemosynary institution, who shall violate this act shall be at once thereafter removed from his position with such institution, and shall not thereafter be eligible to hold said position, and in addition thereto shall be guilty of a misdemeanor, and shall be punished by imprisonment in the county jail for a period of not less than ten days, nor more than six months, the venue of such case to be in the county in which may be located the institution affected by such acts of such offender. [Act 1913, 1st S. S., p. 32, ch. 22, § 3.]

Art. 120. State purchasing agent shall not be interested in any contract with state, or accept or receive from any person to whom contract has been awarded, rebate, gift, money, etc.; penalty for.—*The state purchasing agent shall not be interested in, or in any manner connected with, any contract or bid for furnishing supplies or articles of any kind to any of said institutions or to any other department or institution of the State, or with any person, firm or corporation who is interested in or in any manner connected with any kind of contract*

with the state or any of its institutions and departments, nor shall he collect or be paid his salary, or any part thereof, while he is in any manner or degree indebted to the state or in arrears in his accounts and reports as such agent. Neither shall said agent accept or receive from any person, firm or corporation to whom any contract may be awarded, directly or indirectly, by rebate, gift or otherwise, any money or other thing of value whatever, nor shall he receive any promise, obligation or contract for future reward or compensation from any such party; provided, that should said purchasing agent violate any of the provisions of this law, or should he receive any rebate, drawback, profit or benefit from any contract, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by confinement in the penitentiary not less than two nor more than five years. [Act 1899, p. 138. Act 1915, p. 194, ch. 126, § 1.]

Explanatory.—A part of section 1, Acts 1899, p. 138, ch. 86, was carried into the Revised Statutes as art. 7325. That article was amended by Acts 1915, p. 194, ch. 126, so as to read as indicated above in italics. This amendment therefore, impliedly repealed the corresponding part of the above article of the Penal Code.

Indictment.—Willson's Cr. Forms, 217, 218.

Art. 121. Storekeepers and accountants, appointment of; interest in contracts for supplies; reports; excess of supplies; providing penalty.—*There shall be appointed by the superintendents, with the advice and consent of the board of managers of said institution, storekeepers and accountants, one for each of said institutions, who shall hold their office for two years from date of qualification, or until their successors shall have qualified, unless sooner removed by the board of managers, at the suggestion of the superintendent or upon complaint of the Purchasing Agent, for inefficiency, incompetency, neglect of duty or other adequate cause affecting their faithful and satisfactory performance of duty; provided, that where the magnitude of an institution is not sufficient to employ a storekeeper and accountant, that the superintendent shall perform that service. Said storekeeper or accountant shall receive a compensation of not to exceed the sum of nine hundred (\$900.00) dollars per annum, to be charged and paid as a part of the current expenses of said institution; and they shall not be entitled to charge, collect or receive any other compensation or commutation or commission, unless it be their own individual board and lodging, when they are required to reside within the institutions to which they are attached. Each of said storekeepers or accountants shall, before entering upon the performance of his duties, make and file with the Comptroller of Public Accounts a bond in the sum of ten thousand (\$10,000.00) dollars, payable to the State of Texas, to be approved by the Governor and filed with the Comptroller, which bond shall be conditioned for the full, faithful, accurate and honest performance of his duties; and it shall not be lawful for said storekeepers or accountants to sell or to in any way be concerned in the sale of any merchandise, supplies or other articles to any of the institutions herein named, or to have any interest in any bid or contract therewith, or with any other institution or department of the state government. The office or position of steward, quartermaster or other similar position heretofore existing in any and all eleemosynary institutions are abolished, and said storekeepers or accountants shall hereafter perform all of the duties, except as may be inconsistent with the provisions of this chapter heretofore imposed upon such abolished officers or employes, as well as such other duties as may be required of them by the management of said institutions. They shall also keep the Purchasing Agent constantly advised as to the amount and character of supplies on hand and the amount and character required in order to keep the institutions constantly provided for, and they shall make report on or before the tenth day of each month to the State*

Purchasing Agent, showing the total amount of appropriation, the total amount expended and the balance unexpended on the first of each month. They shall also furnish any other information respecting such matters as may be desired by the said Purchasing Agent. If at any time any institution accumulates an amount of supplies on hand in excess of its needs, and another institution is in need of any such supplies, the Purchasing Agent shall present such facts to a board composed of the Governor, Comptroller and Purchasing Agent, with the recommendation that such institution in need of such supplies shall be furnished from such excess of supplies, and if approved by the board, shall forthwith transfer any of such from the institution having such excess to such institution in need of such supplies, and the debit and credit shall be made on the basis that such supplies could be purchased in the open market at the time of the transfer, if such is less than the cost under the general contract for such supplies for the fiscal year, otherwise the debit and credit shall be made on the basis of the general contract price for that year, and all controversies as to such shall be determined by a board composed of the Governor, Comptroller and Purchasing Agent; provided, that any educational institution may dispense with the position of storekeeper, provided for in this Act, and select or appoint some person at such institution whose duty it shall be to receive such supplies purchased, and such person shall make the reports to the Purchasing Agent, as is required of the storekeeper in this article. Any person violating any of the provisions of this article shall be deemed guilty of a felony, and, upon conviction thereof, be punished by confinement in the state penitentiary not less than two nor more than five years. [Act 1899, p. 138, § 3; Act 1915, p. 195, ch. 126, § 1.]

Explanatory.—A part of section 3, Acts 1899, p. 138, ch. 86, was carried into the Revised Statutes of 1911 as art. 7327. That article was amended by Acts 1915, p. 195, ch. 126, so as to read as indicated above in italics. This amendment, therefore, impliedly repealed the corresponding part of the above article of the Penal Code.

Art. 122. Such officers and employés shall not use or receive provisions, clothing, merchandise or other articles furnished by state; penalty for so doing.—No officer or employé created by this law shall ever use or receive for their own use any provisions, clothing, merchandise, or other articles furnished by the state, but that the salaries fixed by law shall be their only compensation; and any person who violates this provision shall, upon conviction, be punished by confinement in the penitentiary for a term not less than two nor more than ten years. [Act 1899, p. 142.]

Art. 122a. Institutions included; proviso.—The institutions herein contemplated are those for the care of the insane, deaf and dumb, the blind, the orphans, the Confederate Home and all other State institutions, educational or eleemosynary, now established or that may hereafter be established anywhere in Texas, excepting the penitentiary system and its management, and also excepting the Senate and House of Representatives and all departments in the State Capitol, including General Land Office, and as to such Senate, House of Representatives, departments and General Land Office the present law or custom now in force shall continue; provided, that all contracts designated in Article 16, Section 21, of the Constitution of the State shall be approved by a board consisting of the Governor, Secretary of State and Comptroller. [Act 1915, p. 198, ch. 126, § 1.]

Explanatory.—The above article was created by way of amendment of art. 7327, Rev. St. 1911. It has application to the subject matter of this chapter of the Penal Code, and it is inserted in this compilation for convenience and to properly supplement the penal provisions.

CHAPTER FIVE

COLLECTION OF TAXES AND OTHER PUBLIC MONEY

Art.	Art.
123. Collector extorting excessive taxes, etc.	139. False affidavit of taxpayers.
124. Tax officer, exacting usury.	140. Failure to collect occupation taxes.
125. Tax officer assuming taxes for reward.	141. Failure of dealer to post occupation license.
126. Collectors failing to forward transcript.	142. Penalty therefor.
127. Collector issuing receipt without affidavit.	143. Officer purchasing property sold for taxes.
128. Wrong license no protection.	144. Collector failing to perform certain duties.
129. Obstruction of tax collections.	145. Collector issuing unauthorized tax receipt.
130. Pursuing taxable occupations without license.	146. Clerk failing to make certain certificates.
131. Plumber conducting business without license, penalty for.	147. Persons and corporations liable for occupation tax failing to make report.
132. Penalty not exclusive; tax receipt a license.	148. Persons and corporations liable for franchise tax failing to make report.
133. Payment of tax bars prosecution.	149. Charter or right to do business of corporations forfeited, right of officers to do business in corporate name ceases.
134. Refusal to render or swear to assessment.	149a. Wholesale dealers in or distributors of liquors; "wholesale dealer" defined.
135. Officers of national banks required to furnish tax assessor sworn statement.	
136. Money and notes defined.	
137. Pretended sale of coin, etc.	
138. Penalty for such pretended sale.	

Article 123. [107] Collector extorting excessive taxes, etc.—If any person authorized to collect or receive taxes or other money due the state shall extort or attempt to extort from any one a larger sum than is due, or shall receive any sum of money or other reward as a consideration for granting any delay in the collection of such dues, or for doing any illegal act, or omitting to do any legal act, in relation to the collection of such money, he shall be punished by fine not exceeding five hundred dollars. [P. C. 238.]

Indictment.—Willson's Cr. Forms, 32, 33.

Art. 124. [108] Tax officer exacting usury.—If any assessor or collector of taxes shall advance for a person owing taxes to the government the amount of money so due, and shall charge therefor a rate of interest greater than ten per centum per annum, he shall be punished in the manner provided in the preceding article. [P. C. 239.]

Indictment.—Willson's Cr. Forms, 34.

Art. 125. [109] Tax officer assuming taxes for reward.—Within the meaning of the preceding article is included the case of any assessor or collector who fails to collect taxes due and assumes to be responsible to the government therefor, and receives for such act any compensation or reward. [P. C. 240.]

Indictment.—Willson's Cr. Forms, 35.

Art. 126. [110] Collector failing to forward transcript.—The collector of taxes shall keep a book of such size and character as may be necessary, in which shall be entered quarterly, at the following dates, to-wit, January 1, April 1, July 1 and October 1, or within ten days thereafter, in which to require the returns to be made under the provisions of this article, the several amounts as shown by such returns for which and upon which any person, firm or association of persons is or may be liable to a tax upon occupation under this act, and within fifteen days from the time of receiving and making up the several amounts and the sums due upon such amounts as occupation tax, the collector shall forward to the comptroller of public accounts a transcript or duplicate of the return and the amounts as shown by his record, this transcript and the record from which it is taken to show the amount of such

quarterly returns, and the tax due thereon, from every person, firm or association of persons liable to such tax; and any collector, failing to forward such transcript or duplicate, taken from the pages of such collector's record herein provided for, or who shall forward a false or pretended transcript of such account, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars; provided, that nothing contained in this article is intended to affect the liability which, in the absence of this statute, would be incurred under any penal enactment of this state. [Act 1879, ch. 134.]

Indictment.—Willson's Cr. Forms, 36.

Indictment held bad because it did not conform to the amendment to the article. *Taylor v. State* (Cr. App.) 50 S. W. 343.

Art. 127. [110a] Collector issuing occupation tax receipt without affidavit, etc.—If any tax collector shall issue any occupation tax receipt without first taking or filing the affidavit required by law, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than ten nor more than one hundred dollars. [Act 1895, p. 18.]

Art. 128. [110b] Wrong license no protection.—No occupation tax receipt or license taken out by a merchant of a lower class than the one to which he properly belongs, shall be any protection against a prosecution and conviction for knowingly pursuing that of a higher class and failing to pay the occupation tax due therefor.

Art. 129. [111] Obstruction of tax collections.—If any person shall, by force or threats of force, prevent, or attempt to prevent, the collection of taxes or other money due the state by an officer authorized to enforce such collection, he shall be punished by a fine not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than three months nor more than one year. When the means used to prevent the collection are such as to amount to a riot, or unlawful assembly, the punishment shall be that which is prescribed in article 452 of this Code.

Indictment.—Willson's Cr. Forms, 38.

Art. 130. [112] Pursuing taxable occupation without license.—Any person who shall pursue or follow any occupation, calling or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes due, and not more than double that sum.

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| 1. Constitutionality of provisions. | 14. — Liquor dealers. |
| 2. Interstate commerce. | 15. — Pawnbrokers. |
| 3. Municipal powers. | 16. — Photographers. |
| 4. — Concurrent and conflicting powers of state and municipality. | 17. — Social clubs. |
| 5. Levy of tax. | 18. — Transient merchants. |
| 6. Occupation. | 19. — Traveling salesmen. |
| 7. Employés. | 20. Payment of tax. |
| 8. Particular occupations—Attorneys. | 21. Posting license. |
| 9. — Druggists. | 22. Receipt as license. |
| 10. — Flying Jenny. | 23. Revocation of license. |
| 11. — Hawkers and peddlers. | 24. Indictment and information. |
| 12. — Itinerant physician. | 25. Evidence. |
| 13. — Lightning rod dealers and canvassers. | 26. Penalties. |
| | 27. Habeas corpus. |
| | 28. Repeals. |

See *Ex parte Bell*, 24 App. 428, 6 S. W. 197; *McReynolds v. State*, 26 App. 372, 9 S. W. 617; *Fahey v. State*, 27 App. 146, 11 S. W. 108, 11 Am. St. Rep. 182; *Davidson v. State*, 27 App. 262, 11 S. W. 371; *Curry v. State*, 28 App. 477, 13 S. W. 773.

1. Constitutionality of provisions.—Previous laws of same tenor have been held constitutional. *Higgins v. Rinker*, 47 Tex. 393; *Tonella v. State*, 4 App. 325; *Fahey v. State*, 27 App. 146, 11 S. W. 108, 11 Am. St. Rep. 182; *Floock v. State*, 34 App. 314, 30 S. W. 794.

The occupation tax imposed on liquor dealers by the Act of 1873 was held constitutional. *Harris v. State*, 4 App. 131; *Tonella v. State*, Id. 325; *Giozza v. Tierman*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599. So, also, was the tax on law-

yers, imposed by the Acts of 1873 and 1876. *Languille v. State*, 4 App. 312. So, also, was the tax on dogs, now repealed. *Ex parte Cooper*, 3 App. 489, 30 Am. Rep. 152; *Ex parte Mabry*, 5 App. 93. So, also, the "bell punch" tax of 1879. *Albrecht v. State*, 8 App. 216, 34 Am. Rep. 737. So, also, the tax on the *Police Gazette*, *Illustrated News*, etc. *Thompson v. State*, 17 App. 253; *Baldwin v. State*, 21 App. 591, 3 S. W. 109. So, also, the tax on drummers. *Ex parte Asher*, 23 App. 662, 5 S. W. 91, 59 Am. Rep. 783. But see *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368.

The act of 1895 imposing tax on peddlers, but allowing merchants to sell the same article in counties where they have a place of business without paying such tax, is void. *Ex parte Overstreet*, 39 App. 474, 46 S. W. 825.

Occupation Tax Law (25th Leg. Sp. Sess. p. 49) Rev. St. 1895, art. 5049, subd. 21, requiring peddlers to pay specified taxes, exempting ex-soldiers and other classes of persons, violates Const. art. 8, §§ 1, 2, and Bill of Rights, § 3. *Ex parte Jones*, 38 App. 482, 43 S. W. 513.

The legislature has no power to license lotteries. Sec. 47, art. 3 of the constitution requires the legislature to pass laws absolutely prohibiting lotteries, and so much of article 5049, Revised Statutes 1895, as seeks to levy a tax on lotteries, is unconstitutional. *Barry v. State*, 39 App. 240, 45 S. W. 571.

The act of the 25th Legislature amending article 5049, subdivision 40, Revised Statutes, placing an annual tax of \$350 on peddlers of certain articles, and a different tax on merchants selling the same article, is void. *Ex parte Overstreet*, 39 App. 474, 46 S. W. 825.

Imposing occupation tax upon cotton buyers, but exempting them as merchants, is invalid. *Poteet v. State*, 41 App. 268, 53 S. W. 863.

Rev. St. 1895, art. 5049, subd. 3, imposing a tax on traveling salesmen of patent medicines, except commercial travelers selling at wholesale, is not invalid as class legislation. *Needham v. State*, 51 App. 248, 103 S. W. 857.

Act of 30th legislature levying an occupation tax on all firms, persons, corporations, etc., selling non-intoxicating liquors in local option territory, is unconstitutional. *Ex parte Woods*, 52 App. 575, 108 S. W. 1171, 16 L. R. A. (N. S.) 450, 124 Am. St. Rep. 1107. And see post, art. 157.

The act of the 29th legislature, page 207, imposing an occupation tax on certain persons, etc., procuring assignments and transfers of wages not due, etc., is unconstitutional. *Owens v. State*, 53 App. 105, 112 S. W. 1075, 126 Am. St. Rep. 772.

The act of the 30th legislature, page 275, regulating the practice of barbering, is unconstitutional. *Jackson v. State*, 55 App. 557, 117 S. W. 818.

A municipal ordinance prohibiting the peddling of any merchandise in a city's public square or in any of its public streets, treating all pursuing the same business alike, was not invalid as class legislation. *Ex parte Hogg*, 70 App. 161, 156 S. W. 931.

The failure to pay an occupation tax, whether imposed for revenue or for revenue and police regulation, may be made an offense, and the punishment therefor is not for a debt within the constitutional prohibition. *South v. State*, 72 App. 381, 162 S. W. 510.

Rev. St. 1911, arts. 7355, 7357, imposing an occupation tax of \$100 on traveling vendors of patent medicines, and authorizing the commissioners' court to levy for county purposes one-half of the state occupation tax on all occupations not otherwise specially excepted, and Pen. Code 1911, art. 130, providing that one pursuing a taxable occupation, without first obtaining a license, shall be fined not less than the tax due and not more than double that sum, are not void on the ground that the penalty in part may be fixed by the commissioners' court, levying a tax of one-half of that of the state for the county. *South v. State*, 72 App. 381, 162 S. W. 510.

2. Interstate commerce.—The law imposing a license tax for soliciting orders for photographs, pictures, etc., for a corporation in another State, is a tax upon interstate commerce and is unconstitutional. *Ex parte Holman*, 36 App. 225, 36 S. W. 441.

Where a person travels in Texas for his principal in another State and takes orders for goods and has the goods shipped to him and he delivers them to purchasers, he is engaged in interstate commerce and does not pay occupation tax. *Turner v. State* (Cr. App.) 55 S. W. 835.

Selling goods by samples for house outside of the State is not taxable occupation because it is interstate commerce. *French v. State*, 42 App. 222, 58 S. W. 1015, 52 L. R. A. 160; *Talbutt v. State*, 39 App. 65, 44 S. W. 1091, 73 Am. St. Rep. 903; *Kirkpatrick v. State*, 42 App. 459, 60 S. W. 762.

One who has buggies shipped to him in original packages by the manufacturers residing in another state, and he puts them together and peddles them about the country is liable to pay the tax assessed on such articles. This is not interstate commerce. *Saulsbury v. State*, 43 App. 90, 63 S. W. 568, 96 Am. St. Rep. 837.

The legislature cannot levy an occupation tax upon the sale of lightning rods manufactured in another State and sold in this State by a traveling salesman. *Talbutt v. State*, 39 App. 64, 44 S. W. 1091, 73 Am. St. Rep. 903.

3. Municipal powers.—That a municipal tax may operate as a local prohibition of a lawful pursuit does not authorize a restraint of its collection, so long as the corporation does not transcend constitutional limits. *Ex parte Schmidt*, 2 App. 196. It may tax an insurance company domiciled in another city, and enforce its collection by criminal proceedings against the agent, *Id.*; but it can not levy a license occupation tax on "vehicles kept for hire," in excess of one half the amount levied by the state, *Ex parte Gregory*, 1 App. 753; *Ex parte Slaren*, 3 App. 662; although under its police power it may impose regulations by way of license, and to an amount necessary to enforce such regulations. *Id.*; *Ex parte Gregory*, 20 App. 210, 54 Am. Rep. 516.

A city cannot levy and collect occupation taxes upon a calling, profession or business when the State has not taxed such calling, profession or business. Ex parte Terrell, 40 App. 28, 48 S. W. 504.

A city held authorized to prohibit peddling of any kind of merchandise on its public square or any street within its limits. Ex parte Hogg, 70 App. 161, 156 S. W. 931.

4. — **Concurrent and conflicting powers of state and municipality.**—See art. 965, C. C. P. and notes thereunder.

5. **Levy of tax.**—See *Monford v. State*, 35 App. 237, 33 S. W. 351.

No particular form is prescribed for an order of the commissioner's court levying a tax. *Wade v. State*, 22 App. 629, 3 S. W. 736; *Halfin v. State*, 18 App. 410.

The ground of objection to the introduction of an order of the commissioners' court levying an occupation tax in a prosecution for pursuing an occupation without having paid such tax that the order "had not been read over and signed at the end of the term by the judge as is required by law" did not affirmatively show that the order was not in fact signed by the judge, and was insufficient. *Staten v. State*, 63 App. 592, 141 S. W. 525.

6. **Occupation.**—The following of such occupation without license is the gravamen of the offense. *Viser v. State*, 10 App. 86; *La Norris v. State*, 13 App. 33, 44 Am. Rep. 699; *Standford v. State*, 16 App. 331; *Wells v. State*, 18 App. 417; *Merritt v. State*, 19 App. 435; *Williams v. State*, 23 App. 499, 5 S. W. 136; *McReynolds v. State*, 26 App. 372, 9 S. W. 617. See *Kennedy v. State*, 58 App. 608, 127 S. W. 204. Single sale of liquor not a pursuing of the occupation of a liquor dealer. *Standford v. State*, 16 App. 331; *Halfin v. State*, 18 App. 410.

Sale of three bottles of medicine by a traveling Methodist minister not a pursuing of "occupation of vending medicine." *Love v. State*, 31 App. 469, 20 S. W. 978.

The word "occupation" means vocation, calling, trade or business by which one makes a living or obtains wealth. *Robbins v. State*, 57 App. 462, 123 S. W. 695. See, also, *Cohen v. State*, 53 App. 422, 110 S. W. 66.

7. **Employés.**—Employé, following the occupation, is equally liable with the principal. *La Norris v. State*, 13 App. 33, 44 Am. Rep. 699; *Davidson v. State*, 27 App. 262, 11 S. W. 371. See *Tardiff v. State*, 23 Tex. 169.

8. **Particular occupations—Attorneys.**—Lawyers may be prosecuted and fined for refusing to pay an occupation tax and take out license to practice law. A lawyer is not, as a part of the judiciary system, exempt from occupation tax. The requirement of the statute making it obligatory upon a previously licensed attorney that he shall, before pursuing his practice, obtain another license, is not the impairment of the original contract by license permitting him to practice. To tax the employment of a vested right has never been held to impair it; and though a license be a vested right, yet unless there is something in the privilege by which the state has relinquished the right of taxation, it is presumed to be accepted subject to the power of the state to impose upon its exercise a share of the public burdens. The license to pursue the occupation is not a technical "license" to practice law; it is simply a receipt for the occupation tax. *Languille v. State*, 4 App. 312, to effect that a lawyer's license is a naked privilege, revocable at pleasure by the state, is disapproved. Ex parte *Williams*, 31 App. 262, 20 S. W. 580, 21 L. R. A. 783.

9. — **Druggists.**—See Ex parte *Woods*, 52 App. 575, 108 S. W. 1171, 16 L. R. A. (N. S.) 450, 124 Am. St. Rep. 1107.

The law does not require druggists in local option districts to obtain license to sell such intoxicants. *Gibson v. State*, 34 App. 218, 29 S. W. 1085; *Rathburn v. State*, 88 App. 281, 31 S. W. 189.

10. — **Flying Jenny.**—Where defendant, a farmer, had provided himself with the necessary equipment to operate a flying jenny, an occupation taxed by law, and to operate the same for profit, he was guilty of pursuing an occupation without paying the occupation tax provided therefor. *Robbins v. State*, 57 App. 462, 123 S. W. 695.

11. — **Hawkers and peddlers.**—One selling goods by sample, who merely takes orders, without delivering the goods, is not a peddler. *Potts v. State*, 45 App. 45, 74 S. W. 31, 2 Ann. Cas. 827.

Power of city, Ex parte *Hogg*, 70 App. 161, 156 S. W. 931.

A "peddler" or "hawker" is a small retail dealer, who carries his merchandise with him, traveling from place to place, or from house to house, exposing his or his principal's goods for sale; it being immaterial whether the goods are bartered or sold, or whether the sale is conditional or on the installment plan. The business of peddling is distinct from that of a manufacturer selling his own products, and those who raise or produce what they sell, such as farmers and butchers, are not peddlers. Ex parte *Hogg*, 70 App. 161, 156 S. W. 931.

Under Pen. Code 1911, arts. 3, 6, providing that no person shall be punished for any act unless the same is made a penal offense and a penalty affixed by written law, and providing that the articles in the Penal Code, and other written law may be looked to, article 130, making one pursuing a taxable occupation, without first obtaining a license, liable to a fine not less than the tax due, when read in connection with Rev. St. 1911, arts. 7355, 7357, imposing an occupation tax of \$100 on traveling vendors of patent medicines, and providing that the commissioners' court may levy for county revenue purposes, one-half of the state occupation tax on all occupations, prescribes a penal offense for pursuing the business of peddling patent medicines without first paying the occupation tax imposed by the statute and by the commissioners' court. *South v. State*, 72 App. 381, 162 S. W. 510.

12. — **Itinerant physician.**—See *Fouts v. State*, 51 App. 3, 101 S. W. 223.

Medical specialist dividing his time between two places of business, held, not one "traveling from place to place." *Hairston v. State*, 36 App. 470, 37 S. W. 853.

Where accused for over a year preceding the prosecution had been a resident of the city of V. and had practiced medicine in the county in which such city was situated, he cannot be convicted of pursuing the occupation of an "itinerant physician" without payment of the tax required, even though he was not authorized to practice in the county, because he had not obtained a license and registered as a physician. *Rutherford v. State* (Cr. App.) 169 S. W. 1157.

13. — **Lightning rod dealers and canvassers.**—In Acts Sp. Sess. 25th Leg. c. 18, subd. 35, providing that every person dealing in lightning rods shall pay an annual tax of \$36 to the state and \$18 to the county, and that every person canvassing for the sale of lightning rods shall pay an annual tax of \$100 to the state and \$50 to the county, the word "dealer" is used in the sense of one who buys and sells at his place of business, and one who pays the dealer's tax is not authorized to make sales by canvassing, so that the act is not in violation of Const. art. 8, §§ 1, 2, providing that taxation shall be equal and uniform upon the same class of subjects. *Camp v. State*, 61 App. 229, 135 S. W. 146.

14. — **Liquor dealers.**—See art. 611 et seq., post.

Local option territory. *Gibson v. State*, 34 App. 219, 29 S. W. 1085; *Snearley v. State*, 40 App. 507, 52 S. W. 547, 53 S. W. 636; *Ex parte Bains*, 39 App. 62, 45 S. W. 24; *Williamson v. State*, 41 App. 461, 55 S. W. 570; *Watson v. State*, 42 App. 13, 57 S. W. 102; *Hail v. State*, 48 App. 514, 90 S. W. 503.

An employé of the Pullman Palace Car Company, who, as such, sold liquors upon his employers' cars, was held to be "a person engaged in the business" within the meaning of the statute. *La Norris v. State*, 13 App. 33, 44 Am. Rep. 699; *Davidson v. State*, 27 App. 262, 11 S. W. 371.

It is pursuing or following an occupation, calling, or profession, or doing an act taxed by law, without first obtaining a license therefor, that constitutes this offense, and therefore the mere sale of liquor without obtaining license to sell, is not an offense. In such case it must be proved that the defendant pursued or followed the occupation, or engaged in the business of a liquor dealer. *Merritt v. State*, 19 App. 435; *Haffin v. State*, 18 App. 410; *Wells v. State*, Id. 417; *Stanford v. State*, 16 App. 331; *La Norris v. State*, 13 App. 33, 44 Am. Rep. 699; *Williams v. State*, 23 App. 499, 5 S. W. 136. For evidence improperly excluded, see *Boyd v. State*, 19 App. 446.

The legislature of this state has the power to absolutely prohibit drinking saloons, or saloons to be used in the pursuit of the liquor traffic. This power carries with it the power to regulate the mode and manner and the circumstances under which such saloons may be conducted, and to surround the right with such conditions, restrictions, and limitations as it may deem proper. Under this rule the act of the legislature requiring the execution of a bond as a condition precedent to the granting of a license to conduct a drinking saloon is constitutional. *Ex parte Bell*, 24 App. 428, 6 S. W. 197.

Relator was charged with the offense of pursuing the occupation of a retail liquor dealer without having complied with the license laws. The application for the writ of habeas corpus alleges the refusal of the relator to execute the bond required by law, and prays for relief upon the ground that the conditions of the bond are unconstitutional. Held, that the conditions of the bond can not be inquired into in a proceeding of this character, the bond never having been executed; and that the constitutionality of the conditions can be impeached only in a proceeding to enforce the penalties for their infraction. *Id.* See, also, *Schwartz v. State*, 32 App. 387, 24 S. W. 28.

The article applies especially to retail liquor dealers, and was intended to enforce prompt payment of their occupation tax. A liquor dealer operating his business a single day without posting his license violates the law at his peril. *Schwartz v. State*, 32 App. 387, 24 S. W. 28; *Meroney v. State*, 49 App. 337, 92 S. W. 844.

The local option law, when put into operation, supersedes in such territory occupation tax laws on the sale of liquors. *Gibson v. State*, 34 App. 218, 29 S. W. 1085.

15. — **Pawnbrokers.**—Rev. St. 1911, art. 6155 et seq., declaring what pawnbrokers shall do when receiving an article in pledge, and what they shall do when they sell it, and Pen. Code 1911, art. 641, punishing a pawnbroker violating the law in either receiving or selling a pledged article, do not fix the liability of a pawnbroker pursuing the occupation without first obtaining a license, but his liability is determined by Rev. St. 1911, arts. 7355, 7357, and Pen. Code 1911, art. 130. *Schapiro v. State* (Cr. App.) 169 S. W. 683.

16. — **Photographers.**—The tax is not levied on the vocation of a photographer but on the owner of a photograph gallery, and where a man has a gallery in one county and an employé goes into other counties and takes pictures, but has no gallery in such counties, he does not have to pay the tax in the latter counties. *Mullinnix v. State*, 42 App. 526, 60 S. W. 769.

17. — **Social clubs.**—See *Arnold v. State*, 38 App. 1, 40 S. W. 734.

Bona fide social clubs are not liable to the occupation tax in selling to its members and non-resident visitors, if the sales are not for profit. *State v. Austin Club*, 89 Tex. 20, 33 S. W. 113, 30 L. R. A. 500; *Koenig v. State*, 33 App. 367, 26 S. W. 835, 47 Am. St. Rep. 35. But, see *Krnavek v. State*, 38 App. 44, 41 S. W. 612.

18. — **Transient merchants.**—Under Rev. St. 1911, art. 7355, § 1, providing that from every merchant removing from place to place and offering for sale bankrupt stocks of goods, or advertising fire sales or water and fire damaged stocks for sale, for a limited period, there shall be collected a certain license, and providing that if such merchants remain in one place for 12 months, they shall be required to pay an additional sum according to class and amount of goods sold

in a year, the tax is imposed only on merchants pursuing such occupation temporarily, and an indictment for engaging in such business without license, which did not allege that accused pursued such occupation for a limited period, was fatally defective. *Mistrot v. State* (Cr. App.) 164 S. W. 848.

19. — **Traveling salesmen.**—Defendant held not to be following the occupation of traveling vendor of medicines. *Love v. State*, 31 App. 469, 20 S. W. 978.

Subdivision 3 of article 5049 of the Revised Statutes of 1895, levies an occupation tax on salesmen of medicines, exempting salesmen of wholesale drug houses. Held, that the exemption does not protect a traveling salesman of a wholesale house who sells at retail. The act is constitutional. *Needham v. State*, 51 App. 248, 103 S. W. 857.

20. **Payment of tax.**—Mere tender of tax, without procuring license, not sufficient. *Curry v. State*, 28 App. 477, 13 S. W. 773.

An insurance agent who pays his tax in the county of his residence, cannot be required to pay in another county under the act of 1897. *Sayles' Civil Statutes* 1897, article 5049, subd. 33; *Eichlitz v. State*, 39 App. 486, 46 S. W. 643.

21. **Posting license.**—*Schwartz v. State*, 32 App. 387, 24 S. W. 28.

22. **Receipt as license.**—A valid receipt for the occupation tax will operate as a license. *Fouts v. State*, 51 App. 3, 101 S. W. 223.

23. **Revocation of license.**—It is within the power of the legislature to revoke, by general law, a license to sell liquors, for which an antecedent tax had been received by the state. *Rowland v. State*, 12 App. 418.

24. **Indictment and information.**—*Willson's Cr. Forms*, 40, 44-46, 48, 49. See *Code Crim. Proc.* art. 464. See, also, *O'Neal v. State*, 51 App. 100, 100 S. W. 919.

The indictment must allege the amount of taxes due, as that is the basis of the penalty. *Spears v. State*, 8 App. 467; *Archer v. State*, 9 App. 78; *Sheffield v. State*, 14 App. 238; *Rather v. State*, 15 App. 556. The cases above cited overrule, upon this point, *Carr v. State*, 5 App. 153; *Harris v. State*, 4 App. 131; *Languille v. State*, Id. 313; *Tonella v. State*, Id. 325; *Munch v. State*, 3 App. 552. It must further allege the levy of the tax by the commissioners' court. *Crews v. State*, 10 App. 292. In an indictment for pursuing the occupation of a liquor dealer without payment of the tax, the name of the person to whom the liquor was sold need not be alleged. *Mansfield v. State*, 17 App. 468. A mere sale of intoxicating liquors without engaging in or pursuing the occupation of selling is not an offense. An indictment, therefore, which charges merely a sale of intoxicating liquors without license charges no offense. But there are certain enumerated acts taxed by law, such as exhibiting a theater, dramatic performance, circus, sleight of hand performance, etc., which are made taxable whether engaged in as an occupation or not, and to commit such acts without paying the tax is a penal offense. In such cases it would be sufficient to allege the commission of the act without alleging that the defendant engaged in or pursued such acts as an occupation, calling, etc. *Merritt v. State*, 19 App. 435. The *Illustrated News* and the *Police Gazette* are publications specially enumerated in the statute levying occupation taxes, as among those the sale of which can not be pursued as an occupation without the payment of the occupation tax. It is not necessary, therefore, that the indictment should describe them further than by name. But if the indictment be with reference to a publication not so specifically named it would be essential to allege the character of such publication and that it was illustrated. *Baldwin v. State*, 21 App. 591, 3 S. W. 109. An indictment for pursuing the occupation of keeping a "pool table" was held bad because it did not allege that it was of a kind with some one or all of those enumerated in the statute levying the tax, and that it was used for profit. *Longenotte v. State*, 22 App. 61, 2 S. W. 620. An indictment alleged that on the twenty-fifth day of December, 1883, the defendant followed the occupation, etc. Held, that this was a sufficient allegation of the year in which he followed the occupation, and of the year for which he failed to pay his occupation tax. *Mansfield v. State*, 17 App. 468.

Indictment must allege positively the following of the occupation and the tax due. *Archer v. State*, 9 App. 78; *Rather v. State*, 15 App. 556; *Sheffield v. State*, 14 App. 238.

Indictment alleging all the elements of the offense as set out in the statute, need not allege that defendant had not procured a license before the finding of the indictment. *Fahey v. State*, 27 App. 146, 11 S. W. 108, 11 Am. St. Rep. 182.

Requisites of indictment for failure to pay occupation tax for license to sell intoxicating liquors in local option territory on prescription. *Watson v. State*, 42 App. 13, 57 S. W. 102.

Indictment for selling medicated bitters without a license should allege that the bitters were intoxicating and that the sale was in quantities of a gallon or less. *Cousins v. State*, 46 App. 87, 79 S. W. 549.

Indictment against peddler should negative the fact that defendant was a merchant paying an occupation tax as such. *Potts v. State*, 45 App. 45, 74 S. W. 31, 2 Ann. Cas. 827. See, also, *Needham v. State*, 51 App. 248, 103 S. W. 857.

An information, closely following the language of this article, charging accused with unlawfully engaging in, following, and pursuing the occupation of bringing off a fight between dogs and dogs, which said occupation was then and there made taxable, and was taxed by law, without having first paid the taxes due the state, is sufficient. *Kennedy v. State*, 58 App. 608, 127 S. W. 204.

Under Rev. St. 1911, art. 7355, § 1, providing that every transient merchant offering for sale bankrupt stocks of goods, etc., shall pay a license of \$100 per month for the first month or less, and for each additional month an additional sum of \$20, but that, where he remains for six months, in addition to the \$100 for the first month, he shall pay \$10 per month, and that, where he remains twelve months, he shall pay the license levied upon the ordinary retail merchant, an

information not alleging how long defendant had been located in the county was not specific enough to show what tax, if any, was due; and, where it charged in one place that Mistrot Bros. and ——— Mistrot engaged in the business, and in another that C. L. Mistrot, one of the firm, engaged in such business, it was so vague that it could not be determined whether Mistrot Bros. or C. L. Mistrot was liable for the tax. *Mistrot v. State*, 72 App. 408, 162 S. W. 833.

A complaint and information, which alleges that accused unlawfully pursued the occupation of pawnbroker, which occupation was taxable by law, without obtaining a license therefor, and which avers that the tax due the state was \$150, and that the tax due the county was \$75, and that the tax due the county had been levied by the commissioners' court, is sufficient without alleging that the commissioners' court had entered the order fixing the county tax, and without alleging that accused loaned money, received deposits as security for the payment of loans and interest on personal property, and what property he took as security and to whom he made loans. *Schapiro v. State* (Cr. App.) 169 S. W. 683.

25. **Evidence.**—See *Boyd v. State*, 19 App. 446; *Petteway v. State*, 36 App. 97, 35 S. W. 646.

The levy of the tax and the amount thereof must be proved. *Crews v. State*, 10 App. 292; *Mansfield v. State*, 17 App. 468; *Barnes v. State*, 44 App. 473, 72 S. W. 177; *Scott v. State*, 47 App. 176, 82 S. W. 656.

Proof of a single sale will not sustain allegation of pursuing the occupation. *Stanford v. State*, 16 App. 331; *Merritt v. State*, 19 App. 435; *Halfin v. State*, 18 App. 410.

Payment of the United States special revenue tax is prima facie evidence of the following of the occupation, which payment may be shown by a copy of the entries in the books of the Internal Revenue office. *Floek v. State*, 34 App. 314, 30 S. W. 794; *Gersteman v. State*, 35 App. 318, 33 S. W. 357; *Monford v. State*, 35 App. 237, 30 S. W. 351.

In a prosecution for fighting dogs without having first paid the occupation taxes due the state, evidence held insufficient to sustain a conviction. *Kennedy v. State*, 58 App. 608, 127 S. W. 204.

See, also, notes under art. 783, C. C. P.

26. **Penalties.**—The minimum penalty for pursuing the occupation of retail liquor dealer, without having first procured license and paid the tax therefor, is by fine not less than the tax imposed. As one year is the shortest period of time for which license will issue for such occupation, the minimum fine assessable is the amount of the tax for one year. *Davidson v. State*, 27 App. 262, 11 S. W. 371.

27. **Habeas corpus.**—One properly charged with pursuing an occupation without a license, cannot on habeas corpus show a receipt for the license tax. *Ex parte Jennings* (Cr. App.) 172 S. W. 1143.

28. **Repeals.**—This article is not repealed by the act of 1897, and, construing it with art. 529s, it provides for obtaining the license required by law. *Gustafson v. State*, 40 App. 67, 45 S. W. 717, 48 S. W. 518, 43 L. R. A. 615.

Art. 131. Plumber conducting business without license; penalty for.—Any person, whether as master plumber, employing, or journeyman plumber, engaged in, working at, or conducting the business of plumbing without license, as provided by law, shall be guilty of a misdemeanor, and, on conviction thereof, shall pay a fine of not less than twenty nor more than two hundred and fifty dollars. [Act 1897, p. 236.]

Necessity of license.—Rev. St. 1911, art. 986, provides that every city having underground sewers or cesspools shall regulate the tapping thereof, and house draining and plumbing. Articles 987 and 988 require such cities to create a board for the examination of plumbers. Held that, where accused was charged with conducting a plumbing business in a town without a license, but it was not shown that the town had underground sewers or cesspools, or that it had any such officers as could constitute a plumbing examiners' board, and had no such board, a conviction could not be sustained. *Brown v. State* (Cr. App.) 167 S. W. 348.

Indictment.—Willson's Cr. Forms, 47.

Art. 132. [113] Penalty not exclusive.—The preceding articles shall not be construed so as to affect any civil remedy to enforce the collection of taxes.

Art. 133. [114] Payment of tax bars prosecution.—Any person prosecuted under article 130 of the Penal Code of the state of Texas shall have the right at any time before conviction to have such prosecution dismissed upon payment of the tax and all costs of said prosecution, and procuring the license to pursue or follow the occupation for the pursuing which, without license, the prosecution was instituted; and no prosecution shall be commenced against any person after the procuring of said license, notwithstanding they may have followed such occupation, calling or profession before procuring said license; provided, said license shall cover the time said person has actually followed said occupation,

calling or profession. The county clerk shall be entitled to ten cents for issuing the license, to be paid by the person to whom it is issued. [Act March 15, 1881, pp. 34-5.]

Cited, *Fahey v. State*, 27 App. 146, 11 S. W. 108, 11 Am. St. Rep. 182.

Dismissal of prosecution.—It was improper for the officer to issue the license until both tax and costs were paid, but the court erred in charging the jury to convict if the defendant paid the tax before trial but did not pay the costs then accrued. *Rogers v. State*, 35 App. 543, 34 S. W. 634.

Minimum penalty.—*Davidson v. State*, 27 App. 262, 11 S. W. 371.

Art. 134. [115] Refusal to render or swear to assessment.—If any person shall refuse or neglect to make out and render a list of his taxable property, when called upon in person by the assessor of taxes or his deputy, or shall fail or refuse to qualify to the truth of his statement of taxable property, or shall fail or refuse to subscribe to any oath or affirmation required by law in the rendition of taxable property, he shall be fined in any sum not less than twenty nor more than one thousand dollars. [Act Aug. 19, 1876, pp. 196-7.]

Fiduciaries.—This article includes all holdings of taxable property held as agent, trustee or in other fiduciary capacity. *Downes v. State*, 22 App. 393, 3 S. W. 242.

President of national bank.—The president of a national bank, when called upon by the assessor to do so, must render a sworn statement showing the number and amount of shares of stock of such bank and the names of the owners of such shares and the number and amount of stock owned by each shareholder, and his refusal or neglect to do so, subjects him to punishment under this article. *Downes v. State*, 22 App. 393, 3 S. W. 242; Gen. Laws, 19 Leg., Reg. Sess., pp. 105-106.

Time for prosecution.—Article 7575, *Vernon's Sayles' Civ. St.* 1914, authorizes a delinquent to exculpate himself before the board of equalization, for refusal, etc., to render a list of taxable property, and he has until the first Monday in June of the year for which he is delinquent, to give reasons for his refusal, etc. Therefore, a prosecution instituted against him for such refusal, etc., before the expiration of said date, is premature and not maintainable. *Mock v. State*, 11 App. 56; *Galbraith v. State*, 33 App. 331, 26 S. W. 502.

Indictment.—*Willson's Cr. Forms*, 50, 51.

This article must be construed in connection with the provisions of the Civil Statutes which prescribe the duties in this regard of all owners and holders of taxable property, and therefore an indictment based on said articles must allege the year for which the defendant's property was assessable. *Berry v. State*, 10 App. 315; *Haugh v. State*, 12 App. 343. An indictment under this article should allege: 1. That the accused was a person required by law to render such list. 2. That he held or owned taxable property on the first day of January of the year for which the property is required to be listed. 3. That he was called upon in person by the assessor of taxes to render a list of his taxable property for the year, naming the year, and stating the time when he was so called upon. 4. That he refused or neglected to make out and render such list of the taxable property held and owned by him on the first day of January of the year for which he was called upon to list. *Caldwell v. State*, 14 App. 171; *Willson's Cr. Forms*, 44, 46; *Davidson v. State*, 27 App. 262, 11 S. W. 371.

Recognizance.—See note under Code Crim. Proc. art. 919.

Art. 135. Officers of national bank required to furnish tax assessor sworn statement.—If any president, vice president, or cashier, of any national bank shall fail or refuse to furnish the tax assessor or deputy tax assessor, when called upon to do so by such tax assessor or deputy tax assessor, a sworn statement, showing:

1. A list of the names of all the shareholders of the stock of such national bank.

2. The number and amount of the shares owned and held by each shareholder of stock in such national bank.

3. The place of residence of each stockholder in such bank, if known. (If not known, that fact shall be so stated.)

4. The amount or amounts of notes issued by such national bank and circulating as money, or that is intended to circulate as money (stating such amounts in dollars.)

5. The amount of money on hand or in transit, or in the hands of other banks, bankers, brokers or others, subject to draft, whether the same be in or out of the state.

6. The amount of indebtedness of such bank and how such indebtedness is evidenced.

7. The amount of paper evidencing indebtedness owned by such bank, which was acquired by such bank, either at par or at a discount.

They shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine of not less than one hundred dollars nor more than one thousand dollars, and by confinement in jail not less than ten days nor more than thirty days. [Act 1897, p. 157.]

See notes to art. 134, ante.

Indictment.—Willson's Cr. Forms, 275.

Art. 136. Money and notes defined.—By the term money and notes, mentioned in the preceding article, is meant all money owned and on hand by such bank, whether on deposit or otherwise. [Act 1897, p. 157.]

Art. 137. [116] Pretended sale or transfer of coin, notes or bonds.—Any evasion by any means of artifice, or temporary or fictitious sale, exchange or pretended transfer upon any bank book, of gold and silver coin, bank notes, or other notes or bonds, subject to taxation under the laws of this state, for United States non-taxable treasury notes, or any notes or bonds not so subject to taxation, and any such pretended sale, exchange or transfer not made in good faith, and by actual exchange and delivery of the funds so sold, exchanged or transferred, and made only by entry on bank books, or by any express or implied understanding not to immediately make a bona fide and permanent sale, shall be deemed prima facie to be a fraud upon the public revenue of this state. [Act March 23, 1891, p. 39.]

Indictment.—Willson's Cr. Forms, 694.

Art. 138. Penalty for such pretended sale.—The president, cashier or secretary of any banking or other corporation, or any person that may be a party or privy to such fraudulent sale, exchange or transfer, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, and in addition thereto shall be confined in the county jail not less than ten days nor more than thirty days. [Act March 23, 1891, p. 39.]

Art. 139. False affidavit.—All assessors of taxes in this state shall require all taxpayers, when assessed by them, to make oath as to any such sale, exchange or transfer made by them, on the first day of January, or within sixty days before said first day of January of any year for which any such assessment is made, as to the good faith and bona fide business transaction of any such sale, exchange or transfer, as above set forth, if any such should have been made by them; and if it should be disclosed that any such pretended sale, exchange or transfer has been made for the purpose of evading taxation, then, and in that event, the assessor shall list and render against such person the coin, bank notes or other notes or bonds subject to taxation under the laws of this state; provided, that if any person shall make a false affidavit as to any of the foregoing facts, he shall be deemed guilty of perjury and be punished as is now provided by law. [Act March 23, 1891, p. 40.]

Art. 140. [117] Failure to collect occupation taxes.—It shall be the duty of the tax collector to make an affidavit before any justice of the peace against any person, firm or association of persons engaging in or pursuing any occupation on which, under the laws of this state, a tax is imposed, who fails or refuses to pay the same. And any collector of taxes who shall knowingly permit any person, firm or association of persons to engage in or pursue any occupa-

tion on which, by the laws of this state, a tax is imposed, without first paying all legal taxes assessed against such person, firm or association of persons, for such occupation, for state and county purposes, shall be fined in any sum not less than fifty nor more than five hundred dollars for every such offense; provided, that evidence that such collector of taxes has made the affidavit herein required immediately against such person, firm or association of persons, so pursuing an occupation in violation of law, shall be a defense against all prosecutions under this article. [Act April 2, 1887, p. 128.]

Indictment.—Willson's Cr. Forms, 39.

Art. 141. [118] Failure of dealer to post occupation license.—

1. Any person, firm or corporation, required by the statutes of this state to pay an occupation tax as a retail liquor dealer, shall post and keep posted in a conspicuous place in his or their place or places of business, his or their occupation license for the tax due the state, county and city, on the occupation in which they are engaged. Said occupation license shall be posted as above specified before any person, firm or corporation, subject to the occupation tax, shall engage in business.

2. Any person, firm or corporation failing, neglecting or refusing to post or keep posted their occupation license, as required in section one of this article, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in double the amount of their occupation tax for each offense, and each day any person, firm or corporation shall violate the provisions of this article shall constitute a separate offense.

3. If from any cause any certificate of occupation license shall be lost, or destroyed, it shall be the duty of the clerk, upon application of the person, firm or corporation who formerly had such license, to furnish a new certificate for the remainder of the term covered by the license lost or destroyed. [Act April 4, 1887, p. 132.]

Constitutionality.—Bell v. State, 28 App. 96, 12 S. W. 410.

Posting license.—Posting license is required in order to enforce prompt payment of the occupation tax. Schwartz v. State, 32 App. 387, 24 S. W. 28.

Gravamen of the offense is pursuing the occupation without having paid the occupation tax and posting the license. Schwartz v. State, 32 App. 387, 24 S. W. 28; Meroney v. State, 49 App. 337, 92 S. W. 844.

Separate offenses.—Each day's failure is a separate offense. Schwartz v. State, 32 App. 387, 24 S. W. 28.

Indictment.—Willson's Cr. Forms, 308.

Art. 142. Penalty.—Any person violating the provisions of this article may be arrested without warrant by any peace officer and carried before the nearest justice of the peace for trial; and any peace officer who shall fail or refuse to arrest such person on his own knowledge, or upon information from some credible person, shall be punished by fine not exceeding five hundred dollars.

See Willson's Cr. Forms, 309.

Art. 143. [119] Officer purchasing property sold for taxes.—If any sheriff, or collector of taxes, of any county in this state, deputy sheriff or deputy collector, or any employé of such sheriff or collector authorized by him to collect or receive taxes, or to assist in any way in making sales for the collection of taxes, shall, in the county where he resides, bid for, purchase or attempt to purchase, or be in any way interested in the purchase of any property, either real or personal, at any sale of such property, made or attempted to be, for the collection of state and county taxes, or either, he shall be fined not less than ten nor more than one thousand dollars, and any such officer so offending shall be deemed guilty of official miscon-

duct, and, upon conviction, shall be removed from office. [Act February 9, 1883, p. 7.]

Art. 144. [119a] Tax collector failing to perform certain duties.—If at the end of any month the collector of taxes shall fail to make to the comptroller of public accounts his itemized monthly report of taxes collected, or if he shall fail at the end of any month to make to the commissioners' court his itemized monthly report of all tax collections for the county, or if he shall fail at the end of any month, or within three days thereof, to promptly remit to the state treasurer the amount due by him to the state, or pay over to the county treasurer the amount due by him to the county, or if he shall fail to make out and post, between April 1 and 15 of each year, a list of delinquent or insolvent taxpayers, he shall be deemed guilty of a misdemeanor, and, upon conviction, fined in a sum not less than three hundred nor more than one thousand dollars, and each failure shall constitute a separate offense. [Act of 1893, p. 91.]

See art. 109, and note thereunder.

Art. 145. [119b] Tax collector issuing unauthorized tax receipt.—Any collector of taxes in this state, who shall issue an occupation tax receipt upon any blank paper, or blank of any kind whatever other than the blank occupation tax receipt furnished to him as required by law, shall be deemed guilty of a misdemeanor, and each receipt so unlawfully issued shall constitute a separate offense, and, upon conviction in any court of competent jurisdiction, shall be punished by fine of not less than one hundred dollars nor more than five hundred dollars. [Id.]

See art. 109, and note thereunder.

Art. 146. [119c] Clerk failing to make certain certificates.—If the county clerk shall fail to examine the monthly reports of the collector of taxes, and within two days after the presentation to him of said reports by the collector, to certify to their correctness as regards names, dates and amounts, or shall fail to file the report intended for the commissioners' court, together with the tax receipt stubs in his office for the next regular meeting of the commissioners' court, he shall be deemed guilty of a misdemeanor, and, upon conviction, fined in a sum not less than fifty nor more than two hundred dollars, and each failure shall constitute a separate offense. [Id. p. 92.]

See art. 109, and note thereunder.

Art. 147. Persons and corporations liable for occupation tax failing to make report.—If the comptroller has reason to believe, or does believe, that any individual, company, corporation, association, receiver or receivers, subject to the provisions of the law providing for the levy of occupation taxes, has made a false return, or has failed or omitted to make a full return of gross receipts, or other statement of business done, required by any of the provisions of said law, he shall report the same in writing to the governor, and it shall be the duty of the governor to immediately require the revenue agent of the state of Texas to examine any books, papers, documents, or other records or evidence showing or tending to show such unlawful act or omission. Said revenue agent shall check the report made with such books, papers, documents or other records or evidence, and make his report to the comptroller; and, if it appears from said report that any false or incorrect return has been made, or that any individual, or the president, treasurer or superintendent of any company, corporation or association, or any member of any firm required by this act to make reports, has failed or

omitted to make a full return, as required by law, then the comptroller shall notify such individual, or the president, treasurer or superintendent of any company, corporation or association, or receiver or receivers of any company, corporation or association, or any member of any firm, to make forthwith an additional or supplemental report; and if any such individual or the president, treasurer or superintendent of any company, corporation or association, or any member of a firm, or any receiver or receivers of any company, corporation or association making said original report, shall fail or refuse to make said additional or supplemental report, he shall be guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than two hundred nor more than five hundred dollars; and venue of such prosecution is hereby fixed in Travis county, Texas. [Act 1907, p. 488.]

Indictment.—Willson's Cr. Forms, 43, 52.

Art. 148. Persons or corporations liable for franchise tax failing to make report.—Every person required by the law prescribing franchise taxes to be paid by corporations to make any annual report to the secretary of state, who shall, for a longer period than five days, and every person who shall, for more than ten days after the mailing by the secretary of state demand upon him for any other report, which the secretary of state is by this law authorized to require, fail or refuse to make such report, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than fifty dollars and not more than two hundred dollars; and each day of such failure or refusal after the expiration of said five days or said ten days, as the case may be, shall constitute a separate offense. The secretary of state shall keep a record of the mailing of any and all notices and demands for reports provided for by this law. [Act 1897, ch. 120; Act 1905, ch. 72; Act 1907, p. 505.]

Explanatory.—Acts 1913, p. 327, § 2 (Vernon's Sayles' Civ. St. 1914, art. 7397b) provides that corporations failing to make the reports required by the act relating to franchise taxes shall be subject to a penalty of \$10 per day, recoverable by civil action to be instituted by the attorney general. It would seem that this act supersedes the criminal penalty imposed by art. 148 above.

Art. 149. Charter or right to do business of corporations forfeited, right of officers to do business in corporate name ceases.—In any and all cases in which the charter or right to do business of any private domestic corporation, heretofore or hereafter chartered under the laws of this state, or the permit of any foreign corporation or its right to do business within this state, shall have been, or shall hereafter be, forfeited, it shall be unlawful for any person or persons who were or shall be stockholders, or officers of such corporation at the time of such forfeiture to do business within this state in or under the corporate name of such corporation, or to use signs or advertisements of such corporation or similar to the signs or advertisements which were used by such corporation before such forfeiture; and each and every person who may violate any of the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one hundred dollars and not more than one thousand dollars; provided, the inhibition and penalties prescribed by this article shall not apply where the right of such corporation to do business within this state has been revived in the manner provided by law and is at the time in good standing. [Act 1907, p. 507.]

Art. 149a. Wholesale dealers in or distributors of liquors; "wholesale dealer" defined.—Each and every individual, company, corporation or association created by the laws of this State or any other State, who shall engage in his own name or in the name of

others, or in the name of its representatives or agents in this State, in the business of a wholesale dealer or a wholesale distributor of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, shall make quarterly, on the first days of January, April, July and October of each year, a report to the Comptroller of Public Accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the gross amount collected and uncollected from any and all sales made within this State of any of said articles during the quarter next preceding. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the Treasurer of the State of Texas an occupation tax for the quarter beginning on said date, equal to one half of one per cent of said gross receipts from said sale as shown by said report.

A wholesale dealer or distributor, within the meaning of this Section, is any individual, company, association or corporation selling any of the articles hereinbefore mentioned in any quantity, for cash or on credit, either in his own name or in the name of others, or in the name of its representatives or agents, to retail dealers or to consumers, not to be drunk on the premises, or who deliver on consignment to their agents for retail or for delivery to consumers, provided the above shall not apply to sales to consumers, where the liquor sold is delivered to the purchaser in person, at the dealers place of business and at time of sale, and where the amount sold does not exceed one gallon.

For the purpose of ascertaining the amount of gross receipt tax due each quarter by each and every individual, company, corporation, or association created by the laws of this State or in any other State, who shall engage in his own name or in the name of others, or in the name of its representatives or agents in this State in the business of a wholesale dealer or a wholesale distributor of spirituous, vinous or malt liquor or medicated bitters capable of producing intoxication, it shall be the duty of each and every individual, company, corporation or association selling any of the articles hereinbefore mentioned either in his own name or in the name of others, or in the name of its representatives or agents, to keep a plain, legible record of the date of each and every such sale or consignment, the name and address of the retail dealer or individual to whom sold or consigned, the quantity, the price, and the manner in which shipment or delivery was made; and this record shall be subject to the inspection of the Comptroller of [or] the State Revenue Agent or their representatives at any time they see proper to investigate said records.

Any person, company, corporation or association, or any receiver or receivers failing to keep a record as provided for in this Act, shall forfeit and pay to the State of Texas a penalty not exceeding one thousand dollars. [Act 1913, p. 33, ch. 19, § 1, amending Art. 7379 Rev. St. 1911.]

Definitions—"Gross receipts."—In this article the term "gross receipts," though ordinarily meaning the gross amount of cash received, includes the gross amount collected and uncollected of all the sales, on which amount the percentage must be computed to determine the tax. *Eppstein v. State* (Civ. App.) 138 S. W. 1124.

—"Receipts."—The tax imposed by this article is a tax on the gross sales whether collected or uncollected during the preceding quarter; the word "receipts," when used in a commercial sense, meaning the receiving of obligations or promises to pay, whether written or verbal, as well as cash. *Eppstein v. State*, 105 Tex. 35, 143 S. W. 144.

IMPOSING OCCUPATION TAX ON PERSONS DEALING IN UNEARNED WAGES OF ANOTHER

Laws 1905, ch. 111, imposing a tax in such case was held unconstitutional in *Owens v. State*, 53 App. 105, 112 S. W. 1075, 126 Am. St. Rep. 772, and was omitted from the revised penal code.

GROSS EARNINGS TAX ON RAILROADS

Laws 1905, ch. 141, imposing a gross earnings tax on railroads was held invalid as interfering with interstate commerce, and section 3, thereof, making it a misdemeanor to omit the making of the reports required by the statute, was not carried into the revised penal code. See *Galveston, H. & S. A. Ry. Co. v. State*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031.

CHAPTER SIX

OCCUPATION TAX ON SOLICITING ORDERS IN LOCAL
OPTION DISTRICTS, COLD STORAGE AND C. O. D.
SHIPMENT OFFICES

Art.		Art.	
150.	Persons, firms or corporations soliciting orders for intoxicating liquor.	153.	Clerk required to make report of all licenses issued.
151.	Persons, firms or associations operating cold storage.	154.	Providing penalty for violation.
152.	Persons, firms or corporations desiring to engage in either business to file application and pay tax.	155.	Persons, firms or corporations maintaining office for C. O. D. intoxicating liquor shipments.
		156.	Penalty for maintaining such office without paying tax.

Article 150. Persons, firms or corporations soliciting orders for intoxicating liquor.—In all counties, justice precincts, towns, cities or other subdivisions of a county, where the qualified voters thereof have, by a majority vote, determined that the sale of intoxicating liquors shall be prohibited therein, there is hereby levied upon all firms, persons, association of persons and corporations that pursue the business of selling or offering for sale any intoxicating liquors by soliciting or taking orders therefor, in any quantities whatsoever, in any such county, justice precinct, town, city or other subdivision of a county, an annual state tax of four thousand dollars; and each county, and also each incorporated city or town, may levy an annual tax not exceeding two thousand dollars in any such county or incorporated city or town where such business is pursued. [Act 1897, p. 128. Act 1907, ch. 112, p. 212. Act 1909, p. 53.]

Explanatory.—Arts. 606a-606g, post, wholly or partly supersede arts. 150-154. These articles may still theoretically operate in respect to transactions within the exceptions named in arts. 606f-606k. It would seem, however, that, for all practical purposes, arts. 150-154 are dead legislation, in view of the very high licenses exacted.

Constitutionality.—*Edmanson v. State*, 64 App. 413, 142 S. W. 887; *Craft v. State* (Cr. App.) 147 S. W. 1163; *Barnes v. State* (Cr. App.) 170 S. W. 548, L. R. A. 1915C, 101.

Levy of tax.—*Edmanson v. State*, 64 App. 413, 142 S. W. 887.

Procuring liquors on request.—*Jones v. State*, 60 App. 611, 132 S. W. 934.

Soliciting orders.—*Barnes v. State* (Cr. App.) 170 S. W. 548, L. R. A. 1915C, 101.

Indictment or complaint.—*Willson's Cr. Forms*, 323.

A complaint and information are defective if they fail to state that the "solicitation" "was for the sale or delivery of intoxicating liquors in said county." *Patterson v. State* (Cr. App.) 90 S. W. 31.

Evidence.—*Edmanson v. State*, 64 App. 413, 142 S. W. 887.

Art. 151. Persons, firms or corporations operating cold storage.—In all counties, justice precincts, towns, cities or other subdivisions of a county, where the qualified voters thereof have, by a majority vote, determined that the sale of intoxicating liquors shall be prohibited therein, there is hereby levied upon all firms, persons, association of persons and corporations that pursue the business of keeping, maintaining or operating what is commonly known as a "cold storage," or any place by whatever name known, or whether named or not, where intoxicating or non-intoxicating liquors or beverages are kept on deposit for others, or where any such liquors are kept for others under any kind or character of bailment, an annual state tax of two thousand dollars. Counties, incorporated cities and towns, where such business is located, may each levy an

annual tax of not exceeding one thousand dollars upon each such place so kept, run, maintained or operated. [Id.]

See note under art. 150.

Cited, *Caswell & Smith v. State* (Civ. App.) 148 S. W. 1159.

Definitions—"Nonintoxicating liquors and beverages."—The words "nonintoxicating liquors and beverages," in this article considered in connection with the evil intending to be corrected and with the history of the legislation upon the same subject, have reference to alcoholic or spirituous fluids, either distilled or fermented, and do not include liquids such as water, milk, etc. *Ex parte Flake* (Cr. App.) 149 S. W. 146.

Constitutionality.—This article is authorized by state constitution, which provides a mode whereby it may be determined whether the sale of intoxicating liquors shall be prohibited in a given territory, since such provision implies that it is within the power, and is the duty of the legislature to enact all laws necessary to enforce prohibition in localities where it is adopted. *Ex parte Flake* (Cr. App.) 149 S. W. 146.

And does not violate Const. art. 3, § 35, providing that no statute shall contain more than one subject, though it provides for the regulation and prohibition of the liquor traffic in prohibition territory; such object and purpose constituting but one subject. *Id.*

And is a police regulation, and not a revenue measure, though incidentally revenue may be derived from its enforcement. *Id.*

The classification by this article is reasonable, and based on what is for the best interest of the state and the welfare of its citizens. *Id.*

And being within police power inherent in the state, does not violate Const. U. S. Amend. 14. *Id.*

The fact that the license prescribed by this article is so large as to be prohibitive of the business, does not render it violative of Const. art. 1, § 19, by depriving citizens of the state of their property rights, privileges, and immunities. *Id.*

This article bears equally upon all citizens seeking to do such cold storage business in local option territory, and hence does not deprive citizens of their equal right to transact business. *Id.*

Uniformity of taxes.—The fact that this article applies only to local option territory does not render it violative of Const. art. 8, §§ 1, 2, providing that taxes shall be uniform throughout the state. *Ex parte Flake* (Cr. App.) 149 S. W. 146.

Right to question validity.—One charged with violating this article, by storing "intoxicating liquors" in local option territory without having obtained a license, could not complain or raise the question as to what other liquors the statute does or does not apply. *Ex parte Flake* (Cr. App.) 149 S. W. 146.

Keeping place.—Certain members of a lodge in prohibition territory organized an auxiliary society, rented a place where they installed barroom fixtures, and on the bar counter placed a locked box, in which each member placed an envelope containing the amount which he desired to spend that week for liquor. One of the members during the first year, and thereafter a different member each week, would take out the money from the box, purchase beer, place it on ice, and have it dealt out to the members to the amount paid for by them, by a porter hired by the society. Accused attended to the business for one week, and had beer carried to the apartment, kept there on ice, and dispensed by the porter. Held that, accused was guilty of pursuing the business of keeping, maintaining, or operating a place where intoxicating liquor is kept on deposit for others. *Barnes v. State* (Cr. App.) 170 S. W. 548, L. R. A. 1915C, 101.

Art. 152. Persons, firms or corporations desiring to engage in either business to file application and pay tax.—Each person and each firm and each corporation and each association of persons, desiring to engage in the business mentioned in articles 150 and 151 in said local option territory, before engaging in same, shall file with the county clerk of the county in which the business is to be pursued, an application in writing for a license to engage therein, and shall state the county or portion of the county in which the business is to be pursued, and, if within the corporate limits of any incorporated city or town, that fact shall be so stated, and any such person or firm or corporation or association of persons shall pay to the tax collector of the county the entire amount of annual tax levied for the state and the entire amount of the annual tax upon such business as may be levied by the commissioners' court of said county, and, if the business is to be pursued in an incorporated city or town, shall pay to the collector of taxes of such city or town the tax that may be levied on such business by said city or town; and all such taxes shall be paid in advance, and no license shall be issued by the county clerk until the person or firm or corporation or association of persons, applying therefor, shall exhibit receipts showing the payment of all taxes levied and authorized by this law,

and the county clerk shall be entitled to charge a fee of twenty-five cents for the issuance of such license. [Id.]

See note under art. 150.

Art. 153. Clerk required to make report of all licenses issued.—The county clerk shall be and is hereby required to make report of all licenses issued by authority of this law as in other cases. [Id.]

See note under art. 150.

Art. 154. Providing penalty for violation.—Any person, or any member of a firm, or any member of an association of persons, or any officer or representative of a corporation, who shall pursue or engage in or aid or assist in any manner in said business, mentioned in articles 150 and 151, in said local option territory, without there having been issued to said person or firm or association of persons or corporation license therefor as provided for, shall each be guilty of a misdemeanor, and, on conviction therefor, shall be fined in any sum not less than the amount of the tax due and not more than double that sum, and shall in addition be imprisoned in the county jail not less than ninety days nor more than six months. [Id.]

See note under art. 150; and see *Ex parte Woods*, 52 App. 575, 108 S. W. 1171, 16 L. R. A. (N. S.) 450, 124 Am. St. Rep. 1107.

Indictment.—Willson's Cr. Forms, 323.

Art. 155. Persons, firms or corporations maintaining office for C. O. D. intoxicating liquor shipments.—Any person, firm or corporation, doing business in this state, shall, at each office or place kept, operated or maintained by such person, firm or corporation, at which intoxicating liquors legally deliverable are delivered upon payment of purchase money therefor, commonly designated as shipments C. O. D., pay annually for each office or place so kept an annual occupation tax to the state of Texas of five thousand dollars, and any county, or any incorporated city or town, wherein such office or place is located, may levy an annual occupation tax upon such person, firm or corporation herein referred to for each of said offices, not to exceed one-half of the amount hereby levied by the state, such tax to be due and payable annually. [Act 1907, p. 2.]

Cited, *Caswell & Smith v. State* (Civ. App.) 148 S. W. 1159.

Constitutionality.—This chapter is valid as a police regulation of the handling of liquors, since the legislature had authority to abrogate the C. O. D. feature of the liquor traffic, or impose any burden thereon which tended to prevent the evasion of the local option statutes. *L. Craddock & Co. v. Wells-Fargo Company Express* (Civ. App.) 125 S. W. 59.

And is not in violation of Const. art. 8, §§ 1, 2, providing that taxation and all occupation taxes shall be equal and uniform, upon the class of subjects within the limits of the authority levying the tax, since the delivery of liquor C. O. D. constitutes a business in itself, and is not necessarily a part of an express company's business. *Id.*

Statute as revenue law.—This chapter is a revenue law, and not prohibited by Const. art. 3, § 48, providing that the legislature shall not levy taxes or impose burdens on the people except to raise revenue sufficient for the economical administration of the government. *L. Craddock & Co. v. Wells-Fargo Company Express* (Civ. App.) 125 S. W. 59.

Rights and liabilities of express companies.—This chapter was sufficient to warrant an express company in refusing to carry liquor in that manner, since it could either pay the license tax or refuse to carry the liquor C. O. D. *L. Craddock & Co. v. Wells-Fargo Company Express* (Civ. App.) 125 S. W. 59.

Where an express company had contracted to carry packages of intoxicating liquor C. O. D. for plaintiff, and the legislature by this chapter rendered this business unlawful, the express company was thereby excused from collecting the price and plaintiff on ordering the goods returned cannot recover the return charges paid on such packages on the ground that defendant's failure to perform the contract of transportation deprived plaintiff of all benefit thereunder. *Id.*

Art. 156. Penalty for maintaining such office without paying tax.—The maintaining or operating such office or offices, place or places, by any person, firm or corporation in this state, without paying the occupation tax required in article 155, shall subject such person, firm or corporation so operating and maintaining such office or offices, place or places, to pay to the state of Texas the sum of

fifty dollars, and to the county and any incorporated city or town in which said offices or places are located, each the sum of fifty dollars for each day such office or offices, place or places, may be maintained or operated, and for each office or place so operated; and the state or county, or any incorporated city or town, may sue for and recover, either jointly or severally, each the said sum, for each day that each of said offices or places may be maintained and operated without prepayment of the aforesaid occupation tax. [Id., p. 2.]

CHAPTER SEVEN

OCCUPATION TAX ON DEALERS IN NON-INTOXICATING MALT LIQUORS

Art.		Art.	
157.	Persons selling non-intoxicating malt liquor as a beverage.	159.	Clerk required to make report of all licenses issued.
158.	To file application for license and pay collector the tax.	160.	Providing penalty for violation.

Article 157. Persons selling non-intoxicating malt liquors as a beverage.—There is hereby levied upon all firms, persons, associations of persons and corporations, selling non-intoxicating malt liquors, an annual state tax of two thousand dollars. Counties, incorporated cities and towns, where such sales are made, may each levy an annual tax of not exceeding one thousand dollars upon all such persons, firms or corporations; provided, that this article shall not prevent the sale of such proprietary remedies as "malt extract," "malt medicine" and "malt and iron," manufactured and used exclusively as medicine and not as a beverage, when sold upon the prescription of a regular practicing physician; provided, further, that not more than one sale shall be made upon any one prescription. [Act 1909, p. 51.]

Police power and constitutionality of regulations.—Acts 1907, c. 112, imposing an occupation tax is unconstitutional, in that the taxes levied are not equal and uniform. Ex parte Woods, 52 App. 575, 108 S. W. 1171-1179, 16 L. R. A. (N. S.) 450, 124 Am. St. Rep. 1107.

This chapter is a valid exercise of the state's police power, and not invalid as imposing a prohibitive tax, and as preventing pursuit of a lawful business. Ex parte Townsend, 64 App. 350, 144 S. W. 628, Ann. Cas. 1914C, 814.

This chapter is not invalid as imposing different rates in different parts of the state from those established by chapter 5, which applies only to the sale of intoxicating liquors. Id.

Const. art. 16, § 20, relating to intoxicating liquors, does not limit the power of the Legislature to regulate sale of nonintoxicating alcoholic liquors. Id.

Alcohol is the intoxicating element in spirituous, vinous, malt, and other intoxicating liquors, and makes the same dangerous, and the Legislature's police power extends to regulation of the sale of all beverages containing any degree of alcohol. Id.

In the absence of constitutional limitation, a state Legislature can absolutely prohibit sale of or place a prohibitive tax upon the sale of any articles which in themselves are harmful, or which may be injurious to the health, morals, or general welfare of the people. Id.

Liquors defined.—Malt liquor is an alcoholic liquor. Ex parte Townsend, 64 App. 350, 144 S. W. 628, Ann. Cas. 1914C, 814.

An intoxicating liquor is any liquor containing alcohol, which can be drunk as a beverage in such quantity as to produce intoxication. Ex parte Townsend, 64 App. 350, 144 S. W. 628, Ann. Cas. 1914C, 814.

Art. 158. To file application for license and pay collector the tax.—Each person, and each firm, and each corporation, and each association of persons, desiring to engage in the business mentioned in the preceding article, before engaging in same, shall file, with the county clerk of the county in which the business is proposed to be pursued, an application in writing for a license to engage therein, and shall state the place or house in which said business is to be pursued, and, if within the corporate limits of any incorporated city or town, that fact shall be so stated; and any such person or

firm or corporation or association of persons shall pay to the tax collector of the county the entire amount of annual tax levied by the state, and the entire amount of the annual tax upon such business as may be levied by the commissioners' court of said county, and, if the business is to be pursued in an incorporated city or town, shall pay to the collector of taxes of such city or town the tax that may be levied on such business by said city or town, and all such taxes shall be paid in advance; and no license shall be issued by the county clerk until the person or firm or corporation or association of persons applying therefor shall exhibit receipts showing the payment of all taxes levied and authorized by this law; and the county clerk shall be entitled to charge a fee of twenty-five cents for the issuance of such license, and it shall be unlawful to carry on business under said license in more than one place at the same time, or in any place other than that named in said application for said license, unless the party carrying on said business shall first file with the county clerk of the county in which said business is carried on a written statement, showing such change of place of business. [Act 1909, p. 397.]

See *Ex parte Townsend*, 64 App. 350, 144 S. W. 628, Ann. Cas. 1914C, 814.

Art. 159. Clerk to make report of all licenses issued.—The county clerk shall be and is hereby required to make report of all licenses issued by the authority of this law as in other cases. [Id., p. 52.]

Art. 160. Providing penalty for violation.—Any person, or any member of a firm, or any member of an association of persons, or any officer or representative of a corporation, who shall pursue or engage in, or aid or assist in any manner, in said business mentioned in article 157, without there having been issued to said person, or firm, or association of persons, or corporation, license therefor, as provided for in this law, shall each be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine in any sum not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail for a period of not less than twenty days nor more than ninety days. [Id., p. 52.]

See *Ex parte Woods*, 52 App. 575, 108 S. W. 1171, 16 L. R. A. (N. S.) 450, 124 Am. St. Rep. 1107.

CHAPTER EIGHT

DEALING IN FRAUDULENT LAND CERTIFICATES

Art. 161. Purchasing, selling, locating or surveying fraudulent certificates.	Art. 163. Handling land office files without authority.
162. Surveyors locating unapproved certificates.	

Article 161. [120] Purchasing, selling, locating or surveying fraudulent certificates.—If any person shall purchase or sell any fraudulent or forged certificate for land, or locate or survey, or cause to be located or surveyed, any such certificate, or be in any manner directly or indirectly concerned in the purchasing, selling, locating or surveying of any such certificate for land, knowing the same to be fraudulent or forged, he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years. [P. C. 242.]

Indictment.—Willson's Cr. Forms, 55.

Art. 162. [121] Surveyor locating unapproved certificates.—It shall not be lawful for any district or deputy surveyor to locate any certificate for land, or to survey any land for any person holding a headright certificate of the first or second class, unless it be certified

under the hand and seal of the clerk of the county court of the county where the certificate was issued, or the county where it is proposed to be located, or under the hand and seal of the commissioner of the general land office, that the same has been reported by the commissioners appointed under an act of congress to detect fraudulent land certificates, etc., passed January, 1840, as a genuine and legal claim against the government of Texas; and any surveyor offending against the true intent and meaning of this article shall be guilty of a high misdemeanor, and, on conviction, shall be fined in any sum not more than five thousand dollars. [P. C. 243.]

Indictment.—Willson's Cr. Forms, 56.

Art. 163. [122] Handling land office files without authority.—If any person shall handle or examine any of the papers, files or records in the general land office, without the consent of the commissioner or chief clerk, or without the presence and superintendence of a clerk in said office, he shall be fined not less than one dollar nor more than five hundred dollars. [Act June 2, 1873, p. 180.]

Intrusion.—It is an offense under this article to handle or examine the records of the general land office without the permission of the commissioner. *Anderson v. Rogan*, 93 Tex. 182, 54 S. W. 242.

Indictment.—Willson's Cr. Forms, 57.

CHAPTER NINE

DEALING IN PUBLIC LANDS BY OFFICERS

Art.	Art.
164. Officers not to deal in public lands.	167. Board of regents of university to have made mineral survey of lands, publish information obtained and providing penalty for communicating such information until published.
165. Clerks in land office not to give information.	
166. Officers not to purchase mineral lands.	

Article 164. [123] Officers not to deal in public lands.—If any person who is an officer or clerk in the general land office, or a district surveyor, or deputy district surveyor, or county surveyor, or his deputy, shall, directly or indirectly, be concerned in the purchase of any right, title or interest in any public land, in his own name or in the name of any other person, or shall take or receive any fee or emolument for negotiating or transacting any business connected with the duties of his office, other than the fees allowed by law, he shall be fined in a sum not exceeding five hundred dollars. [P. C. 244.]

See Appendix to Vernon's Sayles' Civ. St. 1914, for omitted and repealed land laws.

County surveyors.—By the provisions of Pen. Code, art. 164, no county or district surveyors or their deputies shall be directly or indirectly engaged in the purchase of public land. When patent has been issued to such a purchaser, the state can maintain an action to cancel the patent without returning or offering to return the purchase-money paid by the defendant to the state. *State v. Thompson*, 64 Tex. 690.

The original article (244) did not include county surveyors among the prohibited class. See an insufficient indictment. *Gray v. State*, 7 App. 10.

An officer must perform the duties of his office until his successor has qualified. He cannot resign so as to legally do anything before his successor qualifies, which he is forbidden to do while holding the office. A county surveyor cannot purchase public land. *Keen v. Featherstone*, 29 Civ. App. 563, 69 S. W. 983.

Indictment.—Willson's Cr. Forms, 58, 59.

Art. 165. [124] Clerks in the land office not to give information.—Any clerk or other employé in the general land office, who shall accept or receive from any person or persons, money, or other thing of value, in consideration of services performed in the designation of vacant land, or in discovering or making known to such person or persons any defects in any file or files, or any paper or document in said office, or who shall perform any work out of office

hours, or receive extra compensation in money or otherwise for any work performed in office hours, or who shall handle or interfere with the records and files of said office, except in office hours, shall be fined in any sum not less than one hundred nor more than five hundred dollars; and, in addition thereto, it shall be the duty of the commissioner of the general land office to immediately discharge such clerk or employé from said office. [Act June 2, 1873, p. 182.]

Indictment.—Willson's Cr. Forms, 60, 61.

Art. 166. [124a] May not purchase mineral lands.—It shall be unlawful for the commissioner of agriculture, insurance, statistics and history, or any person employed by him or connected with his office, to purchase all or any part of any mine or mineral lands, or be in any manner interested in such purchase, during the term of his office or employment. Any person violating the provisions of this article shall be punished by fine as provided in the Penal Code. [Sen. Jour., 1895, p. 478.]

Indictment.—Willson's Cr. Forms, 62.

Art. 167. Board of regents of university to have made mineral survey of lands, publish information obtained, and providing penalty for communicating such information until published.—1. The board of regents of the university of Texas are authorized and directed, as soon as practicable, to have made a mineral survey of all the lands belonging to the public schools, university, asylums, or of the state.

2. Said board shall employ for that purpose persons skilled, and who have had at least five years experience, in the science of mineralogy, geology and chemistry, who shall conduct said survey under the direction of said board.

3. Said board shall publish annually, for free distribution among the people of the state, all practical information collected in the prosecution of said survey as the same progresses; but the information obtained by a survey of the public school, university, asylum or state lands shall not be communicated by said board, or by the person or persons making said survey, to any person whomsoever until said information is published for the benefit of the general public; and anyone violating this provision shall, upon conviction, be fined in any sum not exceeding one thousand dollars, or by imprisonment not to exceed two years in jail. [Act 1901, p. 32.]

Explanatory.—Acts 1901, p. 32, at the time it was carried into the revised Penal Code as above, had been superseded by Acts 1903, p. 234, ch. 144. The superseding act is as follows:

1. The board of regents of the University of Texas are authorized and directed as soon as practicable to have made a mineral survey of all the lands belonging to the public schools, university, asylums or to the State and other mineral lands within the State.

2. Said board shall employ for that purpose persons skilled and who have had at least five years of practical experience in the science of mineralogy, geology or chemistry, and who shall conduct said survey under the direction of said board.

3. Said board shall publish at least once annually for free distribution among the people of the State all practical information collected in the prosecution of said survey as the same progresses; but the information obtained by a survey of the public school, university, asylum or State lands shall not be communicated by said board or by the person or persons making said survey, to any person whomsoever until said information is published for the benefit of the general public; and anyone violating this provision shall upon conviction, be fined in any sum not exceeding one thousand dollars, or by imprisonment not to exceed two years in jail. But it is

expressly provided, that said information shall be communicated to the Commissioner of the General Land office for his guidance in the disposition of mineral bearing lands. [Act 1903, p. 234, ch. 144, §§ 1-3.]

CHAPTER TEN

PERSONAL PROPERTY OF THE STATE

Art.		Art.	
168.	Personal property belonging to state shall be inventoried by persons in possession of same.		property and the full value thereof.
169.	Sworn copy of such inventory to be forwarded to secretary of state, duplicate of same forwarded to comptroller.	172.	Officers taking possession of such property shall require their predecessors to list and inventory same.
170.	Report shall be made at beginning of term of office.	173.	Failure to make such inventory or perform duties required, penalty therefor.
171.	Persons in charge of public institutions responsible for such	173a.	Sale, disposal of, or secreting arms of militia.

Article 168. Personal property belonging to state shall be inventoried by person having possession of same.—It shall be the duty of every official or other person, who has in his possession or under his control, or for which he is in anywise responsible, any personal property belonging to the state of Texas, or in which it has an interest, to immediately make out in triplicate a correct and full list and inventory of all such personal property which is or was in his possession when he assumed charge of such office or position, or had under his control, or for which he is in any way responsible, and which inventory shall contain the name of the article or articles of such personal property, the cost thereof, a fair and reasonable estimate of the present value thereof, a statement of the present condition of the same, how long said property has been in use, and the extent of the probable service, use and benefit that such property will be to the state in future; and, if sold during his term of office, or while in his possession, or under his control, he shall state the selling price thereof, and the disposition of the proceeds. [Act 1899, p. 307.]

Indictment.—Willson's Cr. Forms, 219.

Art. 169. Sworn copy of such inventory to be forwarded to the secretary of state, duplicate of same forwarded to comptroller.—A copy of said list and inventory, duly sworn to, shall be, by such person charged with keeping said property, or who has the same under his control, management, or who is responsible for the same, transmitted by him by registered letter to the secretary of state at Austin, Texas, whose duty it shall be to enter such list and inventory on a book to be kept by him for the purpose under its appropriate heading; and said secretary of state is hereby authorized to purchase such book or books as shall be necessary to record all such lists and inventories so made to him, and he shall be responsible for the correct entry of all said articles in such book or books, and shall be responsible for the safe keeping of the original sworn report from each of the persons named in this act, including the governor of this state, comptroller of public accounts, treasurer, attorney general, adjutant general, commissioner of insurance, statistics and history, superintendent of public buildings and grounds, the commissioner of the general land office, chief justice of the supreme court, court of criminal appeals, and the several courts of civil appeals, and the clerks thereof, the managers of each and every asylum in the state of Texas, superintendents and assistant superintendents of the penitentiaries and reformatories, superintendents

and managers of all state farms, superintendents and managers of the university and the several branches thereof, normal schools, all the officers and employés of either branch of the legislature, having personal property belonging to the state in their possession, and each and every other person holding any personal property in trust for the state of Texas, or having the same under his control, or in his possession, or for which he is in any wise responsible, all of whom are included in this act and subject to its provisions. A duplicate of said list and inventory, so sent to the secretary of state, shall be forwarded to the comptroller of public accounts, who shall carefully preserve the same in his office; and it is made the duty of the person, so making out the list, to retain in his possession, for his successor in office, a true copy thereof, and whose duty it shall be to deliver same to such successor within three days after his qualification and assuming charge of such position, office or agency. [Act 1899, p. 307.]

Indictment.—Willson's Cr. Forms, 220, 221.

Art. 170. Report shall be made at beginning of term of office.—Upon qualification at the beginning of the terms of office of any of the persons named herein, after each succeeding general election, and within thirty days after taking charge of any personal property as herein named, it shall likewise be his duty to make said report as herein required, and to forward same to the officers herein named, who shall receive them, and who shall continue to keep the registration of said reports, lists and inventories, as herein required of the secretary of state under the foregoing section hereof, and who shall, when said lists are received, make comparisons with former reports and note all articles of property not included in former lists, or which were included in former lists, but are not in the list last filed, and shall designate all such articles which are either dropped from or added to those of former lists and inventories. [Act 1899, p. 307.]

Art. 171. Person in charge of public institution responsible for such property and the full value thereof.—Every person herein named or referred to, in charge of any public institution of Texas, or having under his control any personal property belonging to the state of Texas, is hereby made responsible for the same and the full value thereof; and all persons, hereafter coming into any of the offices or positions herein enumerated, shall at once become and shall remain responsible for the preservation and safe keeping of all personal property herein named or referred to, whether such persons be under official bonds or not; and all official bonds made by any of the persons herein named or referred to, shall be intended as security to the state of Texas for the full value of all such personal property in any such institution or department, or otherwise belonging to the state, over which such person is in control, or for which he is by this law made responsible. [Id., p. 307.]

Art. 172. Officers taking possession of such property shall require their predecessors to list and inventory same.—Hereafter, when any of the officers named in this law, or who are hereby referred to and required to take charge of any of the properties of the state, shall take charge of same, they shall require of their predecessors in such positions, whose duty it is hereby made to furnish same, to make out for them a full list and inventory as above mentioned, of all properties in their possession or under their control and management, or for which they are in any wise responsible, belonging to the state of Texas; and such outgoing and incoming officers shall together check up said list and inventory and ascertain that the same and each article in said list named is then on hand or duly

accounted for; said incoming officer shall give his receipt to his said predecessor in office for all of such property before he shall be entitled to possession of the same, and said receipt shall be by him delivered to said secretary of state for registration in his office, and a copy of the same shall be likewise delivered to the comptroller of public accounts for preservation in his office. [Id., p. 307.]

Art. 173. Failure to make such inventory or perform duties required, penalty therefor.—Should any of the officers, persons or employes named herein fail to make out said list and inventory, or fail to perform any of the duties herein required of him, he shall become immediately responsible to the state of Texas for the value of any and all articles of furniture, implements, goods, wares, merchandise, live stock and all other personal property which have come into his hands, or for which he may be responsible, and be subject to suit in the name of the state of Texas for the value of the same; and should he fail to do or perform any of the acts and things required of him by this law, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in a sum not less than one hundred nor more than five hundred dollars; and for each thirty days that he fails to comply with the provisions of this law in any respect shall be considered a separate offense. The jurisdiction for all suits or prosecutions under this act shall be either in the county court of Travis county, or in the county where such officer shall reside at the time of the institution of said suit or prosecution, or where such property may be situated. [Id., p. 307.]

Indictment.—Willson's Cr. Forms, 37.

Art. 173a. Sale, disposal of or secreting arms, etc., of militia.—Any person who shall secrete, sell, dispose of, offer for sale, purchase, retain after demand made by a commissioned officer of the active militia of this state, or in any manner pawn or pledge, any arms, uniforms, equipments or other military property, issued under the provisions of this act, or of the military regulations of this state, and any person who shall wear any uniform, or part thereof, or device, strap, knot or insignia of any design or character used as a designation of grade, rank or office, such as are by law or by general regulations duly promulgated, prescribed for the use of the active militia of this state or similar thereto, except members of the army of the United States or the active militia of this state or any other state, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than two hundred dollars, and in addition thereto shall forfeit to this state one hundred dollars for each offense, to be sued for in the name of the state of Texas by a judge-advocate, district or county attorney. All money recovered by any action or proceeding under this section shall be paid to the adjutant general, who shall apply the same to the use of the active militia of this state. [Act 1905, p. 183.]

CHAPTER ELEVEN

THE STATE FLAG

Art.		Art.	
173b.	Use of state flag for advertising purposes.	173c.	Same; proviso.
		173d.	Same; Goods bearing imprint of flag.

Article 173b. Use of state flag for advertising purposes.—On and after July 1st, 1914, it shall be unlawful for any person to use any imitation, label, trade-mark, design, device, imprint or form of the flag of the State of Texas for the purpose of advertising or giv-

ing publicity to any goods, wares or merchandise, or any commercial undertaking, or for any trade or commercial purpose; and any person whether in his individual capacity or as any officer, agent or receiver of any corporation, who shall violate this section of this act, shall upon conviction, be punished by a fine of not less than fifty dollars and not more than one hundred dollars, and each day this section is violated shall be a separate offense. [Act 1913, 1st S. S., p. 28, ch. 19, § 1.]

Act 1913, 1st S. S., ch. 19, repeals Act 1913, Reg. Sess., ch. 14.

Art. 173c. Same; proviso.—Provided that none of the provisions of this Act, shall apply to any fraternal or patriotic organizations using the Texas flag for an emblem. [Act 1913, 1st S. S., p. 28, ch. 19, § 1a.]

Art. 173d. Same; goods bearing imprint of flag.—On and after July 1st, 1914, it shall be unlawful for any person to offer or expose for sale any article or commodity of commerce bearing the imitation, design, imprint or form of the flag of the State of Texas, and any person whether in his individual capacity or as an officer, agent or receiver of any corporation who shall violate this section of this Act, shall upon conviction, be punished by a fine of not less than twenty-five dollars nor more than fifty dollars, and each day this section is violated shall be a separate offense. [Id., § 2.]

TITLE 5

OFFENSES AFFECTING THE EXECUTIVE, LEGISLATIVE
AND JUDICIAL DEPARTMENTS OF THE
GOVERNMENT

- Chap.
1. Bribery.
2. Lobbying.

- Chap.
3. Drunkenness in office and in public
[or private] place.

CHAPTER ONE

BRIBERY

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| Art. | Art. |
| 174. Bribery of certain officers. | 185. Acceptance of bribe by same. |
| 175. Officer accepting bribe. | 186. Bribery of same to do any act. |
| 176. Officers specified. | 187. Bribery of sheriffs and peace officers. |
| 177. Bribery of clerks, etc., in legislative and executive departments. | 188. Same subject. |
| 178. Accepting bribe by same. | 189. Same subject. |
| 179. Bribery of auditor, juror, etc. | 190. Acceptance of bribe by sheriffs, etc. |
| 180. Acceptance of bribe by same. | 191. Bribery of witness. |
| 181. Offense complete, when. | 192. Acceptance of bribe by witness. |
| 182. Bribery of attorneys. | 193. "Bribe" defined. |
| 183. Acceptance of bribe by same. | 194. Bribe need not be direct. |
| 184. Bribery of clerks of courts. | |

Article 174. [125] Bribery of certain officers.—If any person shall bribe or offer to bribe any executive, legislative or judicial officer after his election or appointment, and either before or after he shall have been qualified or entered upon the duties of his office, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding which may be then pending or may thereafter by law be brought before such officer in his official capacity, or do any other act or omit to do any other act in violation of his duty as an officer, he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years. [Act Feb. 12, 1858, p. 159; P. C. 250.]

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| 1. Officers subject. | 6. Future offenses. |
| 2. Offense when complete. | 7. Evidence. |
| 3. Tender of bribe. | 8. Indictment. |
| 4. Entrapment. | 9. Instructions. |
| 5. Defense. | 10. Recognizance. |

1. Officers subject.—There can be no conviction of bribing an "assistant city attorney" of a city, the charter of which makes no provision for such an officer. *Naill v. State*, 59 App. 484, 129 S. W. 630, Ann. Cas. 1912A, 1268.

The words "executive, legislative, or judicial officer" are meant in their broadest sense and are intended to embrace every officer, whether a state, county, or precinct officer. *Davis v. State*, 70 App. 524, 158 S. W. 288.

2. Offense when complete.—The offense is complete when the offer is made. *Rath v. State*, 35 App. 142, 33 S. W. 229.

3. Tender of bribe.—An actual tender is not essential. *O'Brien v. State*, 6 App. 665.

4. Entrapment.—Where an officer first suggests his willingness to a person to accept a bribe, and thereby originates the criminal intent, and apparently joins the defendant in a criminal act first suggested by the officer, merely to entrap the defendant, it seems this would not constitute the offense of offering to bribe the officer. *O'Brien v. State*, 6 App. 665; S. C., 7 App. 181. But if the defendant first offered to bribe the officer, no subsequent conduct of the officer would exculpate the defendant. *O'Brien v. State*, 7 App. 181.

A person tendering a bribe to an assistant county attorney for the purpose of influencing his official action was guilty of offering a bribe, even though the county attorney made the first advance and by his words, acts, and conduct induced accused to make the offer, and although the assistant county attorney did not intend to accept the bribe. *Davis v. State*, 70 App. 524, 158 S. W. 288.

A person could be guilty of bribing a policeman, although the policeman had no corrupt purpose or intent, but took the bribe merely to secure evidence against the briber for the purpose of procuring his conviction; the guilt of the briber being measured by his own intent and not by the intent of the acceptor of the bribe. *Minter v. State*, 70 App. 634, 159 S. W. 286.

5. Defense.—On a trial for offering to bribe a county commissioner to vote a certain way on a certain proposition pending before the commissioners' court,

the fact that the commissioner suggested bribery to defendant, or was willing to be bribed, is immaterial. *Rath v. State*, 35 App. 142, 33 S. W. 229.

6. **Future offenses.**—Bribery could be committed by bribing an officer not to arrest a person for thereafter keeping a gambling house or house for the unlawful sale of intoxicating liquor as well as for theretofore keeping it. *Minter v. State*, 70 App. 634, 159 S. W. 286.

7. **Evidence.**—On a trial for offering a bribe a county commissioner to vote a certain way on a certain proposition pending before the commissioners' court, it is not necessary, in order to prove that such person was a commissioner, to introduce the record of his election and qualification. *Rath v. State*, 35 App. 142, 33 S. W. 229.

8. **Indictment.**—Willson's Cr. Forms, 63.
See Code Crim. Proc. art. 466.

9. **Instructions.**—On a trial for offering a bribe to an assistant county attorney to induce him to file a motion to set aside a judgment of conviction against a third person and to recommend to the judge that the judgment be set aside, where accused claimed that he offered the money merely in payment of such third person's fine, the court should have made it plain in its charge that, if the money was tendered under the belief that it was to be used in paying the fine, accused would not be guilty and would be guilty only if he tendered the money to influence the attorney's action as an official. *Davis v. State*, 70 App. 524, 158 S. W. 288.

Where the court required the jury to believe beyond a reasonable doubt every essential element of bribery before they could convict, and also properly charged on reasonable doubt, the failure to quote the statutory definition of a bribe was not error. *Minter v. State*, 70 App. 634, 159 S. W. 286.

10. **Recognizance.**—See notes under Code Crim. Proc. art. 903.

A bail bond describing the offense as offering to bribe a judicial officer, held sufficient. *Hardin v. State*, 36 App. 460, 37 S. W. 735.

Art. 175. [126] Officers accepting bribe.—Any legislative, executive or judicial officer who shall accept a bribe or consent to accept a bribe under an agreement or with an understanding that his act, vote, opinion or judgment shall be done or given in any particular manner or upon a particular side of any question, cause or proceeding which is or may thereafter by law be brought before him, or that he shall make any particular nomination, appointment, or do any other act or omit to do any act in violation of his duty as an officer, shall be punished by confinement in the penitentiary not less than two nor more than ten years. [Act Feb. 12, 1858, p. 159; P. C. 251.]

Former laws.—Prior to the revision of the Code it was held that an agreement by an officer to accept a bribe was not an offense. *Hutchinson v. State*, 36 Tex. 293. But the words, "or consent to accept a bribe," were inserted in the foregoing article by the revisers, with a view, doubtless, to supply the defect therein pointed out by the decision above cited.

Justices of the peace.—Justice of the peace accepting money for failure to institute proceedings against one whom he knew to be guilty of unlawfully carrying a pistol held guilty. *Morawietz v. State*, 46 App. 436, 80 S. W. 997.

Offense.—To constitute bribery the gift, advantage or emolument must precede the act. *Hutchinson v. State*, 36 Tex. 293.

To constitute bribery, the gift, advantage or emolument must be bestowed to induce the officer to do a particular act in violation of his duty, or as an inducement to favor, or in some manner aid the person offering same, or another, in a manner forbidden by law. *Hutchinson v. State*, 37 Tex. 293.

Failure of a justice in consideration of a bribe to institute proceedings for the arrest of a person carrying a pistol is criminal. *Morawietz v. State*, 46 App. 436, 80 S. W. 997.

Indictment.—Willson's Cr. Forms, 63, 64.

Requisites, see Code Crim. Proc. art. 466.

When offense complete.—The offense was complete when the bribe was accepted and received. *Ruffin v. State*, 36 App. 565, 38 S. W. 169.

Offense held complete when the bribe was accepted and received with the understanding that the incumbent of an office would be removed and an appointment made regardless of whether the removal was ever made or the matter of appointment came up. *Ruffin v. State*, 36 App. 565, 38 S. W. 169.

Proof.—On a trial for offering to bribe a county commissioner to vote a certain way on a certain proposition pending before the commissioners' court, it is not necessary, in order to prove that such person was a commissioner, to introduce the record of his election and qualification. *Rath v. State*, 35 App. 142, 33 S. W. 229.

On an indictment charging defendant, a county commissioner, with accepting a bribe with the understanding that his opinion, judgment, acts, influence, and vote should be given in favor of securing the appointment of a person to an office to be filled by the commissioners' court, a conviction cannot be had on proof that he accepted the bribe with the understanding that he should bribe another commissioner with it. *Ruffin v. State*, 36 App. 565, 38 S. W. 169.

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Accomplice.—One giving a bribe is an accomplice of the officer receiving it. *Ruffin v. State*, 36 App. 565, 38 S. W. 169.

Where a justice of the peace accepted money for failing to institute proceedings against a person whom he knew to be guilty of unlawfully carrying a pistol, and divided the money with a deputy sheriff who was with him when he obtained the information as to carrying the pistol, the deputy sheriff, the person guilty of carrying the pistol, and a friend of his who was with him at the time the settlement was made, and furnished a part of the money therefor, were all accomplices. *Morawietz v. State*, 46 App. 436, 80 S. W. 997.

Art. 176. [127] Officers specified.—Under the name of executive, legislative and judicial officers are included the governor, lieutenant-governor, comptroller, secretary of state, state treasurer, commissioner of the general land office, commissioner of agriculture, insurance, statistics and history, superintendent of public instruction, members of the legislature, aldermen of all incorporated cities and towns in this state, judges of the supreme, district and county courts and of the courts of appeals, attorney general, district and county attorneys, justices of the peace, mayors and judges of such city courts as may be organized by law, county commissioners, school trustees, and all other city, county and state officials. [Act March 30, 1885, p. 69; amended Act 1907, p. 127.]

See notes under art. 174.

Cited, *Davis v. State*, 70 App. 524, 158 S. W. 288; *Minter v. State*, 70 App. 634, 159 S. W. 286.

Officers.—Prior to the adoption of the Revised Codes, article 122 did not specify "county attorney" as an officer, as it now does. It was nevertheless held that such officer was within the meaning of said articles, such officer being a judicial one. *State v. Currie*, 35 Tex. 17.

In *Hutchinson v. State*, 36 Tex. 293, the prosecution was against an overseer of a road for accepting a bribe in that capacity. It was not questioned but that he was such an officer as came within the meaning of art. 122.

A private person to whom a prisoner is delivered is not an officer. *Messer v. State*, 37 App. 635, 40 S. W. 488.

There can be no conviction of bribing an "assistant city attorney" of a city, the charter of which makes no provision for such an officer, but by Loc. & Sp. Laws 30th Leg. c. 5, § 26, only authorizes the city attorney to appoint a "deputy," the word "deputy" not meaning the same as "assistant city attorney"; an "assistant" being one who assists, and in the absence of statutory authority never acts officially for his principal, and is not required to be sworn, while a deputy may do anything his principal can do, and is required to be sworn, and, in the absence of the creation by the charter of the office, it being impossible that an assistant city attorney can be an official de jure or de facto. *Naill v. State*, 59 App. 484, 129 S. W. 630, Ann. Cas. 1912A, 1268.

"Executive, legislative or judicial officer," construed. *Davis v. State*, 70 App. 524, 158 S. W. 288.

Indictment.—Willson's Cr. Forms, 63.

Art. 177. [128] Bribery of clerks, etc., of legislative and executive departments.—If any person shall bribe, or offer to bribe, any clerk or other officer of either branch of the legislature, or any clerk or employé in any department of the state government, with the intent to influence such officer to make any false entry in any book or record pertaining to his office, or to mutilate or destroy any part of such book or record, or to violate any other duty imposed upon him as an officer, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1858, p. 159; P. C. 253.]

Indictment.—Willson's Cr. Forms, 65.

Art. 178. [129] Accepting bribe by same.—If any officer named in the preceding article shall accept a bribe so offered, or consent to accept the same, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1858, p. 159; P. C. 254.]

Indictment.—Willson's Cr. Forms, 66.

Art. 179. [130] Bribery of auditor, juror, etc.—If any person shall bribe, or offer to bribe, any auditor, juror, arbitrator, umpire or referee, with intent to influence his decision, or bias his opinion in relation to any cause or matter which may be pending before, or may thereafter by law be submitted to, such auditor, juror, arbitra-

tor, umpire or referee, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1858, p. 161; P. C. 299.]

Indictment.—Willson's Cr. Forms, 67.

Art. 180. [131] Acceptance of bribe by same.—If any juror, auditor, arbitrator, umpire or referee shall accept, or agree to accept, a bribe offered for the purpose of biasing or influencing his opinion or judgment, as set forth in the preceding article, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1858, p. 161; P. C. 300.]

Indictment.—Willson's Cr. Forms, 67, 68.

Art. 181. [132] Offense complete, when.—To complete the offenses mentioned in the two preceding articles, it is not necessary that the auditor, umpire, arbitrator or referee shall have been actually selected or appointed; it is sufficient if the bribe be offered or accepted with a view to the probable appointment or selection of the person to whom the bribe is offered, or by whom it is accepted. Nor is it necessary that the juror shall have been actually summoned; it is sufficient if the bribe be given or accepted in view of his being summoned as a juror, or selected as such, to sit in any particular case, civil or criminal. [P. C. 301.]

Indictment.—Willson's Cr. Forms, 67, 68.

Art. 182. [133] Bribery of attorneys.—If any person shall bribe, or offer to bribe, any attorney at law, charged with the prosecution or defense of a suit, with intent to induce him to divulge any secret of his client, or any circumstance which came to his knowledge as counsel, to the injury of his client, or with intent to induce him to give counsel, or in any way advise or assist the opposite party, to the injury of his client in any cause, civil or criminal, or to neglect the interests of his client, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1858, p. 161; P. C. 302.]

Evidence.—A conviction for an attempt to bribe the attorney at law employed by private persons to prosecute for a theft is not established by the confession of defendant that he offered the attorney money, at the request of the prosecuting witness, to dismiss the prosecution; the attorney being dead, and the confession uncorroborated. *Brady v. State*, 32 App. 264, 22 S. W. 924.

Indictment.—Willson's Cr. Forms, 69.

Requisites, see Code Crim. Proc. art. 466.

Art. 183. [134] Acceptance of bribe by same.—If any attorney at law charged, as above stated, with the management of any cause, civil or criminal, shall accept, or agree to accept, a bribe offered to induce him to divulge any secret of his client, or any circumstance which came to his knowledge as counsel, to the injury of his client, or to give counsel or in any way advise or assist the opposite party, to the injury of his client, or to neglect the interests of his client, he shall be punished in the manner provided in the preceding article. [P. C. 303.]

Indictment.—Willson's Cr. Forms, 70.

Art. 184. [135] Bribery of clerks of courts.—If any person shall bribe, or offer to bribe, any clerk or deputy clerk of any court of record, to induce such officer to alter, destroy or mutilate any book, record or paper pertaining to his office, or to surrender to the person offending any book, record or paper for any unlawful purpose, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than five years. [Act Feb. 12, 1858, p. 161; P. C. 304.]

Indictment.—Willson's Cr. Forms, 71.

Art. 185. [136] Acceptance of bribe by same.—If any clerk, or deputy clerk, of any court of record in this state shall accept, or

agree to accept, a bribe offered for the purposes enumerated in the preceding article, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than five years. [Act Feb. 12, 1858, p. 161; P. C. 305.]

Indictment.—Willson's Cr. Forms, 72.

Art. 186. [137] Bribery of same to do any official act.—If any person shall bribe, or offer to bribe, any officer named in article 184 to do any other act not enumerated in said article, in violation of the duties of his office, or to omit to do any other act incumbent on him as an officer, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1858, p. 161; P. C. 306.]

Indictment.—Willson's Cr. Forms, 71.

Evidence.—On a trial for offering to bribe a county commissioner to vote a certain way on a certain proposition pending before the commissioners' court, it is not necessary, in order to prove that such person was a commissioner, to introduce the record of his election and qualification. *Rath v. State*, 35 App. 142, 33 S. W. 229.

Art. 187. [138] Bribery of sheriffs and peace officers.—If any person shall bribe, or offer to bribe, any sheriff or other peace officer to permit any prisoner in his custody to escape, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than five years. [Act Feb. 12, 1858, p. 162; P. C. 307.]

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| 1. Offense. | 6. Evidence. |
| 2. Defense. | 7. Instructions. |
| 3. Legality of arrest. | 8. Indictment. |
| 4. Officers. | 9. Variance. |
| 5. Offer. | 10. Examining trial. |

1. Offense.—Paying or offering to pay any money or thing of value to a peace officer for the release of a prisoner from his custody is a criminal offense. *O'Brien v. State*, 6 App. 665.

Where a peace officer with a view to entrap defendant suggests that he will accept a bribe, defendant by acceding thereto does not become guilty of bribery. *O'Brien v. State*, 6 App. 665.

The actual tender of a bribe is not necessary to perfect the offense of attempting to bribe a peace officer, but any expression of an ability to produce a bribe as a gift to the officer to induce him to release a prisoner is sufficient to complete the offense. *Lee v. State*, 47 App. 620, 85 S. W. 804.

2. Defense.—On a trial for offering to bribe a county commissioner to vote a certain way on a certain proposition pending before the commissioners' court, the fact that the commissioner suggested bribery to defendant, or was willing to be bribed, is immaterial. *Rath v. State*, 35 App. 142, 33 S. W. 229; *O'Brien v. State*, 6 App. 665.

3. Legality of arrest.—A defendant charged with offering to bribe an officer to release a prisoner, cannot question the manner in which such officer became charged with the custody of such prisoner, said officer being a deputy sheriff de facto and jailer. *Florez v. State*, 11 App. 102; *Moseley v. State*, 25 App. 515, 8 S. W. 652. The manner in which the prisoner came into the custody of the de facto officer is not subject to question. *Florez v. State*, 11 App. 102.

To constitute the offense the arrest of the prisoner must have been legal. *Moore v. State*, 44 App. 159, 69 S. W. 521; *Ex parte Richards*, 44 App. 561, 72 S. W. 838.

4. Officers.—Officer de facto. *Florez v. State*, 11 App. 102.

A private citizen guarding a prisoner until he could execute a bail bond not being a "peace officer" within the statute, an offer to bribe him is no offense. *Messer v. State*, 37 App. 635, 40 S. W. 488.

The officer bribed must have been in the discharge of a legal and official duty. *Moore v. State*, 44 App. 159, 69 S. W. 521.

A chief of police of a city engaged in assisting a deputy sheriff to make an arrest is a peace officer, within the meaning of the statutes defining the offense of attempting to bribe a peace officer. *Lee v. State*, 47 App. 620, 85 S. W. 804.

5. Offer.—A question, "how much would you take to turn me loose and let me go and get away?" was an offer to bribe the officer. *Evans v. State*, 48 App. 620, 89 S. W. 1080.

6. Evidence.—In a prosecution for attempting to bribe a peace officer, testimony that witness met the chief of police, who afterwards arrested defendant, and told him that he had a capias for defendant, and instructed him to arrest him if he found him, and suggested that they go around the square in different directions to look for defendant, was admissible to show the legality of the arrest, although such statements were made in defendant's absence. *Lee v. State*, 47 App. 620, 85 S. W. 804.

In a prosecution for attempting to bribe a police officer, evidence that just before the attempt defendant tried to borrow money from witness, and just aft-

er the commission of the offense told witness that he had no money in his possession, was inadmissible. *Lee v. State*, 47 App. 620, 85 S. W. 804.

7. Instructions.—In a prosecution for attempting to bribe a peace officer, a charge that the exact language in which the offer of a bribe was made need not be proven is, if erroneous, harmless, where the exact language was proven. *Lee v. State*, 47 App. 620, 85 S. W. 804.

8. Indictment.—Willson's Cr. Forms, 73, 75.
See *Moseley v. State*, 25 App. 515, 8 S. W. 652.
Requisites, see Code Crim. Proc. art. 466.

9. Variance.—Evidence that defendant told a peace officer who had arrested him that he was going to leave the country, and that if the officer would release him he would give him five dollars, "and give him more money then," does not constitute such variance, as to necessitate its exclusion, from an indictment alleging that defendant offered to give the police officer "the sum of five dollars in money." *Lee v. State*, 47 App. 620, 85 S. W. 804.

Where an indictment charged that defendant offered to bribe an officer having him in custody by stating to the officer, "How much will you take to turn me loose and let me go and get away?" and the language proved was, "How much will you take to turn me loose and let me go?" there was no variance. *Evans v. State*, 48 App. 620, 89 S. W. 1080.

10. Examining trial.—Where the evidence was conflicting as to whether defendant offered to bribe the officer while he was being held under an illegal arrest, or whether the offer was made after the officer had discovered the goods in his possession which would entitle him to hold defendant on another charge, the examining court was justified in holding him to further answer the action of the grand jury. *Ex parte Richards*, 44 App. 561, 72 S. W. 838.

Art. 188. [139] Same subject.—If any person shall bribe, or offer to bribe, any sheriff or other peace officer, in any case, civil or criminal, to make a false return upon any process, directed to him, or fail to return any such process, or summon, or fail to summon, any one to serve on a jury, with a view to produce a result favorable to a particular side in any cause, civil or criminal, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1858, p. 162; P. C. 308.]

Cited, *Moseley v. State*, 25 App. 515, 8 S. W. 652.

Indictment.—Willson's Cr. Forms, 74, 75.

Art. 189. [140] Same subject.—If any person shall bribe, or offer to bribe, a sheriff or any other peace officer to do any other act not heretofore enumerated, contrary to his duty as an officer, or to omit to do any duty incumbent upon him as an officer, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1858, p. 162; P. C. 309.]

Cited, *Moseley v. State*, 25 App. 515, 8 S. W. 652.

Elements of offense.—"Willfully" and "corruptly" are not descriptive elements of the offense. *Garner v. State*, 50 App. 364, 97 S. W. 98.

A prisoner does not violate this article by appealing to the sheriff to intercede for him in the disposition of cases against him, if he does not attempt to get that officer to default in his duty. *Garner v. State*, 50 App. 364, 97 S. W. 98.

Indictment.—Willson's Cr. Forms, 75.

Requisites, see Code Crim. Proc. art. 466.

Evidence.—See notes under Code Crim. Proc. art. 783.

Art. 190. [141] Acceptance of bribe by sheriffs, etc.—If any sheriff or other executive or peace officer shall accept, or agree to accept, a bribe offered, as mentioned in articles 187, 188 and 189, he shall receive the same punishment as is affixed to the offense of giving or offering a bribe in the particular case specified. [P. C. 310a.]

Offense.—Where a justice of the peace accepted money for failing to institute proceedings against a person whom he knew to be guilty of unlawfully carrying a pistol and divided the money with a deputy sheriff who was with him when he obtained the information as to carrying the pistol, the deputy was guilty of taking a bribe. *Morawietz v. State*, 46 App. 436, 80 S. W. 997.

Legality of arrest.—A peace officer prosecuted for accepting a bribe to release a prisoner cannot question the legality of the arrest and custody. *Moseley v. State*, 25 App. 515, 8 S. W. 652.

Indictment.—Willson's Cr. Forms, 75.

Art. 191. [142] Bribery of witness.—If any person shall bribe, or offer to bribe, any witness in any case, either civil or criminal, to disobey a subpoena or other legal process, or to avoid the service of the same by secreting himself, or by any other means, he shall be

punished by confinement in the penitentiary not less than two nor more than five years. [Act Feb. 11, 1860, p. 95; P. C. 310b.]

See *Leeper v. State*, 29 App. 154, 15 S. W. 411, and, ante, art. 174.

Elements of offense.—The money or gift need not be produced, tendered, or accepted, if the prosecution is for an "offer to bribe," nor is it essential that an indictment be pending or a subpoena issued for the witness. *Jackson v. State*, 43 Tex. 421.

Statements by one co-defendant to another, "I will assist you to pay your fine," or "I would rather pay your fine than mine," constituted no offer to bribe the other to absent himself from the trial. *Peacock v. State*, 37 App. 418, 35 S. W. 964.

A prosecution for the bribery of a witness in a pending cause cannot be defeated because the state fails to show that an information has been filed, where it does not show an affidavit and a subpoena, etc. *Smalley v. State*, 59 App. 95, 127 S. W. 225.

To constitute the offense of bribing a witness to avoid a process, there must have been a process either issued or served. *Harrison v. State* (Cr. App.) 151 S. W. 552.

Principals and accomplice.—See notes under article 74, ante.

Indictment.—Willson's Cr. Forms, 76.

See Code Crim. Proc. arts. 466, 801, and notes thereunder.

Evidence.—In a prosecution for attempting to bribe a witness, the uncontradicted testimony of a number of witnesses that the witness on whom the attempt at bribery was made had been duly summoned was sufficient evidence of the summoning, without the introduction of the subpoena. *Savage v. State* (Cr. App.) 170 S. W. 730.

Such explanatory testimony was admissible as showing defendant's attempt to tamper with the witness as a circumstance tending to show his guilt. *Savage v. State* (Cr. App.) 170 S. W. 730.

Art. 192. [143] Acceptance of bribe by witness.—If any witness in any case, civil or criminal, shall accept, or agree to accept, a bribe offered for the purpose or purposes mentioned in the preceding article, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [Act Feb. 11, 1860, p. 95; P. C. 310b.]

Indictment.—Willson's Cr. Forms, 77.

Art. 193. [144] "Bribe" defined.—By a "bribe," as used throughout this Code, is meant any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or the promise of either, bestowed or promised for the purpose of influencing an officer or other person, such as are named in this chapter, in the performance of any duty, public or official, or as an inducement to favor the person offering the same, or some other person. [P. C. 255; Const., Art. 16, § 41.]

Cited, *Peacock v. State*, 37 App. 418, 35 S. W. 964.

Definition.—Instruction defining bribery held correct. *Lee v. State*, 47 App. 620, 85 S. W. 804.

Charge of court defining "bribe" in the language of this article is proper and sufficient. *Lee v. State*, 47 App. 620, 85 S. W. 804.

Tender.—Actual tender not necessary; any expression of ability to produce the bribe, sufficient to constitute the offense. *Lee v. State*, 47 App. 620, 85 S. W. 804.

Indictment.—Requisites, see Code Crim. Proc. art. 466.

Art. 194. [145] Bribe need not be direct.—The bribe, as defined in the preceding article, need not be direct; it may be hidden under the semblance of a sale, wager, payment of a debt, or in any other manner designed to cover the true intention of the parties. The bribe, or the promise thereof, must precede the act which it is intended to induce the person bribed to perform. [P. C. 256.]

Cited, *Peacock v. State*, 37 App. 418, 35 S. W. 964.

Indictment.—Requisites, see Code Crim. Proc. art. 466.

CHAPTER TWO

LOBBYING

Art.		Art.	
195.	Defining lobbying.	197.	Provisions shall not apply, when.
196.	Persons privately soliciting vote of member of legislature guilty of.	198.	Providing penalty.
		199.	Persons prohibited from going on floor of either house of the legislature.

Article 195. Defining lobbying.—If any person having any direct interest, or the president or any other officer of any corporation having any direct interest, in any measure pending before, or thereafter to be introduced in, either branch of the legislature of this state, shall, at any place in this state, in any manner, privately attempt to influence the action of any member of the legislature of this state during his term of office concerning such measure, except by appealing to his reason, he shall be deemed guilty of lobbying. [Act 1907, p. 162.]

Art. 196. Persons privately soliciting vote of member of legislature guilty of.—That if any paid or employed agent, representative or attorney of any person, association or corporation, shall, at any place in this state, after the election and during the term of office of any member of the legislature of this state, privately solicit the vote, or privately endeavor to exercise any influence, or offer anything of value or any other inducements whatever, to any such member of the legislature, to influence his action concerning any measure then pending, or thereafter to be introduced, in either branch of the legislature of this state, he shall be deemed guilty of lobbying. [Id., p. 162.]

Art. 197. Provisions shall not apply, when.—The provisions of this law shall not be held to apply to the governor or a member of the legislature of this state, nor to prohibit any person either in person, or by his agent or attorney, or any corporation by representatives, agents or attorneys, from exercising the right of petition to the legislature, or from collecting facts, preparing petitions, procuring evidence and submitting the same, together with arguments, to either branch of the legislature, when in session, or to any committee thereof, in the interest of any measure in which he or it may be interested; but in such case the agency and the interest in the measure, or the person so appearing, shall be fully disclosed. [Id., p. 162.]

Art. 198. Providing penalty.—That lobbying, as hereinbefore defined, shall be unlawful, and the same is hereby prohibited; and any person who shall be convicted of lobbying, shall, upon such conviction, be punished by fine of not less than two hundred dollars nor more than two thousand dollars, and in addition may, at the discretion of the jury, be imprisoned in the penitentiary for a term not less than six months nor more than two years; and any violation of this law may be prosecuted in the county where the offense is committed, or in Travis county. [Id., p. 162.]

Art. 199. Persons prohibited from going on floor of either house of the legislature.—To prevent lobbying and to promote the orderly dispatch of business, it is hereby made unlawful for any person employed in any manner to represent the interest in legislation of any person, association or corporation to go upon the floor of either house of the legislature, reserved for members thereof, while in session, except upon invitation of such house; and any person violating the provisions of this article shall be punished by a fine not to exceed one hundred dollars. [Id., p. 162.]

CHAPTER THREE

DRUNKENNESS IN OFFICE AND IN PUBLIC [OR PRIVATE] PLACE

<p>Art. 200. State or district officers guilty of drunkenness.</p> <p>201. "State or district officer" defined.</p> <p>202. County or municipal officer guilty of drunkenness.</p>	<p>Art. 203. "Drunkenness" defined.</p> <p>204. Drunkenness in public place or private place; how punished.</p> <p>205. Drinking intoxicating liquor on railway passenger train.</p>
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Article 200. [146] **State or district officer guilty of drunkenness.**—Any state or district officer in this state who shall be guilty of drunkenness shall be subject to removal from office in the manner provided by law; and, upon conviction thereof, in any court of competent jurisdiction, shall be fined in any sum not less than ten nor more than two hundred dollars. [Act July 31, 1876, pp. 76-7.]

Jurisdiction.—Drunkenness does not indicate corruption or willful neglect or failure of duty, and is not included in the term "official misconduct." This offense is within the jurisdiction of the county court. *Craig v. State*, 31 App. 29, 19 S. W. 504; *Bordeaux v. State*, 31 App. 37, 19 S. W. 603.

Indictment.—Willson's Cr. Forms, 78.

In a proceeding under section 24 of article 5 of the Constitution of 1876, to remove an officer for "habitual drunkenness," it is sufficient to allege that such officer was guilty of habitual drunkenness. *Trigg v. State*, 49 Tex. 645.

It is not necessary to its definition that specific instances of drunkenness be alleged, or that the effect upon the mind or body produced thereby be stated. *Trigg v. State*, 49 Tex. 645.

Acts of drunkenness between the election and qualification of the officer should not have been allowed in the pleading or in evidence. *Trigg v. State*, 49 Tex. 645.

Allegations charging, with time and place, four acts of drunkenness in as many months, would not be sufficient, from which the charge of habitual drunkenness could be inferred as a necessary or legal consequence. *Trigg v. State*, 49 Tex. 645.

The indictment clearly charging an offense under the statute both in getting drunk and being found intoxicated in a public place, unnecessary allegations do not invalidate it but are to be treated as surplusage. *Kuykendall v. State*, 72 App. 153, 161 S. W. 130.

Removal from office.—See *Trigg v. State*, 49 Tex. 645.

Art. 201. [147] **"State or district officer" defined.**—Within the term "state or district officer" are included the governor, lieutenant-governor, the heads of the several executive departments at the capital, and their chief clerks, the judges of the supreme court, courts of appeals, and the district courts, district attorneys, members and officers of the senate and house of representatives, and all other officers who derive their appointment directly from state authority.

Indictment.—Willson's Cr. Forms, 78.

Art. 202. [148] **County or municipal officer guilty of drunkenness.**—Any county or municipal officer who shall be guilty of drunkenness shall, for the first offense, be fined in any sum not less than five and not more than fifty dollars; upon a second conviction for the same offense, he shall be fined not less than fifty nor more than one hundred dollars; and upon a third conviction for the same offense, he shall be fined not less than one hundred nor more than three hundred dollars, and be subject to removal from office in the manner provided by law. [Act July 31, 1876, pp. 76-7.]

Indictment.—Willson's Cr. Forms, 78-80.

Art. 203. [149] **"Drunkenness" defined.**—Drunkenness, as used in this chapter, is the immoderate use of any spirituous, vinous or malt liquors to such an extent as to incapacitate an officer from the discharge of the duties of his office, either temporarily or permanently. [Act July 31, 1876, p. 76.]

Habitual drunkenness as ground for removal discussed. *Trigg v. State*, 49 Tex. 645.

Indictment.—Willson's Cr. Forms, 78, 79.

Art. 204. [150] Drunkenness in public or private place; how punished.—Any person who shall get drunk, or be found in a state of intoxication, in any public place, or at any private house, except his own, shall be deemed guilty of a misdemeanor, and upon conviction before a court of competent jurisdiction, shall be fined in any sum not more than one hundred dollars for each and every such offense. [Act Feb. 21, 1879; Act 1913, p. 177, ch. 93, § 1, amending Art. 204 P. C.]

Public place.—This term does not mean a place which, in point of fact, is public, as distinguished from private, a place that is visited by many persons, and that is usually accessible to the public. A grand jury room, during the session of the grand jury, is a public place. *Murchison v. State*, 24 App. 8, 5 S. W. 508; *Clinton v. State*, 64 App. 446, 142 S. W. 591. A schoolhouse, where people are assembled for religious worship, is a "public place." *January v. State* (Cr. App.) 146 S. W. 555. A hotel room was not a "public place." *Bordeaux v. State*, 31 App. 37, 19 S. W. 603. A private residence was not a "public place." *Pugh v. State*, 55 App. 462, 117 S. W. 817, 131 Am. St. Rep. 822. Whether a place is a public place is a mixed question of law and fact, to be submitted to the jury. *Elsbury v. State*, 41 Tex. 158; *Parker v. State*, 26 Tex. 204.

Persons liable.—This article applies to all persons found drunk in a public place, and is not limited to public officers. *January v. State* (Cr. App.) 146 S. W. 555.

Conflicting jurisdiction of state and city.—See Code Cr. Proc. art. 965.

A city ordinance identical with an existing penal statute is void, and will not support a conviction. *Ex parte Wickson* (Cr. App.) 47 S. W. 643.

Indictment and information.—Willson's Cr. Forms, 78, 81.

An information charging, "In a certain public place, to wit, in the town of H., near the H. and H. public road, known as the old Grove mill," held insufficient. *Murray v. State*, 48 App. 219, 87 S. W. 349.

An information, alleging that accused did unlawfully, by the voluntary and immoderate use of liquor, get drunk, and was found in a state of intoxication in a designated schoolhouse, where people were then assembled for religious purposes, states an offense. *January v. State* (Cr. App.) 146 S. W. 555.

It was sufficient, in a complaint and information, to allege that the offense occurred in the county in which the prosecution was brought, without alleging the particular place in the county. *Howard v. State* (Cr. App.) 174 S. W. 607.

A complaint and information sufficiently identified the public place by describing it as a restaurant to which people commonly resorted for the purpose of eating and purchasing refreshments. *Howard v. State* (Cr. App.) 174 S. W. 607.

Evidence.—In a prosecution for being drunk in a public place, evidence held insufficient to support a conviction. *Clinton v. State*, 64 App. 446, 142 S. W. 591.

On a trial of accused for being drunk in a public place, the fact that some one had vomited at the place, and that a greasy spot was on the floor where one had vomited, was admissible. *January v. State* (Cr. App.) 146 S. W. 555.

Instructions to jury.—Charge should confine the jury to the public place alleged in the information. *Murray v. State*, 48 App. 219, 87 S. W. 349.

The court, on a trial of accused for being drunk in a public place, must define, in its instructions, a public place, and leave the jury to find whether the alleged place was a public place. *January v. State* (Cr. App.) 146 S. W. 555.

Art. 205. Drinking intoxicating liquors on railway passenger train.—It shall be unlawful for any person to drink intoxicating liquors of any kind in or upon any railway passenger train, or coach, or closet, vestibule thereof, or platform connected therewith, while the said passenger train or coach is in the service of passenger transportation within this state. Provided, that nothing in this article shall be construed to prevent the use of intoxicating liquors as stimulant in case of actual sickness of the person using said stimulant.

Any person violating this article shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than ten dollars nor more than one hundred dollars. [Act 1907, p. 51.]

Indictment.—Willson's Cr. Forms, 78, 732k.

TITLE 6

OF OFFENSES AFFECTING THE RIGHT OF SUFFRAGE *

Chap.		Chap.	
1.	Bribery and undue influence.	4.	Miscellaneous offenses affecting the right of suffrage.
2.	Offenses by persons, judges and other officers of election.	5.	Primary elections.
3.	Riots and unlawful assemblies at elections, and violence used or menaced towards electors.	6.	Election of United States Senators.

CHAPTER ONE

BRIBERY AND UNDUE INFLUENCE *

Art.		Art.	
206.	Bribery of any person to influence elector.	209.	Bribery of elector.
207.	Bribery of election officer.	210.	Elector accepting bribe.
208.	Election officer accepting bribe.	211.	Furnishing money for election purposes.

Article 206. [152] Bribery of any person to influence voter.—Any person who lends or contributes, or offers or promises to lend or contribute or pay any money or other valuable thing to any voter, to influence the vote of any other person, whether under the guise of a wager or otherwise, or to induce any voter to vote or refrain from voting at an election for or against any person or persons, or for or against any particular proposition submitted at an election, or to induce such voter to go to the polls or to remain away from the polls at an election, or to induce such voter or other person to place or cause to be placed his name unlawfully on the certified list of qualified voters that is required to be furnished by the county tax collector, is guilty of a felony, and, on conviction, shall be punished by confinement in the penitentiary not less than one year nor more than five years, and in addition shall forfeit any office to which he may have been elected at the election with reference to which such offense may have been committed, and is rendered incapable of holding any office under the state of Texas. [Act 1903, ch. 101; Act 1905, p. 559.]

Indictment.—Willson's Cr. Forms, 82, 83.
Requisites, see Code Crim. Proc. art. 466.

Art. 207. [153] Bribery of election officers.—If any person shall bribe, or offer to bribe, any manager, judge or clerk of a public election, or any officer attending the same, as a consideration for some act done or omitted to be done, or to be done or omitted contrary to his official duty in relation to such election, he shall be punished by fine not exceeding five hundred dollars. [P. C. 259.]

Indictment.—Willson's Cr. Forms, 82, 84.

Art. 208. [154] Election officer accepting a bribe.—If any manager, judge or clerk of an election, or officer attending thereon, shall accept a bribe offered as set forth in the preceding article, he shall be punished in the same manner as is provided in reference to the persons offering the bribe. [P. C. 260.]

Indictment.—Willson's Cr. Forms, 85.

Art. 209. [155] Bribery of elector.—Any person who gives, or offers to give, any office, employment or thing of value, or promises to secure any office, thing of value or employment to or for any voter or to or for any other person, to vote or refrain from voting at an election for or against any person, or for or against any proposition submitted at an election, or to obtain his certificate of ex-

*As to offenses relating to suffrage omitted from Penal Code, see note under art. 220, post.

emption, is guilty of a felony, and, upon conviction, shall be punished by confinement in the penitentiary not less than three nor more than five years, and in addition shall forfeit any office to which he may have been elected, and becomes ineligible to any office to which he may have been elected, and becomes ineligible to any other public office. [P. C. 260; Amend Act 1905, p. 559.]

Indictment.—Willson's Cr. Forms, 86.

Art. 210. Elector accepting bribe.—The penalty prescribed in the last preceding article against those who violate any of its provisions shall be imposed on any one who receives or agrees to receive any money, gift, loan or other thing of value, for himself or any other person, for voting or agreeing to vote, for going or agreeing to go to the polls on election day, or for remaining away or agreeing to remain away from the polls on election day, or for refraining or agreeing to refrain from obtaining his poll tax receipt or certificate of exemption, or for obtaining or agreeing to obtain the same, or for voting or agreeing to vote for or against any particular person or proposition submitted to a vote of the people. [Act 1905, p. 560.]

Indictment.—Willson's Cr. Forms, 87.

Art. 211. [156] Furnishing money for election purposes.—If any person shall furnish money to another to be used for the purpose of promoting the success or defeat of any particular candidate, or of any particular question submitted to a vote of the people, he shall be punished by a fine not exceeding two hundred dollars. [P. C. 262.]

Indictment.—Willson's Cr. Forms, 88.

CHAPTER TWO

OFFENSES BY PERSONS, JUDGES AND OTHER OFFICERS OF ELECTIONS *

Art.	Art.
212. Sundry offenses by election officers.	237. Editors or managers of newspapers.
213. Judge may require voter to answer under oath.	238. Collector delivering tax receipt.
214. Election officer opening ballot, etc.	239. Loaning money to pay poll tax.
215. Election officer divulging vote.	240. Voting at primary elections.
216. Officer corruptly refusing vote.	241. Election judges permitting removal of ballots.
217. Intimidation by election officers.	242. False certificate by chairman.
218. Presiding officer failing to deliver ballots.	243. Defacing election booths.
219. Official ballot to be posted.	244. Employés permitted to go to polls.
220. Penalty for misdemeanor under this law.	245. Keeping open saloon.
221. Voting or attempting to vote more than once.	246. Falsely personating another.
222. Doing any act in violation of this law.	247. Making false affidavit.
223. List of qualified voters.	248. Altering or obliterating ballot.
224. Poll tax receipt.	249. Delivering poll tax receipt to fictitious person.
225. Making false canvass.	250. Refusal to return poll tax receipt.
226. Officers, failure of duty.	251. Obtaining money on poll tax receipt.
227. Permitting illegal voting.	252. Ballots, poll tax receipts, etc., protection of.
228. Influencing voter.	253. Failure to securely keep ballot box.
229. Agent obtaining poll tax receipt.	254. Candidate filing false statement.
230. Suppressing, opening or reading ballot.	255. Failure to place name of candidate on ballots.
231. Electioneering near polls.	256. Person in military service attempting to control voter.
232. Failure of candidate to file statement.	257. Corporations furnishing money.
233. Candidate or person paying poll tax.	258. Judges of election assisting voter to prepare ballot.
234. Parties required to testify.	259. Officer or employé of state using his authority.
235. Judges to charge grand jury.	260. Persons holding public office.
236. Political advertising.	

*As to offenses omitted from Penal Code, see note under art. 220, post.

Art. 212 OFFENSES AFFECTING THE RIGHT OF SUFFRAGE (Title 6

Art.	Art.
261. Officers or heads of departments demanding contributions.	264c. Election on proposed amendment to Constitution: report by supervisor as to fraud and irregularity.
262. Certificate of naturalization.	264d. Same; false return or certificate; penalty.
263. National banks and other corporations, contributions by.	264e. Same; intimidation or obstruction of voters; penalty.
264. Officers making false certificate of election.	264f. Same; false returns of election to Secretary of State; penalty.
264a. Nomination of judge, clerk, and supervisor for election on proposed amendment to the Constitution; duty of managers and judges.	264g. Same; refusal of county judge to appoint nominated officers of elections; penalty.
264b. Same; penalty.	264h. Same; repeal of existing statutes.

Article 212. [157] Sundry offenses by election officers.—If any manager, judge or clerk of an election shall knowingly make or consent to any false entry on the list of voters, or put into the ballot box, or permit to be put in, any ballot not given by a voter, or take out of such box, or permit to be taken out, any ballot deposited therein, except in the manner prescribed by law, or change any ballot given by an elector, or make any false return as to the number of votes given for or against any particular candidate, the person so offending shall be punished by fine not less than one hundred nor more than one thousand dollars. [P. C. 264.]

Indictment.—Willson's Cr. Forms, 89.

Art. 213. Judge may require voter to answer under oath.—Any judge may require a citizen to answer under oath before he secures an official ballot, whether he has been furnished with any paper or ballot on which is marked the names of any one for whom he has agreed or promised to vote, or for whom he has been requested to vote, or has such paper or marked ballot in his possession, and he shall not be furnished with an official ballot until he has delivered to the judge such marked ballot or paper, if he has one. And any person who gives, receives or secures, or is interested in giving or receiving, an official ballot, or any paper whatever, on which is marked, printed or written the name or names of any person or persons for whom he has agreed or proposed to vote, or for whom he has been requested to vote, or has such paper marked, written or printed in his possession as a guide or indication by which he could make out his ticket, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars, and confinement in the county jail for thirty days. [Act 1905, p. 536.]

Art. 214. [158] Election officer opening ballot, etc.—Any manager or other officer of election who shall unfold or examine any ballot, or who shall examine the indorsement on any ballot by comparing it with the list of voters when the votes are counted or being counted, or who shall examine or permit to be examined by any other person the ballots subsequent to their being received into the ballot box, except in the manner prescribed by law, shall be punished by confinement in the penitentiary for a term not less than one nor more than two years. [Act Aug. 23, 1876, p. 308, § 16; Acts 1879, ch. 112, p. 119.]

Indictment.—Willson's Cr. Forms, 90.

Art. 215. [159] Election officer divulging vote.—Any presiding officer, judge, clerk or other officer of an election who shall divulge how any person has voted at such an election, from an inspection of the tickets, unless in a judicial investigation, shall be fined in any sum not less than one hundred nor more than five hundred dollars. [Acts Aug. 23, 1876, p. 309, § 16; Acts 1879, ch. 112, p. 120.]

Indictment.—Willson's Cr. Forms, 91.

Art. 216. [160] Officer corruptly refusing vote.—If any manager or judge of an election shall corruptly refuse to receive the vote of any qualified elector who shows by his own oath that he is entitled to vote, when his vote is objected to, such manager or judge shall be punished by fine not exceeding two hundred dollars. [P. C. 266.]

Indictment.—Willson's Cr. Forms, 92.

Art. 217. [162] Intimidation by election officer.—Any manager, judge or clerk of an election who shall, while in discharge of his duties as such, by violence or threats of violence, attempt to influence the vote of an elector for or against any particular candidate, shall be punished by fine not exceeding one thousand dollars. [P. C. 268.]

Art. 218. [163] Presiding officer failing to deliver ballots.—Any presiding officer of any election precinct who shall fail, immediately after such election, to securely box, in the mode prescribed by law, all the ballots cast thereat, and within five days thereafter to deliver the same to the county clerk of his county, shall be fined not less than fifty nor more than five hundred dollars, and, in addition thereto, may be imprisoned in the county jail for a period not exceeding six months. [Acts Aug. 25, 1876, p. 308; April 19, 1879, p. 119; April 4, 1881, p. 97; April 9, 1883, pp. 50-1.]

Indictment.—Willson's Cr. Forms, 94.

Art. 219. Official ballot to be posted.—It shall be the duty of the county clerk of each county to post in a conspicuous place in his office, for the inspection and information of the public, the names of all candidates that have been lawfully certified to him to be printed on the official ballot, for at least ten days before he orders the same to be printed on said ballot, and he shall order all the names of the candidates so certified printed on the official ballot as herein otherwise provided; and in case the county clerk refuses or wilfully neglects to comply with this requirement, he shall be guilty of a misdemeanor, and shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars, or to hard labor on the public roads of the county in which the offense was committed for any period of time not less than sixty days nor more than one year or both such penalties. [Act 1905, p. 554.]

Art. 220. Penalty for misdemeanor under this law.—Any person who is found guilty of a misdemeanor under the succeeding articles of this chapter shall be subject to a fine of not less than two hundred dollars nor more than five hundred dollars, or to hard labor on the public roads of the county in which the offense was committed for any period of time not less than sixty days nor more than one year, or to both such penalties. [Id., p. 558.]

Explanatory.—The above article, as originally enacted, reads as follows: "Any person who is found guilty of a misdemeanor under this act shall be subject to a fine of not less than two hundred dollars nor more than five hundred dollars, or to hard labor on the public road of the county in which the offense was committed for any period of time not less than sixty days nor more than one year, or to both such penalties." Act 1903, ch. 101, § 108; Act 1905, 1st S. S., p. 558, ch. 11, § 148.

Art. 222, post, in its original form reads as follows: "Any person who fraudulently or wilfully does anything in violation of this act to affect the result of any primary, special or general election is guilty of a misdemeanor unless some other penalty for such act is specially provided for." Act 1903, ch. 101, § 109; Act 1905, 1st S. S., p. 558, ch. 11, § 150.

Art. 226, post, in its original form, is as follows: "Any judge, clerk, chairman or member of an executive committee, collector of taxes, county clerk, sheriff, county judge or judge of an election, president or member of a State convention, or Secretary of State who wilfully fails or refuses to discharge any duty imposed on him by this law, is guilty of a misdemeanor unless the particular act under some other section of the law is made a felony." Act 1903, ch. 101, § 115; Act 1905, 1st S. S., p. 558, ch. 11, § 154.

Construing together the above three sections of the act of 1905, it would seem that the compilers of the revised Penal Code failed to present in the Code all the

offenses described in the original act. The various things denounced in the act of 1905 are made misdemeanors by sections 150 and 154 of that act (Penal Code, arts. 222, 226) and section 148 (Penal Code, art. 220) fixes the penalty where it is not otherwise specifically denominated in the act. If the original act is to stand unimpaired by the revision, as would seem to result from the decision in *Berry v. State* (Cr. App.) 156 S. W. 626, the Penal Code is incomplete in so far as it attempts to enumerate the offenses against the right of suffrage. In view of the doubt as to whether the revision has limited the scope of the original act, and as to just what acts directed or prohibited by the act of 1905, and its subsequent amendments, come within the criminal provisions, the compilers have not attempted to set out the omitted provisions. The omitted provisions, with their amendments will be found in *Vernon's Sayles' Civ. St.* 1914, arts. 2912, 2920-2924, 2927, 2933, 2935, 2937-2954, 2957-2970, 2972-2974, 2976-2985, 2990-2995, 2997-2999, 3001, 3003-3011, 3013, 3015-3023, 3026, 3084-3138, 3140, 3145-3174.

Art. 221. Voting or attempting to vote more than once.—Any person who, at a general, special or primary election, wilfully votes or attempts to vote in any other name than his own, or who votes or attempts to vote more than once, is guilty of a misdemeanor. [Id., p. 558.]

Indictment.—Willson's Cr. Forms, 104.

Art. 222. Doing any act in violation of this law.—Any person who fraudulently or wilfully does anything in violation of this law to affect the result of any primary, special or general election, is guilty of a misdemeanor unless some other penalty for such act is specially provided for. [Id., p. 558.]

See note under art. 220.

Art. 223. List of qualified voters.—Any person who, being an officer, clerk or employé of the county collector of taxes, precinct judge or clerk of election, who knowingly puts in the certified list of qualified voters of a precinct any other number than that written when the poll tax receipt or certificate of exemption was issued, or who knowingly delivers to, or receives from, any voter any poll tax receipt or certificate of exemption on which is placed any other name than that first written when it was issued, is guilty of a misdemeanor. [Id., p. 558.]

Art. 224. Poll tax receipts.—Any collector of taxes, or any one in his employ, who wilfully fails or refuses to transcribe correctly from the original poll tax receipt or certificate of exemption and insert in the duplicate retained in the collector's office the name and other description of the citizen required by law to be given by him, or who fails to transcribe correctly from the duplicate kept in the collector's office and insert in the list of qualified voters of a precinct the name and description of the citizen as contained in said duplicate, or who issues a poll tax receipt after the first day of February in any year, bearing a date prior to the first day of February, or who wilfully fails to keep said original duplicate securely locked up when the same are not being used, or permits them to be mutilated, defaced, lost or destroyed, or who conceals, alters or destroys them, is guilty of a misdemeanor. [Id., p. 558.]

Art. 225. Making false canvass.—Any judge or clerk of an election, chairman or member of a party executive committee, or officer of a primary, special or general election, who wilfully makes any false canvass of the votes cast at such election, or a false statement of the result of a canvass of the ballots cast, is guilty of a felony, and, upon conviction, shall be punished by confinement in the penitentiary not less than two years nor more than five years. [Id., p. 558.]

Indictment.—An indictment, charging that defendant, while acting as a precinct judge of an election, unlawfully made a false canvass of the votes cast in that precinct, in that he announced that a certain number of votes were cast for the several candidates for mayor, whereas in fact a different number of votes had been cast for each of them, if by "canvassing" was meant that defendant as one of the judges falsely called the ballots for tabulation, was insufficient, because not alleging the names of the voters so falsely called, and, if that could not be done, then that their names were unknown. *Beach v. State* (Cr. App.) 171 S. W. 715.

Art. 226. Officers, failure of duty.—Any judge, clerk, chairman or member of an executive committee, collector of taxes, county clerk, sheriff, county judge or judge of an election, president or member of a state convention, or secretary of state, who wilfully fails or refuses to discharge any duty imposed on him by this law, is guilty of a misdemeanor, unless the particular act under some other section of the law is made a felony. [Id., p. 558.]

See note under art. 220.

Art. 227. Permitting illegal voting.—Any judge of an election or primary, who wilfully or knowingly permits a person to vote, whose name does not appear on the list of qualified voters of the precinct, and who fails to present his poll tax receipt or certificate of exemption, or makes affidavit of its loss or that it was misplaced or inadvertently left at home, except in cases where no certificate of exemption or tax receipt is required, is guilty of a misdemeanor. [Id., p. 558.]

Art. 228. Influencing voter.—Any judge, clerk, supervisor or other person who may be in the room where an election, either primary, special or general, is being held, who there indicates by word, writing, sign or token how he desires a citizen to vote or not to vote, shall be fined not less than two hundred nor more than five hundred dollars, and shall, in addition, be confined in jail or worked as a convict on the public road not less than ten nor more than thirty days. [Id., p. 559.]

Indictment.—Willson's Cr. Forms, 93.

Art. 229. Agent obtaining poll tax receipt.—Any person who knowingly becomes agent to obtain a poll tax receipt or certificate of exemption, except as provided by this act, or any one who gives money to another to induce him to pay his poll tax, is guilty of a misdemeanor. [Id., p. 559.]

Indictment.—An indictment under this article need not negative the exceptions. *Johnson v. State* (Cr. App.) 177 S. W. 490.

An indictment charging, in a single count, the commission of a misdemeanor, in violation of this article, and also the commission of a felony in violation of article 233, post, is duplicitous and should be quashed. *Johnson v. State* (Cr. App.) 177 S. W. 490.

Jurisdiction of prosecution.—See notes to Code Cr. Proc. arts. 88, 98.

Art. 230. Suppressing, opening or reading ballot.—If any person intrusted with the transmission to the precinct election judge of official ballots, sample cards, instruction cards, distance markers or other election supplies, or who, being entrusted with the same, wilfully fails to deliver or return the same, or does any act to defeat the delivery or return of the same, or being a person to whom may be legally entrusted the ballots cast at an election, shall open and read a ballot, or permit it to be done, is guilty of a misdemeanor. [Id., p. 559.]

Art. 231. Electioneering near polls.—Any person who shall do any electioneering or loitering within one hundred feet of the entrance of the place where the election is to be held, or who shall hire any vehicle for the purpose of conveying voters to the polling place, or shall wilfully remove any ballots from the polling place, except as permitted by law, except when in marking, or who, being a voter, shall show his ballot so as to reveal the vote cast by him, or marks it otherwise than is required by law for identification, or who, being a voter, shall deliver to the precinct judge of election any other ballots than the one delivered to him by the judge at the polling place, is guilty of a misdemeanor. [Id.]

Art. 232. Failure of candidate to file statement.—Any candidate for any public office who fails to file with the county judge of his county, within ten days after the date of a primary or general elec-

tion, an itemized statement of all money or things of value paid or promised by him before or during his candidacy for such office, including his traveling expenses, hotel bills and money paid to newspapers, and make affidavit to the correctness of such account, showing to whom paid or promised, whether he was elected or not, is guilty of a misdemeanor, and, on conviction, shall be fined not less than two hundred nor more than five hundred dollars, may be sentenced to work on the county roads not less than thirty days nor more than twelve months. [Id., p. 560.]

Art. 233. Candidate or person paying poll tax.—Any candidate for office or other person who pays or procures another to pay the poll tax of a citizen, except as is permitted by law, is guilty of a felony, and shall be punished by confinement in the penitentiary not less than two nor more than five years. [Id.]

Indictment.—An indictment under this article need not negative the exceptions. *Johnson v. State* (Cr. App.) 177 S. W. 490.

An indictment charging, in a single count, the commission of a misdemeanor, in violation of art. 229 ante, and also the commission of a felony in violation of this article is duplicitous and should be quashed. *Johnson v. State* (Cr. App.) 177 S. W. 490.

Jurisdiction of prosecution.—See notes to Code Cr. Proc. arts. 88, 98.

Art. 234. Parties required to testify.—When two persons are parties to the same act in violating any provisions of the election laws of this State, either party may be required to testify regarding the same, but the one testifying shall not thereafter be prosecuted for such illegal act. [Id.]

Art. 235. Judges to charge grand jury.—The offenses and penalties described in this act shall be given specially in charge by district judges to grand juries, and whenever this duty is neglected by a district judge, it shall be the duty of the next grand jury to make a formal report of such neglected duty to the court. District judges shall, in every charge to a grand jury, emphasize the importance of pure elections as necessary to preserve free government and direct them to search diligently and to present all infractions of the election laws of this state. [Id.]

Art. 236. Political advertising.—Anything published in a newspaper, pamphlet or printed journal in favor of or in opposition to any candidate for any public office, or in favor of or in opposition to the success or defeat of any political party, or any proposition submitted to a vote of the people, when the same is published in consideration of the receipt or promise of money or thing of value, shall be known as political advertising; and any editor, publisher, manager or agent of any newspaper, pamphlet or printed journal, who shall publish political advertising other than as advertising matter, which shall be labeled at the beginning or end thereof with the word "advertisement," or who shall knowingly and wilfully demand or receive, for the publication of such political advertising, money or other thing of value in excess of the sum or sums due for such service at the regular advertising rates of such newspaper, pamphlet or printed journal, or any person who shall pay, or offer to pay the editor, publisher, manager or agent of any newspaper, pamphlet or printed journal for such service any money or other thing of value in excess of the sum or sums due at regular advertising rates, or any person who shall pay or offer to pay any editor, publisher, manager or agent of a newspaper, pamphlet or printed journal any money or thing of value for the publication of political advertising, except as advertising matter, shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, and sentenced to imprisonment in the county jail or to work on the county road not less than ten nor more than thirty

days; provided, however, that nothing herein contained shall be construed as applying to announcements of candidates for office. [Id.]

Indictment.—Willson's Cr. Forms, 159.

Art. 237. Editors or managers of newspapers.—If any editor or manager of a newspaper or printed journal, or if any person or persons having control thereof, shall demand or receive any money, thing of value, reward or promise of future benefit for publishing anything as editorial matter in advocacy of or opposition to any candidate, or for or against any proposition submitted to a vote of the people, he or they, and also the individual or parties offering such reward, shall be punished as in the last preceding section, and if the offense be committed by the president of any corporation, or by any officer thereof, with the knowledge or consent of its president, in addition to punishment of the individual, its charter shall be forfeited. Either party to a violation of this and the preceding section may be compelled to testify regarding thereto, but shall not be punished for any act regarding which he may have been required to testify. [Act 1905, p. 561.]

Art. 238. Collector delivering tax receipt.—Any tax collector who shall deliver a tax receipt or certificate of exemption to anyone except the one entitled thereto, and at the time when the tax is paid or the certificate of exemption is applied for, except as specially permitted by this act, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, and shall be removed from office. [Id.]

Art. 239. Loaning money to pay poll tax.—Any person who loans or advances money to another knowingly to be used for paying the poll tax of such other person is guilty of a misdemeanor. [Id.]

Art. 240. Voting at primary elections.—Any person who votes or offers to vote at a primary election or convention of a political party, having voted at a primary election or convention of any other party on the same day, is guilty of a misdemeanor. [Id.]

Art. 241. Election judges permitting removal of ballots.—Any judge of election who wilfully permits the removal of ballots before the closing of the polls, or refuses to receive a ballot after a citizen has legally folded and returned same, or refuses to deliver to a citizen entitled to vote under the law an official ballot, or wilfully fails to keep order within the polling place, or permits any person, except the clerks and judges of election or those who enter for the purpose of voting, to come within the guard rail, or knowingly permits anyone to remove, alter or deface a stamp number or signature legally placed on a ballot for future identification, is guilty of a misdemeanor. [Id.]

Art. 242. False certificate by chairman.—Any chairman of a county executive or district or state executive committee who is charged with the duty of certifying the names of the candidates selected by a primary convention or primary election or elections, who wilfully omits to certify the name of any candidate legally chosen, or who certifies falsely regarding anyone chosen or defeated, is guilty of a misdemeanor. [Id., p. 562.]

Art. 243. Defacing election booths.—Any person who, during an election, wilfully defaces or injures an election booth or compartment, or wilfully removes any of the supplies provided for elections, or, before the closing of the polls, wilfully defaces or destroys any list of candidates to be voted for at an election which has been posted in accordance with law, is guilty of a misdemeanor. [Id.]

Art. 244. Employés permitted to go to polls.—Any person or corporation who refuses to an employé entitled to vote the privilege of attending the polls, or subjects such employé to a penalty or deduction of wages because of the exercise of such privilege, is guilty of a misdemeanor. [Id.]

Art. 245. Keeping open saloon.—If any person shall open or keep open any barroom, saloon or wholesale liquor house, where vinous, malt, spirituous or intoxicating liquors are sold, during any portion of the day on which an election is held for any purpose or office in the voting precinct, town or city where such election is held, or shall in such voting precinct, village, town or city, sell, barter or give away any vinous, malt, spirituous or intoxicating liquor during the day of such election, or if any person shall carry or cause to be carried to the polling place on the day of election any such liquor for the purpose of sale, gift or drinking the same, or if any person shall find and take possession of any liquor at or near the polling place, or inform another of its whereabouts, he shall be deemed guilty of a misdemeanor; provided, that such liquors may be sold on election day by a drug store to fill a prescription of a physician, who shall at the time certify in writing on honor that it is needed by his sick patient, leaving such certificate with the druggist. [Id.]

Cited, Croell v. State, 25 App. 596, 8 S. W. 816; Croell v. State, 25 App. 755, 9 S. W. 68; Cooper v. State, 26 App. 575, 10 S. W. 216; Watts v. State, 61 App. 364, 135 S. W. 585.

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| 1. Explanatory. | 7 Defenses—Mistake of fact. |
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1. Explanatory.—This article, at the time of its incorporation into the revised Penal Code, had been superseded in part by Acts 1909, p. 309, which was carried into the Penal Code as art. 630.

2. Validity.—This article as originally enacted in 1876, held valid. English v. State, 7 App. 171.

3. Repeal.—As to repeal of former laws by implication, see Fleeks v. State, 47 App. 327, 83 S. W. 381.

4. Permits by officers.—Judges of election or other officers cannot permit establishments to be kept open. English v. State, 7 App. 171.

5. Day defined.—The word day includes the time elapsing from one midnight to the succeeding one. Haines v. State, 7 App. 30; Lawrence v. State, 7 App. 192.

6. Persons liable.—An employé who opens or helps to keep open his proprietor's saloon is equally with him amenable. Davidson v. State, 27 App. 262, 11 S. W. 371; Janks v. State, 29 App. 233, 15 S. W. 815.

7. Defenses—Mistake of fact.—See Hailes v. State, 15 App. 93.

8. — Validity of election.—On a prosecution for keeping open a bar-room on election day, held, that the validity of the election could not be attacked in regard to the manner of ordering and holding the same, where same was held under the forms of law. Geib v. State, 31 App. 514, 21 S. W. 190.

That an election is merely voidable owing to irregularities but not void is no defense. Sadler v. State, 48 App. 507, 89 S. W. 974, 122 Am. St. Rep. 770.

9. — Prescription.—A physician who keeps a drug store is not at fault if the applicant for a prescription practices a fraud upon him. Walker v. State (Cr. App.) 64 S. W. 1052.

10. Indictment and information.—Willson's Cr. Forms, 121, 122.

The prosecution may be by information, Haines v. State, 7 App. 30.

An indictment for the offense should allege what the election was for. It is not sufficient to allege that an election was then and there held. Hoskey v. State, 9 App. 202. And it must allege that the offense was committed in the defendant's voting precinct, village, town, or city. Zweifel v. State, 16 App. 154; Smith v. State, 18 App. 454. But this allegation would not now be required. Hailes v. State, 15 App. 93. A prosecution for this offense may be by information as well as by indictment. Haines v. State, 7 App. 30.

Information, to be sufficient, must aver that the house was opened and kept open on the day of election in the precinct, village, town, or city where such election was being held, or within three miles thereof. Patton v. State, 31 App. 20, 19 S. W. 252. An information for keeping open a bar-room on election day, is sufficiently specific if it alleges that such election was held by lawful authority. Following Janks v. State, 29 App. 233, 15 S. W. 815.

It is no ground for quashing an indictment for keeping open a bar room on an election day that the election was not legally held. If it was held under the forms of law it is not subject to collateral attack. *Wear v. State*, 35 App. 30, 26 S. W. 68, 29 S. W. 1082.

An indictment charging the sale of intoxicating liquors on election day, which does not give the number of the voting precinct where the election was held, nor of the Justice precinct, is insufficient. *Gage v. State* (Cr. App.) 76 S. W. 459.

An information charging the giving of intoxicating liquors to another while an election is being held need not state that the defendant is not a druggist, etc.; the proviso of the statute relating to such offense forming no part of its definition. *Walker v. State* (Cr. App.) 151 S. W. 318.

11. **Evidence.**—The State has only to prove that the defendant is engaged in the saloon business and that the same was open by or under his direction. It need not show that he sold, gave away or offered to sell intoxicating liquors. *Smith v. State*, 52 App. 357, 107 S. W. 353.

12. **Instructions.**—On trial of one for keeping open saloon on election day, instruction need not state that defendant must have kept it open unlawfully and willfully, as these words are not part of the definition of the offense. *Knox v. State* (Cr. App.) 77 S. W. 14.

Art. 246. Falsely personating another.—Any person who attempts to falsely personate at an election another person, and vote, or attempt to vote, on the authority of a poll tax receipt or certificate of exemption not issued to him by the county tax collector, is guilty of a felony, and shall be punished by hard labor within the walls of a penitentiary not less than three nor more than five years. [Id.]

Art. 247. Making false affidavit.—If any person shall make a false affidavit that his poll tax receipt or certificate of exemption has been lost or mislaid, or wilfully and corruptly induce another to make such affidavit, he shall be punished by imprisonment in the penitentiary not less than three nor more than five years. [Id.]

Art. 248. Altering or obliterating ballot.—If any person shall wilfully alter or obliterate, suppress or destroy any ballots, election returns or certificates of election, he shall be deemed guilty of a felony, and shall be punished by imprisonment in the state penitentiary not less than three nor more than five years. [Id.]

Indictment.—Willson's Cr. Forms, 111-114.

Art. 249. Delivering poll tax receipt to fictitious person.—Any collector of taxes, who shall knowingly or wilfully issue and deliver a poll tax receipt or certificate of exemption to a fictitious person, shall be punished by confinement in the state penitentiary not less than three nor more than five years. [Act 1905, p. 562.]

Art. 250. Refusing to return poll tax receipt.—Anyone to whom a poll tax receipt or certificate of exemption may be intrusted for safe keeping, who refuses on the demand of the owner to return the same to the owner thereof, before any primary election day or primary convention day and before any general election day, shall be deemed guilty of a misdemeanor. [Id. p. 563.]

Art. 251. Obtaining money on poll tax receipt.—Any person who shall sell, pledge, loan or deposit his poll tax receipt or certificate of exemption for money or any other thing of value shall be deemed guilty of a misdemeanor; and the person who purchases, borrows or obtains possession of the same, by way of pledge or loan, is guilty of a misdemeanor. Either of the parties to such wrongful act may be compelled to appear and testify in a proceeding against the other, but he shall not thereafter be arrested or punished for his participation in such wrongful act. [Id.]

Art. 252. Ballots, poll tax receipts, etc.; protection of.—If any person intrusted with the transmission to the precinct election judges of official ballots, poll tax receipts and exemption certificate rolls, sample cards, instruction cards, and all supplies required to conduct an election, or who, being intrusted with the transmission of election returns, or election boxes, wilfully fails to deliver within

the time required by this law, or wilfully does any act to defeat the delivery thereof, or, not being a person intrusted therewith, shall do any act to defeat the due delivery of such election returns, election supplies, election boxes, or who, being an officer or person with whom may be legally intrusted the ballots cast at an election, shall open or read any ballot, or permit it to be done, except as provided by law in the discharge of his duty, shall be guilty of a misdemeanor. [Id.]

Art. 253. Failure to keep ballot box.—Any person who fails to keep securely any ballot box containing ballots voted at an election, when committed to his charge by one having authority over the same, shall be guilty of a misdemeanor. [Id.]

Art. 254. Candidate filing false statement.—Any person who wilfully fails or refuses to file, within ten days after an election, with the county clerk of the county of his residence, any report or itemized statement required by this law, or who knowingly files a false or incomplete statement thereof, shall be guilty of a misdemeanor. [Id.]

Art. 255. Failure to place name of candidate on ballots.—Any county clerk or other officer, charged by this act with the duty of preparing or having printed the official ballot at any general or special election, and any county chairman or a member or members of the county executive committee of any political party hereby charged with the duty of preparing or having printed the official ballot to be used at any primary election of such party, who fails or refuses, except in cases permitted by law, to have the name of any candidate or candidates, whose nominations have been certified to him, placed or printed on such official ballot, shall be guilty of a felony, and, upon conviction, shall be punished by confinement in the penitentiary for not less than one nor more than five years. [Id.]

Art. 256. Person in military service attempting to influence voter.—Any person in the civil or military service of the United States in this state who, by threats, bribery, menace or other corrupt means, attempts to control or controls the vote of an elector, or annoys, injures or punishes him for the manner in which he exercises his elective franchise in any election, is guilty of a misdemeanor, and may be arrested and tried at any future time when he may be found in Texas. [Id.]

Art. 257. Corporations furnishing money.—Any corporation or officer thereof who, directly or indirectly, furnishes, loans or gives any money or thing of value to aid those who manage the political campaign of any candidate or candidates, or to any campaign manager, or to any particular candidate or person, to promote the success of such candidate for public office, shall be guilty of a misdemeanor, and, if a corporation, if the act was done with the approval or connivance of its president, financial agent or treasurer, forfeits its charter. It shall be the duty of the attorney general to institute proceedings for such forfeiture whenever it is made known to him by the affidavit of a reputable man that in his opinion such offense has been committed. The officers, agents and employes of such corporation, as also the candidate, and all persons connected with his political headquarters, shall be competent witnesses, and may be compelled to attend court and testify, and those shall not be subject to prosecution who reveal facts showing a violation of this section. [Id.]

Art. 258. Judges of election assisting voter to prepare ballot.—Any judge of an election or an interpreter who, in assisting a voter

to prepare his ballot, shall prepare the same otherwise than the way the voter himself shall direct, shall be deemed guilty of a misdemeanor. [Id. p. 564.]

Art. 259. Person or employé of State using his authority.—Any officer or employé of the state, or of a political subdivision thereof, who, directly or indirectly, uses his authority or official influence to compel or induce any officer, clerk or employé of the state, or any political subdivision thereof, to subscribe, pay or promise to pay, any political assessment, shall be guilty of a misdemeanor. [Id.]

Art. 260. Person holding public office.—Any person who, while holding a public office, or seeking a nomination or appointment thereof, corruptly uses or promises to use, directly or indirectly, any official authority, or influence possessed or anticipated, in any way, to aid any person in securing an office or public employment, or any nomination, confirmation, promotion, appointment or increase of salary, upon consideration that the vote or political influence or action of the person so to be benefited, or any other person, shall be given or used in behalf of any candidate, officer or party, or upon any other corrupt consideration, is guilty of a misdemeanor. [Id.]

Art. 261. Officers or heads of departments demanding contributions.—Any head of any of the departments of state, or other public officer, who shall demand or receive any money or thing of value from any clerk or other person in his office, for his election expenses, or to reimburse him for money already expended, or who shall remove from any office any competent clerk who declines to make such contribution, shall be deemed guilty of a misdemeanor. [Id.]

Art. 262. Certificate of naturalization.—Any person who knowingly and wilfully procures from any court, clerk or other officer a certificate of naturalization, which has been allowed, signed or sealed in violation of the laws of the United States, or of this state, with intent to enable him or any other person to vote at any election, when he or such person is not entitled by the laws of the United States to become a citizen or to exercise the elective franchise, is guilty of a felony, and, upon conviction, shall be punished by confinement in the penitentiary not less than five nor more than ten years. [Id.]

Art. 263. National banks and other corporations, contributions by.—That it shall be unlawful for any national bank, or any other corporation organized by authority of any law of congress, and doing business in this state, or authorized to do business in this state, or any other corporation organized by the authority of the laws of this state, or of any foreign country, or any corporation authorized by the authority of the laws of any other state of the United States, doing business in this state, or authorized to do business in this state, to make any money contribution, or its equivalent, or to offer to pay at any future time any money, or its equivalent, directly or indirectly, for the purpose of aiding or defeating the election of any candidate for the office of representative in congress, or presidential or vice presidential electors from this state, or any candidate for any state, district, county or precinct office in this state, or the success or defeat of any political measure submitted to a vote of the people of this state.

Every corporation which shall make, or offer to make, any contribution in violation of the foregoing provisions of this article shall be subject to a fine of not less than five thousand nor more than ten thousand dollars for each offense; and every officer or director of any corporation who shall consent to any contribution, as above

provided, by the corporation in violation of the foregoing provisions shall, upon conviction, be punished by a fine of not less than five hundred nor more than one thousand dollars, or by imprisonment in the penitentiary for a term of not less than two nor more than five years, or by both such fine and imprisonment. [Act 1907, p. 169.]

Art. 264. [164] Officer giving false certificate.—If any officer authorized by law to give a certificate of election shall, knowingly and corruptly, give any false certificate thereof, he shall be punished by fine not exceeding three hundred dollars, and, in addition thereto, may be imprisoned in the county jail for a term not less than one month nor more than one year. [P. C. 269.]

Indictment.—Willson's Cr. Forms, 95.

Art. 264a. Nomination of judge, clerk, and supervisor for election on proposed amendment to the Constitution; duty of managers and judges.—Whenever any proposed amendment to the Constitution of this State is to be voted upon by the qualified voters of this State, either at an election held for that purpose or at any election for the State officers, the county chairman of any organization advocating, and the county chairman of any organization opposing the adoption of such amendment, or if such county chairman fails to act, then three members of the county executive committee of any organization advocating, or three members of the county executive committee opposing the adoption of such constitutional amendment may at any time not less than five days before the election at which such proposed amendment is to be voted upon, nominate one judge, one clerk and one supervisor to serve as judge, clerk and supervisor, respectively, for the voting box for which they are so selected, who shall be qualified voters of the voting precinct or box for which they are chosen, by presenting in writing to the county judge of the county the names of such judges, clerks and supervisors so selected, and such county judge shall appoint the parties nominated to act in such capacities at the respective voting precincts and boxes for which they are respectively selected. Should the county judge fail or refuse to appoint such officers, they shall apply to the officers and judges of the voting precinct or box for which they were respectively nominated, and the manager and judges of such precinct or box shall permit such persons so selected to act in the capacities named. [Act 1911, p. 144, ch. 80, § 1.]

Art. 264b. Same; penalty.—The managers or judges of the election so refusing, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$100.00 and not more than \$500.00, and shall be imprisoned in the county jail for not less than twenty days and not more than sixty days. [Id., § 2.]

Art. 264c. Election on proposed amendment to Constitution; report by supervisor as to fraud and irregularity.—Any supervisor who shall discover any fraud or irregularity in the conduct of an election or in counting the votes or in making returns thereof, within five days after said election, shall file a written report under oath with the county clerk of the county in which he resides, setting out fully any irregularity or fraud or semblance thereof occurring in said voting precinct or box that would in any manner affect the true result of said election in said voting precinct. The clerk of the county court of said county shall keep said report on file in his office and shall permit the same to be inspected upon application by any citizen of this State. It shall be the duty of such supervisor to call the attention of the officers holding such

election to any fraud, irregularity or mistake, illegal voting attempted, or legal voting prevented, or other failure to comply with the law governing such election at the time it occurs, if practicable, and if he has knowledge thereof at the time; and he shall not report any matter to which he should have called attention at the time, to which he did not call attention at the time, unless he shows some good and sufficient reason why the same was not called to the attention of such election officers. [Id., § 4.]

Art. 264d. Same; false return or certificate; penalty.—Any manager, judge or clerk of any such election, who shall knowingly make any false return or false certificate of the result of any such election, shall be deemed guilty of a felony, and upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one nor more than five years. [Id., § 5.]

Art. 264e. Same; intimidation or obstruction of voters; penalty.—Any election officer or supervisor who shall intimidate or attempt to intimidate any voter, or knowingly refuse to allow any qualified voter to vote, or any person who, within one hundred feet of the voting box on election day, shall intimidate or attempt to intimidate any qualified voter from voting, or in any manner by word or act attempt to influence any voter to cast his vote for or against any question provided under this Act to be voted upon, shall be deemed guilty of a misdemeanor and upon conviction, shall be fined in any sum not less than \$50.00 nor more than \$500.00. Provided, further, that the provisions of this Section shall not be construed to prevent the officers of the election from assisting any qualified voter in making out his ticket as is provided for under the General Election Laws. [Id., § 5a.]

Art. 264f. Same; false returns of election to Secretary of State; penalty.—Any officer of any county upon whom is placed by law the duty of making and certifying to the Secretary of State returns of any such election, who shall knowingly make or certify to any false certificate or false statement of the result of any such election shall be deemed guilty of a felony, and upon conviction shall be punished by confinement in the penitentiary for not less than one nor more than five years. [Id., § 6.]

Art. 264g. Same; refusal of county judge to appoint nominated officers of election; penalty.—Should any county judge refuse to appoint the officers as provided for and required in Section 1 of this Act [art. 264a], upon application to him, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not less than \$50.00 nor more than \$500.00, and by imprisonment in the county jail for not less than ten days nor more than thirty days, and in addition, such refusal of such county judge shall be grounds for his impeachment and removal from office. [Id., § 7.]

Art. 264h. Same; repeal of existing statutes.—This law shall not repeal any existing statute with reference to the conducting of elections, but shall be cumulative thereof. [Id., § 16.]

CHAPTER THREE

RIOTS AND UNLAWFUL ASSEMBLIES AT ELECTIONS,
AND VIOLENCE USED OR MENACED
TOWARD ELECTORS *

<p>Art. 265. Riots at elections. 266. Unlawful assemblies to prevent. 267. Tumults, mobs and disturbances.</p>	<p>Art. 268. Intimidation of electors. 269. Carrying arms about election.</p>
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Article 265. [165] Riots at elections.—If any riot be committed at the place of holding a public election, or within one mile of such place, with a design to disturb or influence such election, every person engaged therein shall be punished by fine not exceeding one thousand dollars. [P. C. 271.]

Indictment.—Willson's Cr. Forms, 96.
Indictment to sufficiently charge riot must show for what purpose the rioters assembled, and that they unlawfully assembled; and further, set out the illegal act which was the object of the meeting. *Blackwell v. State*, 30 App. 672, 18 S. W. 676.

Art. 266. [166] Unlawful assemblies to prevent.—If any unlawful assembly meets at the place of holding an election or within a mile thereof, for the purpose of preventing the holding of such election, all persons engaged in such unlawful assembly shall be punished by fine not exceeding five hundred dollars. [P. C. 272.]

See art. 436, post.
Indictment.—Willson's Cr. Forms, 97.

Art. 267. [167] Tumults, mobs and disturbances at elections.—If any person shall disturb any election by inciting or encouraging a tumult or mob, or shall cause any disturbance in the vicinity of any poll or voting place, he shall be punished by fine of not less than one hundred nor more than five hundred dollars, and, in addition thereto, may be imprisoned in the county jail for a period not exceeding one month. [Act Aug. 23, 1876, p. 311, § 25.]

Indictment.—Willson's Cr. Forms, 98.

Art. 268. [168] Intimidation of electors.—If any person shall, by force or intimidation, obstruct or influence, or attempt to obstruct or influence, any voter in the free exercise of the elective franchise, he shall suffer the punishment prescribed in the preceding article. [Act Aug. 23, 1876, p. 311, § 25.]

Indictment.—Willson's Cr. Forms, 99.
Indictment under Act Aug. 15, 1870, held sufficient. *State v. Franks*, 38 Tex. 640.

Art. 269. [169] Carrying arms about elections.—If any person, other than a peace officer, shall carry any gun, pistol, bowie knife or other dangerous weapon, concealed or unconcealed, on any day of election, during the hours the polls are open, within the distance of one-half mile of any poll or voting place, he shall be punished as prescribed in article 167 [267] of this Code. [Act Aug. 23, 1876, p. 311, § 25.]

Validity.—This article is constitutional. *Livingston v. State*, 3 App. 74.
This article defines the offense of carrying arms about elections. Article 477, post, defines the offense of carrying arms in church or other assembly. These two offenses are distinct, comprehending different elements and punished by different penalties, although one of the ingredients of each is common to both. These acts are, therefore, not within the rule that if the inculpatory acts enumerated in two different articles of the Penal Code be the same, and the penalties prescribed be different, neither will be enforceable because of uncertainty as to the penalty. *Cooper v. State*, 25 App. 530, 8 S. W. 654; *Cooper v. State*, 26 App. 575, 10 S. W. 216.

Operation.—The statute cannot be construed to abridge the right to carry arms where the purpose is protection against apparent, present and serious danger to human life then about to be inflicted. *Barkley v. State*, 28 App. 99, 12 S. W. 99.

It is immaterial whether the election is held for a state officer or for a con-

*As to offenses omitted from revised Penal Code, see note under art. 220, ante.

gressman, since the election being under the laws of the state, the offender is punishable under the state's laws. *State v. Franks*, 38 Tex. 640.

Relation to other laws.—The act of 1876 virtually re-enacts Act 1873, § 31, and hence its repeal of that act does not condone offenses violative of that section committed while the act of 1873 was in effect. *Livingston v. State*, 3 App. 74.

Defendant procured a pistol on the east side of the square of the city of Tyler on an election day, put it in his pocket and walked across the east side of the square to the courthouse where people were voting. He was prosecuted under article 269, and his defense was that he should have been prosecuted under article 477 because of the lesser penalty; held, that the offense announced under article 269 was complete before the offense announced by article 477 was committed. *Burns v. State*, 36 App. 601, 38 S. W. 204.

Former laws.—A similar provision in a former statute (Acts 1870, chap. 78, sec. 54) was held applicable to all elections, congressional as well as state. See a sufficient allegation. *State v. Franks*, 38 Tex. 640.

Offense, what constitutes.—Where it reasonably appeared to defendant that his brother was in danger of injury from persons armed with sticks and he procured a pistol and went to the polling place and quelled the disturbance peaceably, he was not guilty of carrying a pistol in violation of this article. *Barkley v. State*, 28 App. 99, 12 S. W. 495.

Defenses.—That the defendant's life had been threatened and was in danger and that he carried a gun to protect himself, is no defense to a charge under this article. *Livingston v. State*, 3 App. 74. Nor is it a defense to such charge that five months before the election the defendant was deputized to execute a warrant. *Snell v. State*, 4 App. 171.

To a prosecution for carrying arms about an election, etc., as that offense is defined by this article, the accused interposed the defense that the election was void because illegal. But held, first: Primarily, the presumption obtains in favor of the legality of the election. Second: Even if the legality of election can be assailed collaterally, the burden of establishing the illegality of the same rests on the accused. Third: In a prosecution for the violation of this article, it is immaterial whether the election was legal or illegal, if the same was held under the forms of law. *Cooper v. State*, 26 App. 575, 10 S. W. 216. See, also, *Barkley v. State*, 28 App. 99, 12 S. W. 495.

Officers.—A special constable appointed by a county commissioner, who is a magistrate, is exempt from the operation of this article. *Gonzales v. State*, 53 App. 430, 110 S. W. 740.

Indictment.—Willson's Cr. Forms, 100.

Evidence.—Defendant's evidence that his life had been threatened and was in danger was properly excluded as immaterial. *Livingston v. State*, 3 App. 74.

Evidence that defendant thought his appointment for the purpose of arresting a certain person named in the warrant authorized him to carry a pistol was properly excluded; the person having been arrested, and his case disposed of, prior to the date of carrying the pistol charged in the indictment. *O'Neal v. State*, 32 App. 42, 22 S. W. 25.

Evidence that defendant reported to the county attorney that one S. had threatened his life, and that the attorney had told him he had the right to carry a pistol by virtue of the warrant authorizing him to arrest another person, was properly excluded, where S. had been placed under bond to keep the peace, and such other person arrested, prior to the offense charged. *O'Neal v. State*, 32 App. 42, 22 S. W. 25.

CHAPTER FOUR

MISCELLANEOUS OFFENSES AFFECTING THE RIGHT OF SUFFRAGE *

Art.		Art.	
270.	Illegal arrest of voter.	280.	County clerk failing to destroy ballots.
271.	Illegal voting.	281.	Not applicable in cases of contest.
272.	Official ballot—depositing two or more tickets folded together.	282.	Wilful neglect of official duty.
273.	Instigating illegal voting.	283.	Elector voting without qualifications.
274.	False swearing by voter.	284.	Penalty for illegal voting.
275.	Procuring voter to swear falsely.	285.	Registrar to administer oaths.
276.	Failing to deliver returns.	286.	Penalty for illegal certificates.
277.	Preventing delivery of returns.	287.	Election officer disclosing vote or giving information.
278.	Officer opening ballot.	288.	Other offenses.
279.	County clerk—failure to keep ballot-boxes securely.		

Article 270. [170] Illegal arrest of voter.—If any magistrate or peace officer shall knowingly cause an elector to be arrested in attending upon, going to, or returning from an election, except in cases of treason, felony, or breach of the peace, he shall be punished by fine not exceeding three hundred dollars. [P. C. 270.]

Indictment.—Willson's Cr. Forms, 101.

*As to offenses omitted from revised Penal Code, see note under art. 220, ante.

Art. 271. [171] Illegal voting.—If any person knowing himself not to be a qualified voter shall, at any election held, vote for any officer to be then chosen, or for or against any measure or proposition to be determined by said election, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 275, amended by Act March 23, 1887, p. 37.]

False swearing.—The offense of false swearing and illegal voting are different offenses, and there is no inhibition in the Constitution against defendant being prosecuted for both offenses; the mere fact that they occur contemporaneously does not make them one and the same offense. *Arrington v. State*, 48 App. 541, 89 S. W. 643.

Knowledge of disqualification.—Previous conviction of felony is a disqualification to vote, and the trial court did not err in charging that if accused had been previously convicted of assault to murder he knew the fact, which was equivalent to knowing that he was not a qualified voter. Held, further, that he was chargeable with knowledge that assault to murder is a felony, and that one of the consequences of conviction therefor is disqualification to vote. *Thompson v. State*, 26 App. 94, 9 S. W. 486.

Subsequent statutes.—One can be punished under this article for illegal voting. The Terrell election law does attempt by implication to repeal this article. *Arrington v. State*, 48 App. 541, 89 S. W. 643.

That other acts were subsequently denounced as illegal voting and made penal held not to prevent prosecutions for violations of this article. *Arrington v. State*, 48 App. 541, 89 S. W. 643.

Voting without complying with any condition that the legislature might subsequently impose would be illegal. *Arrington v. State*, 48 App. 541, 89 S. W. 643.

Indictment.—Willson's Cr. Forms, 102.

See *Thompson v. State*, 26 App. 94, 9 S. W. 486.

Indictment for illegal voting is not required to allege the specific authority for the election, nor the authority of the officers, nor the names of the candidates. *Gallagher v. State*, 10 App. 469.

An indictment charging that the "vote was for city attorney and other officers then and there to be chosen at state election," held to sufficiently charge the purpose of the election. *Gallagher v. State*, 10 App. 469.

An allegation that defendant voted at an election authorized by law, included the further idea that it was held by proper officers. *Gallagher v. State*, 10 App. 469.

Under the better practice an indictment for illegal voting should aver the particular disability. *Gallagher v. State*, 10 App. 469.

An indictment charging that the election was "held and authorized by law within the City of W." held to sufficiently state the place of voting. *Gallagher v. State*, 10 App. 469.

Indictment held to sufficiently allege the purpose for which the election was being held. *Borches v. State* (Cr. App.) 25 S. W. 423.

Voting place sufficiently alleged in averment "election authorized by law at Prairie Hill school house, in voting precinct No. 10." *May v. State*, 43 App. 54, 63 S. W. 132.

If, where the election was held was the usual voting place in the precinct and had been so used by the voters, the election would be a legal one if no other place had ever been designated. *May v. State*, 43 App. 54, 63 S. W. 132.

Alleging that the election was "then and there held for the purpose of electing various county and precinct officers of Texas," indictment sufficiently designated the character of the election. *May v. State*, 43 App. 54, 63 S. W. 132.

Gist of the offense is that the accused voted illegally at a legal election, and not that he voted for or against any particular candidate or proposition. It was not essential for the indictment to charge how he voted. *May v. State*, 43 App. 54, 63 S. W. 132.

Proper form of indictment of a justice of the peace for accepting a bribe for failure to institute proceedings for the arrest of a person whom he knew to be unlawfully carrying a pistol, stated. *Morawietz v. State*, 46 App. 436, 80 S. W. 997.

Evidence.—Any error in admitting the minutes of the commissioners' court of the county wherein the county judge ordered the election for county and precinct officers was immaterial, where the election was general of which the court could have taken judicial notice. *Borches v. State* (Cr. App.) 25 S. W. 423.

The disqualification charged being the minority of the defendant, the question was one for the jury on the evidence. *May v. State*, 43 App. 54, 63 S. W. 132.

Art. 272. [173] Official ballot.—All ballots shall be printed with black ink on clear white paper of sufficient thickness to prevent the marks thereon to be seen through the paper, and of uniform style. The tickets of each political party shall be placed or printed on one ballot, arranged side by side in columns separated by parallel rule. The space which shall contain the title of the office and the name of the candidate (or candidates, if more than one is to be voted for for the same office) shall be of uniform style

and type in said tickets. At the head of each ticket shall be printed the name of the party. When a party has not nominated a full ticket, the titles of those nominated shall be in position opposite to the same office in a full ticket; and title of the offices shall be printed in the corresponding position in spaces where no nominations have been made. In the blank columns and independent columns, the titles of the offices shall be printed in all blank spaces to correspond with a full ticket. When presidential electors are to be voted on, their names shall appear at the heads of their respective tickets. When a constitutional amendment or other propositions are to be voted on, the same shall appear once on each ballot in uniform style and type. When a voter desires to vote a ticket straight, he shall run a pencil or pen through all other tickets on the official ballot, making a distinct marked line through such ticket not intended to be voted; and when he shall desire to vote a mixed ticket, shall do so by running a line through the names of such candidates as he shall desire to vote against in the ticket he is voting, and by writing the name of the candidate for whom he desires to vote in the blank column and in the space provided for such office, same to be written with black ink or pencil, unless the names of the candidates for whom he desires to vote appear on the ballot, in which event, he shall leave the same not scratched.

When a constitutional amendment or other question submitted by the legislature is to be voted on, the form in which it is submitted shall be described by the governor in his proclamation in such terms as to give the voter a clear idea of the scope and character of the amendment, and printed once at the bottom of each ballot as described by this act the words, "for" and "against" under it; provided, the legislature has failed to prescribe a form. If a proposition or question is to be voted on by the people of any city, county or other subdivision of the state, the form in which such proposition shall be voted on shall be prescribed by the local or municipal authority submitting it. [Act 1905, p. 531.]

Depositing ballots folded together.—Any person who shall deposit any ballot, except as provided in this article, or shall deposit two or more tickets folded together, at any election in this state, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding one hundred dollars. [Act April 18, 1879, p. 119.]

For construction in Civil cases, see notes under art. 2969, Vernon's Sayles' Civ. St. 1914.

Indictment.—Willson's Cr. Forms, 105.

Art. 273. [174] Instigating illegal voting.—Every person who shall procure, aid, assist, counsel or advise another to give his vote at any election, knowing that the person is not duly qualified to vote, or shall procure, aid, assist, counsel or advise another to give his vote more than once at such election, shall be fined in a sum not less than one hundred nor more than five hundred dollars, and may, in addition thereto, be imprisoned in the county jail for a period not exceeding one month. [O. C. 276, and act Aug. 23, 1876, p. 311, § 25.]

Indictment.—Willson's Cr. Forms, 106, 108.

Art. 274. [175] False swearing by voter.—If any person challenged as unqualified shall be guilty of wilful and corrupt false swearing, in taking any oath prescribed by law, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [O. C. 278.]

Indictment.—Willson's Cr. Forms, 109.

Art. 275. [176] Procuring voter to swear falsely.—Every person who shall wilfully and corruptly procure any person to swear

falsely, as prescribed in the preceding article, shall be punished by confinement in the penitentiary for any time not exceeding three years, or by fine not exceeding three thousand dollars. [O. C. 279.]

Indictment.—Willson's Cr. Forms, 110.

Art. 276. [178] Failing to deliver returns.—If any person intrusted with the transmission of an election return, shall wilfully do any act that shall defeat the delivery thereof or shall wilfully neglect to deliver the same as directed by law, he shall be punished by a fine not exceeding one thousand dollars. [P. C. 281.]

Indictment.—Willson's Cr. Forms, 115.

Art. 277. [179] Preventing delivery of returns.—If any person shall take away such election return from any person intrusted therewith, either by force or in any other manner, or shall wilfully do any act that shall defeat the due delivery thereof, as directed by law, he shall be punished by fine not exceeding two thousand dollars. [P. C. 282.]

Indictment.—Willson's Cr. Forms, 116.

Art. 278. [180] Officer opening ballots.—Any officer or person with whom may be legally deposited the ballots cast in an election, who shall open and read any ballot, or who shall permit it to be done, except in cases provided for by law, shall be punished by fine not less than fifty nor more than five hundred dollars, and may, in addition thereto, be imprisoned in the county jail not to exceed six months. [Act Feb. 12, 1858, p. 160; P. C. 269a; Acts of 1879, ch. 112, p. 120.]

Indictment.—Willson's Cr. Forms, 117.

Art. 279. [181] County clerk failing to keep ballot boxes securely.—If any clerk of the county court in this state shall fail, neglect or refuse to securely keep any ballot box containing tickets of election committed to his custody by the presiding officer of any election precinct, he shall be punished by fine not less than fifty nor more than five hundred dollars, and, in addition thereto, he may be imprisoned in the county jail for a period not exceeding six months. [Act Aug. 23, 1875, p. 308, § 16.]

Indictment.—Willson's Cr. Forms, 118.

Art. 280. [182] County clerk failing to destroy ballots.—If any clerk of the county court in this state shall fail, after the expiration of one year from the date of any election, to destroy, by burning, all the ballots cast at such election, which may have come to his custody, he shall be punished as prescribed in the preceding article. [Act Aug. 23, 1876, p. 308, § 16.]

Indictment.—Willson's Cr. Forms, 119.

Art. 281. [183] Not applicable in cases of contest.—The provisions of the foregoing article shall not apply to cases in which a contest may have grown out of any election, within one year after the date of such election. [Act Aug. 23, 1876, p. 308, § 16.]

Art. 282. [184] Wilful neglect of official duty.—If any officer on whom a duty is enjoined, in any statute relating to elections, shall be guilty of a wilful neglect of such duty, or shall act corruptly or with partiality in the discharge of such duty, in any manner not provided for in this title, he shall be fined in a sum not less than one hundred nor more than one thousand dollars. [P. C. 283.]

Indictment.—Willson's Cr. Forms, 120.

Art. 283. [187] Elector voting without legal qualifications.—Any elector voting at any election who does not possess the legal qualification shall be punished as now provided by law for illegal

voting; and any person swearing falsely as to his own qualifications, or those of a challenged elector shall be punished as now provided by law for false swearing. [Act March 30, 1891, p. 47.]

Art. 284. [188] Penalty for illegal registration.—Any person who shall illegally register as a qualified voter of any city shall be deemed guilty of felony, and, upon conviction in any court of competent jurisdiction, shall be punished by confinement in the penitentiary for not less than one year nor more than two years. [Act 22d Leg., called session, p. 13, § 14.]

Art. 285. [189] Registrar to administer oaths; penalty for false swearing.—The registrar is hereby authorized and empowered to administer all necessary oaths to applicants for registration, and also to all witnesses touching the qualifications of applicants for registration; and any person who shall swear falsely about his own qualifications as a voter of the city, or any person who shall, as a witness for the applicant for registration, swear falsely about the qualifications of such applicant, shall be deemed guilty of false swearing, and, upon conviction in any court of competent jurisdiction, shall be punished as is provided by law for the punishment of false swearing in other cases. [Act April 12, 1892, chap. 13, p. 13, 22d Leg., called session, § 15.]

Art. 286. [190] Penalty for issuing illegal certificates.—Any registrar who shall knowingly issue a registration certificate to any person not legally entitled to register, or who shall knowingly issue, or cause to be issued, a certificate of registration to any imaginary or fictitious person, shall be deemed guilty of a felony, and, upon conviction in any court of competent jurisdiction, shall be punished by confinement in the penitentiary for not less than one year, nor more than two years for each and every such registration certificate so issued. [Id., § 22.]

Art. 287. [191] Election officer disclosing vote or giving information.—Any officer upon whom a duty is imposed by an act to provide for the registration of all voters in all cities containing ten thousand inhabitants or more, who shall disclose to any person the name of any candidate for whom any elector has voted, or gives any information by which it can be ascertained for whom any elector has voted, or any person who shall remove any ballot from any polling place, or any person who shall knowingly apply or receive any ballot in any polling place other than that in which he is entitled to vote, or any person who shall show his ballot after it is marked to any person in such a way as to reveal the contents thereof, or the name of the candidate or candidates for whom he marked his ballot, or any person who shall, contrary to this act, examine his ballot or solicit the voter to show the same, or person other than an officer of election who shall deliver any ballot to an elector, or any elector who shall deliver a ballot to the presiding officer to be voted, except the one he received from the election officer, or any elector or any one who shall, contrary to the provisions of this act, place any mark upon or do anything to his ballot by which it may afterwards be identified as the one voted by any particular individual, upon conviction, shall be punished by a fine not less than fifty dollars and not more than five hundred dollars, or by imprisonment in the county jail not less than three months nor more than one year, or both, in the discretion of the court. [Id., § 28.]

Construed.—Articles 1738 and 1741 of the Revised Statutes of 1895, requiring that all ballots shall be numbered, were not repealed by this article. *State v. Connor*, 86 Tex. 133, 23 S. W. 1103.

Art. 288. [192] Other offenses declared and penalty prescribed.—Any judge or clerk of election who shall wilfully disregard any of the provisions of this act, or who shall negligently fail to enforce any of the provisions of this act, or who shall, in counting the ballot or making the returns thereof, wilfully disregard any of the directions or requirements of this act, or any person who shall wilfully alter or destroy any ballot cast at an election or any of the returns of an election regulated by this act, or who shall introduce among the genuine ballots a fraudulent ballot, or any person who shall falsely write the initials of the presiding officer or any writing upon the ballot purporting to be written by the clerk or presiding officer, or any person who shall steal any of the ballots or returns, or wilfully or fraudulently hinder or delay the delivery of any election returns to the county clerk, or wilfully break open any of such sealed returns of any election regulated by this act, upon conviction, shall be punished by imprisonment in the penitentiary not less than one year nor more than three years, or by fine of not less than five hundred dollars nor more than two thousand dollars, or by both such fine and imprisonment. [Id., § 29.]

Indictment.—Willson's Cr. Forms, 111-114.

CHAPTER FIVE

PRIMARY ELECTIONS *

Art.	Art.
289. Penalty for illegal voting at primary election.	293. Bribery, or attempt, of officer of election.
290. Procuring an illegal vote.	294. Bribery, or attempt, of voter.
291. Officer making false return.	295. Open saloon on election day, and drinking liquor by election officers.
292. Officer divulging votes.	

Article 289. [192a] Penalty for illegal voting at primary election.—Any person voting at any primary election, called and held by authority of any political party for the purpose of nominating candidates of such political party for any public office, who is not qualified to vote, in the election precinct where he offers to vote at the next state, county or municipal election, or who shall vote more than once at the same or different precincts or polls on the same day, or different days in the same primary election, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding sixty days, or by both such fine and imprisonment. [Act 1895, p. 40.]

Indictment and information.—Willson's Cr. Forms, 103, 104.

An information alleging that defendant voted at a primary in a certain precinct, while a resident of another county, is fatally defective in failing to also allege that he would not be a qualified elector in such precinct at the next election. *Calcoat v. State*, 37 App. 245, 39 S. W. 364.

Art. 290. [192b] Procuring an illegal vote.—Every person who shall knowingly procure any illegal vote to be cast at any such primary election shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished as provided in the preceding article. [Act 1895, p. 40.]

Indictment.—Willson's Cr. Forms, 107.

Art. 291. [192c] Officer making false return.—Any presiding officer, manager, judge or clerk of any primary election, called and held by authority of any political party in this state, who shall knowingly make or return, or cause to be made or returned, a false statement of the result of any such primary election, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be

*As to offenses omitted from revised Penal Code, see note under art. 220, ante

punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding sixty days, or by both such fine and imprisonment. [Act 1895, p. 40.]

Art. 292. [192d] Officer divulging votes.—Any presiding officer, judge, clerk or other officer of an election, who shall divulge how any person voted at such primary election, from an inspection of the tickets, unless in a judicial investigation, shall be fined in any sum not less than one hundred nor more than five hundred dollars. [Id.]

Art. 293. [192e] Bribery or attempted bribery of officer of election.—If any person shall bribe, or offer to bribe, any presiding officer, manager, judge or clerk of any primary election, called and held by authority of any political party for the purpose of nominating candidates of such political party for public office, as a consideration for some act done or omitted to be done, or to be done or omitted contrary to his duty in relation to such primary election, he shall be punished by fine not exceeding five hundred dollars. [Id.]

Art. 294. [192f] Bribery or attempted bribery of voter.—If any person shall bribe, or offer to bribe, any voter for the purpose of influencing his vote at any primary election, called and held by authority of any political party for the purpose of nominating candidates of such political party for any public office, upon conviction thereof, [he] shall be punished by fine not exceeding five hundred dollars. [Id.]

Art. 295. Open saloon on election day, and drinking liquor by certain officers.—The law prohibiting the sale of intoxicating liquor on election day applies to primary elections with all its prohibitions and penalties; and the officers of primary elections shall not, on primary election day, partake of spirituous, vinous, malt or intoxicating liquors after the polls are open. [Act 1905, p. 552.]

Indictment.—Willson's Cr. Forms, 122.

CHAPTER SIX

ELECTION OF UNITED STATES SENATORS

Art.	Art.
295a. Application of other election laws.	295m. Filing statement of disbursements; contents; final statement.
295b. Same; corrupt practices.	295n. Filing statements with county clerk and Secretary of State.
295c. Same; certain provisions made applicable.	295o. Contents of statements.
295d. Same; applicable provisions enumerated.	295p. Persons receiving payments to file statements with Secretary of State; penalty for violation.
295e. Disbursements for political purposes.	295q. Blanks for statements; distribution.
295f. Same; want of knowledge no defense.	295r. Name of candidate not to be printed on ballot if statements not filed.
295g. Disbursements through agents prohibited; filing authorization.	295s. Persons other than candidates or committees to file statements of disbursements; contents of statements.
295h. Personal campaign committee, filing authorization to make disbursements; secretary of committee; revocation of authority; filling vacancy, presumptions.	295t. Limitation of amount of disbursements; proviso.
295i. Disbursements by persons other than candidates and their committees prohibited; exceptions.	295u. Delegation of authority to make disbursements; limitation on amount.
295j. What disbursements by candidates authorized.	295v. Persons other than candidates failing to comply with requirements; penalty.
295k. What disbursements by committee authorized.	
295l. Rendition of bills for disbursements; time for; bills presented out of time not to be paid.	

Art. 295a OFFENSES AFFECTING THE RIGHT OF SUFFRAGE (Title 6

Art. 295w. Persons other than candidates doing things prohibited; penalty.	Art. 295y. Candidate doing things forbidden; penalty.
295x. Candidate failing to do things required; penalty.	295z. Any other candidate may have his name placed on ballot under same restrictions.

Article 295a. Application of other election laws.—Every law regulating or in any manner governing elections or the holding of primaries in this State shall be held to apply to each and every election or nomination of a candidate for a United States Senator so long as they are not in conflict with the Constitution of the United States or of any law or statute enacted by the Congress of the United States regulating the election of United States Senators or the provisions of this Act. [Act 1913, 1st S. S., p. 102, ch. 39, § 3.]

See Vernon's Sayles' Civ. St. 1914, arts. 3174a-3174z.

Art. 295b. Same; corrupt practices.—At each and every primary election held in this State for the nomination of a candidate for United States Senator, each and every provision of the laws of this State which has for its object the protection of the ballot and the safe guarding of the public against fraudulent voting, illegal methods, undue influence, corrupt practices, and in fact each and every restriction of whatever kind or character or nature as applied to any election held in this State whether general, special or primary shall be held to apply to a primary election held for or when a candidate for United States Senator is to be nominated when not in conflict with the provisions of this Act. And the violation of any such provisions or restrictions at any such primary election shall be punished in the same manner as prescribed by law for the violation of any election law whether general, special or primary. [Id., § 6.]

Art. 295c. Same; certain provisions made applicable.—When the law with reference to holding senatorial primaries is silent the election officers in securing supplies, in conducting the election and in making returns and in canvassing the votes shall in every particular follow the methods provided by law covering primary elections or general elections held for the purpose of electing or nominating State, district, county, and precinct offices. [Id., § 7.]

Art. 295d. Same; applicable provisions enumerated.—The following provisions shall be held to apply to all primaries and elections for United States Senator whether special or general. [Id., § 12.]

Art. 295e. Disbursements for political purposes.—No person shall receive or accept any money, property or other thing of value, or any promise or pledge thereof, constituting a disbursement made for political purposes contrary to law. [Id., § 13.]

Art. 295f. Same; want of knowledge no defense.—In any prosecution for the violation of this provision it shall be a defense if the accused person shall prove that he had neither knowledge that such disbursements constituted a disbursement made for political purposes contrary to law, nor any reasonable cause to believe that it constituted such disbursement. [Id., § 14.]

Art. 295g. Disbursements through agents prohibited; filing authorization.—No candidate for United States Senator shall make any disbursement for political purposes except under his personal direction, which for every purpose shall be considered his act, through a party committee, or through a personal committee, whose authority to act shall be filed, as provided by this Act. [Id., § 15.]

Art. 295h. Personal campaign committee; filing authorization to make disbursements; secretary of committee; revocation of authority; filling vacancy; presumptions.—Any candidate for United States Senator may select a personal campaign committee to consist of one or more persons, but before any personal campaign committee shall make any disbursement in behalf of any candidate, or shall incur any obligation, express or implied, to make any disbursement in his behalf, it shall file with the Secretary of State a written statement, signed by such candidate for United States Senator setting forth that such personal campaign committee has been appointed and giving the name and address of each member thereof, and the name and address of the secretary thereof. If such campaign committee consists of only one person, such person shall be deemed the secretary thereof. Any candidate for United States Senator may revoke the selection of any member of such personal campaign committee by a revocation in writing which, with proof of personal service on the member whose selection is so revoked, shall be filed with the officer with whom the appointment was filed. Such candidate may fill the vacancy thus created in the manner in which an original appointment is made. The acts of every member of such personal campaign committee will be presumed to be with the knowledge and approval of the candidate until it has been clearly proved that the candidate did not have knowledge of and approved the same, and that in the exercise of reasonable care and diligence, he could not have had knowledge of or any opportunity to disapprove the same. [Id., § 16.]

Art. 295i. Disbursements by persons other than candidates and their committees prohibited; exceptions.—No person or group of persons, other than a candidate or his personal campaign committee or a party committee, shall in an election for a United States Senator or nomination of a candidate for United States Senator make any disbursement for political purposes otherwise than through a personal campaign committee or a party committee, except that expenses incurred for rent of hall or other room for public speaking, for printing, for postage, for advertising, for distributing printed matter, for clerical assistance and for hotel and traveling expenses solely in connection with a public speaking engagement, may be contributed and paid by a person or group of persons residing within the county where such expenses are incurred, but not otherwise. [Id., § 17.]

Art. 295j. What disbursements by candidates authorized.—No candidate for the nomination or election for United States Senator shall make any disbursements for political purposes except:

(1) For his personal hotel and traveling expenses and for postage, telegraph and telephone expenses.

(2) For payments which he may make to the State pursuant to law.

(3) For contributions to his duly registered campaign committee.

(4) For contribution to his party committee.

(5) For other purposes enumerated by law when such candidate has no personal campaign committee, but not otherwise.

(6) After the primary, no candidate for United States Senator for election shall make any disbursement in behalf of his candidacy, except contributions to his party committee, for his own actual necessary personal traveling expenses, and for postage, telegraph and telephone expenses. [Id., § 18.]

Art. 295k. What disbursements by committee authorized.—No party committee nor personal campaign committee shall make any disbursements except:

(1) For maintenance of headquarters and for hall rentals, incident to the holding of public meetings.

(2) For necessary stationery, postage and clerical assistance to be employed for the candidate at his headquarters or at the headquarters of the personal campaign committee, or party committee incident to the writing, addressing and mailing of letters and campaign literature.

(3) For necessary expenses incident to the furnishing and printing of badges, banners and other insignia, to the printing and posting of hand bills, posters, lithographs and other campaign literature and the distribution thereof through the mails or otherwise.

(4) For campaign advertising in newspapers, periodicals or magazines, as provided by law.

(5) For actual and necessary personal expenses of public speaking.

(6) For traveling expenses of members of party committees or personal campaign committees. Nothing herein shall be construed as authorizing the employment on a salary or any other reward, any campaign manager, booster or political organizer. [Id., § 19.]

Art. 295l. Rendition of bills for disbursements; time for; bills presented out of time not to be paid.—Every person who shall have any bill, charge or claim upon or against any personal campaign committee, any party committee or any candidate for United States Senator for any disbursement made, services rendered, or thing of value furnished, for political purposes or incurred in any manner in relation to any primary or election for United States Senator, shall render in writing to such committee or candidate, such bill, charge or claim within ten days after the day of election or primary in connection with which such bill, charge or claim was incurred. No candidate for United States Senator and no personal campaign or party committee shall pay any bill, charge or claim so incurred prior to any primary or election which is not so presented within ten days after such primary or election. [Id., § 20.]

Art. 295m. Filing statement of disbursements; contents; final statement.—Every candidate for United States Senator and the secretary of every party committee shall on the second Saturday occurring after such candidate for United States Senator or committee has first made a disbursement or first incurred any obligation, express or implied, to make a disbursement for political purposes, and thereafter, on the second Saturday of each calendar month, until all disbursements shall have been accounted for, and also on the Saturday preceding any election or primary, file a financial statement verified upon the oath of such candidate for United States Senator or upon the oath of the Secretary of such committee, as the case may be, which statement shall cover all transactions not accounted for and reported upon in statements theretofore filed. Each statement after the first shall contain a summary of all preceding statements, and summarize all items theretofore reported under the provisions of each subdivision of this Act in a separate total, and shall state the sum and total of all disbursements up to date of the report. On or before the second Saturday after the election, a final statement shall be filed by said candidate for United States Senator and the Secretary of every personal campaign committee, and the secretary of every party committee, which said statement shall include all former statements and be

as full and complete as that required for the statements required to be made on the last Saturday before the election and required by this Act. [Id., § 21.]

Art. 295n. Filing statements with county clerk and Secretary of State.—The statement of every candidate for United States Senator and the statement of his personal campaign committee shall be filed with the county clerk of the county where such candidate resides and with the Secretary of State. [Id., § 22.]

Art. 295o. Contents of statements.—Each statement shall give in full detail:

(1) Every sum of money and all property, and every other thing of value received by such candidate or committee during such period from any source whatsoever which he uses or has used, or is at liberty to use for political purposes, together with the name of every person from which same was received, the specific purposes for which it was received, and the date when each was received, together with the total amount received from all sources in any amounts or manner whatsoever.

(2) Every promise or pledge of money, property or other thing of value received by such candidate or committee during such period, the proceeds of which he uses or has used or is at liberty to use for political purposes, together with the names of the person by whom each was promised or pledged, and the date when each was so promised or pledged together with the total amounts promised or pledged from all sources in any amount or manner whatsoever.

(3) Every disbursement made by such candidate or committee for political purposes during such period, together with the name of every person to whom the disbursement is made, the specific purpose for which each was made, and the date when each was made, together with the total amount of disbursements made in any amounts or manner whatsoever.

(4) Every obligation, express or implied, to make any disbursement incurred by such candidate or committee for political purposes during such period, together with the names of the person or persons to or with whom each such obligation has been incurred, the specific purpose for which each was made, and the date when each was incurred, together with the total amount of such obligations made in any amounts or manner whatsoever. [Id., § 23.]

Art. 295p. Persons receiving payments to file statements with Secretary of State; penalty for violation.—Each and every person who shall receive any payment directly or indirectly, for political purposes in a campaign before a primary or a general election for United States Senator whether as salary or as expenses, shall within thirty days after such payment has been made, or such payment has been promised, make a sworn statement showing in detail said payment or promised payments, by who made, what services were rendered for same. This statement shall be filed with the Secretary of State. Any person who comes within the provisions of this section and fails to make the statements herein, shall upon conviction be confined in the county jail for not less than ten nor more than thirty days. [Id., § 24.]

Art. 295q. Blanks for statements; distribution.—Blanks for all statements required by law shall be prepared by the Secretary of State and copies thereof, together with a copy of this Act, shall be furnished by the Secretary of State to the secretary of every personal campaign committee and to the secretary of every party commit-

tee, and to every candidate for United States Senator upon the filing of nomination papers, and all other persons required by law to file such statements who may apply therefor. [Id., § 25.]

Art. 295r. Name of candidate not to be printed on ballot if statements not filed.—The name of no candidate for United States Senator chosen at a primary election or otherwise, shall be printed on the official ballot for the ensuing election, unless there has been filed by or on behalf of said candidate and by his personal campaign committee, if any, the statements of accounts and expenses relating to the nominations of candidates for United States Senator required by this Act. [Id., § 26.]

Art. 295s. Persons other than candidates or committees to file statements of disbursements; contents of statements.—Every person other than a candidate or a personal campaign committee or party committee, who shall within any twelve months before or after any election for United States Senator make any disbursements for any political purposes relating to the election or nomination of a candidate for United States Senator exceeding in the aggregate, twenty-five (\$25) dollars in amount and value, shall file within forty-eight hours after making any disbursements, causing the aggregate of such disbursements to reach such amount, a sworn statement thereof with the clerk of the county wherein he resides. (2) Such statements shall give in full detail, with date, every item of money, property, or other thing of value constituting any part of such disbursement, the exact means by which and the manner in which each such disbursement is made, and the name and address of every person to whom each was made, and the specific purpose for which each was made. [Id., § 27.]

Art. 295t. Limitation of amount of disbursements; proviso.—No disbursement shall be made and no obligation, express or implied, to make such disbursement or payment, shall be incurred by or on behalf of any candidate for the nomination for United States Senator which shall be in the aggregate in excess of \$5,000.00, and \$1,000.00 additional when a second primary is necessary. Provided that the expenditures allowed in Section 17 [Art. 295i] shall not be included in estimating the \$5,000.00, or the additional \$1,000.00 for the second primary. [Id., § 28.]

Art. 295u. Delegation of authority to make disbursements; limitation on amount.—Any candidate for United States Senator may delegate to his personal campaign committee, or to any party committee or his party, in writing duly subscribed by him, the expenditure of any portion of the total disbursements which are authorized to be incurred by him or on his behalf, by the provisions of this Act, but the total of all disbursements, by himself, by his personal campaign committee in his behalf, by all party committees in his behalf, or otherwise made in his behalf, shall not exceed in the aggregate the amounts in this Section, except as provided by law. Provided that the expenditures allowed in Section 17 [Art. 295i] hereof shall not be included in estimating the total amount. [Id., § 29.]

Art. 295v. Persons other than candidates failing to comply with requirements; penalty.—Any person other than a candidate for United States Senator and any or all members of any personal campaign committee, or any party committee, who shall fail to do and perform any and all the things required by him or them in reference to the disbursement or collection, or the payment of money, or things of value for political purposes, as defined by this Act, shall upon conviction be confined in the county jail not less

than thirty nor more than one hundred days, and in addition there-to may be fined in a sum of not less than one hundred, nor more than five hundred dollars. [Id., § 30.]

Art. 295w. Persons other than candidates doing things prohibited; penalty.—Any person (not a candidate) and any and all members of any personal campaign committee or party committee who shall do any of the things forbidden by this Act with reference to the payment, collection or disbursement of money or other things of value for political purposes, as defined herein, shall, upon conviction, be confined, in the county jail not less than thirty nor more than one hundred days, and in addition thereto may be fined in a sum of not less than two hundred nor more than five hundred dollars. [Id., § 31.]

Art. 295x. Candidate failing to do things required; penalty.—Any candidate for United States Senators who shall fail to do and perform any of the things or acts required of him under the provision of this Act relating to the disbursement or collection of money or anything of value for political purposes, shall upon conviction be confined in the county jail for not less than thirty nor more than one hundred days, and in addition thereto, may be fined not less than two hundred, nor more than five hundred dollars, nor shall he be entitled to hold the office for which he may be elected, or if nominated, his name shall not be placed upon the official ballot for the ensuing election. [Id., § 32.]

Art. 295y. Candidate doing things forbidden; penalty.—If any candidate for United States Senator shall do any of the things or acts forbidden by the provisions of this Act with reference to the disbursement or collection of money, or anything or things of value, for political purposes as defined by this Act, he shall upon conviction, be confined in the county jail not less than thirty nor more than one hundred days, and in addition thereto may be fined in any sum not less than two hundred, nor more than five hundred dollars, nor shall he be entitled to hold the office for which he may be elected, or if nominated, his name shall not be placed upon the official ballot for the ensuing election. [Id., § 33.]

Art. 295z. Any other candidate may have his name placed on ballot under same restrictions.—Any person who has not been defeated at the primary election preceding the general or special election for United States Senators, desiring to have his name appear upon the official ballot at any general election as a candidate for United States Senator who is not the nominee of any political party or political organization may do so only upon presenting a petition to the Secretary of State signed by at least ten per cent of the qualified voters in the State of Texas as measured by the total vote for Governor at the preceding general election. Said petitioner shall conform in every particular to the requirements of the laws of this State with reference to placing the name of any candidate, other than the nominee of any party upon the official ballot, provided, further, that in no case shall the name of any person be placed upon the official ballot at any general election as a candidate for United States Senator as the nominee of any party unless he has been nominated under the provisions of this Act and has complied with every provision of the laws of this State with reference to the nomination of candidates for United States Senators. [Id., § 36.]

TITLE 7

OF OFFENSES WHICH AFFECT THE FREE EXERCISE
OF RELIGIOUS OPINION

Chap.	Chap.
1. Disturbance of religious worship.	2. Sunday laws.

CHAPTER ONE

DISTURBANCE OF RELIGIOUS WORSHIP

Art.	Art.
296. Disturbance of congregation in any manner.	297. Offender may be bound over. 298. Double penalty for second offense.

Article 296. [193] **Disturbance of congregation in any manner.**—Any person who, by loud or vociferous talking or swearing, or by any other noise or in any other manner, wilfully disturbs any congregation, or part of a congregation, assembled for religious worship and conducting themselves in a lawful manner, or who wilfully disturbs in any manner any congregation assembled for the purpose of conducting or participating in a Sunday school, or to transact any business relating to or in the interest of religious worship or a Sunday school, and conducting themselves in a lawful manner, shall be fined in any sum not less than twenty-five nor more than one hundred dollars. [O. C. 284, amended by Act April 23, 1873, p. 43, and by Act Feb. 28, 1883, p. 17, amended Act 1897, p. 102.]

Elements of offense.—The law protects a congregation, assembled for religious worship, from disturbance so long as any one of them remains on the ground. *Haynes v. State*, 71 App. 31, 159 S. W. 1059; *Dawson v. State*, 7 App. 59.

If one denomination lends its house of worship to another, its sexton cannot interfere by raising a quarrel during services as to right of occupancy. *Dorn v. State*, 4 App. 67.

To constitute offense the congregation must have been "wilfully" disturbed. *Richardson v. State*, 5 App. 470; *Wood v. State*, 16 App. 574; *Finney v. State*, 29 App. 184, 15 S. W. 175; *Holmes v. State*, 39 App. 231, 45 S. W. 487, 73 Am. St. Rep. 921.

Proof must show that congregation, or a part thereof, was disturbed, and also that the disturbance was wilful. *Richardson v. State*, 5 App. 470.

A church official may notify the minister that he has been silenced. *Richardson v. State*, 5 App. 470.

The disturbance must be in one of the modes mentioned. *Richardson v. State*, 5 App. 470.

The congregation must be assembled for some purpose named in the statute; assemblage for business purposes is not sufficient. *Wood v. State*, 11 App. 318.

One who wilfully disturbs one member of a congregation assembled for religious worship, violates this article. *McVea v. State*, 35 App. 1, 26 S. W. 834, 28 S. W. 469.

The offense is complete if only one worshipper was disturbed, and it is not error for the court to so instruct the jury. *McVea v. State*, 35 App. 1, 26 S. W. 834, 28 S. W. 469.

Not error to charge authorizing conviction if defendant disturbed the congregation or any part of same. *Clark v. State* (Cr. App.) 78 S. W. 1078.

The fact that defendant was in a crowd which disturbed a religious meeting will not support a conviction, without a showing that he participated in the disturbance. *Denny v. State*, 52 App. 158, 105 S. W. 798.

Persons who assembled at a church in the belief of a rumor that there would be preaching constitute a congregation assembled for religious worship, even though the rumor was false, and it was contradicted by the preacher. *Laird v. State* (Cr. App.) 155 S. W. 260.

In a prosecution for disturbing a congregation assembled for religious worship, where people assembled at the church for worship were disturbed, the mere fact that the minister failed to come did not alter the character of the assemblage. *Haynes v. State*, 71 App. 31, 159 S. W. 1059.

Sunday schools.—Disturbing Sunday school is distinct from the offense of disturbing religious worship, and proof of one will not authorize conviction of the other. *Hubbard v. State*, 32 App. 389, 24 S. W. 30.

Indictment, information, or complaint.—Willson's Cr. Forms, 123.

The indictment may charge the offense generally in the language of the statute, without specifying the particular acts done. *State v. Wupperman*, 13 Tex. 33; *Kindred v. State*, 33 Tex. 67; *Corley v. State*, 3 App. 412; *Bush v. State*, 5 App. 64;

Lockett v. State, 40 Tex. 4. But the indictment must allege the manner of the disturbance, as well in order that it may be determined whether or not the statutory offense has been charged, as that the accused may know the "nature and cause of the accusation against him." It is not necessary in charging the manner of the disturbance to enter into details. A general statement, as that it was effected by "loud talking," "swearing," "discharging fire-arms," "whistling," "fighting," or the like will be sufficient. *Kindred v. State*, 33 Tex. 67, holds a contrary doctrine to the above, but that decision was made under a statute materially different from the existing one, and is not now applicable. *Thompson v. State*, 16 App. 159. Where all the prescribed modes of disturbance are charged in one count, as they may be, they must be charged conjunctively. *Copping v. State*, 7 App. 61. If the information charges the offense sufficiently, it is immaterial that the complaint is very general. *Phants v. State*, 2 App. 398; *Wood v. State*, 11 App. 318. But the information and complaint must not be materially variant. *Hefner v. State*, 16 App. 573; *Wood v. State*, 11 App. 318.

The indictment under the old statute (Hart. Dig., sec. 481) was required to allege that the congregation was assembled at one of the places specified in the statute, *State v. McClure*, 13 Tex. 23; but the term "a house for religious worship" might have been employed instead of "a meeting-house;" and if the allegation was that the congregation "were assembled for religious worship," it was sufficiently comprehensive to embrace the statutory ingredient that they "were attending a protracted or other religious meeting." *State v. Yarborough*, 19 Tex. 161. See a good indictment. *Lockett v. State*, 40 Tex. 4; *Bush v. State*, 5 App. 64.

The indictment must charge the means or manner of disturbance, but need not enter into details. *Thompson v. State*, 16 App. 159 (overruling *Kindred v. State*, 33 Tex. 67); *Nash v. State*, 32 App. 368, 24 S. W. 32, 26 S. W. 412, distinguishing *Ma-gee's Case*, 7 App. 99; *McKay's Case*, 8 App. 672, and *Mullinix's Case*, 32 App. 116, 22 S. W. 407.

An indictment charging disturbing a congregation assembled for religious worship held good under Pen. Code, art. 296, before such article was amended by Act April 23, 1873. *Lockett v. State*, 40 Tex. 4.

Information taken in connection with the affidavit held sufficient to support a conviction. *Phants v. State*, 2 App. 398.

Indictment held to sufficiently allege the locality at which the congregation was assembled. *Corley v. State*, 3 App. 412.

Indictment charged: "Heretofore, to wit, on the first day of December, A. D. 1876, in the county of H. State of T. did willfully disturb a congregation assembled for religious worship and conducting themselves in a lawful manner, by loud and vociferous talking." Held, sufficient as to time, place and manner. *Bush v. State*, 5 App. 64, citing *Corley v. State*, 3 App. 412.

Indictment held sufficient as to time, place and manner in which the congregation was disturbed. *Bush v. State*, 5 App. 64.

A complaint charging that the offense was committed by defendant and another "by loud and vociferous talking and by assaulting each other," held not at fatal variance with an information charging that defendant alone committed the offense. *Wood v. State*, 11 App. 318.

Indictment held bad for uncertainty, where it failed to allege the means or manner by which the defendant disturbed the congregation. *Thompson v. State*, 16 App. 159.

Where the state makes no reply to a motion to dismiss the cause on the ground that no complaint was filed as a basis for the information, and no complaint appears in the record, it will be presumed that the record is complete, and the cause will be dismissed. *McVea v. State*, 35 App. 1, 26 S. W. 834, 28 S. W. 469.

Complaint must be filed as a basis for information. *McVea v. State*, 35 App. 1, 26 S. W. 834, 28 S. W. 469.

The indictment must state that the congregation alleged to have been disturbed was conducting themselves in a lawful manner. *Kizzia v. State*, 38 App. 319, 43 S. W. 86.

An indictment charging a defendant with disturbing a congregation "assembled for religious worship in a lawful manner" is insufficient to charge the offense defined by Rev. Pen. Code, art. 296, of disturbing a congregation "assembled for religious worship and conducting themselves in a lawful manner." *Kizzia v. State*, 38 App. 319, 43 S. W. 86.

Complaint that did not begin with the constitutional requirement "in the name and by the authority of the State of Texas," held absolutely void. *Ex parte Jackson*, 50 App. 324, 95 S. W. 1047.

An indictment for disturbing religious worship is not sustained by proof that the meeting was for the purpose of practicing singing and took place at a school-house Sunday evening. *Green v. State* (Cr. App.) 56 S. W. 916.

Evidence.—In a prosecution for this offense, a witness was asked by the prosecution, "Was the manner in which the defendant spoke, calculated to disturb the congregation?" He answered in the affirmative. Both question and answer were objected to by the defendant and it was held that the court erred in not sustaining said objections. It was further held that defendant's questions propounded to the same witness, viz.: "Why was it that defendant called you a d—d liar?" "What had you done or said?" were competent, and should have been permitted, not in justification of the offense, but in mitigation of punishment. *Calvert v. State*, 14 App. 154. *Wood v. State*, 16 App. 574; *Lyons v. State*, 25 App. 403, 8 S. W. 643.

Testimony that defendant "caused general confusion, excitement and disturbance among the people there assembled," being a statement of fact and not opinion evidence, was admissible. *Lewis v. State*, 33 App. 618, 28 S. W. 465.

On a prosecution for disturbing a religious meeting, testimony, elicited from defendant on cross-examination, that he was drinking at the time of the disturb-

ance, is admissible to show his mental condition, and as affecting the weight of his testimony. *Lewis v. State*, 33 App. 618, 28 S. W. 465.

Evidence that after preaching was over defendant said if the preacher fooled with him he would shoot him was admissible to show intent. *McAdoo v. State* (Cr. App.) 35 S. W. 966.

Testimony that the preacher ceased preaching, and spoke to defendant, and the others participating in the disturbance, about their talking, is not inadmissible as hearsay. *McAdoo v. State* (Cr. App.) 35 S. W. 966.

On trial for disturbing religious worship, it was error to admit evidence that parties had quit attending Sunday school on account of the acts of the defendant. *Deskin v. State*, 94 App. 439, 93 S. W. 742.

Evidence of threats made by accused after the offense against the minister whose congregation was disturbed was admissible to show accused's animus, and to disprove his claim that the disturbance was not willful. *Webb v. State*, 63 App. 207, 140 S. W. 95.

In a prosecution for disturbing a congregation assembled for religious worship, evidence that, before accused moved into the community, some one had shot into the church was inadmissible, as it did not tend to show who committed the offense in question. *Haynes v. State*, 71 App. 31, 159 S. W. 1059.

— **Sufficiency.**—Evidence held to sustain a conviction. *Webb v. State*, 63 App. 207, 140 S. W. 95; *McElroy v. State*, 25 Tex. 507; *Hunt v. State*, 3 App. 116, 30 Am. Rep. 126; *Friedlander v. State*, 7 App. 204; *Lott v. State*, 41 Tex. 121; *Dorn v. State*, 4 App. 67; *Cantrell v. State* (Cr. App.) 29 S. W. 42; *Love v. State*, 35 App. 27, 29 S. W. 790; *Winnard v. State* (Cr. App.) 30 S. W. 555; *Laird v. State* (Cr. App.) 155 S. W. 260; *Haynes v. State*, 71 App. 31, 159 S. W. 1059.

Evidence held insufficient. *Richardson v. State*, 5 App. 470; *Bush v. State*, 6 App. 421; *Wood v. State*, 16 App. 574; *Lyons v. State*, 25 App. 403, 8 S. W. 643; *Denny v. State*, 52 App. 158, 105 S. W. 798; *Wood v. State*, 11 App. 318.

Evidence that defendant disturbed the congregation by talking and laughing with others, held sufficient. *McAdoo v. State* (Cr. App.) 35 S. W. 966.

Instructions.—An instruction that the term "willful" as used in the indictment signifies "without reasonable ground for believing the act to be lawful, or a reckless disregard of the rights of others," is correct. *Finney v. State*, 29 App. 184, 15 S. W. 175.

Pending the taking of a collection after a religious service, a person known as "Camptime," who had prayed in a very loud manner for defendant as being a wicked and mean person, was requested to sing, when defendant objected, in an ordinary voice, to "Old Camptime doing any more," saying that he would not attend another meeting if Camptime was allowed to run it. Held that defendant was entitled to an instruction that the congregation, to be protected from disturbance, must be conducting itself in a lawful manner. *Nash v. State*, 32 App. 368, 24 S. W. 32, 26 S. W. 412.

A charge which instructs the jury that the statute protects the congregation "so long as any one of them are on the ground," etc., held not erroneous when the evidence showed that a part of the disturbance occurred in the house during service. *Love v. State*, 35 App. 27, 29 S. W. 790.

Where it was shown that the disturbance occurred in the church during service, as well as just outside the church immediately after service, it was proper to charge that the statute protects a congregation so long as any of them are on the ground, either before, during, or after service. *Love v. State*, 35 App. 27, 29 S. W. 790.

In a prosecution for willfully disturbing a congregation, the definition of "willful" as meaning with evil intent, or without reasonable grounds for believing the act to be lawful, is sufficient, without stating that it should be with legal malice. *Holmes v. State*, 39 App. 231, 45 S. W. 487, 73 Am. St. Rep. 921.

Where the evidence showed that the disturbance occurred in the house, defendant was not prejudiced by a charge that he would be guilty if he disturbed the congregation in or out of the house. *Clark v. State* (Cr. App.) 78 S. W. 1078.

Refusal of an instruction that before defendant could be convicted as principal the evidence must show that he either created the disturbance himself or acted with, or encouraged, those who disturbed the congregation, held error. *Denny v. State*, 52 App. 158, 105 S. W. 798.

In a prosecution for disturbing a congregation assembled for religious worship, where the instructions defined the word "willfully" as meaning with evil intent, or without reasonable grounds for believing the act to be lawful, it was not necessary to give any other instruction defining the word, nor was it necessary to carry the definition forward in each paragraph of the instructions wherein the word was used. *Haynes v. State*, 71 App. 31, 159 S. W. 1059.

Where the evidence in a prosecution for disturbing a congregation assembled for religious worship showed that a jug was thrown through the window by one of two persons acting together, and accused admitted that he was with a certain companion, it was not error to refuse to instruct that if accused did not throw the jug, he must be acquitted, for if either threw the jug, both would be guilty. *Haynes v. State*, 71 App. 31, 159 S. W. 1059.

Verdict.—See notes under Code Crim. Proc. art. 763.

Recognizance.—See notes under Code Crim. Proc. art. 919.

Art. 297. [194] Offender may be bound over.—If complaint be made to any magistrate that a person has committed the offense mentioned in the preceding article, he may be, at the discretion of the magistrate, bound over to keep the peace and to refrain from like disturbance for the term of one year. [P. C. 285.]

For forms relating to peace bonds, see Willson's Cr. Forms, 1060, 1061, 1065, 1067.

Art. 298. [195] Double penalty for second offense.—Double the punishment prescribed in article 296 shall be imposed for any subsequent offense of the same kind. [P. C. 286.]

Indictment.—Willson's Cr. Forms, 125.

CHAPTER TWO

SUNDAY LAWS

<p>Art. 299. Working on Sunday. 300. Not applicable, when. 301. Horse racing, gaming, etc., on Sunday.</p>	<p>Art. 302. Selling goods on Sunday. 303. Exceptions from operation of preceding article.</p>
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Article 299. [196] Working on Sunday.—Any person who shall hereafter labor, or compel, force, or oblige his employes, workmen or apprentices to labor on Sunday, or any person who shall hereafter hunt game of any kind whatsoever on Sunday, within one-half mile of any church, school house or private residence, shall be fined not less than ten nor more than fifty dollars. [Act April 2, 1887, p. 108.]

Cited. *Ex parte Brewer* (Cr. App.) 152 S. W. 1068.

Validity.—This article is within the police power of the state and is constitutional. *Ex parte Kennedy*, 42 App. 148, 58 S. W. 129, 51 L. R. A. 270.

Labor.—The term "labor" as used in this article does not apply to an officer engaged in his official duties. *Stephens v. Porter*, 29 Civ. App. 556, 69 S. W. 423.

The steward for a club, opening and conducting its business on Sunday, and selling two bottles of beer, is not guilty, under this article, of laboring on Sunday. *Benson v. State*, 47 App. 609, 85 S. W. 800.

This article prohibits the running of a poolroom on Sunday. *Ex parte Axsom*, 63 App. 627, 141 S. W. 793, 40 L. R. A. (N. S.) 179, Ann. Cas. 1913D, 794.

A social club which sold intoxicating liquors generally to its members on Sunday violated this article. *State v. Country Club* (Civ. App.) 173 S. W. 570.

Injunction.—A court of equity will interfere to restrain one from carrying on business on Sunday if no property rights are invaded. *York v. Yzaguirre*, 31 Civ. App. 26, 71 S. W. 563.

Indictment.—Willson's Cr. Forms, 126, 127.

Art. 300. [197] Not applicable, when.—The preceding article shall not apply to household duties, works of necessity or charity; nor to necessary work on farms or plantations in order to prevent the loss of any crop; nor to the running of steamboats and other water crafts, rail cars, wagon trains, common carriers, nor to the delivery of goods by them or the receiving or storing of said goods by the parties or their agents to whom said goods are delivered; nor to stages carrying the United States mail or passengers; nor to foundries, sugar mills, or herders who have a herd of stock actually gathered and under herd; nor to persons traveling; nor to ferrymen or keepers of toll bridges, keepers of hotels, boarding houses and restaurants and their servants; nor to keepers of livery stables and their servants; nor to any person who conscientiously believes that the seventh or any other day of the week ought to be observed as the Sabbath, and who actually refrains from business and labor on that day for religious reasons. [Act Dec. 2, 1871, p. 62.]

Necessity.—The term "necessity," as employed in the Sunday statutes, is not an absolute, unavoidable, physical necessity, but rather an economic and moral necessity, and the necessity may grow out of or be incident to a particular trade or calling (quoting 5 Words and Phrases, p. 4729). *Lane v. State* (Cr. App.) 150 S. W. 637; *Hennersdorf v. State*, 25 App. 597, 8 S. W. 926, 8 Am. St. Rep. 448.

The operation of an ice factory on Sunday comes within the exception. *Hennersdorf v. State*, 25 App. 597, 8 S. W. 926, 8 Am. St. Rep. 448. And, likewise, does the shoeing of a stage horse. *Nelson v. State*, Id., 599, 8 S. W. 927.

Where no special circumstances exist, the work of a barber in shaving customers on Sunday is not such a work of necessity as is excepted. *Ex parte Kennedy*, 42 App. 148, 58 S. W. 129, 51 L. R. A. 270.

Where defendant engaged in farm work on Sunday, which there was evidence to show was not a work of necessity, a verdict convicting him of violating the Sunday law was supported by the evidence. *Lee v. State*, 50 App. 643, 100 S. W. 156.

This article prohibits the running of a poolroom. *Ex parte Axsom*, 63 App. 627, 141 S. W. 793, 40 L. R. A. (N. S.) 179, Ann. Cas. 1913D, 794.

A contract to construct a building stipulated that the owner would pay the contractor \$50 per day for each day prior to a designated future date that he should complete the building, and that the contractor would pay \$50 per day for every day subsequent to such date it took to complete the building. The building was not completed on the designated date, and thereafter the contractor worked his men on Sunday, paying them double wages. The extra pay allowed for Sunday work amounted to more than \$50 per day. Held, that the work on Sunday was not a work of necessity, and an employé working for the contractor was properly convicted of violating the Sunday law. *Lane v. State* (Cr. App.) 150 S. W. 637.

Art. 301. [198] Horse racing, gaming, etc., on Sunday.—Any person who shall run, or be engaged in running, any horse race, or who shall permit or allow the use of any nine or ten pin alley, or who shall be engaged in match shooting, or any species of gaming for money or other consideration, within the limits of any city or town on Sunday, shall be fined not less than twenty nor more than fifty dollars. [Act Dec. 2, 1871, p. 62.]

Constitutional questions.—This article is constitutional. *Shook v. State*, 25 App. 345, 8 S. W. 329.

The legislature cannot withdraw the jurisdiction of justices courts and give it to municipal courts. *Ex parte Ginnochio*, 30 App. 584, 18 S. W. 82.

Gaming.—This article embraces any species of gaming for money; and as fast as any game for money became prohibited by law, this article attached thereto. *Borders v. State* (Cr. App.) 66 S. W. 1102.

Gaming in a house outside, but proximate to the city limits, cannot be punished under this article. *Borders v. State* (Cr. App.) 66 S. W. 1102.

Indictment.—Willson's Cr. Forms, 128, 131-133.

Indictment must allege the name of the person or persons with whom the accused engaged in gaming. *Shook v. State*, 25 App. 345, 8 S. W. 329.

Art. 302. [199] Selling goods on Sunday.—Any merchant, grocer, or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employé of any such person, who shall sell, barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement on Sunday, shall be fined not less than twenty nor more than fifty dollars. The term, place of public amusement, shall be construed to mean circuses, theaters, variety theaters and such other amusements as are exhibited and for which an admission fee is charged; and shall also include dances at disorderly houses, low dives and places of like character, with or without fees for admission. [Act April 2, 1887, p. 108.]

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Cited, *Ex parte Mussett*, 72 App. 487, 162 S. W. 846; *Adams v. State* (Cr. App.) 145 S. W. 940; *Ex parte Zuccaro*, 72 App. 214, 162 S. W. 844.

1. **Historical.**—Before the changes made in this article by the Act of April 2, 1887, amending the Act of April 10, 1883, it read as follows: "Any merchant, grocer, or dealer in wares or merchandise, or trader in any lawful business whatsoever, or the agent or employé of any such persons, who shall sell or barter on Sunday, shall be fined not less than twenty, nor more than fifty dollars; provided, this article shall not apply to markets or dealers in provisions as to sales of provisions made by them before 9 o'clock a. m., nor the sale of burial or shrouding material; provided, the sale of newspapers, ice, and milk at any hour in the day shall be permissible; provided further, that nothing in this title shall be construed to prevent the sending or receiving of telegraph messages." As adopted in the Revised Code it read as follows: "Any merchant, grocer, or dealer in wares or merchandise, or trader in any lawful business whatsoever, who shall barter or sell on Sunday, shall be fined not less than twenty nor more than fifty dollars; provided, this article shall not apply to markets or dealers in provisions as to sales made by them before 9 o'clock a. m." As enacted by the act of Dec. 2, 1871, it read as follows: "Any merchant, grocer, or dealer in wares or merchandise, or

trader in any lawful business whatsoever, who shall sell or barter on Sunday, between the hours of 9 o'clock a. m. and 4 o'clock p. m., within the limits of any city or town, shall be fined in a sum of not less than twenty nor more than fifty dollars; provided, that nothing contained in this act shall be construed to prohibit the sale of drugs and medicines on Sunday." 2 Pas. Dig., article 6504.

2. Legislative power.—A municipal charter which attempts and purports to confer upon a "city court" exclusive jurisdiction of all violations of the Sunday law within the city limits between the hours of 12 o'clock Saturday night and 9 o'clock Sunday morning, and between the hours of 4 o'clock p. m. Sunday and 12 o'clock Sunday night, is unconstitutional and absolutely void, in that it attempts a divestiture or destruction by the legislature of the power and jurisdiction of justices' courts created and provided for by the state constitution. *Ex parte Ginnocchio*, 30 App. 584, 18 S. W. 82; *Todd v. State*, 30 App. 667, 18 S. W. 642.

It is within the power of the Legislature to require cessation of labor on certain days periodically. *Ex parte Roquemore*, 60 App. 282, 131 S. W. 1101, 32 L. R. A. (N. S.) 1186.

3. Municipal powers.—See art. 965, C. C. P., and notes.

4. Validity.—Sunday laws are constitutional as within the police power of the State. *Gabel v. Houston*, 29 Tex. 335; *Bohl v. State*, 3 App. 683; *Usener v. State*, 8 App. 177; *Ex parte Sundstrom*, 25 App. 133, 8 S. W. 207; *Ex parte Brown* (Cr. App.) 61 S. W. 396.

This article as to sales by merchants, is constitutional. *Ex parte Sundstrom*, 25 App. 133, 8 S. W. 207; *Whitcomb v. State*, 30 App. 269, 17 S. W. 258; *Todd v. State*, 30 App. 667, 18 S. W. 642.

This article is not class legislation. *Searcy v. State*, 40 App. 460, 50 S. W. 699, 51 S. W. 1119, 53 S. W. 344.

The Sunday law is not violative of Const. art. 16, § 20, known as the Local Option section, or suspended as to a licensed liquor dealer. *Bennett v. State*, 49 App. 294, 92 S. W. 415.

5. Construction.—This article is not affected by nor is it in conflict with any of the provisions of the Baskin-McGregor law, regulating the sale of intoxicating liquors. *Ex parte Wright*, 56 App. 504, 120 S. W. 868.

The purpose of the Baskin-McGregor law is to punish one selling intoxicating liquors without a license at any time, whether on Sunday or week day. The general Sunday law punishes infractions by sales on Sunday, whether with or without license. *Id.*

6. Terms defined.—"Open," as used herein, means that the house should be closed against all traffic. *Whitcomb v. State*, 30 App. 269, 17 S. W. 258.

In a prosecution for keeping open a liquor saloon for traffic on Sunday the court charged that, if the jury believed defendant kept his saloon open for the purpose of "traffic" on Sunday he should be convicted; and "that the term 'traffic' as employed has its usual and commonly accepted meaning." Held that no further definition of the word "traffic" was necessary. *Levine v. State*, 35 App. 647, 34 S. W. 969.

This article means the entire day, from Saturday midnight to Sunday midnight. *Muckenfuss v. State*, 55 App. 229, 116 S. W. 51, 20 L. R. A. (N. S.) 783, 131 Am. St. Rep. 813, 16 Ann. Cas. 768.

A base ball park is not within the term, "and such other amusements for which admission fee is charged," the rule being that, where general words follow an enumeration of particular things in the statute, such words must be held to include only such matters or objects as are of the same kind as those specifically enumerated. *Ex parte Roquemore*, 60 App. 282, 131 S. W. 1101, 32 L. R. A. (N. S.) 1186.

The word "theater" does not mean the building, but the performance or exhibition given; and, while a moving picture show is not a theater, it falls within the prohibition of the statute as one of "such other amusements" prohibited (citing 8 Words & Phrases, p. 6937). *Ex parte Lingenfelter*, 64 App. 30, 142 S. W. 555, Ann. Cas. 1914C, 765.

The word "employé," is synonymous with servant, a "servant" being a person employed to labor for the pleasure or interest of another, or as a legal term, one employed to render service or assistance in some trade or vocation, but without authority to act as agent in place of his employer; and, while an "agent," in the broadest sense of the word, may be construed to have the same power of authority as his principal, no such inference can be drawn from the term "employé"; and by the use of such terms it was intended to include any subordinate, though without the authority of his principal or the proprietor, who, in any way, acted together with the proprietor in the commission of the offense. *Oliver v. State* (Cr. App.) 144 S. W. 604.

7. Elements of offense.—The offense is complete if the place is kept open for the purpose of traffic whether there has been a sale or not. *Armstrong v. State*, 47 App. 510, 84 S. W. 827; *Brown v. State*, 38 App. 597, 44 S. W. 176.

It is immaterial that the purchaser did not pay for the article sold by defendant. *Elsner v. State*, 30 Tex. 524.

The statute does not prohibit the gift of intoxicating liquors on Sunday. *Keller v. State*, 23 App. 259, 4 S. W. 886.

8. Former jeopardy.—An acquittal of a saloon keeper of the charge of permitting his place of business to be open on Sunday, February 24, 1895, was not a bar to a prosecution for keeping his place open on Sunday, August 10, 1895, in the absence of proof that the two charges referred to the same transaction. *Fehr v. State*, 36 App. 93, 35 S. W. 381, 650.

9. Separate offenses.—Each act of sale is a separate offense. *Albrecht v. State*, 8 App. 313; *Mosely v. State*, 18 App. 311.

10. Persons liable.—Principals and accomplices, see notes under articles 74 and 79.

Defendant, a bar-tender, being present and in control of the porter, he was liable for the sale, though the porter waited on the customer. *Collins v. State*, 34 App. 95, 29 S. W. 274.

A sale of goods, wares or liquors on Sunday is not a violation of law, unless brought within the inhibition of this article, and must be by a "merchant, grocer, or dealer in wares or merchandise, or trader in any business," etc. *Meeks v. State*, 32 App. 420, 24 S. W. 98; *Johnson v. State*, 34 App. 106, 29 S. W. 472.

The statute includes any person in the employ of the merchant or dealer, in any capacity about the particular business, even though not as salesman, and an employé of any kind, though he did not in fact make the sale as agent, if he aided in it, is a principal. *Burnett v. State*, 42 App. 600, 62 S. W. 1063.

A party violating the Sunday law, is amenable in his individual capacity, though he belongs to a firm. *Morris v. State*, 48 App. 562, 89 S. W. 832.

A ticket agent of an amusement company held liable. *Oliver v. State* (Cr. App.) 144 S. W. 604.

11. Barbers.—In absence of special circumstances, a barber shaving his customers on Sunday violates this article. *Ex parte Kennedy*, 42 App. 148, 58 S. W. 129, 51 L. R. A. 270.

12. Farmers.—To constitute one guilty under this article he must come within the terms or definition of the statute: i. e., he must be a merchant, grocer or dealer in wares or merchandise or trader in any business whatsoever, etc. A farmer selling products from his farm produced by his own labor does not come within the statute. *Hanks v. State*, 50 App. 577, 99 S. W. 1011, 1012.

13. Liquor sales.—See arts. 615, 616, 623.

Whisky is ordinarily regarded as a beverage and not as a medicine, especially when not sold as a medicine or by a druggist. *Searcy v. State*, 40 App. 460, 50 S. W. 699, 51 S. W. 1119, 53 S. W. 344.

The local option law treats whisky as a medicine, and authorizes its sale under certain conditions, and when the conditions are complied with, such sale can be made in a drug store in local option territory as well as outside such territory. *Watson v. State*, 46 App. 138, 79 S. W. 31.

A hotel or restaurant keeper, though authorized to pursue his occupation on Sunday, is not thereby authorized to violate any prohibitory law. Whether the beer served with the meal was a gift or sale, properly submitted to the jury. *Savage v. State*, 50 App. 199, 88 S. W. 351.

14. Drugs.—In a prosecution for selling Florida water on Sunday, evidence which tended to show that such water was a drug or medicine and was sold as such did not authorize a conviction. *Todd v. State*, 30 App. 667, 18 S. W. 642.

Drugs and medicines are excepted from the statutes prohibiting the sale of goods on Sunday. *Todd v. State*, 30 App. 667, 18 S. W. 642.

15. Public amusements.—This article includes moving picture shows. *Ex parte Lingenfelter*, 64 App. 30, 142 S. W. 555, Ann. Cas. 1914C, 765; *Lempke v. State* (Cr. App.) 171 S. W. 217.

An assembling of persons on Sunday to unlawfully open a theater would not be a violation of this article, unless an admission fee was charged. *Ex parte Jacobson*, 55 App. 237, 115 S. W. 1193.

The opening of places of amusement on Sunday is not a violation of the law unless an admission fee is charged. *Ex parte Jacobson*, 55 App. 237, 115 S. W. 1194.

A theater giving more than one exhibition on Sunday cannot be punished for each performance. It is only one offense. *Muckenfuss v. State*, 55 App. 229, 116 S. W. 51, 20 L. R. A. (N. S.) 783, 131 Am. St. Rep. 813, 16 Ann. Cas. 768.

This article does not prohibit the owner of a baseball park from permitting a game to be played therein on Sunday for admission fee. *Ex parte Roquemore*, 60 App. 282, 131 S. W. 1101, 32 L. R. A. (N. S.) 1186.

This article was intended to prevent the Sunday theater when an admission was charged thereto. *Oliver v. State* (Cr. App.) 144 S. W. 604.

Defendant, in a prosecution under this article as the agent and employé of an amusement company, was shown to have been the ticket agent and in the ticket office of the building in which the performance was given, and to have sold admission tickets thereto, but urged that under the statute only the proprietor could "permit" the place to be open; and hence that no mere subordinate could be convicted thereunder. Held, that the intent of the section was to make it an offense for any agent or employé of the proprietor to do any act toward keeping the theater open and running on Sunday, whether he had control of it, or could permit it to be opened, or not; and hence that defendant was guilty of the offense. *Oliver v. State* (Cr. App.) 144 S. W. 604.

A "theater" is a playhouse, a building for the representation of a theatrical performance. *Gould v. State* (Cr. App.) 146 S. W. 172.

The opening of theaters and moving picture shows on Sunday, and the exhibition therein of vaudeville performances and plays, or moving picture scenes, where a fee is charged for entrance thereto, violates this article. *Ex parte Zuccaro*, 72 App. 214, 162 S. W. 844.

A contract for services of vaudeville performers is not void as in violation of this article, where the contract called for no services upon Sunday except such as might be lawfully given. *Bergere v. Parker* (Civ. App.) 170 S. W. 808.

Under this article, held, that a contract with an amusement company could not be enforced in so far as it included Sunday exhibitions. *La Crandall v. Ledbetter*, 15 Fed. 702, 86 C. C. A. 570.

16. Indictment and information.—Willson's Cr. Forms, 134.

An indictment charging the selling of beer on Sunday need not so describe the

offense as to entirely dispense with proof of its identity, where the judgment is pleaded in bar of the subsequent prosecution. *Albrecht v. State*, 8 App. 313.

An indictment should allege that defendant was a merchant, grocer or dealer in wares or merchandise or a trader in a lawful business. *Archer v. State*, 10 App. 482.

It is necessary, therefore, that the indictment shall, with reasonable certainty, specify the sale alleged, as the offense for which the accused is to be tried. An indictment which alleged that the defendant on a certain Sunday sold "merchandise," without describing the merchandise, or naming the person to whom he sold it, or otherwise identifying such sale, was held bad. *Mosely v. State*, 18 App. 311. The indictment should allege that the defendant, at the time of the offense, was a merchant, grocer, dealer in wares and merchandise, or a trader in a lawful business as the case may be, and it is also necessary to prove such allegation. *Archer v. State*, 10 App. 482. An indictment which alleged that the defendant was a "liquor dealer" was held sufficient upon the ground that "liquor" is "merchandise." *Day v. State*, 21 App. 213, 17 S. W. 263. When the allegation is that the defendant is a "dealer," proof that he was merely a clerk in the establishment does not sustain the allegation. *Archer v. State*, 10 App. 482. Where an indictment charged the sale of "whisky" on Sunday, it was held that the charge was sustained by proof that he sold a beverage known as "whisky cocktail" on Sunday. *Galloway v. State*, 23 App. 398, 5 S. W. 246.

An indictment charging defendant with selling drinks of whisky, "said person being then and there a liquor dealer" is sufficient; it not being necessary to allege that defendant was a "trader in unlawful business" or "a retail liquor dealer." *Day v. State*, 21 App. 213, 17 S. W. 262.

Where the indictment alleged in separate counts the keeping open of a place of business and also a sale therein on a certain day, the state was not bound to elect on which count to proceed; it not being necessary to set out such different states of facts in separate counts. *Brown v. State*, 33 App. 597, 44 S. W. 176, see *Hall v. State*, 41 App. 423, 55 S. W. 173; *Herod v. State*, *Id.* 597, 56 S. W. 59.

Information was insufficient in not alleging that the defendant was the employé or clerk of his employer and sold the liquor belonging to his said employer as his employé or clerk. *Behrens v. State*, 42 App. 629, 62 S. W. 568.

Indictment not invalid because it charges that, as liquor dealer "or" keeper of a bar-room, defendant permitted his saloon to be opened on Sunday for traffic. *Hofheintz v. State*, 45 App. 117, 74 S. W. 310.

Not necessary to specify the particular business defendant was engaged in, and allegation that he was a dealer in wares and merchandise is sufficient. The further allegation that he permitted his place of business to be opened for traffic on Sunday, can be sustained without proof of a specific sale. *Griffith v. State*, 48 App. 575, 89 S. W. 832. *Armstrong v. State*, 47 App. 510, 84 S. W. 827.

An information alleging that accused, as agent and employé of the proprietor of a theater, permitted a theatrical performance to be given on Sunday, to which a fee was charged for admission, charges an offense. *Gould v. State*, 61 App. 195, 134 S. W. 695.

17. **Pleading and proof.**—Proof that defendant was a clerk in a saloon was insufficient to sustain an allegation that he was a dealer. *Archer v. State*, 10 App. 482.

Where the indictment charged the sale of whiskey on Sunday and the proof showed a sale of "whiskey cocktail," there was no variance.—*Galloway v. State*, 23 App. 398, 5 S. W. 246.

In a prosecution for permitting one's place of business to be open for the purpose of traffic on Sunday, it is not necessary to prove a sale. *Griffith v. State*, 48 App. 575, 89 S. W. 832.

18. **Evidence.**—Evidence held insufficient to sustain a conviction for selling on Sunday. *Caspary v. State*, 14 App. 567.

A conviction of selling liquor is not sustained by proof of a gift. *Keller v. State*, 23 App. 259, 4 S. W. 886.

In a prosecution for selling liquor on Sunday, it is not reversible error to allow the prosecuting attorney to ply defendant with certain questions on cross-examination, intended to show that he had no regard for the Sunday law, and that he was in the habit of violating it, where he answers in the negative. *Levine v. State*, 35 App. 647, 34 S. W. 969.

In a prosecution for selling liquors on Sunday the prosecuting attorney may ask defendant on his cross-examination as a witness how many times he had been convicted for violating the liquor and Sunday laws. *Levine v. State*, 35 App. 647, 34 S. W. 969.

Where defendant is testifying in a case against him for keeping his place of business open on a named Sunday for traffic, State can prove by him that he has kept it open on other Sundays. *Dickey v. State* (Cr. App.) 56 S. W. 628.

In a prosecution for selling liquor on Sunday, information charging that accused sold as the agent and employé of a certain firm, evidence that it was generally understood that the firm were the owners of the saloon where the sale occurred is inadmissible, the proper method of proving ownership being by the license, bond, etc. *Earl v. State*, 44 App. 493, 72 S. W. 376.

The county clerk testified that he kept a stub book from which retail liquor licenses were issued. The stub book showed the issuance of the license to the firm employing accused, its date and expiration, etc. Held, that the stub book was inadmissible. *Earl v. State*, 44 App. 493, 72 S. W. 376.

Admission of evidence of other indictments charging defendant with similar offenses about the same time to show the fact of ownership as stated in the other indictments held error. *Custer v. State*, 48 App. 144, 86 S. W. 757.

Defendant delivered the whiskey and declined to receive the proffered payment, but did not protest when the money was left at a usual place on the counter, or

offer to return it. Proof of sale was sufficient. *Morris v. State*, 48 App. 562, 89 S. W. 832.

Competent for State to prove by defendant that he was an habitual violator of the Sunday law. *Morris v. State*, 48 App. 562, 89 S. W. 832.

Where one not under arrest was called before the grand jury, at the time evidently believing he was under suspicion for violating the Sunday law, and was informed that such jury was investigating violations of such law, and without being warned was questioned on the subject, his statement then made may be used against him on a trial for violating such law. *Smith v. State*, 48 App. 509, 90 S. W. 37.

Evidence showing the club room was a subterfuge, conviction was proper. *Ward v. State*, 55 App. 362, 116 S. W. 1154.

Defendant admitting on cross-examination that he had a license, there was no reversible error in admitting in evidence a stub book kept by the clerk. *Ward v. State*, 55 App. 362, 116 S. W. 1154.

On a trial for permitting a theatrical performance on Sunday, testimony of witnesses as to what took place in the building on the occasion was admissible. *Gould v. State*, 61 App. 195, 134 S. W. 695.

In a prosecution of an employé of the lessee of a theater for permitting a Sunday performance, the lease held admissible. *Oliver v. State* (Cr. App.) 144 S. W. 604.

19. Instructions.—Refusal of an instruction that defendants could not be convicted unless the evidence showed that their place of business was open on Sunday for the purpose of traffic with their knowledge or consent, held error, since the presumption that defendants knew what was going on at their place of business could be rebutted by evidence. *Whitcomb v. State*, 30 App. 269, 17 S. W. 258.

An instruction held erroneous where it submitted to the jury all phases of the statute instead of restricting them to a consideration of the phase charged in the indictment,—that defendants permitted their place to be open on Sunday. *Whitcomb v. State*, 30 App. 269, 17 S. W. 258.

A requested instruction that defendants could not be convicted unless their saloon was permitted by them to be open for traffic and that the mere fact that liquor was sold on Sunday would not be sufficient to convict if the doors were closed, held properly refused as misleading where it appeared that the doors were all closed and that persons got in at the side door which was not locked. *Whitcomb v. State*, 30 App. 269, 17 S. W. 258.

Refusal of an instruction to acquit defendant unless the sale, if any, made by him, was made as a merchant, grocer, or dealer in wares or merchandise, held error. *Hanks v. State*, 50 App. 577, 99 S. W. 1011.

20. Judgment.—Judgment against plural defendants prosecuted to conviction for misdemeanors must be several and not joint. *Whitcomb v. State*, 30 App. 269, 17 S. W. 258.

21. Penalty.—On the question of increased penalty, the court properly admitted in evidence memoranda orders of a corporation court showing a previous conviction for a similar offense, and it was not necessary to show that such judgment was formally entered by the corporation court. *Muckenfuss v. State*, 55 App. 216, 117 S. W. 853.

Nor was it necessary that the memoranda judgments show a conviction for a similar offense of the identical class; sufficient if it showed conviction for violating the Sunday law in any of the prescribed modes. *Muckenfuss v. State*, 55 App. 216, 117 S. W. 853.

22. Recognizance on appeal.—See notes under C. C. P. art. 919.

23. Injunction.—An injunction to restrain one from keeping his barber shop open on Sunday will not issue at the suit of one who shows no property rights invaded, but who merely seeks to restrain competition of a business rival. *York v. Yzaguirre*, 31 Civ. App. 26, 71 S. W. 563.

Art. 303. [200] Exceptions from operation of preceding article.—The preceding article shall not apply to markets or dealers in provisions as to sales of provisions made by them before 9 o'clock a. m., nor to the sale of burial or shrouding material, newspapers, ice, ice cream, milk, nor to the sending of telegraph or telephone messages at any hour of the day, nor to keepers of drug stores, hotels, boarding houses, restaurants, livery stables, bath houses, or ice dealers, nor to telegraph or telephone offices. [Act April 13, 1891, p. 173.]

Validity.—This article is not class legislation. *Searcy v. State*, 40 App. 460, 50 S. W. 699, 51 S. W. 1119, 53 S. W. 344.

Druggists.—The legislature is authorized, under its police power, to exempt certain articles of merchandise as common necessities, from the inhibition of sale. *Searcy v. State*, 40 App. 460, 50 S. W. 699, 51 S. W. 1119, 53 S. W. 344.

This article exempts druggists selling drugs and medicines (*Todd v. State*, 30 App. 667, 18 S. W. 642), or intoxicants under the local option law. *Watson v. State*, 46 App. 138, 79 S. W. 31.

Indictment.—Willson's Cr. Forms, 134.

It is not necessary to negative the exceptions. *Archer v. State*, 10 App. 482; *Mosely v. State*, 18 App. 311.

TITLE 8

OF OFFENSES AGAINST PUBLIC JUSTICE

[Unlawful assemblies, riots, etc., see post, arts. 437-444, 452-459].

Chap.	Chap.
1. Of perjury.	6. Miscellaneous offenses. (Continued.)
2. Of false swearing.	(2. Conversion.)
3. Of subornation of perjury and false swearing.	(3. Peculation.)
4. Offenses relating to the arrest and custody of prisoners [and to the administration of the laws.]	(4. Nepotism.)
5. False certificate and authentication or entry by an officer.	(5. Failure of duty.)
6. Miscellaneous offenses.	(6. Barratry.)
(1. Extortion.)	(7. Compounding crime.)
	(8. Malicious prosecution.)
	(9. False Personation.)
	(10. Badges, unlawful wearing.)
	(11. General provisions.)

CHAPTER ONE

OF PERJURY

Art.	Art.
304. "Perjury" defined.	308. In what sort of proceeding.
305. Not perjury, when.	309. Immaterial statement not perjury.
306. Oath must be legally administered.	310. Punishment.
307. And about something past or present.	311. Perjury in capital cases.

Article 304. [201] "Perjury" defined.—Perjury is a false statement, either written or verbal, deliberately and wilfully made, relating to something past or present, under the sanction of an oath, or such affirmation as is by law equivalent to an oath, where such oath or affirmation is legally administered, under circumstances in which an oath or affirmation is required by law, or is necessary for the prosecution or defense of any private right, or for the ends of public justice. [P. C. 287.]

See notes under C. C. P. art. 439.

See *Powell v. State*, 36 App. 377, 37 S. W. 322.

Cited, *Murff v. State* (Cr. App.) 172 S. W. 238; *O'Bryan v. State*, 27 App. 339, 11 S. W. 443.

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| 1. Elements of offense. | 7. Convicts. |
| 2. ——— Deliberation and wilfulness. | 8. Indictment. |
| 3. ——— Jurisdiction of proceedings in which perjury was committed. | 9. Evidence. |
| 4. ——— Affidavits. | 10. Instructions. |
| 5. False swearing. | 11. Verdict. |
| 6. Defenses. | 12. Judgment. |

1. Elements of offense.—The essential elements are 1. A false statement, either written or verbal. 2. Must have been deliberately and wilfully made. 3. Must relate to something past or present. 4. Must be made under the sanction of an oath or its equivalent affirmation. 5. The oath or affirmation must have been administered under circumstances in which it is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice. *West v. State*, 8 App. 119; *State v. Peters*, 42 Tex. 7; *Warren v. State*, 57 App. 262, 122 S. W. 541.

Where the court has jurisdiction and power to administer an oath to a witness, his false statement under oath constitutes perjury though the jury has not been properly sworn. *Smith v. State*, 31 App. 315, 20 S. W. 707; *Schooler v. State*, 52 App. 331, 106 S. W. 359.

Any deliberate and wilful false statement by a witness in answer to questions is perjury though the questions would be too general to form the basis of his impeachment. *McDonough v. State*, 47 App. 227, 84 S. W. 594, 122 Am. St. Rep. 684 (overruling *Meeles v. State*, 32 App. 420, 24 S. W. 98; *McMurtry v. State*, 33 App. 521, 43 S. W. 1010; *Higgins v. State*, 38 App. 539, 43 S. W. 1012).

False testimony before grand jury. *Pipes v. State*, 26 App. 318, 9 S. W. 614; *Jones v. State* (Cr. App.) 174 S. W. 1071.

Defendant on trial of G. for theft testified that he saw M. and not G. in possession of the property. On subsequent trial of M. he testified that he saw G. and not M. in possession of the property and denied that he had testified otherwise on the trial of G.; held, immaterial which statement was true. *Whitaker v. State*, 37 App. 479, 36 S. W. 253.

If a false statement is material and is wilfully and knowingly made, it is perjury whether in the conjunctive or disjunctive form. *Fry v. State*, 36 App. 582, 37 S. W. 741, 38 S. W. 168.

Where the party is charged with having committed perjury in trial in justice

court, State must show the jury in justice court was sworn. *Curtley v. State*, 42 App. 227, 59 S. W. 45.

Perjury committed on the taking of depositions is complete when the depositions are taken, though they are never filed. *Manning v. State*, 46 App. 326, 81 S. W. 957, 3 Ann. Cas. 867.

False testimony in a civil action for the collection of a note, that a receipt, purporting to have been signed by the plaintiff and to show payment of the note, had been executed by the plaintiff, is perjury. *Barber v. State*, 64 App. 96, 142 S. W. 577.

False testimony by accused upon the trial of an action in justice court that he was an infant at the time he incurred certain obligations constitutes perjury, though the cause was continued upon the claim of plaintiff that it was surprised by such testimony. *Poulter v. State*, 70 App. 197, 157 S. W. 166.

Where the grand jury investigating violations of the law prohibiting the sale and storing of intoxicating liquors investigated the question whether certain persons had received liquor, and stored the same in a house rented by a witness before the grand jury, and whether he knew that the persons had received liquor on a designated date and stored it in the house, the false testimony of the witness that no liquor had been received and stored in his house constituted perjury. *Trinkle v. State*, 71 App. 64, 158 S. W. 544.

On a trial for perjury predicated on accused giving false testimony in the county court on his trial for crime, the state need not prove that the jury in the county court was sworn. *Mares v. State*, 71 App. 303, 158 S. W. 1130.

"Perjury" is a false statement deliberately and wilfully made. *Johnson v. State*, 71 App. 428, 160 S. W. 964.

2. — Deliberation and wilfulness.—Among the ingredients essential to constitute perjury the false statement assigned must have been made by the accused deliberately and wilfully; his mind must have been deliberate; he must, in such mind, have made the false statement deliberately and wilfully; he must have known the statement to be false, and with such knowledge he must deliberately have made it. To this extent the offense of perjury involves the condition and status of the mind of the accused; and whether intoxicated at the time he made the false statement, and incapable of mental deliberation and criminal intent, and therefore incapable of perjury, is a proper inquiry to be submitted to the jury. See in extenso the opinion of Hurt, presiding judge, in elaboration of the question, and for a review of authorities thereon. (Overruled by *Evers v. State*, 31 App. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811.) *Lyle v. State*, 31 App. 103, 19 S. W. 903.

It is immaterial whether accused swore to facts set forth according to the best of his knowledge and belief, or that they were absolutely true. *Beach v. State*, 32 App. 240, 22 S. W. 976.

If defendant believed the statement he made to be true he is not guilty of perjury. *Butler v. State*, 36 App. 444, 37 S. W. 746.

"Wilful" means with evil intent or legal malice, or without legal ground to believe the act lawful, and so the jury must be instructed. *Windom v. State*, 56 App. 198, 119 S. W. 309.

In a prosecution for uttering a false affidavit, the fact that accused was suffering from an illness at the time does not prevent the issue that it was not wilfully and deliberately made. *Welch v. State*, 71 App. 17, 157 S. W. 946.

3. — Jurisdiction of proceedings in which perjury was committed.—See *Manning v. State*, 46 App. 326, 81 S. W. 957, 3 Ann. Cas. 867.

A false statement may be assigned for perjury if it was made in the course of a judicial proceeding before a court of competent jurisdiction over the subject-matter of the proceeding, although its jurisdiction had not actually attached. *Anderson v. State*, 24 App. 705, 7 S. W. 40; *Higgenbotham v. State*, 24 App. 505, 6 S. W. 201.

The perjury assigned in this case was alleged to have been committed on the trial of one Coy for the murder of one Jackson in Wilson county. Soon after the killing of Jackson, Coy killed one Elder, in Karnes county, and fled to Mexico, whence he was extradited for the murder of Elder, but not for the murder of Jackson. Coy was then indicted and put upon trial in Wilson county for the murder of Jackson, which trial resulted in a mistrial. No objection nor plea to the jurisdiction of the district court of Wilson county was interposed upon the trial for the murder of Jackson, but, soon after the mistrial, Coy sought his discharge by the writ of habeas corpus upon the ground that, not having been extradited for the murder of Jackson, he was illegally restrained of his liberty upon the charge of the murder of Jackson. Upon the hearing of the writ it was adjudged that the district court of Wilson county had no jurisdiction to try him for the Jackson murder, and he was discharged from restraint under that charge. The contention in this case is that the district court of Wilson county, having no jurisdiction to try Coy for the murder of Jackson, the accused did not, and could not, commit legal perjury on that trial. Held: 1. The district court of Wilson county had jurisdiction of the subject-matter of the prosecution—murder—against Coy. 2. It did not have jurisdiction over Coy's person to try him for the murder of Jackson, because he was not extradited for that particular murder. 3. Jurisdiction over the person is a matter subject to the objection or waiver only of the person over whom it is being, or is sought to be, exercised. 4. If such person submits to the jurisdiction of the court over his person, and to trial, without objection, he waives his privilege, whatever it may be, and the proceedings of the court trying him, at the most, are merely voidable, and voidable only at his instance, and can not be questioned by any other person. 5. The trial of Coy for the murder of Jackson was a legal proceeding, and the court trying him was a court of competent jurisdiction for the purpose of this case. Wherefore the contention of the defense is not tenable. *Cordway v. State*, 25 App. 405, 8 S. W. 670.

An indictment for perjury will lie for giving false testimony upon an examining trial, though the complaint upon which the trial was had was defective, and should have been quashed on motion. *Waddle v. State* (Cr. App.) 165 S. W. 591.

Accused was in justice court convicted of a gaming offense, the charge being made by complaint only. Thereafter he appealed to the county court, and the prosecutor, discovering the complaint to be defective, moved to dismiss and filed a new complaint. Accused waived notice and the filing of an information, consenting to go to trial immediately upon the complaint. Held, that the county court had jurisdiction over the prosecution, and accused, having given materially false testimony, was guilty of perjury. *Etheridge v. State* (Cr. App.) 173 S. W. 1031.

4. — Affidavits.—Perjury may be assigned upon an affidavit made in support of a motion for new trial, although such affidavit be made by a person other than the defendant in the cause in which the same is made, and although the motion for new trial was not filed in proper time. *Hernandez v. State*, 18 App. 134, 51 Am. Rep. 295.

Perjury may be assigned upon oral testimony taken before an examining court, although such testimony is required to be reduced to writing. *Covey v. State*, 23 App. 388, 5 S. W. 283.

Perjury, under this article, may be assigned upon the affidavit of a public school teacher to the voucher or check drawn by the trustees for his pay, such as is contemplated by article 3962 (3776) of the Revised Statutes of 1895. *O'Bryan v. State*, 27 App. 339, 11 S. W. 443.

Sheriff's affidavit for fees conveying witness held to be an oath for the "prosecution of a private right." *Shely v. State*, 35 App. 190, 32 S. W. 901.

Perjury cannot be assigned on an affidavit made for the purpose of obtaining a new trial in an examining court. *Butler v. State*, 36 App. 483, 38 S. W. 46; *Id.*, 36 App. 444, 37 S. W. 746.

The offense of false swearing is consummated when accused signs and swears to a false affidavit, even though he does not use the affidavit for the purpose for which it was intended. *Welch v. State*, 71 App. 17, 157 S. W. 946.

5. False swearing.—Perjury and false swearing distinguished, see notes under art. 312, *post*.

6. Defenses.—No one can be compelled to give evidence against himself, but this right may be waived, and it confers no immunity for false testimony. *Mattingly v. State*, 8 App. 345. See *Kitchen v. State*, 26 App. 165, 9 S. W. 461; *Pipes v. State*, 26 App. 318, 9 S. W. 614.

In a prosecution for making a false affidavit, it is no defense to show that accused's attorney advised or suggested to him that he make such affidavit as a means of procuring a continuance. *Welch v. State*, 71 App. 17, 157 S. W. 946.

That the question asked of a witness before the grand jury is too general to form a basis for his impeachment will not preclude a false answer from being ground for a conviction of perjury. *Scott v. State*, 72 App. 26, 160 S. W. 960.

7. Convicts.—An exconvict may be prosecuted and convicted of perjury. (Following *Williams v. State*, 28 App. 392, 12 S. W. 1103; *Shannon v. State*, 28 App. 474, 13 S. W. 599.) *Murphy v. State*, 33 App. 314, 26 S. W. 395.

8. Indictment.—Willson's Cr. Forms, 135-138.
See Code Crim. Proc. art. 465.

9. Evidence.—Number of witnesses and corroboration, see Code Cr. Proc., art. 806 and notes.

Directing acquittal for insufficiency of corroboration, see Code Cr. Proc., art. 805 and notes.

Perjury may be proved by circumstantial evidence. *Rogers v. State*, 35 App. 221, 32 S. W. 1044; *Trinkle v. State*, 71 App. 64, 158 S. W. 544; *Miles v. State* (Cr. App.) 165 S. W. 567; *Hart v. State* (Cr. App.) 166 S. W. 152. See, also, notes under art. 806, Code Cr. Proc.

In a prosecution for perjury in giving false testimony, evidence held to support a verdict of guilty. *Waddle v. State* (Cr. App.) 165 S. W. 591; *Freeman v. State*, 44 App. 496, 72 S. W. 1001.

In a prosecution for slander against one who called a female a whore, accused testified that he had had intercourse with the prosecutrix. Thereafter accused was charged with perjury. A witness testified that the prosecutrix admitted to her that she had intercourse with a named man. Held, that the witness could not be contradicted by evidence of statements by the man named that he never had any improper relations with the prosecutrix. *Cox v. State* (Cr. App.) 174 S. W. 1067; *Reed v. State* (Cr. App.) 174 S. W. 1065.

The papers in the case in which perjury was committed cannot be used as evidence, but only as inducement to show fact of judicial proceeding in which perjury is alleged to have been committed. *Ross v. State*, 40 App. 352, 50 S. W. 336.

Under the law of this state an information is insufficient for any purpose unless founded upon a complaint, filed therewith, charging an offense. The indictment in this case charged that the perjury was committed on the trial of a judicial proceeding in the county court, "wherein one Bean was duly and legally charged by information," etc. To support the allegation of jurisdiction of the county court, the state introduced in evidence the information, but not the complaint. Held, that the proof was insufficient. *Wilson v. State*, 27 App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Smith v. State*, 27 App. 50, 10 S. W. 751.

That the court was in session and a judicial proceeding pending when perjury was committed was sufficiently proved by oral testimony without introducing the records where no objection to the manner of proof was urged. *King v. State*, 32 App. 463, 24 S. W. 514.

Where perjury is assigned on testimony of defendant at trial of another case

against him, a judgment of acquittal of the offense therein charged is inadmissible as evidence. *Hutcherson v. State*, 33 App. 67, 24 S. W. 908.

On a trial for giving false testimony before a grand jury regarding a theft by third persons, testimony tending to prove the theft including the confessions of such third persons, though not made in defendant's presence, was admissible on the questions of falsity and materiality. *Martin v. State*, 33 App. 317, 26 S. W. 400.

The coroner's certificate of the inquest bore a wrong date; held that it was competent to show the actual date of the inquest. *Rogers v. State*, 35 App. 221, 32 S. W. 1044.

On trial for perjury assigned on evidence given in another case against defendant, the judgment in the former case is inadmissible in evidence. *Hutcherson v. State*, 33 App. 67, 24 S. W. 908.

In a trial for perjury, it was held relevant and competent for the state to prove by the attorney who represented the defendant in the trial in which the perjury was alleged to have been committed, his reason and purpose for having the defendant to testify in said cause, such testimony tending to show that the defendant did not make the alleged false statements through inadvertence or mistake, or under agitation. *Davidson v. State*, 22 App. 372, 3 S. W. 662; *Cordway v. State*, 25 App. 405, 8 S. W. 670.

While it may be shown by the minutes of the court that the grand jury before whom defendant testified was legally impaneled, the failure to do so is not cause for acquittal where this is otherwise shown without objection. *Foster v. State*, 32 App. 39, 22 S. W. 21.

When perjury is assigned upon one of two conflicting statements by defendant, the pleader should select a statement, assign it for perjury, and prove that it was false, and such proof cannot be made alone by a statement in conflict with that assigned. *Whitaker v. State*, 37 App. 479, 36 S. W. 253.

Testimony held insufficient to support conviction. *Butler v. State*, 36 App. 433, 38 S. W. 46; *Id.*, 36 App. 444, 37 S. W. 746.

Defendant was charged with swearing that he did not see one K. with a pistol on a certain occasion. Two witnesses testified that on a bright moonlight night K., in the immediate presence of defendant, drew out his pistol and struck at one of the witnesses; held, that this is tantamount to positive proof that defendant saw such pistol. *Franklin v. State*, 38 App. 346, 43 S. W. 85.

Evidence of facts tending to show that when false affidavit was made, defendant believed the statements therein to be true was admissible. *Luna v. State*, 44 App. 482, 72 S. W. 378.

Facts and circumstances incriminating the person upon whose trial the perjury was committed, are necessary facts on the trial for perjury. *Freeman v. State*, 44 App. 496, 72 S. W. 1001.

Where the parol evidence in connection with so much of the judgment as was introduced sufficiently identified the case in which the perjury was committed, it was not necessary to introduce the complaint and information. *Curtis v. State*, 46 App. 480, 81 S. W. 29.

On a prosecution for perjury, all that is necessary to show jurisdiction of the court is to show that it had jurisdiction of the prosecution on which the alleged false testimony was given; and though the prosecution is in the county court, where such false testimony was given, and the prosecution in which the false testimony was given originated in a justice court, it is unnecessary and improper to introduce the transcript of such court, though it is proper to introduce the complaint. *Warren v. State*, 57 App. 518, 123 S. W. 1115.

On a prosecution for perjury, the judgment on the prosecution of defendant on which the alleged false testimony was given is not admissible. *Warren v. State*, 57 App. 518, 123 S. W. 1115.

In a prosecution for perjury consisting of false testimony given in another suit, the pleadings in such suit were properly admitted; the court having limited the purpose, for which they might be considered. *Downing v. State*, 61 App. 519, 136 S. W. 471.

Where in a suit on certain notes accused testified that A., from whom he purchased the notes, had not signed them until he did so at the request of accused at the time of the transfer, to establish that accused was a bona fide purchaser for value, and perjury was assigned on such testimony, evidence that witnesses had seen the notes prior to the date of the purchase, and that A.'s name was on them at that time, and also that other witnesses saw A. sign the notes prior to the purchase, and prior to their indorsement by the payees before they were delivered to A., who delivered them to accused, was admissible. *Downing v. State*, 61 App. 519, 136 S. W. 471.

In a prosecution for perjury consisting of evidence given by accused in another action to show that he was a bona fide purchaser of certain notes sued on, evidence as to the terms of a trade in which the notes were canceled and delivered to one of the alleged makers before they were transferred by the latter to accused, there being no claim that accused was present at that time or had any knowledge thereof when he purchased the notes, was irrelevant. *Downing v. State*, 61 App. 519, 136 S. W. 471.

Where perjury was based on alleged testimony by accused in a prior suit on certain notes, it was proper for the state to permit witnesses, including the stenographer at the trial, to testify what testimony was given by him in such suit. *Downing v. State*, 61 App. 519, 136 S. W. 471.

In a trial for falsely testifying before a grand jury which investigated a gaming transaction, it was proper to exclude a question asked by accused whether a certain watch was not taken or lost as part of the transaction, the testimony being offered by accused to show that the witness declined to answer any questions about the game before the grand jury under advice of counsel that his

testimony might incriminate him under a charge of having taken the watch, where the witness had already explained that he refused to testify before the grand jury under such advice. *Moore v. State* (Cr. App.) 144 S. W. 598.

In a trial for falsely testifying before a grand jury that accused did not participate in a gambling game and did not see others play, he claiming that, if he played or saw others play, he was so drunk that he did not remember it. when he was before the grand jury, the state was properly permitted to show that, before he left the grand jury room, he was given opportunity to retract his testimony, that he testified that he was not drunk or frightened, and knew what he was doing, and that he testified before the grand jury that a certain person came in the room where the game was played about a certain time. *Moore v. State* (Cr. App.) 144 S. W. 598.

In a prosecution for perjury in an action by his wife for a divorce, it was proper to show the pendency of that action, and whether or not issue was joined therein. *Spearman v. State* (Cr. App.) 152 S. W. 915, 44 L. R. A. (N. S.) 243.

In a prosecution for perjury for having testified falsely in his wife's action for divorce that he had not had intercourse with his wife before marriage, the wife's testimony as to such intercourse was admissible. *Spearman v. State* (Cr. App.) 152 S. W. 915, 44 L. R. A. (N. S.) 243.

Where a third person executed to accused a mortgage note for \$650, and a note for \$80, not secured by a mortgage, and the \$80 note was a genuine one, while the \$650 note was given to prevent the third person's creditors from levying on the mortgaged property, the testimony of accused on the examining trial of the third person for disposing of mortgaged property, that the third person owed him the \$650 note, sustained a charge of perjury. *Waddle v. State* (Cr. App.) 153 S. W. 882.

In a prosecution for perjury based on false testimony by accused that he was an infant when he contracted the liability sued on, testimony by a witness that he filed a suit for accused's mother for divorce is admissible when limited only to fix the date of his first acquaintance with accused. *Poulter v. State*, 70 App. 197, 157 S. W. 166.

In a prosecution for perjury based on accused's false testimony that he was an infant when he incurred the obligation sued on, evidence that, in the action in which the testimony was given, he was asked if he had not stated to the clerk, when he applied for a marriage license some time before, that he was more than 21 years of age, is admissible. *Poulter v. State*, 70 App. 197, 157 S. W. 166.

In a prosecution for perjury based on false testimony by accused that he was an infant when he incurred an indebtedness to plaintiff, the charter and amendments of the plaintiff corporation in the former action are admissible. *Poulter v. State*, 70 App. 197, 157 S. W. 166.

The state must not only prove the alleged perjured testimony, but must prove that accused knew that the testimony was false when he gave it. *Trinkle v. State*, 71 App. 64, 153 S. W. 544.

On a trial for perjury based on accused testifying that liquor was not received and stored in his house on a designated date, the testimony of the receipt of liquor on that date was admissible, but the receipt of liquor on later dates was not admissible, in the absence of evidence that accused had notice thereof. *Trinkle v. State*, 71 App. 64, 153 S. W. 544.

Evidence held not to show that accused knew that the alleged perjured testimony was false when he gave it. *Trinkle v. State*, 71 App. 64, 153 S. W. 544.

On the trial of accused for perjury, based on his false testimony in the county court on his trial for unlawfully betting at a gaming bank, the complaint and information in the county court are admissible. *Mares v. State*, 71 App. 303, 153 S. W. 1130.

In a prosecution for perjury committed in a divorce suit by the plaintiff therein, the petition in the divorce suit was properly admitted in evidence. *Edwards v. State*, 71 App. 417, 160 S. W. 709, 49 L. R. A. (N. S.) 563.

Where an indictment for perjury, based on defendant's denial as a witness before the grand jury that he knew of any gambling, alleged that he knew of gambling between certain parties at a certain place about May 1st, it was error to admit evidence that he knew of gambling at a different place on about August 1st, especially where it did not appear that the participants in both games were the same. *Scott v. State*, 72 App. 26, 160 S. W. 960.

In a prosecution for perjury alleged to have been committed in an action on a note made by accused to another, the note, being fully identified, is admissible in evidence, although not marked with a file mark. *Johnson v. State*, 71 App. 428, 160 S. W. 964.

In a prosecution for perjury in falsely testifying in a personal injury action that accused had never been injured while working for another railroad, parts of the transcript in the civil action, which showed that accused's counsel therein withdrew from the case upon it appearing that accused had testified falsely, were not admissible in evidence; only accused's questions and answers in the civil action being admissible. *Key v. State*, 72 App. 129, 161 S. W. 130.

In a perjury case, where defendant was charged with testifying falsely before the grand jury, the testimony of grand jurymen was admissible to show that defendant acted deliberately and wilfully and did not testify through misapprehension or agitation. *Poulter v. State*, 72 App. 140, 161 S. W. 475.

Since in a perjury case, where defendant was charged with testifying falsely before the grand jury as to his brother's age, it was incumbent on the state to show that the grand jury was inquiring into an alleged violation of law, evidence showing that an action was pending against the brother in the justice court, in which he had entered a plea of minority and swore that he was only 19 years

of age, was admissible, but the result of that trial was inadmissible, as defendant was not bound thereby. *Poulter v. State*, 72 App. 140, 161 S. W. 475.

In a prosecution for perjury for falsely stating that W. was in a certain house between the hours of 9 and 11 on a certain night, when in truth W. was at that time on a certain street corner and then and there committed the theft, it was not necessary to prove that accused was at the place of the theft, or that W. committed the theft. *Hart v. State* (Cr. App.) 166 S. W. 152.

In a prosecution for committing perjury in a theft case by testifying that the alleged thief was in a certain house at a certain time, when the thief was in fact on a certain street corner where the theft was committed, evidence held to sustain a finding that accused's testimony was false. *Hart v. State* (Cr. App.) 166 S. W. 152.

Where accused, who was charged with falsely testifying that he had had sexual intercourse with the prosecutrix in a slander case, attacked prosecutrix's reputation for chastity, evidence showing her good reputation for chastity, as well as that of a medical examination disclosing that she was a virgin, is admissible. *Reed v. State* (Cr. App.) 174 S. W. 1065.

Accused, who was charged with falsely testifying that the prosecutrix in a slander case permitted sexual intercourse, offered witnesses to show that prosecutrix was not a virtuous female. Held, that it was permissible to show on cross-examination of these witnesses that they attended church functions and social gatherings with the prosecutrix. *Cox v. State* (Cr. App.) 174 S. W. 1067.

In a prosecution for slander brought against one who stated that a young woman was no better than a whore, accused testified that he had had intercourse with the woman. The issues in the slander case were the truth of the statement and the utterance of the words. Held that, in a subsequent prosecution for perjury, proof that the defendant in the slander case uttered the slander as alleged was not essential to a conviction; accused's testimony at all events being material to the issues. *Cox v. State* (Cr. App.) 174 S. W. 1067.

In a prosecution for perjury, committed before a grand jury investigating illegal sales of liquor, the evidence showing that, while defendant stated that he had received no liquor from one S., two sheriffs looking over a partition had seen S. hand him a pint, evidence that witness had talked with defendant and another negro, and that, although he did not know which one had made the remark or the exact words of it, nevertheless something had been said to the effect that deputy sheriffs, through a hole in a certain partition, could have seen the transfer of liquor, and that there was no use in swearing to a lie, was admissible in evidence to impeach defendant's testimony and as an implied admission. *Jones v. State* (Cr. App.) 174 S. W. 1071.

10. Instructions.—Instructions as to corroboration and number of witnesses, see Code Cr. Proc. art. 806 and notes.

Where the court charges that perjury is a false statement deliberately and willfully made and that a false statement made through inadvertence or under agitation or by mistake, the failure to define willful is not error, in the absence of any objection or request for a special instruction. *Hill v. State*, 22 App. 579, 3 S. W. 764.

Where the indictment itself shows that the perjury assigned relates to a past event, it is not necessary to charge that the statement must relate to a past or present event. *Kitchen v. State*, 26 App. 165, 9 S. W. 461.

When the nature of the offense charged is made by law to depend upon the peculiar condition and state of the mind of the accused at the time, it is not only proper that evidence of drunkenness as a fact affecting the mind should be received, but the court should instruct the jury that in passing upon the question whether the accused deliberately and willfully committed the act, they should look to all the evidence, including that relating to drunkenness in connection with the other testimony tending to show the condition of the mind of the accused. *Lyle v. State*, 31 App. 103, 19 S. W. 903. (Overruled by *Evers v. State*, 31 App. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811.) For other decisions hereunder, see *Anderson v. State*, 24 App. 705, 7 S. W. 40; *Smith v. State*, 27 App. 50, 10 S. W. 751; *Brookin v. State*, 27 App. 701, 11 S. W. 655; *Brooks v. State*, 29 App. 582, 16 S. W. 542; *Turner v. State*, 30 App. 691, 18 S. W. 792.

Under indictment charging perjury before a grand jury in reference to gaming in an outhouse, when the testimony as to the house being commonly resorted to is very meager, the judge should instruct the jury that unless they find that the house referred to was commonly resorted to for gaming purposes, they should acquit the defendant. *Higgins v. State*, 38 App. 539, 53 S. W. 1012.

Where the allegation as to the particular officer administering the oath was specially controverted, defendant was entitled to a special instruction that the jury should acquit if the oath was not administered by such officer. *Crouch v. State*, 46 App. 76, 79 S. W. 524.

Where the state proved its case as alleged while defendant's witnesses were not definite as to the time and place of a conversation the court was not required to charge on the theory that there was a conflict as to whether the conversation occurred at the time and place alleged. *Jordan v. State*, 47 App. 133, 83 S. W. 821.

It was not error to charge that if the oath was not administered on the occasion when the alleged false statements were made the jury should acquit, and defendant could not complain thereof. *Clay v. State*, 52 App. 555, 107 S. W. 1129.

In charging this article the court should define to the jury the meaning of the words "deliberately" and "willfully." For not doing so the case will be reversed. *Windon v. State*, 56 App. 198, 119 S. W. 309.

The indictment for perjury charged that in a certain case the accused testified, "I know Mr. A. when I see him. He shot once with a pistol in the direction of Mr. O., * * * and did not drop his pistol," etc., and further alleged that it was

material whether the accused was present at such shooting, and whether A. had a pistol and shot, and that in fact accused was not immediately present at the time, and A. did not have a pistol, and that accused's testimony was willfully false. Held, that it was not necessary to require the jury to find that the single sentence, "I know Mr. A. when I see him" was false. *Young v. State*, 70 App. 434, 157 S. W. 151.

In a prosecution for perjury, charges requiring the jury to find, beyond a reasonable doubt, that issue was joined between accused and plaintiff in an action in justice court, and that while it was pending accused gave the testimony upon which perjury was assigned, coupled with other charges, stating the averments of the indictment, and requiring a finding that they were true in order to convict, and that if, when accused testified in the justice court, the question was whether a continuance should be granted, and he was interrogated by counsel in order that the latter might determine if he would ask for a postponement, then accused should be acquitted, are more favorable to accused than he is entitled. *Poulter v. State*, 70 App. 197, 157 S. W. 166.

In a prosecution for false swearing to a false affidavit, intended by accused to be used as a basis for a continuance, but was not, it was not improper for the court to charge the jury that the affidavit was not made in the course of a judicial proceeding. *Welch v. State*, 71 App. 17, 157 S. W. 946.

Where an indictment charged accused with committing perjury in testifying that he did not bet at a game played with dice with two persons named "and" other persons at a specified time and place, an instruction, that accused would be guilty if he falsely testified before the grand jury that he did not bet with the persons designated "or" any other person at a game played with dice, etc., was not objectionable as failing to submit the perjury assigned in the indictment. *Portwood v. State*, 71 App. 447, 160 S. W. 345.

Where, in a prosecution for perjury in testifying before the grand jury that accused did not bet at a game played with dice, with two persons specified and others, at a specified time and place, there were two issues presented by the evidence—one that he was asked before the grand jury if he did not play at the game with the persons specified at such time and place, and the other that he was not asked particularly about any game and did not testify about any particular game, and therefore did not testify that he did not bet at a game played with the parties specified—it was error to refuse a request to charge that he could only be convicted of falsely testifying as alleged in the indictment, and could not be convicted if it was found that he only testified that he did not bet at any game, and was not asked and did not testify about any particular game, under the rule that accused is entitled to have defensive matter sustained by the evidence affirmatively submitted to the jury. *Portwood v. State*, 71 App. 447, 160 S. W. 345.

Where the indictment, in a prosecution for perjury based on a false denial that defendant knew of gambling, charged him with knowledge that a particular game was played, and evidence was admitted showing that he knew of the playing of an entirely different game, it was error to refuse to instruct that the jury could not convict upon proof of any game except that alleged in the indictment. *Scott v. State*, 72 App. 26, 160 S. W. 960.

Where, in a prosecution for perjury based on defendant's denial as a witness before the grand jury that he knew of any gambling in the county where the grand jury was sitting, the evidence left it doubtful whether the game of which defendant knew was not played in another county to which the grand jury would have had no right to extend its investigation, it was error to refuse to instruct that defendant should be acquitted unless the gambling occurred in the county where the grand jury was sitting. *Scott v. State*, 72 App. 26, 160 S. W. 960.

Where, on a trial for perjury based on accused falsely testifying in a civil action between third persons that he had dug a well 54 feet deep, the evidence was conflicting, and several witnesses testified that, if a well was left standing for a year or more without casing, the same would run together, a charge that if accused dug a well 54 feet deep, and it filled up or there was a reasonable doubt thereof, accused must be acquitted, and, if employes of accused drilled a well 54 feet deep, accused was not guilty, and if he had been informed by his employes that the well was 54 feet deep, and he believed the statement, he was not guilty, etc., is sufficient. *Green v. State*, 132 S. W. 806.

11. **Verdict.**—Applying general verdict to good assignment of perjury sustained by evidence, see Code Cr. Proc. art. 770 and notes.

12. **Judgment.**—Conforming judgment to verdict on appeal, see notes under Code Cr. Proc. art. 938.

Art. 305. [202] Not perjury, when.—A false statement made through inadvertence, or under agitation, or by mistake, is not perjury. [P. C. 288.]

Inadvertence, etc.—See *Davidson v. State*, 22 App. 372, 3 S. W. 662, for evidence held competent when adduced by the state, to show that the false statement was not made through inadvertence, etc. See, also, *Sisk v. State*, 28 App. 432, 13 S. W. 647.

That a false statement was made through inadvertence or mistake or under agitation is a matter of defense. *Johnson v. State*, 71 App. 428, 160 S. W. 964; *Brown v. State*, 9 App. 171.

Evidence that defendant excused certain witnesses but afterwards told a third person to see them and countermand the order releasing them was admissible to show that defendant's false statement in an application for a continuance that the witnesses were not absent by his procurement or consent was made through mistake. *Brookin v. State*, 27 App. 701, 11 S. W. 645.

Perjury cannot be predicated on an erroneous construction of a written instrument by a witness. *Schoenfeld v. State*, 56 App. 103, 119 S. W. 101, 22 L. R. A. (N. S.) 1216, 133 Am. St. Rep. 356.

Where, on a trial for perjury, accused testified that he had been sick some time before he gave his testimony, that if he had ever received the money which the witnesses testified he did receive, and which he denied receiving, he did not remember it, that his memory was not good, and that it was more than four years since the money was claimed to have been paid him, the refusal to charge the substance of this article was error. *Mason v. State*, 57 App. 319, 122 S. W. 871.

It was proper for the court to charge the requirements of this article. *Mares v. State*, 71 App. 303, 158 S. W. 1130.

In a prosecution for perjury based on a false statement, made by defendant as a witness before the grand jury, that he knew of no gambling, testimony of the foreman of the grand jury that they informed defendant that they had strong evidence that there had been gambling in which he was implicated, or of which he knew, and that they repeatedly urged him to tell the truth and gave him time to consider before signing his statement, was admissible on the issue whether defendant's testimony before the grand jury was deliberate, and not under agitation, mistake, or failure of memory. *Scott v. State*, 72 App. 26, 160 S. W. 960.

Instructions.—Where intoxication at the time of the alleged false statement was relied on as a defense, an instruction giving the provisions of this article was sufficient, without calling special attention to his intoxicated condition. *Sisk v. State*, 28 App. 432, 13 S. W. 647.

Indictment.—Willson's Cr. Forms, 135.

Art. 306. [203] Oath must be legally administered.—The oath or affirmation must be administered in the manner required by law, and by some person duly authorized to administer the same in the matter or cause in which such oath or affirmation is taken. [P. C. 289.]

Authority to administer oath.—*Pipes v. State*, 26 App. 318, 9 S. W. 614.

In order to constitute perjury, the oath must be administered by some person authorized to administer it in the manner in which it was taken, and in the manner required by law. *State v. Powell*, 28 Tex. 627; *State v. Peters*, 42 Tex. 7; *Stewart v. State*, 6 App. 184.

Where perjury is committed before a justice of the peace, it is sufficient to allege that he was a justice of the peace and had jurisdiction without showing his commission or how jurisdiction attached. *State v. Peters*, 42 Tex. 7; *Bradberry v. State*, 7 App. 375; *Waters v. State*, 30 App. 284, 17 S. W. 411. See also *Stewart v. State*, 6 App. 184.

The foreman of a grand jury has authority to administer oaths to witnesses appearing before that body to testify. *Massie v. State*, 5 App. 81.

County attorneys are authorized and qualified to administer oaths to complaints cognizable in justice courts, and to affidavits on which to base informations in the county courts. *Bradberry v. State*, 7 App. 375.

An affidavit sworn to before a county clerk to obtain a marriage license will not support an assignment of perjury. Such an oath is extrajudicial and extrajudicial oaths lay no foundation for perjury. No oath before a person acting in a private capacity, or having no authority to administer oaths of a public nature or to administer the oath actually taken, or before persons assuming to administer justice by means of an authority seemingly colorable but in fact unwarrantable and void, can ever amount to perjury. *Davidson v. State*, 22 App. 372, 3 S. W. 662; *Steber v. State*, 23 App. 176, 4 S. W. 880.

An oath to complaint charging one with aggravated assault can be taken by a county attorney and comes within the statute defining perjury. *Rambo v. State*, 43 App. 271, 64 S. W. 1039.

Form of oath.—Where the statute has prescribed the form of the oath, and the indictment sets out a different oath, the indictment is bad. *State v. Perry*, 42 Tex. 238.

Indictment.—Willson's Cr. Forms, 135.

See Code Crim. Proc. art. 465.

Art. 307. [204] And about something past or present.—The false statement must be of something past or present; oaths of office, or any other promissory oaths, are therefore not included in the definition of perjury, except that part of the official oath prescribed by the constitution which relates to dueling. [P. C. 289.]

Indictment.—Willson's Cr. Forms, 135.

See Code Crim. Proc. art. 465.

Art. 308. [205] In what sort of proceeding.—All oaths or affirmations legally taken in any stage of a judicial proceeding, civil or criminal, in or out of court, or before a grand jury, are included in the description of this offense. [Act March 15, 1875, p. 170; P. C. 290a.]

See notes under art. 304, ante.

Judicial proceedings.—False statement in judicial proceeding before jurisdiction over subject matter has attached. *Anderson v. State*, 24 App. 705, 7 S. W. 40; *Higgenbotham v. State*, 24 App. 505, 6 S. W. 261.

Grand jury. *Pipes v. State*, 26 App. 318, 9 S. W. 614; *Jones v. State* (Cr. App.) 174 S. W. 1071.

Affidavit by third person on motion for new trial filed after time. *Hernandez v. State*, 18 App. 134, 51 Am. Rep. 295.

Oral testimony before examining court. *Covey v. State*, 23 App. 388, 5 S. W. 283.

Swearing falsely in a civil case, in the absence of issue joined, is not perjury. *Garrett v. State*, 37 App. 198, 38 S. W. 1017, 39 S. W. 108.

False testimony on a trial under a defective information is perjury. *Kelley v. State*, 51 App. 507, 103 S. W. 189.

The false statement as to the property owned by him, made by one justifying as a cognizor in a criminal prosecution, is in a judicial proceeding, within this article. *Warren v. State*, 57 App. 262, 122 S. W. 541.

False testimony by accused upon the trial of an action in justice court that he was an infant at the time he incurred certain obligations constitutes perjury, though the cause was continued upon the claim of plaintiff that it was surprised by such testimony. *Poulter v. State*, 70 App. 197, 157 S. W. 166.

Indictment.—Willson's Cr. Forms, 135.

See Code Crim. Proc. art. 465.

Art. 309. [206] Immaterial statement not perjury.—The statement of any circumstance wholly immaterial to the matter in respect to which the declaration is made is not perjury. [P. C. 291.]

Cited, *Cordway v. State*, 25 App. 405, 8 S. W. 670; *Parker v. State*, 25 App. 743, 9 S. W. 42; *Maines v. State*, 26 App. 14, 9 S. W. 51; *Sisk v. State*, 28 App. 432, 13 S. W. 647; *Lucas v. State*, 27 App. 322, 11 S. W. 443.

Materiality.—To constitute perjury, the false statement must be material to the issue on the trial of which the defendant was sworn. But it is not necessary that the particular fact sworn to should be immediately material to the issue. It must, however, have such a direct and immediate connection with a material fact as to give weight to the testimony on that point. A party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by swearing falsely and corruptly as to material circumstances tending to prove or disprove such facts. If the statement tends even circumstantially to the proof of the issue, it will be deemed material. The true test is, whether the statement could have properly influenced the tribunal. If it tends to do so, or to extenuate or increase the damage, it is material. The degree of materiality is of no importance. And if it be material as to a single fact, it is sufficient. *Davidson v. State*, 22 App. 372, 3 S. W. 662; *Lawrence v. State*, 2 App. 479; *State v. Lindenburg*, 13 Tex. 27; *Bradberry v. State*, 7 App. 375; *Martinez v. State*, Id. 394; *Mattingly v. State*, 8 App. 345; *State v. Webb*, 41 Tex. 67; *Donohoe v. State*, 14 App. 638; *Hernandez v. State*, 18 App. 134, 51 Am. Rep. 295; *Williams v. State*, 28 App. 301, 12 S. W. 1103; *Rahm v. State*, 30 App. 310, 17 S. W. 416, 28 Am. St. Rep. 911; *Agar v. State*, 29 App. 605, 16 S. W. 761; *Martin v. State*, 33 App. 317, 26 S. W. 400; *Wynne v. State*, 60 App. 660, 133 S. W. 682; *Frazier v. State*, 61 App. 647, 135 S. W. 583.

Perjury may be assigned upon a false statement affecting only a collateral issue, as that of the credit of a witness. *Washington v. State*, 22 App. 26, 3 S. W. 228; *Williams v. State*, 28 App. 301, 12 S. W. 1103; *McVicker v. State*, 52 App. 508, 107 S. W. 834.

A witness' denial that he had been convicted 16 years before was immaterial, as it was too remote for purposes of impeachment. *Busby v. State*, 48 App. 83, 86 S. W. 1032.

False testimony before the grand jury as to sales of liquor is not material unless the sellers are within the classes inhibited by statute from selling. *Meeks v. State*, 32 App. 420, 24 S. W. 98.

The materiality of evidence before a grand jury must be measured by the subject matter under investigation. If the matter being investigated is innocent of the law, then the statement is not materially false, though untrue. *Weaver v. State*, 34 App. 554, 31 S. W. 400.

Testimony in a civil suit assigned as perjury held immaterial. *Misener v. State*, 34 App. 588, 31 S. W. 858.

Testimony before grand jury held material. *Butler v. State*, 36 App. 483, 37 S. W. 746.

When there is no plea of non est factum defendant's testimony that he did not sign the note is immaterial. *Garrett v. State*, 37 App. 198, 38 S. W. 1017, 39 S. W. 103.

N. was charged with the theft of hogs belonging to R. Defendant testified that he saw N. driving said hogs in the county in which the theft was alleged to have been committed, which testimony was alleged to be false; held, this testimony was necessarily material. *Martinez v. State*, 39 App. 479, 46 S. W. 826.

Though a witness is asked about immaterial matters without objection, for the purpose of impeachment, perjury cannot be predicated on his answers. *McAvoy v. State*, 39 App. 684, 47 S. W. 1000.

Where defendant testified that the man committing an assault was a small man, his false denial on cross-examination that he had stated before the trial that the man was a large man was material. *George v. State*, 40 App. 646, 60 S. W. 374, 51 S. W. 378.

Where, in a suit by accused as indorsee of a note, he claimed and sought to use evidence that A., from whom he procured the note, had not signed the same until he did so at the request of accused at the time of transfer, as a circumstance to prove that accused was an innocent purchaser, and accused testified to such fact solely to prove that he was an innocent purchaser, the fact as to when A. signed the note was sufficiently material to be the subject of an assignment of perjury. *Downing v. State*, 61 App. 319, 136 S. W. 471.

The testimony of accused, on his trial for unlawfully betting at a gaming bank at the house of a third person, that he was not present at the house at the time charged is material so as to be perjury if false. *Mares v. State*, 71 App. 303, 153 S. W. 1130.

Where a witness had testified falsely, before the grand jury investigating illegal sales of liquor by a third person, that he had not secured any liquor from such person, the possession of liquors by the accused always being material in prosecutions for violation of a liquor law, such testimony was material and supported the conviction of perjury. *Jones v. State* (Cr. App.) 174 S. W. 1071.

Indictment.—See Code Crim. Proc. art. 465.

Evidence.—Number of witnesses and corroboration, see Code Crim. Proc. art. 806.

The evidence should clearly show the materiality of the alleged false testimony. *Lawrence v. State*, 2 App. 479; *Cox v. State* (Cr. App.) 174 S. W. 1067; *Jones v. State* (Cr. App.) 174 S. W. 1071.

All the essential allegations in the indictment must be proved. *Lawrence v. State*, 2 App. 479. Proof that the false testimony was admitted on the trial of the case in which it was given, is not sufficient evidence of its materiality on a trial for perjury. *Lawrence v. State*, 2 App. 479. When the perjury is assigned upon an affidavit which the defendant signed by making his mark thereto, there must be proof that he knew and understood the contents of such affidavit at the time he swore thereto. Evidence held insufficient to prove such knowledge. *Hernandez v. State*, 18 App. 134, 51 Am. Rep. 295. Where the perjury was committed before a grand jury, it is competent to show by the records of the court, that said court was in session, and the grand jury organized when the perjury was committed. *St. Clair v. State*, 11 App. 297. The indictment alleging that the perjury was committed upon the trial of one P., the state was properly permitted to prove the proceedings had, and the evidence delivered by the defendant upon said trial, for the purpose of showing that the alleged false statements were made in a judicial proceeding, and were material to an issue in said proceeding. *Partain v. State*, 22 App. 100, 2 S. W. 854. The state was permitted, over the objection of the defendant, to prove by the attorney of B., upon whose trial the perjury was alleged to have been committed, his reason and purpose for placing the defendant upon the witness stand on said trial. Held, competent evidence for the purpose of negating that the alleged false statements were made through inadvertence, etc. *Davidson v. State*, 22 App. 372, 3 S. W. 662. *Freeman v. State*, 44 App. 496, 72 S. W. 1001. A judgment rendered in the judicial proceeding in which the perjury is alleged to have been committed is admissible evidence as inducement, but not to prove the perjury. *Davidson v. State*, 22 App. 372, 3 S. W. 662; *Maines v. State*, 23 App. 568, 5 S. W. 123. But the record of a trial and judgment in a civil suit in which the perjury was alleged to have been committed was held to have been properly excluded when offered by the state, because the parties to said suit were not the parties to the prosecution; because the action was not in rem, nor the judgment of a public nature; and because said record and judgment were not sought to be used by way of inducement, or to establish a collateral fact, but as evidence to prove the alleged perjury. *Hill v. State*, 22 App. 579, 3 S. W. 764. See this case for certain conversations of defendant held to be competent evidence against him. And for other evidence held inadmissible, see *Washington v. State*, 23 App. 336, 5 S. W. 119; *Maines v. State*, 23 App. 568, 5 S. W. 123.

Facts held insufficient to convict. *Lawrence v. State*, 2 App. 479.

Where the alleged false oath was made on habeas corpus before another judge, the order of transfer from the judge issuing the writ is competent. *Watson v. State*, 5 App. 11.

In a prosecution for perjury committed upon the trial of C. for burglary, the state was properly permitted to prove the testimony of the accused before the grand jury upon the investigation of the charge against C., and his subsequent contradictory evidence on the trial of C., and his statement, respecting the inducements under which he testified as he did on the trial. *Littlefield v. State*, 24 App. 167, 5 S. W. 650.

It was not error to permit the state in a trial for perjury to read in evidence the complaint filed in the cause upon the trial of which the perjury was alleged to have been committed, inasmuch as such evidence was competent to prove that the alleged false statements were made in the judicial proceeding and before the court alleged in the indictment, but, having admitted such evidence, the trial court, in its charge, should have limited its effect to such purpose only. *Higgenbotham v. State*, 24 App. 505, 6 S. W. 201.

The indictment charges that the perjury was committed upon the trial of M. and J. for the murder of J. J. The state introduced in evidence a separate judgment rendered against J., to which the defense objected upon the ground that it did not appear from that judgment that M. and J. were jointly tried, but that J. was tried alone. As matter of fact, M. and J. were jointly placed upon trial, and when the state closed its evidence the court directed the acquittal of J., and the trial of M. was proceeded with, the consequence being the return of two verdicts and the rendition of two judgments in the case. The statement of defendant, assigned as perjury, was made during the progress of the joint trial. Held, that the judgment against J. was properly admitted in evidence. *Kitchen v. State*, 26 App. 165, 9 S. W. 461.

The record of the proceedings upon the trial in which the perjury was alleged to have been committed was properly admitted in evidence as matter of inducement, and to support the allegation in the indictment that the perjury was committed upon the said trial. *Kitchen v. State*, 26 App. 169, 9 S. W. 461.

The state introduced in evidence, over objection of the defendant, an indictment charging him with the murder of J. J.—the offense involved in the trial upon which the perjury is alleged to have been committed—and adduced oral proof that M., one of the defendants in the said trial, was a witness against him. Held, that the evidence was competent to show motive. *Kitchen v. State*, 26 App. 165, 9 S. W. 461.

Evidence that the oath was administered by another person than the one named in the indictment is admissible. *Jefferson v. State* (Cr. App.) 29 S. W. 1090.

Evidence held to show that false testimony of accused before grand jury investigating illegal sales of liquor was on a material point. *Jones v. State* (Cr. App.) 174 S. W. 1071.

See, also, *Maines v. State*, 26 App. 14, 9 S. W. 51; *Kiteken v. State*, 29 App. 45, 14 S. W. 392; *Brooks v. State*, 29 App. 582, 16 S. W. 542; *Waters v. State*, 30 App. 284, 17 S. W. 411; *Aguierre v. State*, 31 App. 519, 21 S. W. 256; *Shely v. State*, 35 App. 190, 32 S. W. 901; *Rogers v. State*, 35 App. 221, 32 S. W. 1044.

Questions for jury.—The materiality of testimony assigned as perjury is a question of law. *Foster v. State*, 32 App. 39, 22 S. W. 21; *Davidson v. State*, 22 App. 372, 3 S. W. 662; *Donohoe v. State*, 14 App. 638; *Washington v. State*, 23 App. 336, 5 S. W. 119; *Smith v. State*, 27 App. 50, 10 S. W. 751; *Jackson v. State*, 15 App. 579; *Scott v. State*, 35 App. 11, 29 S. W. 274; *Luna v. State*, 44 App. 482, 72 S. W. 378; *Jones v. State* (Cr. App.) 174 S. W. 1071.

Like any other question of law, the question of materiality may be so mingled with the facts that the court should submit it, with proper instructions upon the law, to the jury. *Foster v. State*, 32 App. 39, 22 S. W. 21; *Washington v. State*, 23 App. 336, 5 S. W. 119.

Submission of materiality of testimony to jury held not prejudicial. *Montgomery v. State* (Cr. App.) 40 S. W. 805.

Instructions.—Number of witnesses and corroboration, see Code Crim. Proc. arts. 805, 806.

Limitation of evidence to specific purpose for which admitted. *Davidson v. State*, 22 App. 372, 3 S. W. 662; *Maines v. State*, 23 App. 568, 3 S. W. 123; *Kitchen v. State*, 26 App. 169, 9 S. W. 461; *Washington v. State*, 23 App. 336, 5 S. W. 119; *Littlefield v. State*, 24 App. 167, 5 S. W. 650; *Higgenbotham v. State*, 24 App. 505, 6 S. W. 201; *Brown v. State*, 24 App. 170, 5 S. W. 685; *Foster v. State*, 32 App. 39, 22 S. W. 21.

Where there are several assignments of perjury the charge of the court should be confined to those that are made upon material matter. *Donohoe v. State*, 14 App. 638; *Sisk v. State*, 28 App. 432, 13 S. W. 647.

An instruction that the jury should acquit if they had a reasonable doubt whether defendant's statement was true or false, was not prejudicial to defendant, and he could not complain that the verdict was contrary to the charge as the error in the charge was against the state. *Kitchen v. State*, 26 App. 165, 9 S. W. 461.

It is not essential to charge that the statement assigned as perjury must relate to a past or present event, where the indictment shows that it related to a past event. *Kitchen v. State*, 26 App. 169, 9 S. W. 461.

The court properly told the jury that the statement assigned as perjury was material. *Scott v. State*, 35 App. 11, 29 S. W. 274.

Art. 310. [207] Punishment.—The crime of perjury, except as in cases provided for in article 311 of the Penal Code, shall be punished by imprisonment in the penitentiary for a term not more than ten years nor less than two years. [P. C. 292, amended 1897, p. 146.]

Cited, *Smith v. State* (Cr. App.) 64 S. W. 838; *Murff v. State* (Cr. App.) 172 S. W. 238.

Art. 311. [208] Perjury in capital case.—When the perjury is committed on a trial of a capital felony, and the person guilty of such perjury has, on the trial of such felony, sworn falsely to a material fact tending to produce conviction; and the person so accused of the capital felony is convicted and suffers the penalty of death, the punishment of the perjury so committed shall be death. [P. C. 293.]

Cited, *Murff v. State* (Cr. App.) 172 S. W. 238.

Competency of witness.—Infant under seven years of age held a competent witness. *Smith v. State* (Cr. App.) 164 S. W. 838.

CHAPTER TWO OF FALSE SWEARING

Art.	Art.
312. "False swearing," definition of.	317. False swearing to enlistment paper.
313. Past or present.	
314. Officer falsely reporting collections of public moneys.	317a. False swearing by applicant or witness in pension proceedings.
315. False swearing in relation to quarantine matters.	317b. False swearing by school census trustee.
316. Witness before grand jury divulging proceedings, etc.	

Article 312. [209] "False swearing," definition of.—If any person shall deliberately and wilfully, under oath or affirmation legally administered, make a false statement by a voluntary declaration or affidavit, which is not required by law or made in the course of a judicial proceeding, he is guilty of false swearing, and shall be punished by imprisonment in the penitentiary not less than two nor more than five years.

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| 1. Validity of article. | 7. Accomplice. |
| 2. Repeal. | 8. Indictment. |
| 3. Elements of offense. | 9. Evidence. |
| 4. Perjury distinguished. | 10. Limiting evidence. |
| 5. Authority to administer oath. | 11. Instructions. |
| 6. Form of oath. | |

1. **Validity of article.**—This article is not invalid under Const., art. 1, § 5, requiring oaths and affirmations to be taken subject to the pains and penalties of perjury, as that section applies only to witnesses while giving evidence. *Campbell v. State*, 43 App. 602, 68 S. W. 513.

2. **Repeal.**—This article was not repealed by Rev. St. art. 3 (Vernon's Sayles' Civ. St. 1914, art. 9) requiring oaths and affirmations to be taken subject to the pains and penalties of perjury. *Campbell v. State*, 43 App. 602, 68 S. W. 513.

3. **Elements of offense.**—Any false oath as to something past or present is false swearing without regard to its materiality. *Wilson v. State*, 49 App. 496, 93 S. W. 547.

If any person deliberately and willfully, under oath legally administered, makes a false statement by a voluntary declaration on affidavit not required by law, he is guilty of false swearing, but such a statement, made through inadvertence or under agitation or by mistake, does not constitute false swearing; the expressions "deliberately" and "willfully" meaning "made after meditation and with an evil intent." *Welch v. State*, 71 App. 17, 157 S. W. 946.

4. **Perjury distinguished.**—If the false statement be made under oath, legally administered, in or out of court, under circumstances which make it necessary for the ends of public justice, and during any stage of a judicial proceeding it cannot be false swearing but may be perjury. Thus a false statement in a complaint before a magistrate initiating a criminal prosecution is not false swearing but may be perjury. *Langford v. State*, 9 App. 233.

An affidavit made before a clerk of a county court to obtain a marriage license would be false swearing, not perjury. *Steber v. State*, 23 App. 176, 4 S. W. 880; *Davidson v. State*, 22 App. 372, 3 S. W. 662.

The verdict convicted of false swearing. The judgment declared for perjury as charged in the indictment. Perjury and false swearing are distinct offenses, and this conviction can not stand. *O'Bryan v. State*, 27 App. 339, 11 S. W. 443. On distinction between the offenses, see *Woodson v. State*, 24 App. 153, 6 S. W. 184.

The affidavit of a public school teacher to the voucher or check for his pay, such as is contemplated by Rev. St. 1895, art. 3962, is one required by law, and a false affidavit is perjury and not false swearing. *O'Bryan v. State*, 27 App. 339, 11 S. W. 443.

A false statement as to the property owned by him, made by one justifying as cognizor in a criminal prosecution, is perjury, rather than false swearing. *Warren v. State*, 57 App. 262, 122 S. W. 541.

5. **Authority to administer oath.**—Under Vernon's Sayles' Civ. St., 1914, art. 13, any affidavit taken within the state may be made before a county judge within his county. *O'Bryan v. State*, 27 App. 339, 11 S. W. 443.

The power to administer oaths and affidavits generally appertains to the office of county clerk, and belongs to his official duties, and his deputy, in this regard, has such power and authority as he can exercise. *Harkreader v. State*, 35 App. 243, 33 S. W. 117, 60 Am. St. Rep. 40.

A minor is eligible to the office of deputy county clerk, and, as such may administer an oath to an applicant for a marriage license. *Harkreader v. State*, 35 App. 243, 33 S. W. 117, 60 Am. St. Rep. 40; *Mahon v. State*, 46 App. 234, 79 S. W. 23.

A notary has authority to swear persons, whether to necessary affidavits required by law, or those which are voluntary, and therefore could swear a chattel mortgagor to an affidavit that he was the owner of the property, and that it was not incumbered. *Campbell v. State*, 43 App. 602, 68 S. W. 513.

A false affidavit signed by P. as "Justice of the Peace and Ex Officio Notary

Public," did not show on its face that it was not taken before an officer authorized to administer oaths. *Wilson v. State*, 49 App. 496, 93 S. W. 547.

6. **Form of oath.**—An objection that the particular form of oath required by statute was not administered cannot be considered on appeal where it was not raised in the trial court, especially where the officer testified that he swore defendant to the affidavit, and that defendant signed it. *Adams v. State*, 49 App. 361, 91 S. W. 225.

7. **Accomplice.**—See notes under art. 79.

8. **Indictment.**—Willson's Cr. Forms, 109, 110, 141, 142, 144.

See Code Crim. Proc. art. 465.

An indictment, whether good or bad as a pleading, which unmistakably describes every element of false swearing as defined by this article, is a charge of crime, within Const. U. S. art. 4, § 2, cl. 2, regulating extradition. *Pierce v. Creecy*, 23 S. Ct. 714, 210 U. S. 387, 52 L. Ed. 1113.

9. **Evidence.**—Number of witnesses and corroboration, see Code Crim. Proc. arts. 805, 806.

In a prosecution for false swearing, the alleged false statement being that the mother of an intended bride was willing for her to marry a certain person, it was held to be irrelevant and incompetent testimony for the state to prove that another person than the said mother, with whom said intended bride lived, did not give his consent to said marriage. *Steber v. State*, 23 App. 176, 4 S. W. 880.

On a trial for false swearing before a justice of the peace he was properly permitted to testify that he was a justice and administered the oath. *Woodson v. State*, 24 App. 153, 6 S. W. 184.

On a trial for swearing falsely on an application for a marriage license that the girl was of age and that no legal objections existed to the marriage, evidence that her parents objected, if not material, was at least not prejudicial. *Harkreader v. State*, 35 App. 243, 33 S. W. 117, 60 Am. St. Rep. 40.

Evidence that defendant pending the engagement but not during the month preceding the making of the affidavit, had given the girl presents which she retained with the knowledge and consent of her parents, was not admissible to show the parent's consent to the marriage. *Harkreader v. State*, 35 App. 243, 33 S. W. 117, 60 Am. St. Rep. 40.

The deputation showing the appointment of a deputy clerk was admissible on a trial for false swearing before him, though he could have sworn that he was such deputy clerk. *Mahon v. State*, 46 App. 234, 79 S. W. 28.

On a trial for false swearing to obtain a marriage license, where the identity of the person making the affidavit was in issue, and it appeared that the license was delivered to such person and was subsequently received by a clergyman from defendant, the license was admissible. *Mahon v. State*, 46 App. 234, 79 S. W. 28.

In a prosecution for false swearing to an affidavit made to the claim agent of a railroad on which defendant claimed to have been injured while an employé, the affidavit, with the proof as to its execution and defendant's signature and oath thereto, without proof by the attesting witness, was admissible; and defendant's deposition in a civil case in another district court, proved up by the officer before whom it was taken, was also admissible. *Urben v. State* (Cr. App.) 178 S. W. 514.

Evidence held to sustain a conviction for false swearing as to the girl's age to obtain a marriage license. *Wilson v. State*, 49 App. 496, 93 S. W. 547.

10. **Limiting evidence.**—On a trial for false swearing to obtain a marriage license where the license was only admissible on the question of identity but could have been considered for other purposes, the court should have limited the jury's consideration thereof to the question of identity. *Mahon v. State*, 46 App. 234, 79 S. W. 28.

11. **Instructions.**—It was error not to define the terms "deliberately" and "willfully." *Knight v. State*, 71 App. 36, 158 S. W. 543; *Steber v. State*, 23 App. 176, 4 S. W. 880; *Mahon v. State*, 46 App. 234, 79 S. W. 28; *Holt v. State*, 48 App. 559, 89 S. W. 838.

Notwithstanding the failure to define such terms, the charge was substantially correct where it was not excepted to and the omission in view of the facts could not have reasonably caused injury, especially where it was practically covered by a special instruction. *Woodson v. State*, 24 App. 153, 6 S. W. 184.

It was reversible error to refuse to charge as requested that if defendant believed the matter stated in his false affidavit made to obtain a marriage license, to be true, he would not be guilty. *Aguierre v. State*, 31 App. 519, 21 S. W. 256.

Instruction as to defendant's lack of knowledge of certain contents of affidavit held erroneously refused under the evidence and not sufficiently covered by instruction given. *Porter v. State*, 48 App. 301, 88 S. W. 359.

Where an indictment assigned false swearing in that an affidavit for a marriage license alleged as true three different facts all of which were false, an instruction submitting all of such predicates in *solido* was not error. *Adams v. State*, 49 App. 361, 91 S. W. 225.

In a prosecution for falsely swearing, in an affidavit to procure a marriage license, that the woman was 18 years of age, accused testified that they did not have any conversation about procuring the license, but that the license clerk asked whom the license was for, and he said for himself; and in answer to a question whether he was 21 years of age said, "I look like it, don't I?" and also stated that he would not swear to the girl's age, not knowing it, and was asked, "How old would you take her to be?" and he said, "I don't know, 20 to 23 years of age," and that the clerk made out the license and told him to sign his name, and that accused swore that the statement was true "to the best of his knowledge." Held, that the evidence raised the issue of mistake in swearing as to the girl's age so as to require an instruction thereon. *Knight v. State*, 71 App. 36, 158 S. W. 543.

In a prosecution for false swearing, where the court, in reference to the oath

made by defendant, charged that the alleged false statements must have been made by defendant of his own free will and accord, and that to warrant a conviction it was necessary that the state prove that the affidavit was voluntarily made, sufficiently defined the word "voluntarily," and defendant's requested addition "unrestrained by external interference, force, or influence, and not prompted or suggested by another," was properly refused. *Urben v. State* (Cr. App.) 178 S. W. 514.

Art. 313. [210] Past or present.—The false swearing must, as in regard to perjury, be relative to something past or present.

Art. 314. [211] Officer falsely reporting collection of public moneys.—If any officer of this state, or of any district or county thereof, who is charged by law with the duty of receiving or collecting public moneys, other than taxes, for the use of the state or counties, and reporting the same, under oath, to the district, county or commissioners' court of any county, shall falsely report the amount of such collections, or any part thereof, he shall be deemed guilty of false swearing, and, upon conviction, shall be punished as prescribed in article 209. [Act May 1, 1874, pp. 182-3.]

Indictment.—Willson's Cr. Forms, 143.

Art. 315. [212] False swearing in relation to quarantine matters.—Any person suspected of violating any quarantine law or regulation, and who, upon being sworn by any one authorized to administer an oath by the provisions of any law of this state, shall knowingly swear falsely about any matter concerning which the quarantine laws and regulations permit examination, shall be deemed guilty of false swearing, and shall, on conviction in a court of competent jurisdiction, be punished by imprisonment in the penitentiary not less than two nor more than five years. [Act March 21, 1883, p. 27.]

Indictment.—Willson's Cr. Forms, 144.

Art. 316. [213] Witness before grand jury divulging proceedings, etc.—Any grand juror, or any person who shall appear before any grand jury in this state, and who, after being sworn according to law as a witness before said grand jury, shall afterwards divulge, either by word or sign, any matter about which said witness may have been interrogated, or any proceeding or fact said witness may have learned by reason of being said witness, shall be guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than one hundred nor more than one thousand dollars, and may be in addition thereto imprisoned in the county jail not exceeding six months; provided, this act shall not apply to persons required to testify to any of the aforesaid matters before a judicial tribunal. [Act April 4, 1887, p. 131.]

Elements of Offense.—It is not essential that the offense should be committed intentionally and willfully, and unless defendant was so under the influence of morphine that he did not know right from wrong, he was guilty. *Higdon v. State*, 46 App. 198, 79 S. W. 546.

When Disclosure Permitted.—It is the declared policy of the law to make secret all proceedings before the grand jury except as provided in Code Cr. Proc. art. 416, authorizing a disclosure when the truth or falsity of evidence given in the grand jury room in a criminal case is under investigation. *Gutgesell v. State* (Cr. App.) 43 S. W. 1016; *Hines v. State*, 37 App. 339, 39 S. W. 935; *Christian v. State*, 40 App. 669, 51 S. W. 903.

Persons compelled to testify.—Where a witness before the grand jury, who could have been compelled to testify against himself in gambling cases, does testify, this, while it may exonerate him from punishment in a gaming matter pertaining to himself, does not authorize or permit him to divulge any matter occurring before the grand jury. *Misso v. State*, 61 App. 241, 135 S. W. 1173.

Indictment.—An indictment reciting that defendant was interrogated by the grand jury with reference to "unlawful card playing," and charging that he afterwards disclosed what he had testified, was good whether the matter about which he was interrogated related to a direct violation of law or not. *Misso v. State*, 61 App. 241, 135 S. W. 1173.

Instructions.—An instruction defining the offense in the language of the statute was proper. *Higdon v. State*, 46 App. 198, 79 S. W. 546. An instruction to find defendant guilty if he disclosed the matter about which he had been interrogated was not on the weight of the testimony. *Id.* The failure of such instruction to state the particulars of the testimony could not be complained of in the absence

of a request for a more specific instruction. *Id.* If the matter inquired about could not have been of a criminal nature defendant should have requested an instruction to acquit. *Id.*

Art. 317. False swearing to enlistment paper.—Every person who enlists or re-enlists in the active militia of this state shall sign and make oath to an enlistment paper, which shall be filed in the office of the adjutant general. Such oath shall be taken and subscribed to before a field officer, or the commanding officer of a signal corps, troop, battery or company, who are hereby authorized to administer such oaths; and such oaths may be taken before any officer authorized by the laws of this state to administer oaths. A person making a false oath to any statement contained in such enlistment paper shall, upon conviction, be deemed guilty of false swearing and punished accordingly. [Act 1905, p. 179.]

Art. 317a. False swearing by applicant or witness in pension proceedings.—Any applicant for a pension under the provisions of this Act, [Vernon's Sayles' Civ. St. 1914, Arts. 6267–6268, 6272, 6279] or any witness testifying under any of the provisions of this Act in regard to the service upon which such claim for pension is based or in regard to the property, effects or income of the applicant who shall wilfully make any false statements in regard thereto shall be deemed guilty of false swearing and upon conviction thereof shall be punished by confinement in the penitentiary for not less than two nor more than five years. [Act 1913, p. 285, ch. 141, § 7.]

Art. 317b. False swearing by school census trustee.—The census trustee shall arrange the forms for white and colored children separately in alphabetical order, according to the family name of the children reported thereon. He shall also make, on a prescribed form, separate census rolls for the white and colored children of his district, showing the name, age, sex and color of each child, and the name of the parent, guardian or person having control of said children by whom it is reported. He shall also make a summary of his rolls showing the number of children of each race that will be of the different ages over seven and under seventeen on the first day of next September, which shall continue to be the scholastic age, as is now provided by law, he shall make oath to his rolls and summaries, and to the faithful and accurate discharge of his duties, deliver the rolls, together with the forms arranged in alphabetical order, to the county superintendent on or before June first next after his appointment.

Any census trustee who shall wilfully fail or refuse to obtain the necessary information in regard to any child which will be over seven and under seventeen years of age on the first day of September next thereafter, or who shall wilfully fail or refuse to include any child within said ages in his rolls, or shall wilfully make any false report, roll or summary, shall be guilty of false swearing, and shall be punished as prescribed by law for that offense. And if the county superintendent finds or believes that any census trustee has violated any duty required under this act, such county superintendent shall report said census trustee to the grand jury of the county at its next session after discovering such breach of duty. [Act 1897, S. S., ch. 16, repealed; Act 1905, p. 285, ch. 124, § 89.]

Explanatory.—The above provision was omitted from the revised Penal Code, and is included in this compilation as art. 317b, in view of the decision in *Berry v. State* (Cr. App.) 156 S. W. 626.

CHAPTER THREE

OF SUBORNATION OF PERJURY AND FALSE SWEARING

Art.	Art.
318. Subornation of perjury, or false swearing.	319. Attempt at subornation of perjury.

Article 318. [214] Subornation of perjury, or false swearing.—If any person shall designedly induce another to commit perjury or false swearing, he shall be punished as if he had himself committed the crime.

Acts constituting another offense.—That the acts making one an accessory to a homicide also constituted subornation of perjury did not prevent his prosecution as an accessory. *Blakely v. State*, 24 App. 616, 7 S. W. 233, 5 Am. St. Rep. 912.

Indictment.—Willson's Cr. Forms, 139, 145.

Art. 319. [215] Attempt at subornation of perjury.—If any person shall, by any means whatever, corruptly attempt to induce another to commit the offense of perjury or false swearing, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years.

See *Watson v. State*, 5 App. 11.

Indictment.—Willson's Cr. Forms, 140, 146.

CHAPTER FOUR

OFFENSES RELATING TO THE ARREST AND CUSTODY
OF PRISONERS [AND TO THE ADMINISTRATION OF THE LAWS]

Unlawful assemblies, riots, etc., see post, arts. 437-444, 452-459.

Art. 320. Officer wilfully permitting escape in capital cases.	Art. 336. Preventing execution of civil process.
321. Same in ordinary felonies.	337. Offenses complete without actual escape.
322. Same in misdemeanors.	338. County convict escaping from employer.
323. Negligently permitting escape in capital cases.	339. Person resisting officer in felony.
324. Same in ordinary felonies.	340. Same in misdemeanor.
325. Same in misdemeanors.	341. Same in civil cases.
326. Officer refusing to arrest in felonies.	342. Resisting officers of improvement district.
327. Same in cases of misdemeanor.	342a. Unlawful construction of levee improvements.
328. Private person appointed to execute same as officer.	342b. Same; purpose and scope of act.
329. Conveying arms, disguises, etc., into jail to aid felon.	342c. Same; repeal.
330. Same in misdemeanor.	342d. Resisting officers of drainage district.
331. Breaking into jail to rescue prisoner.	343. Resisting navigation and canal commissioners and engineers.
332. Aiding prisoner charged with felony to escape from officer.	343a. Resisting officers of irrigation district.
333. Same in case of misdemeanor.	344. Accused resisting process.
334. Assisting inmate of state institution for correction of juveniles to escape.	345. Process must be legal.
334a. Persuading inmate from Girls' Training School.	346. "Accusation" defined.
335. Telegraph operator divulging process.	347. "Legally confined in jail" defined.
	348. "Jail" defined.
	349. "Officer" defined.
	350. "Arms" defined.
	351. Refusing to aid officer.

Article 320. [216] Officer in charge of prisoner wilfully permitting escape in capital case.—Any officer, jailer or guard, having the legal custody of any person accused or convicted of a capital offense, who wilfully permits such person to escape, or to be rescued, shall be punished by confinement in the penitentiary not less than two nor more than ten years. [P. C. 312.]

See C. C. P. art. 470, and notes.

Escape pending appeal.—See, *Lloyd v. State*, 19 App. 137.

Elements of offense.—Voluntary and negligent escapes are made by the statute distinct offenses with different punishments. The former may be a felony, the latter can only be a misdemeanor. *State v. Dorsett*, 21 Tex. 656.

Defenses.—On the trial of a constable for permitting the escape of one in his custody by virtue of his official authority, it is immaterial whether the arrest and custody were legal or illegal. *Moseley v. State*, 25 App. 515, 8 S. W. 652.

Indictment.—See Willson's Cr. Forms, 147.

The indictment must charge that the defendant did willfully permit the escape. *Barthelow v. State*, 26 Tex. 175. Willfully and negligently permitting an escape are distinct offenses, and an indictment which in the same count alleges that the defendant "did willfully and negligently" permit the escape is duplicitous and bad. *State v. Dorsett*, 21 Tex. 656. The indictment need not show that the arrest and custody of the escaped prisoner were legal, nor that any accusation had been legally made against him, nor the particulars of the crime he had committed or was charged with committing. *State v. Hedrick*, 35 Tex. 485.

Evidence.—See *Martin v. State*, 25 App. 557, 8 S. W. 682.

Art. 321. [217] In felonies.—Any officer, jailer or guard, who has the legal custody of any person accused or convicted of a felony less than capital, who wilfully permits such person to escape, or to be rescued, shall be punished by imprisonment in the penitentiary for a term not less than two and not exceeding five years. [P. C. 313.]

Indictment.—Willson's Cr. Forms, 147.

Art. 322. [218] In misdemeanors.—Any officer, jailer or guard, having the legal custody of a person accused or convicted of a misdemeanor, who wilfully permits such person to escape, or to be rescued, shall be fined not exceeding one thousand dollars. [P. C. 314.]

Effect of unauthorized release of prisoner.—See notes under Code Cr. Proc., art. 879.

Elements of offense.—A sheriff who permits a person convicted of misdemeanor to go at large, when such prisoner has been committed to jail until the fine and costs are paid, is guilty of permitting such prisoner to escape. *Luckey v. State*, 14 Tex. 400. The escape must be permitted knowingly and intentionally by the officer, and such knowledge and intention must appear satisfactory from the evidence. *Barthelow v. State*, 26 Tex. 175.

Indictment.—See Willson's Cr. Forms, 147. See art. 320.

Art. 323. [219] Negligently permitting escape in capital case.—Any officer, jailer or guard, who has the legal custody of a person accused or convicted of a capital offense, and who negligently permits such person to escape or to be rescued, shall be punished by a fine not exceeding two thousand dollars. [P. C. 315.]

Jurisdiction.—Under the constitutional provision giving the district court jurisdiction of misdemeanors involving official misconduct, the district court has jurisdiction of a prosecution for negligently permitting the escape of one accused or convicted of a capital offense. *Hatch v. State*, 10 App. 515. But see *Watson v. State*, 9 App. 212.

Indictment.—See Willson's Cr. Forms, 147. See art. 320.

The indictment need not show that the arrest and custody of the escaped prisoner were legal nor that any accusation had been legally made against him nor the particulars of the crime he had committed or was charged with committing. *State v. Hedrick*, 35 Tex. 485.

Evidence.—The escape must be permitted knowingly and intentionally by the officer, and such knowledge and intention must appear satisfactorily from the evidence. *Barthelow v. State*, 26 Tex. 175.

Art. 324. [220] In felonies.—Any officer, jailer or guard, who has the legal custody of a person accused or convicted of a felony less than capital, and who negligently permits such person to escape or to be rescued, shall be punished by fine not exceeding one thousand dollars. [P. C. 316.]

Indictment.—Willson's Cr. Forms, 147. See art. 320.

Art. 325. [221] In misdemeanors.—Any officer, jailer or guard, who has the legal custody of a person accused or convicted of a misdemeanor, and who negligently permits such person to escape or to be rescued, shall be punished by fine not exceeding five hundred dollars. [P. C. 317.]

Indictment.—Willson's Cr. Forms, 147. Art. 320.

Art. 326. [222] Officer refusing to arrest or receive in felony.—Any sheriff or other officer, who wilfully refuses or fails from neglect to execute any lawful process in his hands requiring the arrest of a person accused of felony, whereby such person escapes, or wilfully refuses to receive in a jail under his charge, or to receive into his custody, any person lawfully committed to such jail and ordered to be confined therein on an accusation of felony, or lawfully committed to his custody on such accusation, shall be fined not exceeding two thousand dollars. [Act Feb. 11, 1860, p. 96; P. C. 318.]

Indictment.—Willson's Cr. Forms, 148, 149.

Art. 327. [223] Same in cases of misdemeanor.—Any sheriff or other officer, who wilfully refuses or fails from neglect to execute any lawful process in his hands requiring the arrest of a person accused of a misdemeanor, whereby the accused escapes, or who wilfully refuses to receive into a jail under his charge, or to receive in his custody any person lawfully committed to such jail on an accusation of misdemeanor, or lawfully committed to his custody on such accusation, shall be punished by fine not exceeding five hundred dollars. [Act Feb. 11, 1860, p. 96; P. C. 319.]

Indictment.—Willson's Cr. Forms, 148, 149.

Art. 328. [224] Private person appointed to execute, same as officer.—If any private person, appointed with his own consent to execute a warrant of arrest, shall be guilty of any one of the offenses heretofore enumerated in this chapter, he shall be punished in the same manner as an officer in a like case. [P. C. 320.]

Indictment.—Willson's Cr. Forms, 150.

Art. 329. [225] Conveying arms, disguises, etc., into jail to aid felon.—If any person shall convey, or cause to be conveyed, into any jail, any disguise, instrument, arms, or any other thing useful to aid any prisoner in escaping, with intent to facilitate the escape of a prisoner lawfully detained in such jail, on an accusation of felony, or shall, in any other manner calculated to effect the object, aid in the escape of a prisoner legally confined in jail, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1858, p. 162; P. C. 321.]

Substantive offense.—This offense is a substantive one, and the culpability of the party charged therewith is in no wise dependent upon, or affected by, the guilt or innocence of the succored prisoner. *Peeler v. State*, 3 App. 533.

Counsel and advice.—The aid conveyed must be physical. Counsel and advice will not constitute the aid intended by the statute. *White v. State*, 13 Tex. 133.

Persons liable.—Articles 86 and 87, relating to accessories, are not applicable in a prosecution for this offense and afford no immunity to the relatives of the prisoners who violate this article. *Peeler v. State*, 3 App. 533.

Jail.—See art. 348, and notes.

Indictment.—See Willson's Cr. Forms, 151.

If the defendant is indicted for aiding in the escape of a prisoner, he can not be convicted under such indictment, upon proof that the prisoner was in his custody, and that he negligently or wilfully permitted him to escape. *White v. State*, 13 Tex. 133.

The indictment must allege that the acts done by the defendant were done for the purpose and with the intent to aid the prisoner to escape. *Jenkins v. State*, 49 App. 470, 93 S. W. 554.

The word "furnish" is not equivalent to the word "convey," and an indictment which employs the former and not the latter word charges no offense. *Francis v. State*, 21 Tex. 280.

See this case for a sufficient but inartistic indictment. *Clayton v. State*, 4 App. 515.

An indictment which fails to allege that accused did the acts complained of with intent to aid in the escape of a prisoner lawfully confined in jail is fatally bad. *Jenkins v. State*, 49 App. 470, 93 S. W. 554.

Evidence.—Declarations of accomplice, see notes under Code Cr. Proc. art. 783. Evidence held insufficient. *Poncio v. State*, 28 App. 104, 12 S. W. 413.

The admission of evidence that defendant for four months was confined for a felony in the same jail with prisoners whose escape he aided, held not injurious to defendant. *Watson v. State*, 32 App. 80, 22 S. W. 46.

Corroboration.—Escaped prisoner as accomplice, see notes under Code Cr. Proc., art. 801.

Art. 330. [226] Same in misdemeanor.—If any person shall, by any of the means contemplated in the preceding article, aid in the escape of a person legally confined in jail upon an accusation for a misdemeanor, he shall be fined not exceeding five hundred dollars. [P. C. 323.]

Post, art. 337.

Indictment.—See Willson's Forms, 151.

Art. 331. [227] Breaking into jail to rescue prisoner.—If any person shall break into any jail for the purpose of effecting the rescue or escape of a prisoner therein confined, or for the purpose of aiding in the escape of any prisoner so confined, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than six years. [P. C. 322, 324.]

Post, art. 337.

Elements of offense.—Where defendant, in company with others, entered the jail at night by unbolting unlocked doors, covered the jailer with firearms, and compelled him to open the prison cells, there was a sufficient breaking. *Williams v. State*, 24 App. 17, 5 S. W. 655.

It is not necessary to show that the prisoner was legally confined. *Starks v. State*, 38 App. 233, 42 S. W. 379.

What constitutes jail.—See art. 348, and notes.

Burglary.—It is not burglary to break into a jail and release prisoners, and a case of burglary cannot be charged in an indictment under this article. *Kipper v. State*, 42 App. 613, 62 S. W. 421, 422.

Indictment.—See Willson's Cr. Forms 152.

See notes under art. 329.

Indictment held sufficient. *Williams v. State*, 24 App. 17, 5 S. W. 655; *Starks v. State*, 38 App. 233, 42 S. W. 379.

In an indictment it is not necessary to charge that the breaking was done willfully and by force, such words not occurring in the statute. *Loggins v. State*, 32 App. 358, 24 S. W. 408.

Evidence.—Proof of ordinances, see notes on documentary evidence under Code Cr. Proc., art. 783.

For evidence insufficient to sustain conviction, see *Gillian v. State*, 3 App. 132.

Evidence held sufficient. *Williams v. State*, 24 App. 17, 5 S. W. 655.

Post, art. 337.

Art. 332. [228] Aiding prisoner charged with felony to escape from officer.—If any person shall wilfully aid in the escape of a prisoner from the custody of an officer, by whom he is legally held in custody on an accusation of felony, by doing any act calculated to effect that object, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years; and if, in aiding in the escape, he shall make use of arms, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than ten years. [Act Feb. 12, 1858, p. 162; P. C. 325.]

Indictment.—See Willson's Cr. Forms, 154. See, post, art. 337.

An indictment which in its charging part merely copies the language of this article, is not sufficient. Thus, an indictment which alleged that the defendant "did unlawfully make an assault upon one H., and did then and there and thereby, wilfully aid in the escape of one K., from the custody of said H., the said H. being then and there the sheriff of T. county, state of Texas, and the said K. being then and there a prisoner, and then and there legally held in custody by the said H., sheriff, on an accusation for a felony, to wit, the theft of three steers," etc., was held to be insufficient. It should have alleged that the defendant, knowing that the sheriff had the custody of a prisoner, and with the intent to aid in the escape of said prisoner, did wilfully make an assault upon the sheriff, describing the character of the assault, and that the assault so made was calculated to effect the escape of the prisoner. *Vaughn v. State*, 9 App. 563.

Art. 333. [229] Same; aid in case of misdemeanor.—If any person shall wilfully aid a prisoner to escape from the custody of an officer by whom he is legally detained in custody after conviction of a misdemeanor, or while being so detained in custody on an accusation for misdemeanor, by doing an act calculated to effect that object, he shall be punished by fine not exceeding five hundred dollars; and if, in aiding in the escape, he shall make use of arms,

he shall be punished by fine not exceeding one thousand dollars. [P. C. 326; amended Act 1905, p. 377.]

Post, art. 337, 346.

Attempts.—An attempt to aid a prisoner to escape is no offense. *Blanchette v. State*, 58 App. 180, 125 S. W. 26.

Aiding convict.—A person who aids a convict to escape is not punishable under this article. It applies to a case where one aids one accused of crime to escape before he is convicted. *Brannan v. State*, 44 App. 399, 72 S. W. 184.

Indictment.—See Willson's Cr. Forms, 153.

Art. 334. [230] Assisting inmate of state institution for correction of juveniles to escape.—Any person who shall knowingly assist any inmate lawfully confined in the state institution for the training of juveniles to escape, or who shall knowingly conceal such inmate, or advise or abet the escape of such inmate, or who shall furnish such inmate with money, arms, or any character of means to escape, with the purpose of facilitating the escape of such inmate, shall be deemed guilty of a felony, and, upon conviction thereof, shall be confined in the penitentiary for a term of not less than two nor more than five years. [O. C.]

Indictment.—Willson's Cr. Forms, 155.

Art. 334a. Persuading inmate from Girls' Training School.—Any person who shall persuade, coerce, employ or induce in any manner any girl who has been committed to the Girls' Training School from such institution or from any home selected by the persons herein [Arts. 5234b-5234i, Vernons' Sayles' Civ. St. 1914] empowered to make such selection, without the knowledge and consent of such persons, shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than \$100.00, and not more than \$500.00, or be imprisoned in the county jail for not less than thirty days nor more than sixty days, or both fined and imprisoned. [Act 1913, p. 291, ch. 144, § 9.]

Art. 335. [231] Telegraph officer divulging process.—Any executive officer, director, superintendent, manager, operator, clerk, messenger or other party in the employ of a telegraph company, who shall wilfully divulge, or in any manner make known, except to the proper authority, the contents of any warrant, affidavit or telegram relating to any crime already committed, or for the prevention of the same, shall, upon conviction, be fined in a sum not less than five hundred dollars nor more than one thousand, or be imprisoned in the state penitentiary for a term not less than two years nor more than five years. [Act April 17, 1871, p. 40, § 7.]

Indictment.—Willson's Cr. Forms, 156.

Art. 336. [232] Preventing execution of civil process.—If any person shall prevent or defeat the execution of any process in a civil cause, by any means not amounting to actual resistance, but which are calculated to prevent the execution of such process, he shall be punished by fine not exceeding five hundred dollars; evading the execution of such process is not an offense under this article. [P. C. 327.]

Post, art. 341.

Indictment.—See Willson's Cr. Forms, 157; post, art. 340.

An indictment should allege the means used by defendant to prevent or defeat the execution of the process and that defendant at the time knew the capacity in which the officer was acting or pretending to act. *Horan v. State*, 7 App. 183.

Evidence.—On a trial for resisting an officer attempting to serve a writ of sequestration fair on its face and issuing from a proper court, it was not necessary, before introducing the writ, to prove a valid affidavit therefor. *Meador v. State*, 44 App. 468, 72 S. W. 186.

Art. 337. [233] Offenses complete without actual escape.—The offenses enumerated in articles 329, 330, 331, 332 and 333 are complete without the actual escape of the prisoner; and a person accused of any of said offenses may be prosecuted and tried, al-

though the person escaping be retaken, and although after being retaken he is brought to trial and acquitted. [P. C. 328-9.]

Indictment.—*Blanchette v. State*, 58 App. 180, 125 S. W. 26.

Art. 338. [234] County convict escaping from employer.—Any person who has been convicted of a misdemeanor or petty offense, and afterwards hired under authority of law, who shall escape from his employer or person hiring him during the term of which he may have been hired, shall be punished by imprisonment in the county jail for a term not exceeding two years. [Act Aug. 21, 1876, p. 229, § 4.]

Elements of offense.—A voluntary escape is where an officer having the custody of a prisoner charged with and guilty of an offense knowingly gives him his liberty with intent to save him from his trial or the execution of his sentence. *Porter v. State*, 34 App. 364, 30 S. W. 791.

A county convict who after being hired out leaves the county with the consent of his hirer on his promise to return, is not on failure to do so guilty of an escape. *Porter v. State*, 34 App. 364, 30 S. W. 791; *Ex parte Logsdan*, 35 App. 56, 31 S. W. 646.

Escape as used in preceding article means the actual escape of a prisoner from confinement or custody. *Carter v. State*, 29 App. 5, 14 S. W. 350.

Evidence that defendant, though living on the farm to which he was sent by his hirer, refused to work and sometimes went to town did not support a conviction, though it perhaps showed refractory conduct justifying punishment under *Vernon's Sayles' Civ. St.* 1914, art. 6240. *Carter v. State*, 29 App. 5, 14 S. W. 350.

Jail defined.—A jail is not necessarily a house. It may be a pen or inclosure. *Welch v. State*, 25 App. 580, 8 S. W. 657.

Indictment.—See *Willson's Cr. Forms*, 158.

The information need only allege that the escape was unlawfully and wilfully made and need not allege that it was without the consent of the hirer or that the convict was hired to be kept and remain in the county. *Carter v. State*, 29 App. 5, 14 S. W. 350.

A complaint charging that defendant was a county convict sufficiently charges that he was convicted of misdemeanor or petty offense within this article. *Porter v. State*, 34 App. 364, 30 S. W. 791.

Pleading.—Under Act April 4, 1891, a county court was authorized to convene in special session to receive a plea of guilty by a county convict charged with an escape. *Porter v. State*, 34 App. 364, 30 S. W. 791.

Art. 339. [235] Person resisting officer in case of felony.—If any person shall wilfully oppose or resist an officer in executing or attempting to execute any lawful warrant for the arrest of another person in a case of felony, he shall be punished by confinement in the penitentiary for a term not less than two nor more than five years; and, if arms be used in such resistance, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years. [Act Feb. 12, 1858, p. 163; P. C. 331.]

Post, arts. 344, 345.

Cited, *Sullivan v. State* (Cr. App.) 148 S. W. 1091.

Warrant executed in other county.—A *capias* issued by a justice of the peace of one county for the arrest of an alleged offender cannot be legally executed in another county until indorsed as required by the Code of Criminal Procedure, and when so indorsed must be executed by the proper officer of the county of the arrest. *Ledbetter v. State*, 23 App. 247, 5 S. W. 226; *Peters v. State*, 23 App. 684, 5 S. W. 228.

Illegal warrant or arrest.—An unlawful arrest is regarded as a continuous assault of an aggravated nature. The party detained or another party in his behalf may use all force adequate to resist the aggression and effect the liberation, even to the extent of taking life if that be essential. *Alford v. State*, 8 App. 545; *Miers v. State*, 34 App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.

A warrant did not authorize the arrest of a person other than the one therein named and the insertion of another's name after the issuance of the warrant was a nullity. *Alford v. State*, 8 App. 545.

Indictment.—See *Willson's Cr. Forms*, 159.

See *Pierce v. State*, 17 App. 232, for an indictment under this article held sufficient.

Resisting search warrant.—Raising question of constitutionality on habeas corpus, see Code Cr. Proc. art. 160.

Art. 340. [236] In cases of misdemeanors.—If any person shall wilfully oppose or resist an officer in executing or attempting to execute any lawful warrant for the arrest of another person in a case of misdemeanor, or in arresting or attempting to arrest any person without a warrant, where the law authorizes or requires

the arrest to be made without a warrant, he shall be punished by a fine of not less than twenty-five nor more than five hundred dollars; and, if arms be used, by a fine of not less than fifty nor more than one thousand dollars. [P. C. 220, amended by Act of April 4, 1881, p. 108.]

Post, art. 345.

Cited, *Sullivan v. State* (Cr. App.) 148 S. W. 1091.

Indictment or information.—See Willson's Cr. Forms, 159. See, post, sec. 491.

An information is insufficient where it does not allege whether the arrest was sought by virtue of a warrant or without one, but only that accused was drunk in a public place in the presence of a deputy sheriff. *Harless v. State*, 53 App. 319, 109 S. W. 334.

Evidence.—In a prosecution for resisting an officer, testimony of what was said and done from the time the officer formally arrested accused until he was confined in the place of custody is admissible to show whether accused's conduct was wilful, so that evidence was admissible that, while the officer was taking accused to jail, he cursed and abused the officer, and threatened to kill him after he was released at the courthouse. *Woodward v. State*, 58 App. 412, 126 S. W. 271.

Art. 341. [237] In civil cases.—If any person shall wilfully resist or oppose an officer in executing, or attempting to execute, any process in a civil cause, he shall be fined not exceeding five hundred dollars; and, if arms be used in such resistance, the punishment shall be doubled. [P. C. 333.]

Ante, art. 336 and notes.

Cited, *Sullivan v. State* (Cr. App.) 148 S. W. 1091.

Resistance.—See authorities cited under articles 339, 344.

Murder in resisting civil process, see *Smith v. State*, 48 App. 233, 89 S. W. 817.

Indictment.—See Willson's Cr. Forms, 153, 160; ante, arts. 335, 336.

The indictment must allege the particular mode in which the resistance was made, and the knowledge of defendant as to the capacity of the officer. *Horan v. State*, 7 App. 183. See, also, notes under art. 344.

Art. 342. Resisting officers of improvement district.—The district supervisors of any levee improvement district, and the district engineer and his assistants, from the time of their appointments, and the state reclamation engineer and his deputies, are hereby authorized to go upon any lands or waters for the purpose of examining the same and locating all levees and other improvements, making plans, surveys, maps and profiles, together with all necessary teams, help and instruments, without subjecting themselves to an act of trespass; and any person or persons, firm or corporation, who shall wilfully prevent or prohibit any of such officers from entering any lands or waters for such purposes, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding twenty-five dollars for each day he, they or it shall so prevent or hinder such officer from entering upon such lands or waters; and any justice of the peace of the county shall have jurisdiction in all such offenses. [Act 1909, p. 152 repealed. Act 1915, p. 244, ch. 146, § 42.]

Art. 342a. Unlawful construction of levee improvements.—From and after the taking effect of this Act it shall be unlawful for any person, corporation or levee improvement district, without first obtaining the approval of plans for the same by the State Reclamation Engineer, to construct, attempt to construct, cause to be constructed, maintain or cause to be maintained, any levee or other such improvement on, along or near any stream of this state which is subject to floods, freshets or overflows, so as to control, regulate or otherwise change the flood waters of such stream; and any person, corporation or district violating this section of this Act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not more than one year, or by both such fine and imprisonment, and each day any such structure is

maintained or caused to be maintained shall constitute a separate offense. And in the event any such structure is about to be constructed, is constructed, or maintained by any person or corporation without approval of plans by the State Reclamation Engineer, it shall be the duty of the Attorney General, on the request of the State Reclamation Engineer, to file suit in one of the district courts of Travis county, in which the venue of such suits is hereby fixed, to enjoin the construction or maintenance of such structure. [Act 1915, p. 248, ch. 146, § 62.]

Art. 342b. Same; purpose and scope of act.—This Act shall not be construed to repeal any of the provisions of Chapter 118, General Laws of the Thirty-second Legislature, Regular Session, entitled "Drainage Districts—Authorizing the Commissioners Courts of the Several Counties of the State to Establish Same," nor of Chapter 36, General Laws Thirty-third Legislature, First Called Session, entitled, "Drainage Districts—Amending Sections 7, 8, 23, 29, 36 and 61, Chapter 118, General Laws, Regular Session, Thirty-second Legislature, Relating Thereto," nor any of the irrigation laws of this State. [Id., § 63.]

Art. 342c. Same; repeal.—Chapter 85, General Laws of the State of Texas, passed by the Thirty-first Legislature, Regular Session, entitled "An Act to authorize the Commissioners Court of the several counties in Texas to create and establish improvement districts to prevent overflows and to construct and maintain levees and other improvements on rivers, creeks and streams to prevent overflows, etc., etc., and declaring an emergency," is hereby expressly repealed, and all other laws and parts of laws in conflict with the provisions of this Act are also hereby expressly repealed. [Id., § 65.]

Art. 342d. Resisting officers of drainage district.—The drainage commissioners of any district and the civil engineer from the time of their appointment, are hereby authorized to go upon any lands lying within said district for the purpose of examining the same, locating the canals, drains, ditches and levees, making plans, surveys, maps and profiles, and are hereby authorized to go upon any lands beyond the boundaries of such district and in any county for the purpose of examining the same, and locating the necessary outlets for any of the canals, drains or ditches of such district, together with all necessary teams, help, tools and instruments, without subjecting themselves to action of trespass, and any person who shall wilfully prevent or prohibit any of such officers from entering any land for such purposes shall be guilty of a misdemeanor, and upon conviction may be fined in any sum not exceeding twenty-five dollars for each day he shall so prevent or hinder such officer from entering upon any land, and any justice of the peace in the county shall have jurisdiction of all such offenses. [Act 1907, p. 78; Act 1911, p. 258, ch. 118, § 41.]

Art. 343. Resisting navigation and canal commissioners and engineers.—The navigation and canal commissioners of any district and the engineers from the time of their appointment are hereby authorized to go upon any lands lying within said district for the purpose of examining the same, making plans, surveys, maps and profiles, together with all necessary teams, help, tools and instruments, without subjecting themselves to action or [for] trespass; and any person who shall wilfully prevent or prohibit any such officer from entering any land for such purposes, shall be guilty of a misdemeanor, and, upon conviction, may be fined in any sum not exceeding twenty-five dollars for each day he shall

so prevent or hinder such officer from entering upon any land; and any justice of the peace in the county shall have jurisdiction of all such offenses. [Act 1909, p. 43.]

Art. 343a. Resisting officers of irrigation district.—The irrigation directors of any district and the engineer and employes thereof are hereby authorized to go upon any lands lying within said district, for the purpose of examining same, locating reservoirs, canals, dams, pumping plants and all other improvements, to make maps and profiles thereof; and are hereby authorized to go upon the lands beyond the boundaries of such districts in any county for the purposes stated, and for any other purposes necessarily connected therewith, whether herein enumerated or not. And any person who shall wilfully prevent or prohibit any such officers or employes from entering any lands for such purposes shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding one hundred dollars for each day he shall so prevent or hinder such officer or employee from entering upon any lands. [Act 1913, p. 402, ch. 172, § 84.]

Art. 344. [238] Accused resisting process.—If the party against whom a legal warrant of arrest is directed, in any criminal case, resist its execution, when attempted by any person legally authorized to execute the same, he shall be fined not exceeding five hundred dollars; and, if arms be used in making the resistance, in such manner as would make him liable for assault and battery or assault with intent to murder, or any other offense against the person, he shall receive the highest penalty affixed by law for the commission of such offense in ordinary cases. [P. C. 334.]

See notes under art. 339.

See *English v. State*, 34 App. 190, 30 S. W. 233.

Acts constituting resistance.—Where defendant objected to his arrest because his name was misspelled in the warrant but upon being informed that this gave him no right to question the officer's authority to arrest, he at once surrendered himself, went with the officer, obtained sureties and executed a bail bond, his conduct did not constitute resistance. *McGrew v. State*, 17 App. 613.

Indictment or information.—See *Willson's Cr. Forms*, 161.

McGrew v. State, 17 App. 613.

The indictment must allege that the officer was resisted in attempting to execute the warrant. *Hill v. State*, 43 Tex. 329.

Indictment for resisting arrest should show that the warrant was valid. *Toliver v. State*, 32 App. 444, 24 S. W. 286.

Where the arrest was for "a misdemeanor of gaming," an information not showing whether the arrest was under a warrant or without a warrant or by what authority the officer undertook to make the arrest, was insufficient. *Lee v. State*, 45 App. 94, 74 S. W. 28.

A complaint and information held not to show resistance to execution of a legal warrant. *Sullivan v. State* (Cr. App.) 148 S. W. 1091.

Evidence.—See *Jacobs v. State*, 28 App. 80, 12 S. W. 408.

On a trial for killing an officer who was attempting to illegally arrest defendant, evidence of the issuance of a *capias* in another county for defendant's arrest for burglary was inadmissible. *Miers v. State*, 34 App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.

Instructions.—See *Jacobs v. State*, 28 App. 80, 12 S. W. 408.

Where the evidence showed that the arrest in resisting which defendant killed an officer was legal, an instruction that the question whether it was illegal or not was not for the jury to determine as there was no evidence that defendant was influenced by an alleged illegal arrest, was not prejudicial. *Sierra v. State*, 37 App. 430, 35 S. W. 982.

Instructions on a trial for homicide as to deceased's authority to arrest defendant and defendant's right of self-defense, held defective. *Hardin v. State*, 40 App. 208, 49 S. W. 607.

Warrant.—The law declares the county judge to be a magistrate and vests him with power to issue warrants of arrest. *Graham v. State*, 29 App. 31, 13 S. W. 1013.

A defect in a warrant is no defense where defendant knew that the officer had a warrant for his arrest and assaulted the officer without inquiring as to the validity of the warrant. *Graham v. State*, 29 App. 31, 13 S. W. 1013.

A justice of the peace cannot order a warrant of arrest executed beyond the limits of his county. *Toliver v. State*, 32 App. 444, 24 S. W. 286.

The offense must be named in the warrant to make it legal. *Fulkerson v. State*, 43 App. 587, 67 S. W. 502; *Sullivan v. State* (Cr. App.) 148 S. W. 1091.

Unlawful arrest.—See *James v. State*, 44 Tex. 314.

Though a man will not be justifiable if he kills in defense against an illegal arrest of ordinary character, the killing is manslaughter only. *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Miller v. State*, 32 App. 319, 20 S. W. 1103. See, also, *Miller v. State*, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836; *Goodman v. State*, 4 App. 349; *Mundine v. State*, 37 App. 5, 38 S. W. 619; *Ex parte Sherwood*, 29 App. 334, 15 S. W. 812.

No statute gives jurisdiction to a sheriff to serve a *capias* beyond the limits of his county, and an attempted arrest in another county was unlawful. *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454.

An unlawful power of arrest may be exercised in such a wanton and unnecessary manner as to make the officer a trespasser and justify resistance. *Ex parte Sherwood*, 29 App. 334, 15 S. W. 812.

A warrant being illegal an officer is not authorized to execute it and the defendant is not required to submit to arrest. His resistance, however, must not be made in an unwarrantable or illegal manner or he will be responsible for his acts. *Toliver v. State*, 32 App. 444, 24 S. W. 286.

A constable had no right to arrest a person without a *capias* for a burglary committed in another county and in making the arrest was a trespasser and the person arrested had the right to resist by force using no more than was necessary to resist the unlawful acts. *Miers v. State*, 34 App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.

An officer making an arrest must not resort to the use of deadly weapons unless compelled to do so by the conduct of the prospective prisoner. *English v. State*, 34 App. 190, 30 S. W. 233.

A defendant would be guilty of murder in the first degree if he, anticipating an arrest, should prepare himself with a deadly weapon and deliberately and calmly form the intent to kill the officer. *Hill v. State*, 35 App. 371, 33 S. W. 1075.

Killing man resisting unlawful arrest.—See *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

Art. 345. [239] Process must be legal.—To render a person guilty of any of the offenses included within the meaning of articles 339 and 340, the warrant or process must be executed, or its execution attempted, in a legal manner. [P. C. 335.]

See notes under preceding articles.

Art. 346. [240] "Accusation" defined.—The word "accusation," as used here, and in every part of this Code, means a charge made in a lawful manner against any person, that he has been guilty of some offense which subjects him to prosecution in the name of the state. A person is said to be "accused" of an offense from the time that any "criminal action" shall have been commenced against him.

A legal arrest without warrant;

A complaint to a magistrate;

A warrant legally issued; and indictment, or an information, are all examples of "accusations," and a person proceeded against by either of these is said to be "accused." [P. C. 336.]

See notes under preceding articles.

Cited, *Pierce v. State*, 17 App. 232.

Indictment and information.—Willson's Cr. Forms, 153.

An information charging that defendant unlawfully made an attempt to aid a prisoner to escape, etc., is insufficient, since there is no such offense as an attempt to aid an escape. *Blanchette v. State*, 58 App. 180, 125 S. W. 26.

Art. 347. [241] "Legally confined in jail" defined.—A person is "legally confined in jail," or "legally detained in custody," when he has been committed or arrested upon a legal warrant, or arrested in any of the modes pointed out in the Code of Criminal Procedure. [P. C. 337.]

Art. 348. [242] "Jail" defined.—The word "jail" means any place of confinement used for detaining a prisoner. [P. C. 338.]

Jail.—A jail is not necessarily a house, but may be an inclosure of any kind or any place of confinement used in detaining prisoners. Whether the space between the jail building and a wall surrounding it was a part of the jail was properly left to the jury. *Welch v. State*, 25 App. 580, 8 S. W. 657.

A building used as a jail and in which a prisoner is confined is within the protection of the statute, though not situated in an incorporated town and not owned by the county. *Irvington v. State*, 45 App. 559, 78 S. W. 928.

Art. 331 applies as well to a city calaboose as to a county jail. *Starks v. State*, 38 App. 233, 42 S. W. 379.

Art. 349. [243] "Officer" defined.—By "officer," as used in this chapter, is meant any peace officer, as sheriff, deputy sheriff, con-

stable of a beat, marshal, constable or policeman of a city or town, any jailer or guard, or any person specially authorized by warrant to arrest. [P. C. 339.]

Policemen.—An indictment for bribing a policeman not to arrest, report, and file a complaint against accused for keeping a gambling house or place where liquor was unlawfully sold was not defective on the ground that the law did not require police officers to report and file complaints against violators. *Minter v. State*, 70 App. 634, 159 S. W. 236.

A policeman is an executive officer within the purview of Pen. Code 1911, art. 424, providing that any person who shall falsely assume or pretend to be a judicial or executive officer of the state shall be punished, for a policeman is a public officer of the state expressly charged by the statutes with enforcing a large body of the criminal law. *Ex parte Preston*, 72 App. 77, 161 S. W. 115.

Art. 350. [244] "Arms" defined.—The term "arms," as used in this chapter includes any deadly weapon.

Art. 351. [245] Refusing to aid an officer.—If any person, being called on by a magistrate, or peace officer, shall fail or refuse to aid such officer in any matter in which, by law, he may be rightfully called on to aid or assist in the execution of a duty incumbent upon such magistrate or peace officer, he shall be punished by fine not exceeding one hundred dollars. [Act Feb. 12, 1858, p. 163; P. C. 339a.]

Cited, *Presley v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 145 S. W. 669.

Indictment.—Willson's Cr. Forms, 162.

CHAPTER FIVE

FALSE CERTIFICATE, AUTHENTICATION OR ENTRY BY AN OFFICER

Art. 352. Commissioner of deeds giving false certificate.	Art. 358. Notary public giving false certificate.
353. "Instrument of writing" defined.	359. Officer giving blank certificate.
354. Commissioner certifying falsely to deposition.	360. Failing to keep a record of acknowledgments.
355. Same as to affidavit.	361. Requisites of such record.
356. Clerk of court making false entry.	362. False certificate as to corporate indebtedness.
357. Clerk giving false certificate.	362a. False certificate to physician.

Article 352. [246] Commissioner of deeds giving false certificate.—If any person, being a commissioner of deeds and depositions, who is residing out of this state, and acting as such commissioner under authority of a law of the state, shall fraudulently certify to the execution of any instrument of writing which was never in fact acknowledged or proved before him, as the same purports to have been acknowledged or proved, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [P. C. 340.]

Venue.—See C. C. P. 249.

Indictment.—Willson's Cr. Forms, 163.

Art. 353. [247] "Instrument of writing" defined.—By "instrument in writing" is meant any deed, conveyance, transfer, release, obligation or other written instrument of any kind or description whatever, which such commissioner is, by law, authorized to authenticate for record. [P. C. 341.]

Blank certificate, see post, art. 359.

Art. 354. [248] Commissioner certifying falsely to deposition.—If any such commissioner shall falsely certify to any deposition purporting to have been taken before him, and to be used in any cause pending in a court of this state, he shall be punished in the same manner as is prescribed in article 352. [P. C. 342.]

Blank certificate, see post, art. 359.

Venue.—See Code Cr. Proc. art. 249.

Indictment.—Willson's Cr. Forms, 164.

Art. 355. [249] Same as to affidavit.—If any such commissioner shall falsely certify to any affidavit purporting to have been made before him, and which, by law, he is authorized to take, he shall be punished as prescribed in article 352. [P. C. 343.]

Venue.—See C. C. P., art. 249.

Indictment.—Willson's Cr. Forms, 165.

Art. 356. [250] Clerks of court making false entry.—If any clerk of a court in this state shall knowingly make any false entry upon the records of his court, which may prejudice or injure the rights of any person, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [P. C. 344.]

Indictment.—Willson's Cr. Forms, 166.

Person.—A state is a "person" within the meaning of this article and so is a corporation. *Martin v. State*, 24 Tex. 61; ante, art. 24.

Art. 357. [251] Giving false certificate.—If any such clerk shall give a false certificate, stating that any person has done any act whatever, to which he has a right to certify, or that such person is entitled to any right whatever, when such clerk may by law give such certificate if the same were true, he shall be punished as directed in the preceding article. [P. C. 345.]

Indictment.—Willson's Cr. Forms, 167.

Art. 358. [252] Notary public giving false certificate.—If any notary public, or other officer authorized by law, shall give a false certificate for the purpose of authenticating any instrument of writing for registration, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [P. C. 346.]

Indictment.—Willson's Cr. Forms, 170.

Art. 359. [253] Officer giving blank certificate.—If any officer, authorized by law to take depositions or administer oaths in this state, shall falsely certify that any depositions was sworn to before him, or any oath made, or shall with fraudulent intent place his certificate, signature or seal to any affidavit which is drawn with blanks as to any other matter of substance, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. Within the meaning of this article, shall be included the case of an officer who, with design that the same may be filled up and used for fraudulent purposes, attaches his signature or seal of office to any paper wholly blank. [Act Feb. 12, 1858, p. 163; P. C. 347.]

Indictment.—Willson's Cr. Forms, 171, 172; ante, art. 354.

Art. 360. [254] Failing to keep a record of acknowledgments.—Any county clerk, justice of the peace, notary public, or any other officer in this state authorized by law to take acknowledgments or proof of instruments required or permitted by law to be placed on record, who shall wilfully fail, neglect or refuse to enter and record in a well-bound book a short statement of each acknowledgment or proof taken by him and sign the same officially, shall be fined in any sum not less than one hundred nor more than five hundred dollars. [Act April 28, 1874, p. 156.]

Indictment.—Willson's Cr. Forms, 173.

Art. 361. [255] Requisites of such record.—By "short statement," as used in the preceding article, is meant that such statement shall recite the true date on which such acknowledgment or proofs were taken, the name of the grantor and grantee of such instrument, its date, if proved by a subscribing witness, the name of the witness, the known or alleged residence of the witness, and whether personally known or unknown to the officer; if personally

unknown, this fact shall be stated, and by whom such person was introduced to the officer, if by any one; and the known or alleged residence of such person. Such statement shall also recite, if the instrument is acknowledged by the grantor, his then place of residence, if known to the officer; if unknown, his alleged residence, and whether such grantor is personally known to the officer; if personally unknown, by whom such grantor was introduced, if by any one, and his place of residence. If land is conveyed or charged by the instrument, the name of the original grantee shall be mentioned, and the county where the same is situated; and a failure to comply with any one of the requirements shall be punished as prescribed in the preceding article. [Act April 28, 1874, p. 156.]

Indictment.—Willson's Cr. Forms, 173.

Art. 362. [255a] False certificate as to corporate indebtedness, etc.—If any mayor, county judge, tax assessor, or other officer or person, for the purpose of securing the certificate of the attorney general, provided for in the issuance and sale of bonds by any county, city or town in the state of Texas, shall knowingly make, or be concerned in making or forwarding, to the attorney general, a false certificate as to the amount of the taxable value of the property in such county, city or town, as shown by the last official assessment, or knowingly and falsely certify as to the amount of indebtedness of such county, city or town, or the rate of tax levied to provide interest and sinking fund for such indebtedness, or other facts required by the attorney general, he shall be guilty of felony, and, upon conviction therefor, shall be punished by confinement in the penitentiary not less than one nor more than five years. [Act 1893, p. 85.]

Indictment.—Willson's Cr. Forms, 173a, 173b.

Art. 362a. False certificate to physician.—That it shall be a misdemeanor and shall disqualify from office for the Board of Medical Examiners [arts. 799a–799g, post] to issue a certificate of license to any person, only as set forth and prescribed from office; the Governor shall appoint a new Board in full, as provided in this Act. [Act 1911, p. 136, ch. 76, § 16.]

CHAPTER SIX

MISCELLANEOUS OFFENSES UNDER THIS TITLE

Art.	1. EXTORTION	Art.	
363.	Extortion by officers.	377.	County judges, commissioners or members of navigation board.
364.	Officers demanding illegal fees.	378.	County judge and other officers of improvement district.
365.	Applies to all officers.	379.	Director or officer of irrigation district.
	2. CONVERSION	379a.	Officers not to be interested in contracts of drainage district.
366.	By sheriff or other officer.	380.	Purchase of witness fees by officer.
367.	Appropriation of trust fund.		4. NEPOTISM
368.	Officer failing to deposit trust fund.	381.	"Nepotism" defined.
369.	Officer failing to turn over trust fund to successor.	382.	Officers included.
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370.	State officer buying claim against state.	384.	Exceptions.
371.	"State officer" defined.	385.	Shall not approve account.
372.	Officers and employes of state penitentiary.	386.	Penalty.
373.	County or city officers trading in claims.	387.	District judge appointing stenographer.
374.	Mayor and members of city council.		5. FAILURE OF DUTY
375.	Ex-officers included, when.	388.	Officer refusing to issue or execute process.
376.	County or city officers becoming interested in contracts.		

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| Art.
389. Officer failing to arrest offender, etc. | Art.
420a. Mailing notice of delinquent taxes; contents of notice; duplicates; furnishing statements of taxes on demand; duties of district attorney; redemption. |
| 390. Refusal of sheriff or constable. | 420b. Records from which notices and statements are to be made; examination of records of district court and county clerk; publication of delinquent list; duties of tax collector. |
| 391. Refusal of district or county attorney. | 420c. Duties of county and district attorneys to foreclose tax liens; compensation. |
| 392. County clerk marking "exempt." | 420d. Same; duties mandatory; violation of law a misdemeanor. |
| 392a. Unlawful issuance of subpoena in felony case. | 420e. Same; repeal. |
| 393. Officer of old county failing to deliver records, etc., to new. | 420f. Assessment of omitted property. |
| 394. Approval of bond when surety is nonresident. | |
| 395. Officer failing to report collections for state. | |
| 396. Officer failing to report collections for county. | |
| 397. Town or city officer failing to report collections. | |
| 398. Justice report; jury service. | |
| 399. Commissioners' court failing to make quarterly statement, etc. | |
| 400. County tax assessor failing to report. | |
| 401. County judge, commissioner or clerk. | |
| 402. Commissioner failing to attend court. | |
| 403. County treasurer failing to report. | |
| 404. Clerk failing to keep index. | |
| 405. Clerk permitting withdrawal of deeds where records are burned. | |
| 406. To what deeds not applicable. | |
| 407. County judge practicing in inferior courts. | |
| 408. May practice in certain counties. | |
| 409. Issuing marriage license to minor, etc. | |
| 410. Father's consent sufficient, when. | |
| 411. Performing marriage without license. | |
| 412. Surveyor failing to return corrected field notes. | |
| 413. Surveyor failing or refusing to make survey on homestead on application, etc. | |
| 414. Not applicable, when. | |
| 415. Surveyor wilfully altering lines. | |
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| 417. Failure of surveyor to survey mining claim. | |
| 418. Parents, etc., refusing to answer questions of school trustees. | |
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6. BARRATRY

421. Defining same.

7. COMPOUNDING CRIME

422. Agreeing with offender not to prosecute.

8. MALICIOUS PROSECUTION

423. Defined and punished.

9. FALSE PERSONATION

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10. BADGES, UNLAWFUL WEARING

425. Penalty for.

11. GENERAL PROVISIONS

426. Wilful neglect of official duty.

427. Selection of jurors in certain counties.

428. Putting in or taking names from wheel illegally.

429. Providing penalty.

430. General penalty in the absence of any other.

431. "Malfeasance" when not otherwise designated.

432. "Officer" defined.

433. Sheriff failing to report to adjutant general.

434. Sheriff appointing deputies not allowed by law.

1. EXTORTION

Article 363. [256] Extortion by officers.—If any officer or person, authorized by law to demand or receive fees of office, shall wilfully collect any fee or fees due him by law in excess of the fee or fees allowed by law for such service, or for fees not allowed by law, he shall be punished by imprisonment in the state penitentiary not less than two nor more than five years for each offense. [P. C. 340, amended by Act of Feb. 9, 1883, p. 5; amended 1907, p. 307.]

See art. 3915, Vernon's Sayles' Civ. St. 1914.

Nature of offense.—Extortion is not an offense *eo nomine* within the rule that if the offense is not one *eo nomine*, the essential ingredients of the offense must be stated in the recognizance on appeal. *Schoonmaker v. State*, 37 App. 424, 35 S. W. 969; *Johnson v. State*, 38 App. 26, 40 S. W. 982.

What constitutes demand.—The presentation of the county judge's certified account of his fees to the commissioner's court, is a "demand." *Brackenridge v. State*, 27 App. 513, 11 S. W. 630, 4 L. R. A. 360.

Elements of offense.—Before this article was amended, it was held that a prosecution under said article for demanding and receiving fees not allowed by law, could not be maintained under it. *Smith v. State*, 10 App. 413. The amendment cures this defect in the article, and also changes the penalty. The extortion must be knowingly done. *Millar v. Douglass*, 42 Tex. 288.

The demand of illegal fees is "official misconduct" subjecting a county judge

to removal from office. *Brackenridge v. State*, 27 App. 513, 11 S. W. 630, 4 L. R. A. 360.

Acts committed after an officer's re-election but before his qualification under such re-election, were not condoned by the re-election. *Brackenridge v. State*, 27 App. 513, 11 S. W. 630, 4 L. R. A. 360.

Under Code Criminal Procedure, art. 1154, a county judge was not entitled to a fee for actions dismissed without trial as for criminal actions tried and finally disposed of. *Brackenridge v. State*, 27 App. 513, 11 S. W. 630, 4 L. R. A. 360.

Where an official stenographer in a suit for his fees in the original petition charged an amount not authorized by law, but in amended petition (upon which the case was tried) reduced the amount so that it was within the law, he did not violate this article. *Ben C. Jones & Co. v. Smith*, 49 Civ. App. 637, 109 S. W. 1111.

Indictment.—Willson's Cr. Forms, 32, 174.

An indictment which charged that defendant "did willfully, corruptly, and extorsively demand of the said H. P. H., administrator, aforesaid, fees greater than were or are allowed by law," held defective; but the court based its decision on another statute (*Pasc. Dig.*, art. 3830), and seems to have overlooked the Code. *State v. Smythe*, 33 Tex. 547.

See a defective indictment under the act of 1874, *State v. Smith*, 44 Tex. 443; which repealed the original article (354b). *lb.* *Robinson v. State*, 2 App. 390.

An indictment for extortion which alleged that defendant as county attorney accepted a fee to dismiss a prosecution, was defective in not alleging the exaction of a fee not authorized by law. *Poole v. State*, 22 App. 685, 3 S. W. 476.

An indictment held to sufficiently charge that demand by county judge was in his official capacity. *Brackenridge v. State*, 27 App. 513, 11 S. W. 630, 4 L. R. A. 360.

Art. 364. Officers demanding illegal fees.—If any officer or other person, authorized by law to demand or receive fees of office, shall willfully make out his account for fees in excess of those allowed by law, or for fees not allowed by law, and shall present or file such account with the proper officer with whom the law requires the same to be presented or filed, he shall be punished by a fine of not less than twenty-five or more than two hundred and fifty dollars for each offense. [Act 1907, p. 307.]

Art. 365. [257] Applies to all officers.—The two preceding articles apply to all persons holding any office to which fees are attached, and to the heads of the departments of the government in whose offices fees may be charged. [P. C. 353.]

2. CONVERSION

Art. 366. [258] Conversion by sheriff, etc.—If any sheriff, or other officer, having collected money for any party to a suit, shall, without the consent of such party, unlawfully convert the same, or any part thereof, to his own use, he shall be punished in the same manner as if he had committed theft of such money. [Act Feb. 12, 1858; P. C. 354a.]

Indictment.—Willson's Cr. Forms, 177.

Art. 367. [259] Appropriation of trust funds.—If any officer of any court who has the legal custody of any money, evidence of debt, scrip, instrument of writing or other article, that may have been deposited in court to abide the result of legal proceedings, shall appropriate the same to his own use, he shall be punished as if he had committed theft of such money, evidence of debt, scrip, instrument of writing or other article. [Act May 19, 1876, p. 7.]

Indictment.—Willson's Cr. Forms, 179.

Art. 368. [260] Officer failing to deposit trust funds, etc.—Any officer of any court having the custody by law of any money, evidence of debt, scrip, instrument of writing or other article that may have been deposited in court to abide the result of any legal proceedings, who shall fail to seal up in a secure package the identical money or other article received by him, and deposit the same in some iron safe or bank vault; or who, when such money or other article is so deposited, shall fail to keep it always accessible and subject to the control of the proper court; or who shall fail to keep, in a well-bound book, a correct statement showing each and every item of money or other article so received or deposited, on what

account received, and what disposition has been made of the same, shall be punished by fine not less than ten nor more than two hundred dollars, or by imprisonment in the county jail for a period not exceeding three months; and may, in addition thereto, be punished by the proper court for contempt. [Act May 19, 1876, p. 7.]

Indictment.—Willson's Cr. Forms, 180

Art. 369. [261] Failing to turn over funds, etc., to successor.—Any officer, such as is enumerated in the preceding article, who shall fail or refuse to turn over to his successor in office, on the expiration of his own term of office, the record of trust funds therein specified, together with the packages of money or other articles in his possession or control, shall be punished as prescribed in the preceding article. [Act May 19, 1876, p. 7.]

Indictment.—Willson's Cr. Forms, 181.

3. PECULATION

Art. 370. [262] State officer buying claims against state.—Any officer of this state who shall trade for, buy or be in any way concerned in the purchase of any claim or demand against the state shall be fined in the sum of one thousand dollars. [Act May 3, 1873, p. 62.]

Indictment.—Willson's Cr. Forms, 182, 188.

Art. 371. [263] "State officer" defined.—By the term, "officer of this state," as used in the preceding article, is meant the governor, lieutenant governor, the heads or employés of any of the executive departments, members and officers of both houses of the legislature, the judges of the several courts, district and county attorneys, sheriffs, tax collectors and tax assessors.

Indictment.—Willson's Cr. Forms, 188.

Art. 372. Officers and employés of state penitentiary.—No officer or employé of the state penitentiaries shall be permitted to purchase any goods or merchandise or other property from the state or penitentiary system, except such surplus fruits, vegetables, ice, water, steam and lights as may be produced or manufactured on the premises of the penitentiary, or to appropriate to his private use or employment the labor, services or use of any state penitentiary convict, or of any animal, vehicle or other personal property belonging to the state, unless it be by the express consent of the penitentiary board, had by an order to that effect entered of record on the minutes of said board, providing for the amount to be paid by such officer or employé for the use, employment and services of such convict or convicts, or the use of any personal property belonging to the state; and no employé or officer using any of the state property shall be allowed to use same in keeping boarders for profit, unless such boarder or boarders be in the employ of the state penitentiary system; and no penitentiary sergeant, guard or other officer or employé of the penitentiary shall accept or receive any salary or other compensation from any person or corporation hiring or otherwise employing state convicts. Any such officer or employé who shall violate any of the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by dismissal from his office or employment, and by a fine of not less than twenty-five nor more than two hundred dollars; and, if the conviction be for accepting or receiving any salary or compensation from a hirer or employer of state convicts, the party so convicted shall, in addition to the penalty above described, be confined in the county jail not less than one month nor more than one year.

Any person, co-partnership or firm, or any member of such co-

partnership or firm, or any agent, servant or representative of such person, co-partnership or firm, or any officer, agent, servant or representative of any corporation, hiring or employing state convicts by contract with the state or penitentiary system of hire, lease, or for any share or portion or per cent of the crops or other products of the labor of such convicts, who shall pay, or promise or offer to pay, either directly or indirectly, to any sergeant, guard or other employé of the state having such convicts in charge or under his control, either in whole or in part, any money or other valuable thing, shall be guilty of a felony, and, on conviction thereof, shall be punished by confinement in the penitentiary for two years. [Act 1903, p. 161.]

See arts. 1615, 1616, post.

Indictment.—Willson's Cr. Forms, 30, 31, 188.

Art. 373. [264] County or city officer trading in claims.—Any officer of any county in this state, or of any city or town therein who shall contract, directly or indirectly, or become in any way interested in any contract for the purchase of any draft or order on the treasurer of such county, city or town, or for any jury certificate or any other debt, claim or demand for which said county, city or town may or can in any event be made liable, shall be punished by a fine of not less than ten nor more than twenty times the amount of the order, draft, jury certificate, debt, claim or liability so purchased or contracted for. [Act March 30, 1874, p. 47.]

Officers included.—This article is comprehensive and not only includes any officer who may contract directly or indirectly with a county, city or town, but also any officer who may in any way become interested in the purchase of draft or order on the treasury or any debt for which the county, city or town may be liable. *Texas Anchor Fence Co. v. City of San Antonio*, 30 Civ. App. 561, 71 S. W. 301.

Ignorance of law.—An alderman of a town purchasing a draft drawn in favor of a third person against the town violates this article, notwithstanding his ignorance of the law or his acting in good faith. *Collmorgen v. State* (Cr. App.) 168 S. W. 519.

Indictment and information.—Willson's Cr. Forms, 187, 188.

See *Robinson v. State*, 2 App. 390.

An averment that defendant unlawfully acquired jury scrip was not a sufficient charge that he contracted or was interested in a contract for jury scrip. *State v. Smith*, 44 Tex. 443.

An information, alleging that accused, being an alderman of a town, became interested in a contract for the purchase of a draft on the treasurer of the town for which it was liable for \$60, sufficiently alleges that the draft was for \$60. *Collmorgen v. State* (Cr. App.) 168 S. W. 519.

An indictment in the language of this article is not insufficient when attacked for the first time on appeal for failing to describe the particular warrant purchased by accused or failing to set it out in *hæc verba*. *Collmorgen v. State* (Cr. App.) 168 S. W. 519.

Evidence.—Proof of character of instrument purchased, see *Huff v. State*, 23 App. 291, 4 S. W. 890. See, also, notes on best and secondary evidence under Code Cr. Proc., art. 783.

On the trial of a county attorney for buying jury scrip the main point necessary to be established to warrant a conviction, was that defendant at the time he purchased the scrip was county attorney, and the evidence being insufficient as to this, the conviction would be set aside. *Huff v. State*, 23 App. 291, 4 S. W. 890.

Amount of penalty.—The word "amount," in this article means the face amount of the draft, and not its cash value at the time it was purchased by the officer or what he in fact paid for it. *Collmorgen v. State* (Cr. App.) 168 S. W. 519.

Art. 374. Mayor and members of city council.—It shall be unlawful for the mayor or any member of any city council or board of aldermen, of any city or town in this state, to accept, directly or indirectly, any frank, privilege, free light or water, or sewerage service, or other service, or a lower rate therefor than the regular rate established by said council or board of aldermen, or any gift or anything of value from any water, gas, light and sewer companies, corporations or persons. The servants, agents, officers or employés, or any person acting, directly or indirectly, in behalf of any of said companies, corporations or persons mentioned, who shall, directly or indirectly, give or grant any privilege, frank, free water,

light, gas, sewerage service or free service of any kind, or any gift of anything of value to any mayor, or to a member of any such city council, board of aldermen, or any such mayor, or a member of any such council or board of aldermen, who shall receive, accept or enjoy such free light, water, gas, or sewerage service, or other free service, or a lower rate than the regular rate, or any gift of anything of value, as prohibited herein, shall be guilty of a misdemeanor, and, upon conviction therefor, shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars, or by confinement in the county jail not exceeding twelve months, or by both such fine and imprisonment. [Act 1907, p. 218.]

Indictment.—Willson's Cr. Forms, 188.

Art. 375. [265] Ex-officers included, when.—Within the term "officer," as used in the preceding article, are included ex-officers until they have made a final settlement of their official accounts. [Act March 30, 1874, p. 47.]

Indictment.—Willson's Cr. Forms, 188.

Art. 376. [266] County or city officers becoming interested in contracts.—If any officer of any county in this state, or of any city or town therein, shall become in any manner pecuniarily interested in any contracts made by such county, city or town, through its agents or otherwise, for the construction or repair of any bridge, road, street, alley or house, or any other work undertaken by such county, city or town, or shall become interested in any bid or proposal for such work or in the purchase or sale of anything made for or on account of such county, city or town, or who shall contract for or receive any money or property, or the representative of either, or any emolument or advantage whatsoever in consideration of such bid, proposal, contract, purchase or sale, he shall be fined in a sum not less than fifty nor more than five hundred dollars. [Act March 30, 1874, p. 47.]

Acts constituting offense.—Previous to this statute it was not an offense for a road-overseer to have an arrangement with the contractor by which he was to share the profits. *Hutchinson v. State*, 36 Tex. 293.

This article inhibits any officer of a county, city or town from entering into, on account of himself, any kind of a financial transaction with the corporation. An indictment charged a violation in that accused sold a mule to the county of which he was a county commissioner. Held, a violation. *Rigby v. State*, 27 App. 55, 10 S. W. 760.

Indictment.—Willson's Cr. Forms, 188.

Hutchinson v. State, 36 Tex. 293, was decided prior to this statute, and under the statute against bribery. The facts of that case would seem to fall within this article.

Removal of officer.—A county official may be removed under Rev. St. 1895, art. 3531 (*Vernon's Sayles' Civ. St.* 1914, art. 6030) for official misconduct, though he has not been convicted on an indictment for the offense alleged as ground of removal. *Bland v. State* (Civ. App.) 38 S. W. 252.

Art. 377. County judges, commissioners or members of navigation board.—Neither the county judge nor any county commissioner, nor member of the navigation board, nor the navigation and canal commissioners or engineer, shall be, directly or indirectly, interested for themselves or as agents for anyone else in the contract for the construction of any work to be performed by such navigation district; and, if said officers, or either of them, shall, directly or indirectly, become interested in any contract for such work, or in any fee paid by such navigation district whereby he or others shall receive any money consideration or other thing of value, except in payment of services as provided by law, he shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by imprisonment in the county jail for not less than six months nor more than one year. [Act 1909, p. 45.]

Indictment.—Willson's Cr. Forms, 188.

Art. 378. County judge and other officers of improvement district.—Neither the County Judge nor any County Commissioner, nor the district engineer, nor the district supervisors, shall be directly or indirectly interested, for themselves or as agents for any one else, in the contract for or construction of any work to be performed by such district; and if any of said officers shall directly or indirectly become interested in any contracts for such work or any fee paid by such district, whereby he shall receive any money consideration or other thing of value, other than such fees and compensation as may be provided for herein, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail for not less than six months nor more than one year. [Act 1909, p. 154, ch. 85, repealed; Act 1915, p. 247, ch. 146, § 55.]

Indictment.—Willson's Cr. Forms, 188.

Art. 379. Director or officer of irrigation district.—No director of any irrigation district, irrigation engineer or employee thereof shall be directly or indirectly interested either for themselves or as agents for any one else in any contract for the purchase or construction of any work by said irrigation district and if any such person shall directly or indirectly become interested in any such contract, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine in any sum not to exceed one thousand dollars, or by confinement in the county jail for not less than six months nor more than one year, or by both such fine and imprisonment. [Act 1905, p. 250, ch. 50, repealed; Act 1913, p. 386, ch. 172, § 22.]

Indictment.—Willson's Cr. Forms, 188.

Art. 379a. Officers not to be interested in contracts of drainage district.—Neither the county judge or any county commissioner or drainage commissioner nor the drainage engineer shall be directly or indirectly, interested for themselves or as agents for any one else in the contract for the construction of any work to be performed by such drainage district, [Arts. 2567-2625, Vernon's Sayles' Civ. St. 1914] and if said officers or either of them shall directly or indirectly, become interested in any contract for such work, or in any fee paid by such drainage district whereby he shall receive any money consideration or other thing of value, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment in the county jail for not less than six months nor more than one year. [Act 1907, p. 78; Act 1911, p. 263, ch. 118, § 63.]

Art. 380. [267] Purchase of witness fees by officer.—Any county judge, clerk or deputy clerk of any district or county court, sheriff or his deputy, justice of the peace or constable, who shall purchase or otherwise acquire from the party interested any fee or fees coming to any witness in any proceeding whatever, either before the district or county court, or the court of any justice of the peace, or before any coroner's inquest, shall be punished by fine not exceeding one hundred dollars. [Act Feb. 12, 1858, p. 164; P. C. 354b.]

Indictment.—Willson's Cr. Forms, 188, 189.

4. NEPOTISM

Art. 381. "Nepotism" defined.—Subject to the exceptions set forth in Article 384, it shall hereafter be unlawful for any officer of this State, or for any officer of any district, county, city, precinct, school district or other municipal subdivision of this State, or for any officer or member of any State, district, county, city, school dis-

trict or other municipal board, or judge of any court, created by or under authority of any General or Special Law of this State, or member of the Legislature, to appoint, or vote for, or to confirm, the appointment to any office, position, clerkship, employment or duty, of any person related within the second degree by affinity or within the third degree by consanguinity to the person so appointing or so voting, or to any other member of any such board, the Legislature, or court of which such person so appointing or voting may be a member, when the salary, fees, wages, pay or compensation of such appointee is to be paid for, directly or indirectly, out of or from public funds or fees of office of any kind or character whatsoever. [Act 1907, p. 12; Act 1909, p. 85; Act 1915, p. 149, ch. 95, § 1, Pen. Code, art. 381, amended.]

Art. 382. Officers included.—The inhibitions declared by and set forth in this law shall apply to and include the Governor, Lieutenant Governor, Speaker of the House of Representatives, Railroad Commissioners, heads of departments of the State Government, judges and members of any and all boards and courts established by or under authority of any General or Special Law of this State, members of the Legislature, mayors, commissioners, recorders, aldermen and members of school boards of incorporated cities and towns, public school trustees, officers and members of boards of managers of the State University and of its several branches, and of the various State educational institutions and of the various State eleemosynary institutions, and of the penitentiaries; but this enumeration is not intended and shall not be construed or held to exclude from the operation and effect of this law any person included within its general provisions. [Act 1907, p. 12; Act 1909, p. 85; Act 1915, p. 149, ch. 95, § 1, art. 382, Pen. Code, amended.]

Art. 383. Persons within second or third degree.—It shall be unlawful for any officer or other person included within any of the provisions of this law to appoint or vote for appointment or for confirmation of appointment to any such office, position, clerkship, employment, or duty of any person whose services are to be rendered under his direction or control and to be paid for, directly or indirectly, out of any such public funds or fees of office, and who is related by affinity within the second degree or by consanguinity within the third degree to any such officer or person included within any of the provisions of this law, in consideration, in whole or in part, that such other officer or person has theretofore appointed, or voted for the appointment or for the confirmation of the appointment, or will thereafter appoint or vote for the appointment, or for the confirmation of the appointment, to any such office, position, clerkship, employment or duty, of any person whomsoever related within the second degree by affinity or within the third degree by consanguinity to such officer or other person making such appointment. [Act 1909, p. 85.]

Art. 384. Exceptions.—Nothing in this law shall apply to any appointment to the office of notary public or to confirmation thereof. [Id., p. 85.]

Art. 385. Shall not approve account.—No executive, legislative, judicial or ministerial officer or other person included within any of the provisions of article 381 shall approve any account or authorize the drawing of or drawing warrant or order, or pay any salary, fee, wages, or compensation of such ineligible officer or person, knowing him to be so ineligible. [Id., p. 85.]

Art. 386. Penalty.—Any violation of any of the provisions of this law shall constitute a misdemeanor involving official miscon-

duct, and shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars. [Id., p. 85.]

Art. 387. District judge appointing stenographer.—Nothing in this law shall be held or deemed to permit any district judge within this state to appoint as official stenographer of his district any person related within the third degree to the judge or district attorney of such district, but any such appointment is hereby declared unlawful under the provisions of this law and subject to the penalties herein provided. [Id., p. 85.]

5. FAILURE OF DUTY *

Art. 388. [268] Officer refusing to issue or execute process, etc.—Whenever any officer who is by law charged with the issuance or execution of process, either in civil or criminal actions, corruptly and wilfully refuses to issue or execute such process, or corruptly or wilfully refuses to perform any other duty enjoined upon him by law, he shall, when the act or omission is not otherwise provided for or punished, be deemed guilty of a misdemeanor, and shall be fined not exceeding five hundred dollars, and may, in the discretion of the jury, be imprisoned in the county jail not exceeding one year. [P. C. 348.]

Indictment.—Willson's Cr. Forms, 190, 292.

Art. 389. [269] Failure to arrest offender.—If any justice of the peace, sheriff or other peace officer shall wilfully neglect to return, arrest or prosecute any person committing a breach of the peace or other crime or misdemeanor which has been committed within his view or knowledge, or shall wilfully and knowingly absent himself from any place where such crime or misdemeanor is being committed, or is about to be committed, for the purpose of avoiding seeing or having a knowledge of the same, he shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than seventy-five dollars nor more than five hundred dollars. [P. C. 354.]

Violation of Sunday Law.—A justice of the peace cannot be prosecuted under this article for failing to return arrest and prosecute one for violating the Sunday law. There is no law requiring him to "return" any one for violating the Sunday law within his view or knowledge. *Green v. State*, 42 App. 549, 61 S. W. 482.

Failure to Institute Proceedings against One Carrying a Pistol.—See Code Cr. Proc. art. 976 and notes.

Mandamus to Compel Institution of Prosecution.—See notes under Code Cr. Proc., arts. 32 and 68.

Indictment.—Willson's Cr. Forms, 191, 192.

Art. 390. Refusal of sheriff or constable.—Any sheriff or constable who refuses or neglects to perform any duty imposed upon him by the law for the organization of the militia, or to execute any lawful process which shall have been issued by the governor or proper officer of a court martial, shall, upon conviction thereof in the district court, be deemed guilty of a misdemeanor, and shall be fined not more than five hundred dollars, and may, in the discretion of the jury, be imprisoned in the county jail not exceeding one year. [Act 1905, p. 203.]

Art. 391. Refusal of district or county attorney.—Any district or county attorney who refuses to perform any duty imposed upon him by the law for the organization of the militia, shall, upon conviction thereof in the district court, be deemed guilty of a misdemeanor, and shall be fined not more than five hundred dollars, and may, in the discretion of the jury, be imprisoned in the county jail not exceeding one year. [Id., p. 203.]

*See, also, Title 18, ch. 25, post.

Art. 392. County clerk marking "exempt."—Any county clerk who marks "exempt" any person enrolled as liable to military duty, whom he knows not to be exempt, shall, upon conviction, be deemed guilty of a misdemeanor, and shall be fined not more than five hundred dollars, and may in the discretion of the jury, be imprisoned in the county jail not exceeding one year. [Id., p. 203.]

Art. 392a. Unlawful issuance of subpoena in felony case.—Hereafter it shall be unlawful for the district clerk or any of his deputies in any county in Texas to issue any subpoena for any witness in a felony case filed or pending in the court of which he is clerk or deputy unless the requirements of the preceding section [Art. 526a, C. C. P.] of this Act have been in all things complied with and any such clerk or deputy thus offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five nor more than two hundred dollars. [Act 1913, p. 320, ch. 150, § 2.]

Art. 393. [270] Officers of old county failing to deliver records to new.—Any district or county clerk, sheriff, justice of the peace, county treasurer or surveyor, or any other officer of a county to which some other unorganized or disorganized county is attached for judicial or other purposes, who shall fail, neglect or refuse to turn over to the proper officers of such unorganized or disorganized county, on demand, and after the organization of such unorganized or disorganized county and the qualification of its officers, all books, records, maps, and all other property belonging to said county so organized that may be in his possession, shall be fined in a sum not less than one hundred nor more than one thousand dollars, or be confined in the county jail for a period not exceeding one year. [Act May 1, 1874, p. 188.]

Indictment.—Willson's Cr. Forms, 193.

Art. 394. [271] Approval of bond when security is non-resident.—Any officer whose duty it may be to pass upon and approve the official bond of a sheriff, or other county officer, who shall approve such bond, when any surety thereon is not a resident of the county of such sheriff or other officer, shall be punished by fine not less than one hundred nor more than five hundred dollars. [Act April 14, 1874, p. 93.]

See *Wilbarger County v. Bean*, 3 Willson, Civ. Cas. 'Ct. App. § 17.

Indictment.—Willson's Cr. Forms, 194.

Art. 395. [272] Officer failing to report collections for state.—Any district attorney, sheriff, deputy sheriff, constable, or other officer, whose duty it may be to collect money, other than taxes, for the use of the state, who shall fail to report to the district court of his county, in writing and under oath, on the first day of each term thereof, the amount of money that may have come into his hands for the use of the state since the last term of said court, from whom the same was collected, and by virtue of what process, shall be punished by fine not less than twenty nor more than two hundred dollars. [Act May 1, 1874, p. 182.]

See C. C. P. arts. 1045, 1046, 1048.

Indictment.—Willson's Cr. Forms, 195.

Art. 396. [273] Officer failing to report collections for county.—Any officer, such as is named in the preceding article, whose duty it may be to collect money, other than taxes, for the use of any county, who shall fail to report in writing, and under oath, to the commissioners' court of such county at each regular term thereof, the amount of money that may have come into his hands for the use of such county since the last term of said court, from whom the

same was received, and by virtue of what process, shall be punished as prescribed in the preceding article. [Act May 1, 1874, p. 182.]

See C. C. P., arts. 1046 to 1049 inclusive.

Officers liable.—The two preceding articles apply to ministerial officers only. A justice of the peace is not such an officer. *Edwards v. State*, 2 App. 525 (distinguished in *Crump v. State*, 23 App. 615, 5 S. W. 182).

Indictment.—Willson's Cr. Forms, 195; Report, Id. 1131; C. C. P., arts. 1045, 1046, 1048.

The indictment must allege that the defendant was authorized to collect money other than taxes; that such money had come into his hands, and that he had failed to report it. Merely to charge that he failed to report without charging that he had collected moneys, is not sufficient. *Edwards v. State*, 2 App. 525; *Addison v. State*, 41 Tex. 462. But see C. C. P. art. 1046, subd. 5.

Art. 397. [274] Town or city officer failing to report collections.—Any town or city marshal, or constable, or other officer or person who may collect money other than taxes, for the use of such town or city, who shall fail to report in writing, and under oath, to the mayor and board of aldermen, or common council, of such town or city, on the first Monday of each month, the amount of money that may have come into his hands during the month preceding such report, for the use of such town or city, from whom the same was collected, and by virtue of what process, shall be punished as prescribed in article 395. [Act May 1, 1874, p. 182.]

See C. C. P., arts. 1045 to 1049 inclusive.

Indictment.—Willson's Cr. Forms, 195; Report, C. C. P., arts. 1045, 1046, 1048.

Art. 398. [275] Justices shall report jury service, etc.—Justices of the peace shall report to the county clerk, on the first Monday in each month, the names of the persons who have served as jurors in his court for the preceding month, and the number of days and fractions of days that they have served respectively, and the number of cases in which they have served respectively on each of said days or fractional days; and it shall be the duty of the county clerk to issue his warrant against the county treasurer in favor of each of the persons so serving as jurors. Every justice failing to make and file such report shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than twenty-five nor more than two hundred and fifty dollars. [Act March 15, 1881, p. 32, § 2.]

Art. 399. [276] Commissioners' court failing to make a tabular statement, etc.—If the commissioners' court of any county in this state shall wilfully fail, neglect or refuse to make, or cause to be made, a tabular statement of the assets, expenditures and indebtedness of such county at each regular term of the said court, specifying therein the names of creditors and the items of indebtedness, with their respective dates of accrual, and also the names of persons to whom moneys have been paid, with the amounts paid each during the quarter for which such statement is prepared, or shall wilfully fail, neglect or refuse to publish an exhibit, showing the aggregate receipts and disbursements of each separate fund for the quarter, in some newspaper published in the county (or if there be no newspaper, then by posting such exhibit in at least four public places in the county), immediately after the first regular term in each calendar year, or shall wilfully fail, neglect or refuse to post such exhibit made at the third regular meeting of said court in each calendar year, at the court house door, and at least three other public places in the county, the members of the court so failing, neglecting or refusing shall be fined in any sum not less than twenty nor more than one hundred dollars. [Amended by Act April 13, 1891, p. 91.]

Explanatory.—This article may be, to some extent, superseded by the later act creating the office of auditor in counties of a specified population. See *Vernon's Sayles' Civ. St.* 1914, arts. 1460, 1490, 1491.

Indictment.—Willson's Cr. Forms, 196, 197.

Art. 400. County tax assessor failing to report.—The commissioner of agriculture shall collect and publish statistics and such other information regarding such industries of this state and of other states as may be considered of benefit in developing the agricultural resources of this state. He shall cause a proper collection of agricultural statistics to be made annually, and, to this end, he shall furnish blank forms to the tax assessors of each county before the first of January of each year, including forms as to the acreage in cotton, grain and other leading products of the state, to be filled out by persons assessed for taxes, together with such instructions as will properly direct said assessor in filling them out. It is hereby made the duty of said tax assessor to return said blanks, with accurate answers, to the commissioner of agriculture on or before the first day of June following. It is further made the special duty of the said tax assessor to forward by registered mail to the commissioner of agriculture lists of the names and addresses of all ginners within their counties when asked to do so by the commissioner. Failure upon the part of any county tax assessor to make such reports as are required shall be deemed a misdemeanor, and, upon conviction thereof, such tax assessor shall be punished by a fine of not less than fifty dollars nor more than two hundred and fifty dollars. [Act 1907, p. 129.]

Art. 401. County judge, commissioner or clerk.—When the commissioners' court has compared and examined the quarterly report of the treasurer and found the same correct, it shall cause an order to be entered upon the minutes of the court, stating the approval thereof, which order shall recite separately the amount received and paid out of each fund by the treasurer since the preceding treasurer's quarterly report, and the balance of such fund, if any, remaining in the treasurer's hands, and shall cause the proper credit to be made in the accounts of the treasurer in accordance with said order; and the said court shall actually inspect and count all the actual cash and assets in the hands of the treasurer belonging to the county at the time of the examination of his said report; and, prior to the adjournment of each regular term of the court, the county judge and each of the commissioners shall make affidavit in writing that the requirements of this article have been in all things fully complied with by them at said term of said court, and that the cash and other assets mentioned in the said county treasurer's quarterly report made by said treasurer to said court, and held by him for the county, have been fully inspected and counted by them, giving the amount of said money and other assets in his hands; which affidavit of the members shall be filed with the county clerk of the county, and by him recorded in the minutes of the said county commissioners' court of the term at which the same were filed; and the same shall be published in some newspaper published in the county, if there be a newspaper published in the county, for one time, to be paid for at the same rate as other legal notices.

And any county judge, county commissioner or county clerk in this state who shall negligently or intentionally fail or refuse to comply with the requirements of this article, shall be deemed guilty of a misdemeanor, and, upon conviction thereof in a court of competent jurisdiction, shall be fined in any sum not less than twenty-five nor more than five hundred dollars. [Act 1897, p. 27.]

Indictment.—Willson's Cr. Forms, 198-200.

Art. 402. [277] Commissioners failing to attend court.—Should any member of the county commissioners' court of any county in this state wilfully fail or refuse to attend any regular meeting or term of said court at which the business or question of

levying a county tax for any purpose is to be acted on, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than two hundred nor more than five hundred dollars. [Act March 25, 1885, p. 51.]

Indictment.—Willson's Cr. Forms, 716.

Art. 403. [278] County treasurer failing to report.—If any county treasurer in this state shall fail, neglect or refuse to furnish to the commissioners' court of his county, upon demand, a tabular statement of the amount of county funds by him received from any given time, the amount on hand, the amounts paid out, to whom paid, on what account, from what fund taken, and the kinds of funds received and disbursed, he shall be fined in any sum not less than one hundred nor more than five hundred dollars, and, in addition thereto, he may be punished for contempt by said commissioners' court. [Act March 8, 1873, p. 14.]

Explanatory.—At the time the above article was carried into the revised Penal Code it had been amended by Acts 1905, p. 369, ch. 149. The article as amended reads as follows:

County treasurer failing to report.—If any county treasurer in this State shall fail, neglect or refuse to furnish to the commissioners court of this county, upon demand, a detailed statement of the amount of county funds, including permanent and available county school funds, received by him from any given time, and when and from whom received, the amount of each fund on hand, the amount paid out, when and to whom paid, on what account, and the kinds of funds received and disbursed; or shall fail, neglect or refuse to exhibit to said commissioners court upon demand, all his books and accounts from any given time, together with all vouchers relating to the same, for the inspection and auditing by said court; or shall fail, neglect or refuse to forthwith produce to said commissioners court, upon demand, all cash and other assets in his hands belonging to his county, to be counted by said commissioners court, he shall be fined in any sum not less than one hundred dollars, nor more than five hundred dollars, and, in addition thereto, he may be punished for contempt by said commissioners court. [Act 1905, p. 369, ch. 149, § 1, amending art. 278, Penal Code of 1895.]

See art. 1580, post, and note thereunder.

Indictment.—Willson's Cr. Forms, 176, 201.

Art. 404. [279] Clerk failing to keep indexes.—Any clerk of the county or district court in this state who shall fail to provide and keep in his office as part of the records thereof, well-bound alphabetical indexes and cross-indexes of the names of the parties to all suits disposed of or pending in his court, together with a reference opposite each party's name to the page of the minute book upon which is entered the final judgment in each case, shall be punished by fine not less than fifty nor more than one hundred dollars for each offense. Each month's failure shall constitute a separate offense. [Act June 21, 1876, p. 25.]

Indictment.—Willson's Cr. Forms, 202.

Art. 405. [280] Clerk permitting withdrawal of deeds when records are burned.—If the clerk of the county court of any county in this state, the land records or records of titles in which, have been burned or otherwise destroyed, or any deputy of such clerk, shall permit any deed filed for record in his office to be withdrawn within twelve months after the same is filed, he shall be fined not less than one hundred nor more than five hundred dollars, and may, in addition thereto, be imprisoned in the county jail for a period of time not to exceed one year. [Act Aug. 21, 1876, p. 252.]

Indictment.—Willson's Cr. Forms, 203.

Art. 406. [281] To what deeds not applicable.—The preceding article shall not apply to deeds executed or purporting to have been executed subsequent to the destruction of such land records or records of titles. [Act Aug. 21, 1876, p. 252.]

Indictment.—Willson's Cr. Forms, 203.

Art. 407. [282] County judge practicing in inferior courts.—Any county judge in this state, who shall practice, or offer or attempt to practice as an attorney or counselor at law, in any county court or court of a justice of the peace, shall be fined not less than one hundred nor more than five hundred dollars. [Act Aug. 19, 1876, p. 616.]

See Vernon's Sayles' Civ. St. 1914, § 334; and post, art. 408.

Where jurisdiction diminished.—This article does not apply to county judges in counties where the civil or criminal jurisdiction of the county court is diminished, in cases wherein the courts over which they preside have neither original nor appellate jurisdiction. Rev. Stat. art. 1734.

Indictment.—Willson's Cr. Forms, 204.

Art. 408. [283] May practice law in certain counties.—County judges, in those counties wherein the civil or criminal jurisdiction of the county courts has been or may hereafter be diminished, shall have the right to practice as attorneys in all justices' and county courts in cases wherein the courts over which they preside have neither original nor appellate jurisdiction; provided they are licensed lawyers. [Acts 1879, extra session, ch. 16.]

Art. 409. [284] Issuing marriage license to minor, etc.—If the clerk of any county court, or other officer authorized by law to issue a license for marriage, shall, without the consent of the parent or guardian of the party applying, issue a marriage license to a male person under the age of twenty-one years, or to a female under the age of eighteen years, he shall be fined not exceeding one thousand dollars. [Act Feb. 11, 1860, p. 101; P. C. 791a.]

Issuance of marriage license by minor as deputy county clerk, see notes under art. 312.

Explanatory.—This article is somewhat modified by the amendment in 1911 of the Civil Statutes relating to the issuance of marriage licenses. See art. 4611, Vernon's Sayles' Civ. St. 1914.

Indictment.—Willson's Cr. Forms, 205.

Art. 410. [285] Father's consent sufficient, when.—Where both parents of any minor may be alive, the consent of the father alone shall be sufficient to authorize the issuance of license to the minor. [Act Feb. 12, 1858, p. 186; P. C. 791b.]

See Vernon's Sayles' Civ. St. 1914, art. 4611.

False swearing to procure marriage license.—See notes ante art. 312.

Art. 411. Performing marriage without license.—Should any person authorized by law to celebrate the rites of matrimony in this state perform the marriage ceremony without a license first having been issued as required by law, such person shall be guilty of a misdemeanor, and, on conviction, shall be punished by fine of not less than fifty nor more than five hundred dollars. [Act 1899, p. 307.]

Indictment.—Willson's Cr. Forms, 206.

Art. 412. [286] Surveyor failing to return corrected field-notes.—If any district or county surveyor in this state, who has been paid his fees for making and recording a survey, shall fail or unnecessarily delay to correct the field-notes of such survey, upon the request of the commissioner of the general land office, or of the party interested, and return the same to the general land office when such field-notes have been returned to him by such commissioner for correction, shall be fined in a sum not less than

double nor more than four times the amount of the fees originally paid him for such survey. [Act Oct. 24, 1871, p. 12.]

Indictment.—Willson's Cr. Forms, 207.

Art. 413. [287] Surveyor failing or refusing to make survey on homestead application, etc.—Any district or county surveyor who shall fail or refuse to make a survey upon a homestead application, within one month after such application is made, or who shall fail to record the field-notes of such survey and forward certified copies thereof and all other papers relating thereto to the general land office within one month after such survey is made, or who shall fail to correct any field-notes of such surveys that may be returned to him for correction by the commissioner of the general land office, within ten days after receipt thereof, or who shall charge, demand or receive higher fees than those allowed by law for making, recording and certifying to such survey, shall be fined not less than ten and not more than one hundred dollars for each offense. [Act May 26, 1873, p. 102.]

Indictment.—Willson's Cr. Forms, 208.

Art. 414. [288] Not applicable, when.—No surveyor shall be punishable criminally for a failure or refusal to make a survey upon a homestead application, or for a failure to record and return the field-notes of any such survey, unless the fees allowed by law for such services shall have been first tendered him.

Art. 415. [289] Surveyor wilfully altering lines.—If any surveyor or other person shall, without authority of law, wilfully destroy, deface, alter or change any established line, corner or line or bearing tree of any legal survey, or shall wilfully make any new line or corner on any established legal survey, without authority of law, he shall be fined not less than one hundred nor more than five hundred dollars. [Act May 4, 1874, p. 220.]

Indictment.—Willson's Cr. Forms, 209.

Unless it is alleged that the acts constituting the offense were wilfully done, the indictment does not charge the offense defined, though it alleges that such acts were "contrary to the form of the statute, etc." *Woolsey v. State*, 14 App. 57.

Former statute.—For cutting and removing a landmark, under a statute now obsolete (*Hart. Dig.*, art. 386), see *State v. West*, 10 Tex. 553.

Art. 416. Destroying or defacing corner or lines.—Should any person in this state destroy or deface any mark or object fixed or established as a line, corner or bearing of any survey, or any permanent mark or any bench mark made or set by the topographical surveyors, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars. [Act 1907, p. 286.]

Art. 417. [289a] Failure of surveyor to survey mining claim.—Upon receiving the application for the survey of any mining claim and fee provided by law, the surveyor shall record the application, together with the affidavit; and he shall thereupon forthwith proceed to survey said claim, and forward the field-notes to the commissioner of the general land office within thirty days after filing the application, in default of which he shall pay the aggrieved party such damages as he may sustain, and, in addition thereto, shall be deemed guilty of a misdemeanor, and, on conviction, fined not less than twenty dollars nor more than one hundred dollars; and it shall be the duty of the applicants to see that the field-notes are so returned. [Act 1895, p. 198.]

Indictment.—Willson's Cr. Forms, 209a.

Art. 418. [289b] Parents, etc., refusing to answer questions of school trustees.—In taking the scholastic census provided for by law, the trustees (district school trustees) are hereby author-

ized and empowered to administer all oaths necessary to obtain a full, complete, and correct census of all children residing in their respective districts; and said trustees may require each parent, guardian, or other person having in charge any child or children to answer under oath as to the names and ages of such child or children; and any person refusing to answer such questions under oath shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than five nor more than twenty-five dollars. [Act 1893, p. 199.]

Explanatory.—When the above article was carried into the revised Penal Code it had been superseded by Acts 1897, S. S. ch. 16, which had in turn been repealed by Acts 1905, p. 285, ch. 124. The last named act was in part carried into the Revised St. 1911, as article 2774. The act of 1905, as found in the session laws is as follows:

Parents refusing to answer questions of school census trustee.—

The county superintendent of public instruction shall, on the first day of January of each year, or as soon as practicable thereafter, appoint one of the trustees of each school district, or some other qualified person, to take the scholastic census, who shall be known as the census trustee of the district. It shall be the duty of the census trustee to take, between the first day of May and the first day of June after his appointment, a census of all the children that will be over seven and under seventeen years of age on the first day of the following September, and who are residents of the school district on said first day of May, and to make report under oath to the county superintendent on or before the first day of June next thereafter. In taking the said census he shall visit each home, residence, habitation and place of abode, and shall, by actual observation and interrogation, enumerate the children thereof in the following manner: He shall use for each parent, guardian or person having control of any such children, a prescribed form showing the name, color, and nationality of the person rendering such children, the name and number of the school district in which the children reside, and the name, sex and date of birth of each child of which he is the parent or guardian, or of which he has control, and which child will be over seven and under seventeen years of age on the first day of September next following. The census trustee shall require such form to be subscribed and sworn to by the person rendering the children, and he is hereby authorized to administer oaths for this purpose. When the census trustee visits any home or house or place of abode of a family, and fails to find either the parent or any person having legal control, it shall be the duty of the census trustee to leave the prescribed census blank for the use of parents at such home or place of abode, with a note to the parent or guardian having legal control of child or children, requiring that the form be filled out, sworn and subscribed to before the census trustee, or any officer authorized to administer oaths, and that the blank, when so filled out, shall be delivered by the parent or person having legal control of the child or children to the census trustee.

Every person having control of any child which will be over seven and under seventeen years of age on the first day of September next thereafter, and who, being requested by the census trustee to prepare said form giving the information required, or to give the information necessary to enable the trustee to prepare the same, shall refuse to do so, or shall refuse to make oath to said form when filled according to his statement of facts in regard to said children, or shall fail to return the form left at his home in his absence, as above required, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five nor more

than ten dollars. And it shall be the duty of the census trustee at once to file with some justice of the peace of competent jurisdiction complaint against such person. Only children of the same family shall be listed on one form, and if one person has under his control children of different family name, he should use a separate form for each family name. [Act 1893, p. 199; Act 1897, S. S. ch. 16, repealed; Act 1905, p. 285, ch. 124, § 89.]

Indictment and information.—Willson's Cr. Forms, 720-722.

Information for refusal to answer questions must allege that defendant had children or was guardian of children of scholastic age. *Dunlap v. State*, 40 App. 591, 51 S. W. 392.

Art. 419. [Superseded by Act 1911, S. S. Ch. 11, § 23. See Art. 1513a, Penal Code, post.]

Indictment.—Willson's Cr. Forms, 723-725.

Art. 420. Tax assessor and equalization board.—Any county tax assessor who shall violate or in any respect fail to comply with any of the provisions of the law creating the state tax board, and any member of any board of equalization, and any county tax assessor, who shall modify or change, or vote to modify or change, in any manner whatsoever the finding, valuation or apportionment of any intangible assets as so fixed, determined, declared and certified by said state tax board, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred nor more than one thousand dollars. [Act 1905, ch. 146; Act 1907, p. 476.]

Art. 420a. Mailing notice of delinquent taxes; contents of notice; duplicates; furnishing statements of taxes on demand; duties of district attorney; redemption.—Not later than the first day of May, 1916, in all counties of less than 50,000 inhabitants, and not later than the first day of May, 1917, in all counties of more than 50,000 inhabitants, and not later than the first day of June in every year following thereafter, it shall be the duty of the Collector of Taxes in the various counties of this state to mail to the address of every record owner of any lands or lots situated in such counties, a notice showing the amount of taxes appearing delinquent or past due and unpaid against all such lands and lots according to the delinquent tax records of their respective counties on file in the office of the Tax Collector, and a duplicate of which shall also have been filed in the office of the Comptroller of Public Accounts of the State of Texas and approved by such officer; such notice shall also contain a brief description of the lands or lots appearing delinquent, and various sums or amounts due against such lands or lots for each year they appear to be delinquent according to such records, and it shall also be the duty of the tax collectors of the various counties in this State not later than the dates named, and every year thereafter, to furnish to the county or district attorneys of their respective counties duplicates of all such statements mailed to the tax payers in accordance with the provisions of this Act, together with similar statements, or in lieu thereof, lists of lands and lots located in such counties containing amounts of State and county taxes due and unpaid, and the years for which due, on lands or lots appearing on such records in the name of "Unknown" or "Unknown Owners," or in the name of persons whose correct address or place of residence in or out of the county said tax collector is unable by the use of due diligence to discover or ascertain; and it shall be the further duty of the tax collector to furnish on demand of any person or persons, firm or corporation, like statements with reference to any particular lot or tract of land for whatever purpose desired, which shall be in all instances certified by him with the seal of his office

attached; said notices or statements herein provided for shall also recite that unless the owner or owners of such lands or lots described therein shall pay to the tax collector the amount of taxes, interest, penalty and costs set forth in such notice within 90 days from date of notice, then, and in that event, the county or district attorney will institute suits not later than January 1, next, for the collection of such moneys, and for the foreclosure of the constitutional lien existing against such lands and lots; and whenever any person or persons, firm or corporation shall pay to the tax collector all of the taxes, interest, penalties and costs shown by the records aforesaid to be due and unpaid against any tract, lot or parcel of land for all of the years for which said taxes may be shown to be due and unpaid, then it shall be the duty of the tax collector to issue to such person or persons, firm or corporation a redemption receipt covering such payment as is now required by law. [Act 1915, p. 250, ch. 147, § 1.]

Art. 420b. Records from which notices and statements are to be made; examination of records of district court and county clerk; publication of delinquent list; duties of tax collector.—In making up the notices or statements provided for in Section 1 of this Act [Art. 420a], it shall be the duty of the tax collectors of the various counties in the State to rely upon the delinquent tax records compiled, or to be compiled, under the provisions of Article 7685 and Article 7707 of the Revised Civil Statutes of the State of Texas for 1911, which have been approved by the commissioners court of such counties and a duplicate of which has been filed in the office of the Comptroller of Public Accounts of the State of Texas, and which has or shall hereafter be approved by such State officer; and it shall be the duty of the tax collector, whenever there shall be as many as two years of back taxes that have not been included in such delinquent tax records to prepare or cause to be prepared a supplement to such records which shall be prepared in duplicate, one copy to be filed in the office of the county clerk and one copy thereof to be furnished to the Comptroller of Public Accounts subject to his approval; and whenever said supplement shall have been approved by the commissioners court and by the State Comptroller, then the tax collector shall rely thereon for the data covering delinquent taxes for said years in making out the notices or statements provided for in Section 1 of this Act [Art. 420a]; provided, said tax collector in making up said delinquent tax record and supplement, shall examine the records of the district court and the county clerk's office of his county and no tract of land shall be shown delinquent on said delinquent tax record for any year where the records of the district court or the county clerk's office show that the taxes for said year have been paid. It shall not be necessary to publish said delinquent tax records and supplements thereto if the delinquent list for each year has been advertised as required by Article 7692 of the Revised Civil Statutes of 1911. To enable the tax collector to comply with the provisions of Section 1 of this Act, it shall be the duty of the tax assessors of the various counties of the State to hereafter enter the postoffice address of each and every tax payer after his name on the tax rolls, and the Comptroller shall hereafter provide a column for the entry of such address on the sheets furnished the assessors for making up the tax rolls. [Id., § 2.]

Art. 420c. Duties of county and district attorneys to foreclose tax liens; compensation.—Not later than January 1, 1917, in counties of less than 50,000 inhabitants, and not later than Jan-

uary 1, 1918, in counties of more than 50,000 inhabitants, and not later than June 1 of each year thereafter, it shall be the duty of the county attorney, or the district attorney if there be no county attorney, to file and institute suits as otherwise provided by law for the collection of all delinquent taxes due at the time of filing such suit on land or lots situated in such county, together with interest, penalties and costs then due as otherwise provided by law; provided, that for the work of filing such suits, the county or district attorney shall receive a fee of \$5 for the first tract of land included in each suit, and \$1 for each additional tract included therein; provided, that where unimproved town lots are sued upon or included in a suit with other land or improved town lots in the same town, only one such additional fee shall be added for each twenty lots or any number less than twenty; and, provided further, that in counties containing over 50,000 inhabitants such attorney's fee shall be \$2.50 for the first tract and 50 cents for additional fees as above provided. [Id., § 3.]

Art. 420d. Same; duties mandatory; violation of law a misdemeanor.—The duties prescribed in this Act for the county tax collector, county and district attorneys and other officers, State and county, are hereby declared to be mandatory and shall not be construed as merely directory, and any county or State official who shall fail or refuse to perform the duties herein set out for him to perform shall be guilty of a misdemeanor, and shall be fined in any sum not less than \$100 nor more than \$1,000, and in addition thereto shall be subject to removal from office; provided, further, that no county or district officer charged with any duty under Title 126, Chapter 15, of the Civil Statutes, 1911, can make settlement with the commissioners court of his county or the Comptroller of this State until he shall have performed the duties required of him under said Title 126, Chapter 15, of the Civil Statutes of 1911. [Id., § 4.]

Art. 420e. Same; repeal.—Article 7707, Revised Civil Statutes of the State of Texas for 1911, and all other laws or parts of laws in conflict with this Act, are hereby expressly repealed. [Id., § 5.]

Art. 420f. Assessment of omitted property.—If any tax assessor, or the county judge, or any member of the commissioners court shall intentionally or willfully neglect, fail or refuse to perform any of the acts herein [Vernon's Sayles' Civ. St. 1914, Arts. 7710-7714] required to be done by such officers, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by fine of not less than one hundred, nor more than five hundred dollars, or by imprisonment in the county jail for not less than one month nor more than one year, or by both such fine and imprisonment. Such offenses may be prosecuted upon indictment or information in any county of the judicial district to which such county belongs other than the county in which the offense is committed. [Act 1905, p. 322, ch. 131, § 6.]

Explanatory.—The above provision [art. 420f] was omitted from the revised Penal Code, and is inserted in this compilation in view of the decision in *Berry v. State* (Cr. App.) 156 S. W. 626.

6. BARRATRY

Art. 421. [290] "Barratry" defined and punished.—If any person shall wilfully instigate, maintain, excite, prosecute or encourage the bringing of any suit or suits at law or equity in any court of this state in which such person has no interest, with the intent to distress or harass the defendant therein, or shall wilfully bring or prosecute any false suit or suits at law or equity,

of his own, with the intent to distress or harass the defendant therein, or, if any attorney at law shall seek or obtain employment in any suit or case at law, or in equity, to prosecute or defend the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such cause, or who shall, by himself or another, seek or obtain such employment by giving to the person from whom the employment is sought money or other thing of value, or who shall, directly or indirectly, pay the debts or liabilities of the person from whom such employment is sought, or who shall loan or promise to give, loan or otherwise grant money or other valuable thing to the person from whom such employment is sought, before such employment, in order to induce such employment, whether the same shall be done directly by him or through another, shall be deemed guilty of barratry, and shall, upon conviction, be punished by fine in any sum not to exceed five hundred dollars, and may in addition thereto be imprisoned in the county jail not exceeding three months. The term attorney at law shall include counselor at law; and any attorney at law violating any of the provisions of this law, shall, in addition to the penalty hereinbefore provided, forfeit his right to practice law in this state, and shall be subject to have his license revoked and be disbarred in the manner provided by law for dishonorable conduct or malpractice, whether he has been convicted for violating this law or not. [Act Aug. 21, 1876, p. 227; amended 1901, p. 125.]

Cited, *M. H. Wolf & Co. v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 144 S. W. 347.

Elements of offense.—The English Statutes against common barratry, maintenance and champerty, are not part of the common law of this state. *Bentnick v. Franklin*, 38 Tex. 458; *Stewart v. Railway Co.*, 62 Tex. 246.

Attorneys at law may contract for a contingent interest in the subject matter of litigation as compensation for professional services where it is done in good faith. *Stewart v. Railway Co.*, 62 Tex. 246.

When one wilfully "instigates," "incites" or "encourages" the institution of a suit with the intent to distress or harass, he is guilty of a misdemeanor and a contract for part of the recovery as a fee is tainted with fraud and unenforceable. *Cox et al. v. Watelsky et al.*, 27 Civ. App. 478, 66 S. W. 328.

The promise of an attorney to defray all the expenses incident to the collection of his client's claim for damages is a promise to grant or give a valuable thing to his client within the meaning of this law. *Ft. W. & D. C. Ry. Co. v. Carlock & Gillespie*, 33 Civ. App. 202, 75 S. W. 932.

If any attorney does not seek or obtain employment in a case by personal solicitation, it is not unlawful for him to loan or promise to loan or advance money to his client who has employed him to recover damages, and his contract with his client is not thereby affected. *M. K. & T. Ry. Co. v. Bacon* (Civ. App.) 80 S. W. 573.

Where attorneys having notes in their possession for collection surrendered them to their client, and thereby surrendered their lien for services rendered, and accepted as consideration a sum admittedly an insufficient remuneration for the work and the release of the lien, and a contract that, if the notes were paid, they should receive \$300 more, and, if not paid within 90 days, the notes should be returned to the attorneys for collection, and they should then receive a reasonable fee for their services, such contract was not in violation of this article. *Fish v. Sadler* (Civ. App.) 155 S. W. 1185.

Indictment.—Willson's Cr. Forms, 210.

7. COMPOUNDING CRIME

Art. 422. [291] Agreeing with offenders not to prosecute.—If any person has knowledge that an offense against the penal laws of this state has been committed, and shall agree with the offender, either directly or indirectly, not to prosecute or inform on him in consideration of money or other valuable things, paid, delivered or promised to him by such offender, or other person for him, he shall be fined not less than one hundred nor more than one thousand dollars.

Extorting money by threats of prosecution.—See arts. 1187 and 1328 and notes.

Acts constituting offense.—As distinguished from arts. 1187 and 1328, relative to extorting money or property by threats, this article seems to be predicated upon

the idea that the agreement is voluntary and entered into. *Williams v. State*, 51 App. 1, 100 S. W. 149.

One who gives a mortgage to secure payment of debt of his son, in order to save him from prosecution for a felony, is not guilty of compounding a felony, but the ones who procured the giving of such mortgage might be guilty. *Gray v. Freeman*, 37 Civ. App. 556, 84 S. W. 1110.

An agreement to the effect that one would not prosecute the son for criminal offense if his parents would convey him a tract of land is not void but might constitute a penal offense. *Medearis v. Granberry*, 38 Civ. App. 187, 84 S. W. 1071.

A contract made in consideration of compounding a criminal offense is void because in contravention of public policy as well as of this article. *Shriver v. McCann* (Civ. App.) 155 S. W. 317.

Accessories and accomplices.—See note under art. 86, ante; *Chenault v. State*, 46 App. 351, 81 S. W. 971.

Corroboration of accomplices.—See notes under Code Cr. Proc. art. 801; *Robertson v. State*, 46 App. 441, 80 S. W. 1000.

Venue.—See Code Cr. Proc., art. 258, and notes.

Indictment and information.—Willson's Cr. Forms, 211.

See *Loessin v. State*, 46 App. 553, 81 S. W. 715; *Powell v. State*, 51 App. 342, 101 S. W. 1006.

Variance.—On a trial for compounding an offense, held that there was no variance as to whether a person through whom the arrangement was made, was acting for defendant or the offender. *Powell v. State*, 51 App. 342, 101 S. W. 1006.

8. MALICIOUS PROSECUTION

Art. 423. [292] "Malicious prosecution" defined and punished.—If any person in this state, for the purpose of extorting money from another, or the payment or security of a debt due him by such other person, or with intent to vex, harass or injure such person, shall institute, or cause to be instituted, any criminal prosecution against such other person, he shall be deemed guilty of malicious prosecution, and, upon conviction, shall be fined not less than one hundred nor more than one thousand dollars, or be imprisoned in the county jail not less than one month nor more than one year.

Cited, *Hubbard v. Lord*, 59 Tex. 384.

In general.—See *Dempsey v. State*, 27 App. 269, 11 S. W. 372, 11 Am. St. Rep. 193; *Reed v. State*, 29 App. 449, 16 S. W. 99; *Blasingame v. State*, 47 App. 582, 85 S. W. 275.

Prosecutions should not be resorted to for the purpose of gratifying private malice, or to enforce the collection of debts. *Robinson v. State*, 33 Tex. 341.

Probable cause and malice.—Malice as element of murder, see notes under art. 1140.

There must be a want of probable cause for instituting or causing to be instituted the alleged malicious prosecution. *Dempsey v. State*, 27 App. 269, 11 S. W. 372, 11 Am. St. Rep. 193.

"The existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted," constitutes probable cause. *Dempsey v. State*, 27 App. 269, 11 S. W. 372, 11 Am. St. Rep. 193.

The prosecution must have been actuated by malice. Any unlawful act done willfully and purposely to the injury of another, is, as against that person, malicious. *Dempsey v. State*, 27 App. 269, 11 S. W. 372, 11 Am. St. Rep. 193.

Where the person prosecuted was guilty, the prosecution was not within the statute, though defendant was actuated by a spirit of revenge and a desire to vex, harass and injure such person. *Johnson v. State*, 32 App. 58, 22 S. W. 43.

Indictment and information.—Willson's Cr. Forms, 212.

The information need not allege that the prosecution had ended before the information was presented. *Dempsey v. State*, 27 App. 269, 11 S. W. 372, 11 Am. St. Rep. 193.

Evidence.—A verdict of acquittal in the prosecution instituted by accused is not competent evidence against him. *Reed v. State*, 29 App. 449, 16 S. W. 99.

Instructions.—The courts should define malice and instruct in regard to the want of probable cause. *Reed v. State*, 29 App. 449, 16 S. W. 99.

Civil liability.—See *Vernon's Sayles' Civ. St.* 1914, pp. 1095, 1343, 1432, 2447, 2533.

9. FALSE PERSONATION

Art. 424. [293] Falsely pretending to be an officer.—Any person who shall falsely assume or pretend to be a judicial or executive officer of this state, or a justice of the peace, sheriff, deputy sheriff, constable or any other judicial or ministerial officer of any county in the state, and shall take upon himself to act as

such, shall be punished by imprisonment in the county jail for a term not exceeding six months, or by fine not exceeding five hundred dollars. [Act Nov. 12, 1866, p. 201.]

Officers personated.—It seems that an indictment will lie for falsely personating a minister of the gospel, but it must expressly aver that the accused was not a minister. *Young v. State*, 35 Tex. 114.

A notary public must be confirmed by the senate, but if he acts officially under an appointment and commission, without confirmation, honestly believing that he has a right to do so, he is not liable criminally. *Brown v. State*, 43 Tex. 478.

A policeman is an executive officer within the purview of this article. *Ex parte Preston*, 72 App. 77, 161 S. W. 115.

Intent.—See *Burnsides v. State*, 51 App. 399, 102 S. W. 118.

It is not the intention of this article to punish one who honestly believes that he is entitled to the office in which he assumes to act. The ordinary test of criminality is the criminal intent or guilty knowledge, and in this offense such intent or knowledge is an essential constituent. The provisions of the Code as to mistake do not apply to offenses of this character. *Brown v. State*, 43 Tex. 478.

Mistake.—See notes under art. 46, ante.

Indictment.—Willson's Cr. Forms, 213.

An indictment which alleges that branch pilots are executive officers of the State is bad. *Petterson v. State* (Cr. App.) 53 S. W. 100.

An indictment charging defendant with pretending to be sheriff of a county, in that he pretended to be J. and acted as such officer is not supported by proof that he represented himself to be the sheriff without representing himself to J., who was the sheriff. *Butts v. State*, 47 App. 494, 84 S. W. 586.

That the complaint charged that defendant "unlawfully, willfully, and falsely assumed and pretended," etc., to be a deputy sheriff, while the information only charged that he "unlawfully and falsely assumed and pretended," etc., was not a fatal variance. *Brown v. State* (Cr. App.) 170 S. W. 714.

Instructions.—The court need not require that defendant's act should have been wilfully done, nor define "wilful," though criminal intent and guilty knowledge are elements of the offense. *Brown v. State* (Cr. App.) 170 S. W. 714.

10. BADGES, UNLAWFUL WEARING

Art. 425. Badges, unlawful wearing.—Any person who shall wilfully and without due authority use or wear the badge, label or button or other emblem of the United Confederate Veterans, United Sons of Confederate Veterans, United Daughters of the Confederacy, Grand Army of the Republic, Women's Relief Corps, the Benevolent and Protective Order of Elks of the United States of America, the Ancient, Free and Accepted Masons, the Independent Order of Odd Fellows, the Knights of Pythias, the Woodmen of the World, any labor organization, or any order, society or organization in the state of Texas, or who shall use or wear the same to obtain aid or assistance or patronage thereby within this state, unless he shall be entitled to use or wear the same under the rules and regulations of the United Confederate Veterans, United Sons of Confederate Veterans, the United Daughters of the Confederacy, Grand Army of the Republic, Women's Relief Corps, the Benevolent and Protective Order of Elks of the United States of America, the Ancient, Free and Accepted Masons, the Independent Order of Odd Fellows, the Knights of Pythias, the Woodmen of the World, any labor organization, or any order, society or organization in the state of Texas, whose badge, label or button or other emblem was so used or worn, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding fifty dollars, or imprisonment for a term not exceeding sixty days, or both, at the discretion of the court or jury trying the case. [Act 1909, p. 134.]

Indictment.—Willson's Cr. Forms, 732j.

11. GENERAL PROVISIONS

Art. 426. [294] Wilful neglect of official duty.—If any officer of the law shall wilfully or negligently fail to perform any duty imposed on him by the Penal Code or Code of Criminal Procedure he shall, when the act or omission is not otherwise de-

fined, be deemed guilty of a misdemeanor, and be punished as prescribed in the succeeding article. [Act May 26, 1864, pp. 7, 8; P. C. 348a.]

"Succeeding article" refers to art. 430 post.

See notes under article 430 post.

Indictment.—Willson's Cr. Forms, 214.

Art. 427. Selection of jurors in certain counties.—That between the 1st and 15th days of August of each year, in all counties in this state having therein a city or cities containing a population aggregating twenty thousand (20,000) or more people, as shown by the United States census of date next preceding such action, the tax collector of such county or one of his deputies, together with the tax assessor of such county or one of his deputies, together with the sheriff of such county or one of his deputies, together with the county clerk of such county or one of his deputies, together with the district clerk of such county or one of his deputies, shall meet at the court house of such county and shall select from the list of qualified jurors of such county as shown by the tax lists in the tax assessor's office for the current year, the jurors for service in the district and county courts of such county for the ensuing year in the manner hereinafter provided. [Acts 1907, p. 269, sec. 1. Amended Acts 1911, p. 150, sec. 1.]

If any of the officers mentioned in this article shall wilfully or negligently fail to serve as herein provided, or if any of the said officers shall wilfully or negligently fail to designate one of their deputies for such service, or if, after such designation, such deputy shall wilfully or negligently fail to serve, the officer so failing to serve or to designate a deputy, or the deputy so failing to serve, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars. [Act 1907, p. 271, ch. 139, § 10.]

Cited, *Todd v. State*, 60 App. 199, 131 S. W. 606.

Constitutionality.—This law is constitutional. *Logan v. State*, 54 App. 74, 111 S. W. 1028; *Huddleston v. State*, 54 App. 93, 112 S. W. 64, 130 Am. St. Rep. 875; *Brown v. State*, 54 App. 121, 112 S. W. 80; *Smith v. State*, 54 App. 298, 113 S. W. 289; *Jones v. Same*, 54 App. 507, 113 S. W. 761; *Dallas Consol. Electric St. R. Co. v. Chase* (Civ. App.) 118 S. W. 783; *Same v. Chambers*, 55 Civ. App. 331, 118 S. W. 851; *Oates v. State*, 56 App. 571, 121 S. W. 370; *Beaver v. State*, 63 App. 581, 142 S. W. 11; *Smith v. State*, 54 App. 298, 113 S. W. 289; *Northern Texas Traction Co. v. Danforth*, 53 Civ. App. 419, 116 S. W. 148; *Razor v. State*, 57 App. 10, 121 S. W. 512.

Denial by the supreme court of a writ of error to review a decision of the court of civil appeals adjudging the validity of this article amounts to a decision that the law is valid and is conclusive on the court of civil appeals in a subsequent case. *Rice & Lyon v. Lewis* (Civ. App.) 125 S. W. 961.

This article is a "general" and not a special law, within Const. art. 3, § 56, prohibiting the passage of any local or special law regulating the summoning or impaneling of juries. *Houston Electric Co. v. Faroux* (Civ. App.) 125 S. W. 922.

Effect.—This act does not repeal the statutory provision relating to the summoning of talesmen, and where less than 24 names are drawn from the wheel the judge can order the sheriff to summon talesmen to fill up the panel. *Houston Electric Co. v. Seegar*, 54 Civ. App. 255, 117 S. W. 902, 903.

Art. 428. Putting in or taking names from wheel illegally.—If any person shall put into the wheel or take from the wheel, except at the times and in the manner provided for by law, a card or cards bearing the name or names of any person, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars. [Act 1907, p. 272.]

Art. 429. Providing penalty.—If any person shall violate any of the provisions of said law [Vernon's Sayles' Civ. St. 1914, arts. 5151-5158], or shall wilfully or negligently fail or neglect to perform any duty therein required of him, then, where no penalty is specifically imposed by the terms of said law, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof,

shall be fined in any sum not less than fifty nor more than five hundred dollars. [Id., p. 271.]

Art. 430. [295] General penalty, in the absence of any other.—Whenever, in the Penal Code or Code of Criminal Procedure, it is declared that an officer is guilty of an offense on account of any particular act or omission, and there is not in the Penal Code any punishment assigned for the same, such officer shall be deemed guilty of a misdemeanor, and shall be fined not exceeding two hundred dollars. [Act March 5, 1863, p. 12; P. C. 349.]

Drunkenness in office.—See arts. 200 to 203.

Acts covered.—Article 426 seems to refer to acts of omission rather than of commission. *State v. Kingsbury*, 37 Tex. 159. This statute covers every wilful failure or neglect to discharge an official duty, the penalty for which is otherwise not provided for; and under it, a justice could be indicted for failure to report as required by Paschal's Digest, sec. 3772, *State v. Baldwin*, 39 Tex. 155; or a sheriff for failing to properly supervise his jail, *Gordon v. State*, 2 App. 154; but intimated that for subscribing a jurat, several months after it was made, as of the day it was made, is an imprudence, and not a crime on the part of a district clerk. *Bacon v. State*, 10 Tex. 98.

Indictment.—An indictment charging a sheriff with unlawfully and negligently exercising supervision and control over the county jail held sufficient. *Gordon v. State*, 2 App. 154.

Art. 431. [296] Malfeasance, when not otherwise designated.—All offenses committed by officers of the law, when not otherwise designated, are known under the general term of malfeasance in office. [P. C. 350.]

Art. 432. [297] "Officer" defined.—By an "officer of the law" as used in the preceding article is meant any magistrate, peace officer or clerk of a court. [P. C. 351.]

Art. 433. [298] Sheriff failing to make report to adjutant general.—1. Hereafter it shall be the duty of each sheriff in this state, upon the close of any regular term of the district court in his county, or within thirty days thereafter, to make out and forward by mail to the adjutant general of this state a certified list of all persons who, after indictment for a felony, have fled from said county. Such lists shall contain the full name of each of such fugitives, with a description giving his age, height, weight, color and occupation, the complexion of skin and the color of eyes and hair, and any peculiarities in person, speech, manner or gait that may serve to identify such fugitive, so far as the sheriff may be able to give them, and shall state the offense with which such person is charged.

2. The adjutant general shall prescribe, have printed and forward to the sheriffs of the several counties the necessary blanks upon which are to be made the lists herein required.

3. Any sheriff in this state failing or refusing to make out and forward said certified lists, within the time and according to the forms herein provided for, shall be deemed guilty of official misconduct, and, upon conviction, shall be fined not less than ten nor more than one hundred dollars. [Act March 25, 1887, p. 44.]

Art. 434. Sheriff appointing deputies not allowed by law.—Any sheriff of any county of this state who shall appoint any more deputies than are provided for by law, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars; provided, further that this law shall not apply to counties having more than one district court. [Act 1903, p. 160.]

Indictment.—Willson's Cr. Forms, 175.

TITLE 9

OF OFFENSES AGAINST THE PUBLIC PEACE

Chap.	Chap.
1. Unlawful assemblies.	3. Affrays and disturbances of the peace.
2. Riots.	4. Unlawfully carrying arms.

CHAPTER ONE

UNLAWFUL ASSEMBLIES

Art.	Art.
435. "Unlawful assembly" defined.	443. To prevent the sitting of any tribunal.
436. To prevent elections.	444. To prevent the collection of taxes.
437. To prevent execution of law, etc.	445. To prevent any person pursuing his labor.
438. To effect the rescue of a capital felon.	446. To frighten any one by disguise.
439. To effect the rescue of a felon.	447. To disturb families.
440. To rescue one accused of capital felony.	448. To effect any other illegal object.
441. To rescue one accused of lesser felony.	449. Lawful meetings not included.
442. To rescue one accused of misdemeanor.	450. Lawful meetings included if the unlawful purpose is afterward agreed upon.

Article 435. [299] "Unlawful assembly" defined.—An unlawful assembly" is the meeting of three or more persons with intent to aid each other by violence, or in any other manner either to commit an offense, or illegally to deprive any person of any right, or to disturb him in the enjoyment thereof. [P. C. 355.]

McGehee v. State, 23 App. 330, 5 S. W. 222.

What constitutes offense.—Under this article and articles 445 and 451, though not per se an offense to stop the running of trains, it was an offense for two or more persons to meet and co-operate in preventing the conductor of a railroad train from pursuing his usual occupation and employment of operating such train. *McGehee v. State*, 23 App. 330, 5 S. W. 222.

There is no unlawful assembly except when it contemplates a disturbance of the peace or injury to the rights of individuals, and it cannot be composed of persons assembled to carry on their ordinary business though on a day and in a manner not authorized by law, unless their actions will in some way disturb the rights of others or the public rights. An actress traveling around the country and meeting with others on Sunday in a theatre to entertain the people is not guilty thereof. *Ex parte Jacobson*, 55 App. 237, 115 S. W. 1193.

Indictment or information.—Willson's Cr. Forms, 96, 97, 222-232.

A count of an indictment held sufficient to charge an unlawful assembly. *McGehee v. State*, 23 App. 330, 5 S. W. 222.

Indictment or information for riot must show for what purpose the rioters assembled. Failing in this allegation the information was insufficient. *Blackwell v. State*, 30 App. 672, 18 S. W. 676.

An indictment for an unlawful assembly to prevent a party by violence from having a social gathering or dance at his house, should allege that such party has a house and was giving or about to give a social gathering or dance, etc. *Follis v. State*, 37 App. 535, 40 S. W. 277.

Art. 436. [300] To prevent elections.—If the purpose of the unlawful assembly is to prevent the holding of any public election, or to prevent any particular person or number of persons from voting at a public election, the punishment shall be that which is prescribed in article 266. [P. C. 356.]

See arts. 265-269, ante.

Indictment.—Willson's Cr. Forms, 96, 97, 222-232.

Art. 437. [301] To prevent execution of law, etc.—If the purpose of the unlawful assembly be to oppose or prevent the execution or enforcement of any law of the state, or the lawful decree or judgment of a court in a civil action, the punishment shall be a fine not exceeding five hundred dollars. [P. C. 357.]

Indictment.—Willson's Cr. Forms, 224-232.

Art. 438. [302] To effect the rescue of capital felon.—If the purpose of the unlawful assembly be to effect the rescue of a pris-

oner lawfully convicted of a capital offense, the punishment shall be a fine not exceeding one thousand dollars. [P. C. 358.]

Indictment.—Willson's Cr. Forms, 226-232.

Art. 439. [303] To effect the rescue of a felon.—If the purpose of the unlawful assembly be to effect the rescue of any person lawfully convicted of a felony less than capital, the punishment shall be a fine not exceeding five hundred dollars. [P. C. 359.]

Indictment.—Willson's Cr. Forms, 226-232.

Art. 440. [304] To rescue one accused of capital felony.—If the purpose of the unlawful assembly be to rescue any person arrested or imprisoned for a capital offense before trial, the punishment shall be a fine not exceeding five hundred dollars. [P. C. 360.]

Indictment.—Willson's Cr. Forms, 227-232.

Art. 441. [305] To rescue one accused of lessor felony.—If the purpose of the unlawful assembly be to rescue any person lawfully arrested or imprisoned for any felony less than capital, the punishment shall be a fine not exceeding three hundred dollars. [P. C. 361.]

Indictment.—Willson's Cr. Forms, 227-232.

Art. 442. [306] To rescue one accused of misdemeanor.—If the purpose of the unlawful assembly be to rescue a person accused of a misdemeanor, the punishment shall be a fine not exceeding two hundred dollars. [P. C. 362.]

Indictment.—Willson's Cr. Forms, 227-232.

Art. 443. [307] To prevent the sitting of any tribunal.—If the purpose of the unlawful assembly be to prevent or oppose the sitting of any lawful court, board of arbitrators or referees, the punishment shall be a fine not exceeding one thousand dollars. [P. C. 362a.]

Indictment.—Willson's Cr. Forms, 228-232.

Art. 444. [308] To prevent the collection of taxes.—If the purpose of the unlawful assembly be to prevent the collection of taxes, or other money due the state, the punishment shall be a fine not exceeding five hundred dollars. [P. C. 363.]

Indictment.—Willson's Cr. Forms, 229-232.

Art. 445. [309] To prevent any person from pursuing his labor.—If the purpose of the unlawful assembly be to prevent any person from pursuing any labor, occupation or employment, or to intimidate any person from following his daily avocation, or to interfere in any manner with the labor or employment of another, the punishment shall be by fine not exceeding five hundred dollars.

Cited, *McGehee v. State*, 23 App. 330, 5 S. W. 222.

Indictment.—Willson's Cr. Forms, 231, 232.

For indictment under which conviction was sustained, see *McGehee v. State*, 23 App. 333, 5 S. W. 222.

An information for preventing one from performing the duties of his lawful employment, was defective for failure to set forth the nature of the "lawful employment." *Luter v. State*, 32 App. 69, 22 S. W. 140.

An indictment charging accused with assembling with others to prevent E. from operating a certain farm, by illegally depriving him of the right to employ Mexicans as laborers thereon, was defective in failing to allege that E. then and there had in his employ, or was about to employ, Mexicans as laborers on his farm. *Bradford v. State*, 40 App. 632, 51 S. W. 379.

Art. 446. [310] To frighten any one by disguise.—If the purpose of the unlawful assembly be to alarm and frighten any person by appearing in disguise, so that the real persons so acting and assembling cannot be readily known, and by using language or gestures calculated to produce in such person the fear of bodily

harm, the punishment shall be by fine not exceeding five hundred dollars. [Act Nov. 6, 1871, p. 19; P. C. 363a.]

Indictment.—Willson's Cr. Forms, 231, 232.

Art. 447. [311] To disturb families.—If the purpose of the unlawful assembly be to repair to the vicinity of any residence, and to disturb the inmates thereof by loud, unusual or unseemly noises, or by the discharge of firearms, the punishment shall be by fine not exceeding five hundred dollars. A residence may be either a public or private house.

See *Ex parte Jacobson*, 55 App. 237, 115 S. W. 1193.

Indictment.—Willson's Cr. Forms, 232.

Art. 448. [312] To effect any other illegal object.—If the purpose of the unlawful assembly be to effect any illegal object other than those mentioned in the preceding articles of this chapter, all persons engaged therein shall be liable to fine not exceeding two hundred dollars. [P. C. 364.]

Indictment.—Willson's Cr. Forms, 232.

An indictment alleging that defendants unlawfully met in a certain county, with intent, by violence, to deprive a certain person of his right to have a dance at his house, sufficiently laid the venue, without averring that the house was in that county; the unlawful meeting being the gist of the offense. *Follis v. State*, 37 App. 535, 40 S. W. 277.

An indictment alleging that defendants met to aid each other, by violence, to deprive a certain person of his right to have a dance at house, is fatally defective, unless it charges that such person had a house and was giving, or intending to give, a dance there. *Follis v. State*, 37 App. 535, 40 S. W. 277.

Art. 449. [313] Lawful meetings not included.—No public meeting for the purpose of exercising any political, religious or other lawful rights, no assembly for the purpose of lawful amusement or recreation, is within the meaning of this chapter. [P. C. 365.]

See *Ex parte Jacobson*, 55 App. 237, 115 S. W. 1193.

Inclusion of similar offenses.—This article must be held to include similar offenses, as the articles which precede it. The act of entertaining or amusing an audience is not and cannot constitute a disturbance of the peace, and has none of the elements of such an offense, whether done on Sunday or any other day. *Ex parte Jacobson*, 55 App. 237, 115 S. W. 1196.

Art. 450. [314] Lawful meetings included if unlawful purpose is afterward agreed on.—Where the persons engaged in any unlawful assembly, met at first for a lawful purpose, and afterward agreed upon an unlawful purpose, they are equally guilty of the offense defined in article 435. [P. C. 376.]

CHAPTER TWO

RIOTS

Art.		Art.	
451.	"Riot" defined.	460.	Preventing any person from labor.
452.	To prevent collection of taxes.	461.	Disturbing residence.
453.	To prevent execution of law.	462.	Committing any other illegal act.
454.	Rescue of felon under death sentence.	463.	Half penalty when object not accomplished.
455.	Rescue of felon less than capital.	464.	All participants guilty.
456.	Rescue of one convicted of misdemeanor.	465.	Where assembly was at first lawful.
457.	Rescue of one imprisoned for capital offense.	466.	One may be prosecuted before others are arrested.
458.	Felony less than capital.	467.	Indictment, requisites of.
459.	Misdemeanor.	468.	Duty of officers in case of riot.

Article 451. [315] "Riot" defined.—If the persons unlawfully assembled together do or attempt to do any illegal act, all those engaged in such illegal act are guilty of riot. [P. C. 366.]

See *McGehee v. State*, 23 App. 330, 5 S. W. 222.

Compound offense.—Riot is a compound offense—there must be both an unlawful act to be done and an unlawful assembly of more than two persons. *Blackwell v. State*, 30 App. 672, 18 S. W. 676.

Indictment.—Willson's Cr. Forms, 96, 233.

See post, arts. 466, 467.

Indictment or information for riot must show for what purpose the rioters assembled that the court may judge whether it was lawful or not, and it must state in terms that the defendants "did unlawfully assemble together." It must likewise state the illegal act which was the object of the meeting, for a riot is a compound offense—there must not only be an unlawful act to be done, but an unlawful assembly of more than two persons. *Blackwell v. State*, 30 App. 672, 18 S. W. 676.

Defective in this case in not alleging that the parties "did unlawfully assemble together," or that, having lawfully assembled they afterwards joined in the commission of an unlawful act. *Blackwell v. State*, 30 App. 672, 18 S. W. 676.

Art. 452. [316] To prevent collection of taxes.—If the purpose of a riot be to prevent the collection of taxes or other money due the state, any person engaged therein shall be punished by fine not less than two hundred dollars and not exceeding one thousand dollars, although the purpose of the riot be not effected; and if such illegal purpose be effected, in addition thereto, imprisonment in the county jail not exceeding two years may be added. [P. C. 367.]

Indictment.—Willson's Cr. Forms, 38, 233, 233a.

See *Blackwell v. State*, 30 App. 672, 18 S. W. 676, which, with reference to essentials of indictment, applies to arts. 465, 466, 469, 470 and 472.

Art. 453. [317] Execution of law.—If any person, by engaging in a riot, shall prevent the execution or enforcement of any law of the state, or the lawful decree or judgment of any court in a civil cause, he shall be punished by imprisonment in the county jail not exceeding two years, and by fine not less than two hundred nor more than one thousand dollars. [P. C. 368.]

Indictment.—Willson's Cr. Forms, 233b, 233c.

Art. 454. [318] Rescue of felon under sentence of death.—If any person, by engaging in a riot, shall rescue another, lawfully convicted or under lawful sentence of death, he shall be punished by imprisonment in the penitentiary not less than five nor more than ten years. [P. C. 369.]

Indictment.—Willson's Cr. Forms, 233d.

Art. 455. [319] Rescue of felon less than capital.—If any person, by engaging in a riot, shall rescue any prisoner, lawfully convicted of felony less than capital, or lawfully under sentence for such offense, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years. [P. C. 370.]

Art. 456. [320] Rescue of one convicted of misdemeanor.—If any person, by engaging in a riot, shall rescue any prisoner, lawfully convicted of a misdemeanor, he shall be punished by imprisonment in the county jail not less than six months nor more than two years.

Art. 457. [321] Rescue of one imprisoned for capital felony.—If any person, by engaging in a riot, shall rescue any prisoner, lawfully arrested or imprisoned for a capital felony, he shall be punished by confinement in the penitentiary not less than two nor more than seven years. [P. C. 371.]

Art. 458. [322] Felony less than capital.—If any person, by engaging in a riot, shall rescue any prisoner, lawfully arrested or imprisoned for a felony less than capital, he shall be punished by confinement in the penitentiary not less than two nor more than seven years. [Act Feb. 12, 1858, p. 164; P. C. 372.]

Indictment.—Willson's Cr. Forms, 233d.

Art. 459. [323] Misdemeanor.—If any person, by engaging in a riot, shall rescue any prisoner, lawfully arrested or imprisoned

for a misdemeanor, he shall be punished by confinement in the county jail not less than six nor more than twelve months.

Indictment.—Willson's Cr. Forms, 233d.

Art. 460. [324] Preventing any person from labor.—If any person, by engaging in a riot, shall prevent any other person from pursuing any labor, occupation or employment, or intimidate any other person from following his daily avocation, or interfere in any manner with the labor or employment of another, he shall be punished by confinement in the county jail not less than six months nor more than one year.

Indictment.—Willson's Cr. Forms, 233e.

Art. 461. [325] Disturbing residence.—If any person, by engaging in a riot, shall disturb the inmates of any residence by loud, unusual or unseemly noises, or by the discharge of fire-arms in the immediate vicinity of such residence, he shall be punished by fine not less than fifty nor more than five hundred dollars. A residence may be either a public or private house.

Indictment.—Willson's Cr. Forms, 233f.

Art. 462. [326] Committing any other illegal act.—If any person, by engaging in a riot, shall commit any illegal act other than those mentioned in the ten preceding articles, he shall, in addition to receiving the punishment affixed to such illegal act by other provisions of this Code, be also punished by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars. [P. C. 373.]

Indictment.—An indictment which charges that defendant "then and there engaged in a riot with other parties, [named.] who had assembled at the residence of T., and he did then and there, acting with said other parties, disturb the inmates of T.'s residence by the discharge of firearms," is fatally defective, in that it fails to allege facts showing either an unlawful assemblage and its purpose, or a lawful assemblage and a subsequent agreement of the persons so assembled to commit an unlawful act. *Blackwell v. State*, 30 App. 672, 18 S. W. 676.

Evidence.—Testimony of accomplices of a meeting to run Mexican laborers out of the country held not sufficiently corroborated by other evidence that notices were afterwards posted on certain premises, without evidence as to who posted them. *Holman v. State*, 40 App. 628, 51 S. W. 379.

Art. 463. [327] Half penalty when object not accomplished.—When the purpose of the riot was to effect any of the illegal acts mentioned in the preceding articles of this chapter, and such unlawful object is not effected, the punishment may, in the discretion of the jury, be diminished to half the penalty affixed to such riot where the illegal purpose was effected. [P. C. 374.]

For construction of articles 463 to 467, see *Blackwell v. State*, 30 App. 372, 18 S. W. 676.

Art. 464. [328] All participants guilty.—A person engaged in any riot, whereby an illegal act is committed, shall be deemed guilty of the offense of riot, according to the character and degree of such offense, whether the said illegal act was in fact perpetrated by him, or by those with whom he is participating. [P. C. 375.]

See note under article 463 ante.

Art. 465. [329] Where assembly was at first lawful.—Where the assembly was at first lawful, and the persons so assembled afterward agree to join in the commission of an act which would amount to riot, if it had been the original purpose of the meeting, all those who do not retire when the change of purpose is known are guilty of riot. [P. C. 377.]

See note under article 463 ante.

Art. 466. [330] One may be prosecuted before others are arrested.—Any one person engaged in an unlawful assembly or riot may be prosecuted and convicted before the others are arrested, but the indictment or information must state, and it must be prov-

ed on the trial, that three or more persons were assembled, and their names given, if known; if not known, it must be so alleged. [P. C. 378.]

See notes under articles 451 and 463 ante.

Art. 467. [331] Indictment, requisites of.—The indictment or information must likewise state the illegal act which was the object of the meeting, or which they proceeded to do, if the assembly was originally lawful. [P. C. 379.]

See notes under articles 451 and 463 ante.

Indictment.—Willson's Cr. Forms, 233a.

Art. 468. [332] Duty of officers in case of riot.—If any persons shall be unlawfully or riotously assembled together, it shall be the duty of any magistrate or peace officer, so soon as it may come to his knowledge, to go to the place of such unlawful or riotous assembly and command the persons assembled to disperse; and all who continue so unlawfully assembled, or engaged in a riot, after being warned to disperse, shall be punished by the addition of one-half the penalty to which they would otherwise be liable, if no such warning had been given. [P. C. 380.]

CHAPTER THREE

AFFRAYS AND DISTURBANCES OF THE PEACE

Art.	Art.
469. "Affray" defined.	472. "Public place" defined.
470. Disturbance of the peace.	473. Shooting in public place.
471. Vulgar or profane language over telephone.	474. Horse racing on public road or street.

Article 469. [333] "Affray" defined.—If any two or more persons shall fight together in a public place, they shall be punished by fine not exceeding one hundred dollars. [O. C. 381.]

Nature and elements of offense.—It is not essential to constitute an affray that the fighting should be by consent of the parties concerned. It is not the mere fighting of the persons engaged that constitutes the gravamen of this offense. It is because the violence is committed in a public place and to the terror of the people that the crime is called an affray, instead of an assault and battery. Hence, one of the parties engaged in an affray may be convicted and punished, whilst the other may be acquitted. *Saddler v. State*, Dallam, 610.

An affray is a State offense and can also be made a city offense, and when one is convicted in a city court he cannot be prosecuted in a State court for the same offense. *Ex parte Freeland*, 38 App. 321, 42 S. W. 295.

If there be actual fighting in a public place a participant who used rough and insulting language before the fray and fought zealously while fighting is not innocent because he entered into it reluctantly. *Pollock v. State*, 32 App. 29, 22 S. W. 19.

When two persons by mutual consent engage in a personal encounter in a public road in presence of a third party it is an affray. *Piper v. State* (Cr. App.) 51 S. W. 1118.

A private residence may become a "public place," within the statute, by throwing it open to the public generally for a single entertainment, and persons who engage in a fight during such entertainment may be prosecuted under the statute. *Austin v. State*, 57 App. 611, 124 S. W. 639.

A conviction for engaging in an "affray" does not bar a prosecution for "aggravated assault" under a plea of former jeopardy, nor does the doctrine of carving apply. *McCraw v. State* (Cr. App.) 163 S. W. 967.

Indictment.—Willson's Cr. Forms, 234.

The indictment need not allege that any fighting took place; "did make an affray" is sufficient. *State v. Washington*, 19 Tex. 128, 70 Am. Dec. 323 (but this was before the Code). It may charge generally that defendant "did fight with one C. in a public place," without further particularity. *Shelton v. State*, 30 Tex. 431. See an approved precedent. *State v. Billingsley*, 43 Tex. 93.

An indictment charging that, at a time and place stated, being a public place, the parties "did unlawfully and willingly fight together though not according to common law precedents conformed to the statute and was sufficient." *State v. Billingsley*, 43 Tex. 93.

It is sufficient to charge fighting in a public place without describing it. *Shelton v. State*, 30 Tex. 431, *Tummins v. State*, 18 App. 13, and *Dailey v. State*, 27 App. 569, 11 S. W. 636, relating to indictments under the statute forbidding playing cards in a public place hold that unless the place is among those enumerated in the statute the facts constituting it a public place should be alleged. And see notes to post, art. 472.

Art. 470. [334] Disturbance of the peace.—If any person shall go into or near any public place, or into or near any private house, and shall use loud and vociferous or obscene, vulgar or indecent language, or swear or curse, or yell or shriek, or expose his person, or rudely display any pistol or other deadly weapon, in a manner calculated to disturb the inhabitants of such public place or private house, he shall be fined in any sum not exceeding one hundred dollars. [Amended by Act Feb. 19, 1883, p. 12.]

See, *Lumbkin v. State*, 12 App. 341; *McCandless v. State*, 21 App. 411, 2 S. W. 811; *Wallace v. State*, 33 App. 178, 26 S. W. 68.

Disturbance of occupant of residence or guest therein.—The language used must be of a character calculated to disturb the inhabitants of the house, and if not near enough for them to hear it conviction could not be sustained. *Elliott v. State*, 37 App. 514, 40 S. W. 234.

That defendant was mistaken in the house was no defense; he appearing there at night, rattling the door, demanding admittance and threatening to kill the inhabitants. *Garrett v. State*, 49 App. 235, 91 S. W. 577.

The court should instruct to the effect that the jury must believe that defendant not only cursed and swore near the alleged private residence, but that he did so in a manner calculated to disturb the inhabitants thereof. *Jones v. State*, 50 App. 210, 96 S. W. 29; *Crain v. State*, 53 App. 617, 111 S. W. 150.

In a prosecution for swearing in a public place at the residence of a person named, where people were assembled for the purpose of innocent amusement, much of the evidence tended to show that the persons present were there by invitation. Held, that the court should have given a requested charge that if the place charged in the indictment was not a public place, but a private residence, and those assembled were there by invitation, then accused would be entitled to an acquittal. *Austin v. State*, 57 App. 623, 124 S. W. 636.

Inhabitants protected by statute.—Those occupying residences abutting a public street are inhabitants of such street. *Keller v. State*, 25 App. 325, 8 S. W. 275.

Houses protected.—A private house in course of construction, so nearly finished that the owner was moving into it was within the protection of the statute. *Crain v. State*, 53 App. 617, 111 S. W. 150.

Rudely displaying pistol or deadly weapon.—Holding a pistol in the hand and firing it into the air is "rudely" displaying it. And it was not necessary that the assembly disturbed saw the pistol. *Gozy v. State*, 34 App. 146, 29 S. W. 783.

Rudely displaying and firing a pistol at or near a private residence in a manner calculated to disturb the inhabitants is an offense, though done by a peace officer. *Russell v. State*, 38 App. 590, 44 S. W. 159.

A club may or may not be a deadly weapon, but it is not a deadly weapon within the meaning of this statute. This article is confined to pistols or guns or weapons of like character usually understood to be deadly. *Fuller v. State*, 48 App. 300, 87 S. W. 832.

That one who displayed a pistol in a road dedicated to public use owned the fee in the road did not prevent his conviction under this and article 472. *Jones v. State*, 60 App. 56, 130 S. W. 1001.

Where, in a prosecution for rudely displaying a deadly weapon in a manner calculated to disturb the inhabitants of a private residence, it appeared that the tenant who had occupied the residence and loaded all his household articles preparatory to moving off the premises, but had not left the premises when trouble arose, and defendant displayed his rifle in such a way as to frighten the tenant's wife and children, the place was properly found to have been the "private residence" of the tenant at the time of the offense. *Ward v. State* (Cr. App.) 167 S. W. 343.

Indecent exposure of person.—In a trial for indecent exposure in a public place while taking a bath in a livery stable, it was error to refuse to instruct that accused was not guilty unless he acted in such way as tended to disturb persons rightfully at the stable, but unqualified instructions that accused would not violate any law by taking a bath in the stable, or if he did not expose his person outside the stable, were properly refused. *Taylor v. State* (Cr. App.) 145 S. W. 599.

Indictment and information, and proof thereunder.—Willson's Cr. Forms, 235.

An information for disturbance of the peace, brought under this article need not set out the abusive language used, and an information based on article 1020, if it charges that defendant, in the presence and hearing of another, did curse or abuse such person, under circumstances reasonably calculated to provoke a breach of the peace, is sufficient. In so far as the case of *Elkins v. State*, 26 App. 220, 9 S. W. 491, announces or intimates a rule different from that above stated, that case is disapproved. *Foreman v. State*, 31 App. 477, 20 S. W. 1109.

The allegation that defendant acted "in a manner calculated to disturb the inhabitants of said public place" sufficiently avers that people were assembled in the place named. *Parsons v. State*, 33 App. 540, 28 S. W. 204.

An information describing the place as St. Paul's Church should have been quashed where the complaint described it as St. Paul's Methodist Church. *Landrum v. State*, 37 App. 666, 40 S. W. 737.

An indictment alleging that defendant "willfully and unlawfully" displayed a deadly weapon to wit a certain club of wood was insufficient in the use of the word willfully, and in description of the weapon. *Fuller v. State*, 48 App. 300, 87 S. W. 832.

Where the indictment alleges that defendant did rudely display a gun, it is fatally defective if it does not allege that the gun was a deadly weapon. *Jones v. State*, 50 App. 210, 96 S. W. 29.

Failure to allege that the gun displayed was a deadly weapon was a fatal defect. *Jones v. State*, 50 App. 210, 96 S. W. 29.

This article provides various and sundry means by which its provisions may be violated. The pleader must select the particular means which the accused used, and the proof will be confined to the allegations. *Lockett v. State*, 50 App. 590, 99 S. W. 1011.

An indictment, charging that defendant and two others unlawfully met together with the intent to aid each other to repair to the vicinity of the residence of V. and there disturb her and two others, inmates thereof, by loud and unseemly noise, and that they did then and there by such means disturb V. and the other inmates of such residence, in the enjoyment of her and their right to peace, etc., was fatally defective, for failure to allege that V. owned any residence, or occupied a house as a residence, and that defendants went to her residence. *Bales v. State*, 57 S. W. 874, 122 S. W. 874.

Where the information charged accused with having used loud and vociferous, vulgar, and indecent language, proof that accused came to the house of complainant and said, "By God, I am not going to come back here any more; I want you to pay me now," there was a fatal variance. *Snodgrass v. State*, 61 App. 654, 136 S. W. 57.

Sufficiency of evidence of offense.—Evidence that defendant while with some drinking companions fired at a dog and then into a house, hitting a woman therein sustained a conviction. *Spiars v. State*, 40 App. 437, 50 S. W. 947.

Evidence held to sustain conviction for swearing and using obscene language in a manner calculated to disturb the inhabitants of a private house. *Mercer v. State*, 52 App. 321, 106 S. W. 365.

Evidence in a prosecution for a breach of the peace held sufficient to sustain a conviction. *Robertson v. State*, 63 App. 268, 140 S. W. 105.

Evidence held insufficient to sustain a conviction of indecent exposure in a public place in violation of this article and article 472 post. *Taylor v. State* (Cr. App.) 145 S. W. 599.

Opinion evidence.—See notes under C. C. P. art. 783.

Charge on weight of evidence.—See notes under C. C. P. art. 735.

Art. 471. Vulgar or profane language over telephone.—If any person shall use any vulgar, profane, obscene or indecent language over or through any telephone in this state, he shall be guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than five dollars nor more than one hundred dollars. [Act 1909, p. 87.]

Language within statute.—The use of the expression "son of a bitch" in a conversation over the telephone falls within the provision of this article, the term "indecent" meaning "unfit to be heard, offensive to modesty and delicacy," the term "vulgar" signifying "lack of cultivation or refinement," while the term "obscene" means "offensive to chastity or modesty," for the expression used is not merely rude and uncouth. *Darnell v. State* (Cr. App.) 161 S. W. 971.

Defenses.—It is no defense to a prosecution under this article that prosecuting witness could have disconnected the phone and thereby refused to listen to more than one single utterance by defendant. *Taylor v. State* (Cr. App.) 177 S. W. 82.

Complaint and information.—Willson's Cr. Forms, 235.

A complaint and information following the language of the statute is sufficient, though there is no allegation that the language was heard by any one or that it disturbed any one. And the commission of the offense is sufficiently alleged before filing of the complaint and information by the use of the word "heretofore." Where the complaint and information alleged the use of obscene language over a telephone on the 16th day of March, the testimony of the sole witness for the state, on a trial had on the 24th day of March, that defendant used the language charged on the former date, did not show that the offense was not committed before the complaint and information was filed. And an allegation that defendant used obscene language over a telephone describing it by number and giving the ownership thereof, is sufficient though not specifically alleging that it was in operation and capable of being actually used. So also an allegation that the telephone belonging to the Southwestern Telegraph & Telephone Company, is sufficient without alleging that such company was a copartnership, corporation, joint-stock company, or individual firm. *Taylor v. State* (Cr. App.) 177 S. W. 82.

Art. 472. [335] "Public place" defined.—A public place, within the meaning of the two preceding articles, is any public road, street or alley of a town or city, or any inn, tavern, store, grocery or workshop, or place at which people are assembled, or to which people commonly resort for purposes of business, amusement, recreation or other lawful purpose. [Amended by Act Feb. 19, 1883, p. 12.]

Validity of statute.—This statute is not void for uncertainty or inaccuracy. *Sisk v. State*, 35 Tex. 495.

Public place.—The following have been held to be public places: A public street. *King v. Brown*, 100 Tex. 109, 94 S. W. 328; a grand jury room, during ses-

sion. *Murchison v. State*, 24 App. 8, 5 S. W. 508. While the following have been held not to be public places: A private room in a hotel. *Bordeaux v. State*, 31 App. 37, 19 S. W. 603; a livery stable. *Metzger v. State*, 31 App. 11, 19 S. W. 254; a gin. *Dailey v. State*, 27 App. 569, 11 S. W. 637; a boarding house. *Huffman v. State*, 49 App. 319, 92 S. W. 419.

A private residence may become a "public place," within the statute, by throwing it open to the public generally for a single entertainment, and persons who engage in a fight during such entertainment may be prosecuted under the statute. *Austin v. State*, 57 App. 611, 124 S. W. 639.

That one who displayed a pistol in a road dedicated to public use owned the fee in the road did not prevent his conviction under this article and article 470. *Jones v. State*, 60 App. 56, 130 S. W. 1001.

Indictment.—Any facts making a place public which is not so per se must be alleged and shown. *Dailey v. State*, 27 App. 569, 11 S. W. 637; *Huffman v. State*, 49 App. 319, 92 S. W. 419.

Sufficiency of evidence.—Evidence held insufficient to sustain a conviction of indecent exposure in a public place in violation of this article and article 470 ante. *Taylor v. State* (Cr. App.) 145 S. W. 599.

Art. 473. [336] Shooting in public place.—If any person shall discharge any gun, pistol or fire-arms of any description, or shall discharge any cannon cracker or torpedo on or across any public square, street or alley in any city, town or village, or in any street, or within one hundred yards of any business house, in this state, he shall be fined in any sum not exceeding one hundred dollars. [Act Nov. 12, 1886, p. 210; Amended Act 1901, p. 300.]

Police shooting dogs under city ordinance.—City ordinance authorizing the shooting by police of unmuzzled dogs found at large is unconstitutional as contrary to this section and such policeman was not protected thereby. *Lynn v. State*, 33 App. 153, 25 S. W. 779.

Indictment.—Willson's Cr. Forms, 238.

Art. 474. [337] Horse racing on public road and street.—Any person who shall run, or be in any way concerned in running any horse race in, along or across any public square, street or alley in any city, town or village, or in, along or across any public road within this state, shall be fined in a sum not less than twenty-five nor more than one hundred dollars. [Act May 19, 1873, pp. 83, 84.]

Cited, *Essery v. State*, 72 App. 414, 163 S. W. 17.

Indictment.—Willson's Cr. Forms, 239-241.

If the indictment is against two persons, it must allege they ran together, *State v. Catchings*, 43 Tex. 654; but the objection comes too late on appeal, if it does not so allege. *King v. State*, 3 App. 7.

CHAPTER FOUR

UNLAWFULLY CARRYING ARMS

Art.	Art.
475. Unlawfully carrying arms.	478. Not applicable to whom.
476. Not applicable, when, and to whom.	479. Arrest without warrant; officer failing to arrest, punishable.
477. Carrying arms in church or other assembly.	480. Not applicable to frontier counties.

Article 475. [338] Unlawfully carrying arms.—If any person in this state shall carry on or about his person, saddle, or in his saddle bags, any pistol, dirk, dagger, slung shot, sword cane, spear, or knuckles made of any metal or any hard substance, bowie knife, or any other knife manufactured or sold for purposes of offense or defense, he shall be punished by fine of not less than one hundred dollars nor more than two hundred dollars, or by confinement in the county jail not less than thirty days nor more than twelve months, or by both such fine and imprisonment. [Amended by Act Jan. 30, 1889; amended 1905, p. 56.]

Cited, *Dowell v. State*, 58 App. 482, 126 S. W. 871.

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| 1. Constitutional right to keep and bear arms. | 5. Character and condition of arms. |
| 2. Constitutionality of statute. | 6. Knuckles. |
| 3. Validity of municipal ordinance. | 7. Slung shot. |
| 4. Carrying in general. | 8. Intent of accused. |
| | 9. Carrying in vehicle. |

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| 10. Carrying at religious gathering. | 16. Carrying from place of gift or purchase. |
| 11. Carrying in pursuit of thieves. | 17. Delivering to buyer. |
| 12. Carrying on range or while hunting stock. | 18. Carrying to place for repair and return. |
| 13. Carrying while hunting. | 19. Carrying borrowed weapon home and returning same to lender. |
| 14. Carrying between residence and place of business. | 20. Jurisdiction of offense. |
| 15. Finding pistol and carrying the same home. | 21. Indictment. |

1. **Constitutional right to keep and bear arms.**—The constitutional right “to keep or bear arms in self-defense or in the defense of the state,” is no defense to an indictment for carrying a pistol contrary to the statute. *Lewis v. State*, 7 App. 567.

A requested charge in a prosecution for unlawfully carrying a pistol that under the state and federal Constitutions every person is allowed to carry arms in the protection of his personal property, and, if accused was in a difficulty and had been physically injured and carried the pistol to protect himself, the jury should acquit, was properly refused as an incorrect statement of the law. *Greer v. State*, 62 App. 81, 136 S. W. 451.

2. **Constitutionality of statute.**—A portion of this article which as formerly enacted declared that the weapon shall be forfeited was held unconstitutional. *Hudeburgh v. State*, 38 Tex. 535; *Jennings v. State*, 5 App. 298.

This statute is constitutional. It does not conflict with section 23 of the Bill of Rights of this state, which declares that “every citizen shall have the right to keep and bear arms in the lawful defense of himself or the state; but the legislature shall have power by law to regulate the wearing of arms with a view to prevent crime.” *State v. Duke*, 42 Tex. 455; *English v. State*, 35 Tex. 478, 14 Am. Rep. 374; *Lewis v. State*, 7 App. 567.

Act Jan. 30, 1889, entitled “An act to amend an act [passed February 24, 1887] entitled ‘An act to amend art. 318, chapter 4, title 9, of the Penal Code,’” is not invalid because of the failure of the first section thereof to express the same intention. *Ratigan v. State*, 33 App. 301, 26 S. W. 407.

3. **Validity of municipal ordinance.**—See notes under C. Cr. Proc. art. 965.

An ordinance against carrying arms is to be construed with the statute and was not void because it omitted the exceptions as to travelers and persons in imminent danger. *Ex parte Boland*, 11 App. 159.

4. **Carrying in general.**—Carrying in his hand was a carrying about his person within the meaning of the statute. *Woodward v. State*, 5 App. 296.

Where the information charged the carrying of a pistol, and the evidence related to no other weapon, a charge including every other weapon mentioned in this article was error, and it was error also for the charge to include the provisions of the following article where the evidence raised no question under it. *Tracy v. State*, 27 App. 496, 11 S. W. 484.

For a correct charge of the court hereon. *McNeil v. State*, 29 App. 48, 14 S. W. 393.

For charge of the court held erroneous, see *Ratigan v. State*, 33 App. 301, 26 S. W. 407.

The owner of a pistol who had placed it in the keeping of a prospective purchaser held not guilty of unlawfully carrying it on taking it back to his place of business though he did not go directly, and exhibited the pistol when assaulted. *Fields v. State*, 45 App. 563, 78 S. W. 932.

Carrying a pistol in a basket held in the hand is a carrying on or about the person. *Johnson v. State*, 51 App. 648, 104 S. W. 902.

Where defendant went into a saloon, took a pistol from the saloon keeper, walked a distance of 80 or 90 feet to the back door of the saloon, and fired it off, and returned and handed it to the saloon keeper, he was guilty of carrying a pistol. *Schuh v. State*, 58 App. 165, 124 S. W. 908.

Where defendant, riding with a marshal, after the marshal had hitched his horse in front of a house and gone into the house, seeing the marshal’s pistol on the buggy seat, took it only for the purpose of handing it to the marshal, and carried it into the house, and at once delivered it, he was not guilty of an unlawful carrying. *Fuller v. State*, 58 App. 449, 126 S. W. 569.

It was error to refuse to instruct that accused did not unlawfully carry a weapon, if he took it during an encounter between others, and retained it only to prevent a shooting. *Baker v. State*, 61 App. 193, 134 S. W. 686.

Accused who had won at gaming, and who was then robbed and made to give the money back to the loser, and who knew that a police officer was within calling distance or within as easy reach as his own arms, was not justified in going 700 yards to his residence returning with a pistol and himself attempting to arrest the robber, and was guilty of unlawfully carrying a pistol. *Wilson v. State* (Cr. App.) 151 S. W. 804.

The fact that accused claimed to have received a pistol by pledge, erroneously believing that he could carry it into a public assemblage for the purpose of meeting the pledgor and having it redeemed, would not be a defense to a charge of unlawfully carrying a pistol; he having in fact intended to carry the weapon on his person, and merely having been ignorant of the legal consequences. *Crain v. State* (Cr. App.) 153 S. W. 155.

One informed of an insult to his wife by a third person may not carry a pistol while going to see the third person to demand an explanation of his conduct. *Austin v. State* (Cr. App.) 165 S. W. 462. But if defendant had just traded for the pistol he might stop on his way home and demand the explanation. *Quinn v. State*, 50 App. 209, 96 S. W. 33.

Where defendant and others were together, and one of the others handed defendant a pistol and defendant fired it, and thereafter immediately dropped the pistol or returned it the defendant was not guilty of unlawfully carrying a pistol. *Guy v. State* (Cr. App.) 170 S. W. 303; *Fretwell v. State*, 52 App. 499, 107 S. W. 837.

5. Character and condition of arms.—To carry the barrel and stock of a revolver, without having the cylinder also, is not an offense. *Cook v. State*, 11 App. 19.

This article is simply to punish one for the carrying of such weapons as it specifically designates, and is not a measure of the right of self defense or criterion by which parties arming themselves to provoke a difficulty may be charged; thus a pocket knife might not be within this article, but yet be an arming of one's self. *Lahue v. State*, 51 App. 159, 101 S. W. 1008.

The inhibition of carrying arms under this article is not the criterion of a party arming himself to provoke a difficulty with a view of using the arms he carries. One may arm himself with a pocket knife, if it is of such dimensions as to be used as a deadly weapon. (*Thornton v. State* (Cr. App.) 65 S. W. 1105, conflicting with this rule, is overruled.) *Lahue v. State*, 51 App. 159, 101 S. W. 1011.

In a prosecution for carrying arms, the state's witnesses testified that accused dropped something in the street which looked like a pistol; but they did not examine it, or look at it carefully, and accused claimed that it was a cylinder or wooden pistol, which would not revolve, and could not be fired, and gave a reason for carrying such a pistol which had some probability. Held, that the evidence raised the issue whether the thing carried was a weapon prohibited by statute. *Blackburn v. State*, 58 App. 48, 124 S. W. 666.

It is illegal to carry a pistol, though the cylinder is carried in one pocket and the frame is carried in another. *Crain v. State* (Cr. App.) 153 S. W. 155.

It is unlawful to carry a pistol which is even broken or out of repair, if it can be still used for shooting, unless it is being carried to be repaired. *Raspberry v. State* (Cr. App.) 160 S. W. 682.

Under the statute declaring that any person who shall carry on or about his person any pistol shall be punished, it is unlawful to carry a pistol, whether a new one or an old one, loaded or unloaded, or a good or an inferior one. *Steele v. State* (Cr. App.) 166 S. W. 511.

6. Knuckles.—Under the old law using only the term "brass knuckles" the courts held that any metal knuckle was included; the term used being merely the name of the kind of weapon intended. *Harris v. State*, 22 App. 677, 3 S. W. 477; *Louis v. State*, 36 App. 52, 35 S. W. 377, 61 Am. St. Rep. 332.

The words "knucks" and "knuckles" mean the same thing; a bail bond using the former was good. *Mills v. State*, 36 App. 71, 35 S. W. 370.

An acquittal of one charged with carrying brass knuckles bars a prosecution for carrying "knuckles made of metal, same being a hard substance." *Morrison v. State*, 38 App. 392, 43 S. W. 113.

7. Slung shot.—A short stick loaded with metal and with a string attached to fasten to the wrist was not a slung shot. *Geary v. State*, 53 App. 38, 108 S. W. 379.

8. Intent of accused.—Intent is an essential. *Waddell v. State*, 37 Tex. 354.

Intent being an essential element of the offense, it is competent in cases involving the intent for the accused to prove his general reputation. *Short v. State*, 25 App. 379, 8 S. W. 281; *Lann v. State*, 25 App. 495, 8 S. W. 650, 8 Am. St. Rep. 445.

It is not the object of the law to punish a person for carrying a weapon when it clearly appears he did not intend to violate the law. *Lyle v. State*, 21 App. 153, 17 S. W. 425.

An instruction that if defendant had no intention to violate the law he was not guilty was properly refused. *Cordova v. State*, 50 App. 353, 97 S. W. 87.

If defendant did not know that the pistol was in his pocket or on his person he could not be convicted. *Miles v. State*, 52 App. 561, 108 S. W. 378, 124 Am. St. Rep. 1106.

The intention of accused is immaterial; the statute not making the intent an element of the offense. *Farris v. State*, 64 App. 524, 144 S. W. 249.

9. Carrying in vehicle.—If one had a pistol on his person while in a buggy he would be guilty. *Prewitt v. State*, 49 App. 323, 92 S. W. 800.

The defendant and another person were going along a road in a wagon; a rabbit was seen by them; the other person handed defendant a pistol; the defendant got out of the wagon and shot at the rabbit; held, these facts did not constitute an offense. *Sanderson v. State*, 23 App. 520, 5 S. W. 138.

Carrying a pistol in a wagon and holding it in the hand while engaged in looking for a flask in the wagon was not within the statute. *Cathey v. State*, 23 App. 492, 5 S. W. 137.

When the evidence showed that the pistol was in a box in a wagon in which defendant and others were riding, it was error to instruct the jury that carrying a pistol in a box within easy reach was carrying it on or about his person. *Hardy v. State*, 37 App. 511, 40 S. W. 299.

One placing a pistol in a wagon driven by him was not guilty of carrying it on or about his person, but when on a difficulty arising he took the pistol and climbed out of the wagon he was guilty. *Thompson v. State*, 48 App. 146, 86 S. W. 1033.

Defendant was guilty of carrying a pistol, where he got out of the vehicle he was driving, and at the point of a pistol, theretofore kept under the seat of the vehicle, forced another party to desist from a difficulty with the latter's wife. *Hill v. State*, 50 App. 619, 100 S. W. 384.

Where accused drove to the residence of his uncle with a pistol in the bottom

of his buggy, and from there toward the home of prosecutrix, and at a distance from the road leading to her home he took the pistol and discharged it, and then put it back in the bottom of the buggy and then went to the home of the prosecutrix, and from that point to his own home, without removing the pistol he was guilty of carrying a pistol. *De Friend v. State* (Cr. App.) 153 S. W. 881.

In a prosecution for carrying of a pistol on or about the person, evidence as to carrying a pistol either in his buggy or under the cushion of the seat held to establish the offense. *Mayfield v. State* (Cr. App.) 170 S. W. 308.

10. **Carrying at religious gathering.**—It was no defense, that in a prosecution under this article it was shown that the pistol was carried at a religious gathering in violation of art. 477. *Veal v. State*, 58 App. 340, 125 S. W. 919.

11. **Carrying in pursuit of thieves.**—Doubted whether it be criminal to carry a pistol when in pursuit of thieves in possession of stolen property. *Lyle v. State*, 21 App. 153, 17 S. W. 425.

The fact that defendant was seeking to arrest one whom he had been informed had stolen his cotton did not justify him in carrying a pistol. *Smith v. State*, 47 App. 469, 85 S. W. 1078.

12. **Carrying on range or while hunting stock.**—Carrying deadly weapons into the woods while hunting stock or on the range for the purpose of killing a beef is a violation of the act of April 12, 1871, permitting carrying "at his own place of business." *Baird v. State*, 38 Tex. 599; *Reynolds v. State*, 1 App. 616.

13. **Carrying while hunting.**—Carrying a pistol while hunting is a violation of the law. *Titus v. State*, 42 Tex. 578.

14. **Carrying between residence and place of business.**—See note on Premises and Places of Business, art. 476.

15. **Finding pistol and carrying the same home.**—To find and carry a pistol to one's home is not an offense. *Mangum v. State*, 15 App. 362.

Where a person, upon finding a pistol in a store, fired it off, and it was immediately taken away from him, his act is not punishable as a violation of the statute against carrying weapons on and about the person. *Hicks v. State* (Cr. App.) 145 S. W. 938.

One who finds a pistol and carries it to his residence does not thereby violate the law against the carrying of weapons. *Meeking v. State* (Cr. App.) 148 S. W. 309.

16. **Carrying from place of gift or purchase.**—Purchasing a pistol in a town, and carrying it from store to store in quest of ammunition for it, and then carrying it a distance of fifteen miles to defendant's home, was not an offense. *Waddell v. State*, 37 Tex. 354.

The object is to prohibit the carrying of weapons for unlawful offensive or defensive purposes and a prosecution against a purchaser of a pistol for carrying it home was frivolous. *Christian v. State*, 37 Tex. 475.

The transportation of a pistol home from the place of purchase, by the party purchasing it, although defendant discharged it while so transporting it, does not constitute an offense. *West v. State*, 21 App. 427, 2 S. W. 810.

One trading for a pistol might stop on his way home to demand explanation of an alleged insult to his wife. *Quinn v. State*, 50 App. 209, 96 S. W. 33.

A purchaser of a pistol need not carry it home by the most direct route. *Granger v. State*, 50 App. 488, 98 S. W. 836.

In rebuttal of defendant's contention that he was carrying the pistol home after it was given to him, the state may show that he turned aside to engage in a personal difficulty. *Griffin v. State*, 54 App. 374, 112 S. W. 1066.

Accused, temporarily residing in a city under a physician's treatment, had his room in the city hospital, but often spent his nights with a friend, rooming in one of the physician's offices. While spending the night with the friend, the latter gave accused a pistol, and the following morning accused carried the pistol while going by the nearest practicable route to the hospital. Held, that accused was not guilty of carrying a pistol in violation of the statute. *Kellum v. State* (Cr. App.) 147 S. W. 870.

17. **Delivering to buyer.**—Carrying pistol to deliver it to another person to whom defendant had sold it is no offense. *Upton v. State*, 33 App. 231, 26 S. W. 197.

Where defendant goes to a certain place to deliver a pistol which he had sold he has the right to carry the pistol to the place of delivery, and, if he does not find the purchaser there, to return with it to his house; but if he fails to find such person at the place of delivery, and then goes about other business, carrying the pistol with him, it is a violation of the law. *Snider v. State* (Cr. App.) 43 S. W. 84.

One carrying a pistol to deliver to the purchaser does not violate the pistol law by using the pistol when engaging in a difficulty with another party. *Head v. State* (Cr. App.) 175 S. W. 1062.

18. **Carrying to place for repair and return.**—Carrying a pistol home from a repair shop is not a violation of the law though it was discharged during the trip. *Pressler v. State*, 19 App. 52, 53 Am. Rep. 383.

The carrying a pistol to a shop to have it repaired is not a violation of this article. *Mangum v. State* (Cr. App.) 90 S. W. 31.

A person who carries a broken pistol in a useless condition to a blacksmith for repairs, and finds the blacksmith absent, is not guilty of carrying a pistol when he takes it away with him and later returns with it to the blacksmith. *Fitzgerald v. State*, 52 App. 265, 106 S. W. 365, 124 Am. St. Rep. 1095.

Where defendant, being in G., and living in X., 15 miles from G., having a pistol, which he claimed he had taken from his home to have repaired, and which, being repaired, he was taking home, went to T., 19 miles from G., and 12 or 15 miles from X., and there spent the night, exhibiting and firing the pistol on the street, the law that, while he had a right to carry the pistol from G. through T. to his home, he did not have the right to go about the streets of T. with the pistol

exhibiting and firing it off, was sufficiently given by a charge that he would have a right to carry a pistol from where he had it repaired to his home by a direct or reasonable and practicable route, but he could not claim the benefit of such exemption, if he stopped over in his journey, and engaged in business, pleasure, or disturbance of the peace; and if he was on his way home by a reasonable and practicable route, and had not digressed from his purpose of carrying the pistol home, he was not guilty, but otherwise if he was not on his way home, and had digressed from his common purpose and intent. *Brent v. State*, 57 App. 411, 123 S. W. 593.

It is lawful for a person to carry a pistol, which is out of repair and will not shoot, to a repairer to be fixed, and to carry it home therefrom. *Britton v. State*, 57 App. 583, 124 S. W. 684, 136 Am. St. Rep. 1000.

One who had loaned another his pistol may go to the home of the latter to get it, and carry it to a gunsmith for repairs, without violating the pistol law; but he may not turn aside, and go on the premises of a third person, and draw the pistol on a person there. *Roberts v. State*, 60 App. 111, 131 S. W. 321.

A requested charge in a prosecution for unlawfully carrying a pistol that the law authorizes a pistol to be carried to a shop for repairs and taken home when repaired was properly refused as inapplicable, where the place to which accused carried the pistol was not a repair shop, and it was not taken there for that purpose. *Greer v. State*, 62 App. 81, 136 S. W. 451.

It is reversible error, in a prosecution for unlawfully carrying a pistol to refuse to submit to the jury the defense that defendant was taking the pistol to get it repaired, as he testified, where a special charge on that point was requested. *Buckley v. State*, 70 App. 550, 157 S. W. 765.

Where accused was carrying a pistol to his home from the place where it had been repaired, the facts that he accidentally discharged it, and that on his journey home he retraced his steps for a short distance to make a small purchase, will not render him guilty of the offense of unlawfully carrying a pistol. *Morris v. State* (Cr. App.) 163 S. W. 709.

19. **Carrying borrowed weapon home and returning same to lender.**—"While defendant would have the right to carry a borrowed pistol home, it would be his duty, while he carried the pistol, to proceed home with it in a reasonable time, and upon the commonly pursued route; and he would not have the right to make unnecessary departure from his direct route, or to visit places with his pistol not necessary to be visited in the exercise of the right that the law gives him." *Corдова v. State*, 50 App. 253, 97 S. W. 87.

For the borrower to carry the pistol to his home is no violation of the statute. *Brooks v. State*, 52 App. 417, 107 S. W. 354.

While one could legally return a pistol which he has borrowed by carrying it on his person, he is not excused, on the ground that he was returning it to the lender, if he went into a public assembly with it, instead of directly proceeding to return it. *Veal v. State*, 58 App. 919, 125 S. W. 919.

In a prosecution for carrying a pistol, where the evidence showed that the defendant loaned his pistol to a certain woman, who carried it to her room, and, when he was arrested, he was there to take it home, it was error to charge that, if defendant "bona fide loaned" the pistol he would have a right to carry it home, as, if he loaned the pistol, he had a right either to send or go for it, whether it was loaned in good faith or not. *Engman v. State*, 61 App. 496, 135 S. W. 565.

Where accused, charged with carrying a pistol, claimed that he borrowed the pistol as he was leaving town after having a difficulty with a third person, and that while en route to his wagon to go home he met the third person and the difficulty was resumed, a charge that before the jury could give accused the benefit of his defensive matter they must find beyond a reasonable doubt that he had a legal right to carry the pistol was erroneous, for the reasonable doubt was in his favor as he could borrow the pistol and carry it home, and if after borrowing it he was en route to his wagon to go home, the mere fact that he had a difficulty did not affect his right. *Davis v. State* (Cr. App.) 175 S. W. 1073.

20. **Jurisdiction of offense.**—The penalty prescribed by the former statute was a fine of not less than twenty-five, nor more than one hundred dollars. It was held that the county courts and justices of the peace had concurrent jurisdiction of the offense. *Woodward v. State*, 5 App. 296; *Jennings v. State*, 5 App. 298; *Solon v. State*, Id. 301; *Leatherwood v. State*, 6 App. 244; *Chaplin v. State*, 7 App. 87. But the amended article has changed the penalty for this offense, fixing it at a fine of not less than twenty-five nor more than two hundred dollars, and confinement in the county jail not less than twenty nor more than sixty days. This deprives justices of the peace of jurisdiction of this offense. Const. art. 5, sec. 19; C. C. P., art. 106; *Tuttle v. State*, 1 App. 364.

A city ordinance prescribing a lower penalty than the statute, is void, and proceedings thereunder in the mayor's court are a nullity. *McLain v. State*, 31 App. 558, 21 S. W. 365.

21. **Indictment.**—Willson's Cr. Forms, 242.

See notes to art. 476.

Art. 476. [339] **Not applicable, when, and to whom.**—The preceding article shall not apply to a person in actual service as a militiaman, nor to a peace officer or a policeman, or person summoned to his aid, nor to a revenue or other civil officer engaged in the discharge of official duty, nor to the carrying of arms on one's own premises or place of business, nor to persons traveling, nor to one who has reasonable ground for fearing an unlawful attack

upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party about to make such attack, upon legal process. [Act April 12, 1871, p. 25.]

See notes under the preceding article.

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1. **Officers in general.**—Certain officers exempt from operation of statute. Lann v. State, 25 App. 495, 8 S. W. 650, 8 Am. St. Rep. 445; West v. State, 26 App. 99, 9 S. W. 485; Blair v. State, 26 App. 387, 9 S. W. 890.

An officer of one city has no right to carry a pistol in another city, when he is not engaged in official duty in the latter. Ray v. State, 44 App. 158, 70 S. W. 23.

The burden was upon one charged with unlawfully carrying a pistol to establish the defense that he was at the time a civil officer engaged in the discharge of his duty, and had a reasonable fear of an unlawful attack upon his person, and that the danger was so imminent as not to permit the arrest of the threatening party, which circumstances article 476, provides shall relieve from liability, especially in view of article 52, requiring accused to establish the facts relied on to excuse or justify the prohibited act. Hunter v. State (Cr. App.) 166 S. W. 164.

2. **Deputies and de facto officers.**—It is no defense that defendant is a deputy marshal of another town. Corley v. State (Cr. App.) 33 S. W. 975; Munn v. State (Cr. App.) Id. 977.

The exception as to peace officers permits a deputy sheriff of one county to carry arms in another county. Irvine v. State, 18 App. 51. And it is immaterial whether he was on private or official business. Clayton v. State, 21 App. 343, 17 S. W. 261.

This article does not authorize a deputy sheriff to carry a pistol when outside the county of his appointment and not on official business. Ransom v. State (Cr. App.) 165 S. W. 932.

If a party honestly believes that he is an appointed officer, and with that belief carries the weapon, he is not guilty. Carroll v. State (Cr. App.) 57 S. W. 94.

That defendant carried a pistol as a deputy constable under the apparent authority conferred by a constable, who, however, under Rev. St. 1911, arts. 7137, 7138, was without authority to appoint deputies, was a mistake of law, which was no defense to a prosecution for carrying a pistol. Johnson v. State (Cr. App.) 164 S. W. 833.

A defendant who had been deputed special constable by a justice of the peace could not, it was held, justify under such authority five months thereafter. Snell v. State, 4 App. 171.

Whether or not a de facto officer is within the exception seems to be an open question. Rainey v. State, 8 App. 62, 34 Am. Rep. 756.

At the time a defendant was seen with a pistol he declared that he was deputy sheriff of the county, and had been over in another county after a horse thief. Held, that, as the declaration accompanied the act of carrying the pistol, it was *res gestæ*, and therefore competent evidence, and as it was a reasonable explanation of his having the pistol, and was not controverted, it was sufficient to show that he was a civil officer engaged in the discharge of an official duty at the time of the alleged offense, and was therefore not culpable for having the pistol on his person. Irvine v. State, 18 App. 51.

A deputy post master violates the statute by carrying a pistol while going about attending his personal affairs. Love v. State, 32 App. 85, 22 S. W. 140.

While one charged with carrying a pistol cannot defend on the ground that he is a deputy sheriff where his appointment bears no indorsement and he resided in another county at the time of the appointment and made no pretense of being an officer under arrest, such person would not be guilty if he carried the pistol under a reasonable and honest belief that he was a deputy sheriff. Blair v. State, 26 App. 387, 9 S. W. 890; Lyle v. State, 21 App. 153, 17 S. W. 425.

The defense, in a prosecution for carrying a pistol, offered in evidence the commission of the sheriff of the county, appointing the accused a special deputy to pursue and capture horse thieves. This evidence, upon objection made thereto by the state, was rejected. Held, error. The commission, whether legal or illegal, being of a nature calculated to lead the accused to believe that he had the right to carry the pistol, should have been admitted. It is also suggested that a citizen, who is not an officer, when in hot pursuit of a thief, or of stolen property, would not violate the law in carrying a pistol. Lyle v. State, 21 App. 153, 17 S. W. 425.

The authority of a person deputized to execute process expires with the attainment of that object. O'Neal v. State, 32 App. 42, 22 S. W. 25.

A person deputized to make an arrest by a magistrate, in the absence of a peace officer may carry arms. Jenkins v. State, 47 App. 224, 82 S. W. 1036.

One deputized to arrest a person could not justify carrying arms while on a different mission in another direction. *Brown v. State*, 51 App. 423, 102 S. W. 406.

One cannot justify the carrying of arms on his appointment as special deputy sheriff, it having been given, when the sheriff had more deputies than the law allowed, on his statement to the sheriff that his father had been having trouble with neighbors, and that he wanted a commission to protect his father, and the appointment being expressly without pay and without authority to serve papers, and he never having taken any oath of office, and the commission not being recorded; this being a mere subterfuge. *Patton v. State*, 61 App. 352, 135 S. W. 556.

A deputy sheriff's belief that he had a right to carry a pistol in a county other than that of his appointment was a mistake of law, and not of fact, and did not relieve him from criminal liability. *Ransom v. State* (Cr. App.) 165 S. W. 932.

Under Rev. St. 1911, art. 7125, authorizing sheriffs to appoint one deputy for each justice precinct in addition to the precinct where the county site is situated, where a sheriff appointed two deputies in such a precinct, one of whom was the active deputy, who made arrests and served process, the appointment of the other was illegal, and he acquired no right by virtue of such appointment to carry a pistol, under this article. *Ransom v. State* (Cr. App.) 165 S. W. 932.

3. Persons summoned to aid of officer.—"Or person summoned to his aid" was added by the revision of 1879. Under the original act, which was silent on this point, it was held that such person was protected in carrying arms so long as he was under the command of the officer, notwithstanding the officer deflected from his course and visited places not specified in the writs. *O'Conner v. State*, 40 Tex. 27.

A person summoned by an officer legally authorized to execute a search warrant, to attend him armed as one of the posse to assist in its execution, can not be convicted for carrying deadly weapons while thus employed, though he may, in company with the officer, and while under his orders, have gone in a direction which he was not required to go in executing the process. *O'Conner v. State*, 40 Tex. 27.

Where, on a trial for carrying a pistol, accused relied on the fact that his father, a constable, had asked him to keep the pistol as he might need accused to help him preserve order, evidence that a third person had a mixed reputation and would fight was properly excluded. *Gentry v. State*, 61 App. 619, 136 S. W. 50.

4. State ranger.—A mere appointment by the adjutant-general without having taken the oath, etc., did not constitute defendant a ranger. *Ringer v. State*, 33 App. 180, 26 S. W. 69.

5. Penitentiary or convict guard.—A sergeant or under officer in the penitentiary service is, while in charge of a convict camp and engaged in duties incidental thereto, a "civil officer engaged in the discharge of official duty" within the meaning of article 476, and as such is expressly exempt from amenability for carrying a pistol. *Carmichael v. State*, 11 App. 27.

A penitentiary guard comes within the meaning of civil officer and is exempt from liability while on duty. *West v. State*, 26 App. 99, 9 S. W. 485.

While a state convict guard is a "civil officer," and may carry a pistol in the discharge of his duties, he cannot carry it when not in the discharge of his duties. *Veal v. State*, 58 App. 340, 125 S. W. 919.

6. City attorney.—When the defense is that defendant is city attorney, the evidence must, in order to justify him, show that he is city attorney and at the time actually in discharge of his duties. *Brownlee v. State*, 35 App. 213, 32 S. W. 1043.

A city attorney is not a civil officer entitled to carry arms. *Featherston v. State*, 35 App. 612, 34 S. W. 276, 938.

7. Soldier of United States army.—A soldier in the United States army, in actual discharge of his duties, is not amenable under this statute. *Lann v. State*, 25 App. 495, 8 S. W. 650, 8 Am. St. Rep. 445.

8. Rural mail carrier.—A rural mail carrier is merely an employé in the postal department of the United States and is not an officer within this and the preceding article. *Lattimore v. State* (Cr. App.) 145 S. W. 588.

9. Travelers.—Question for jury. See notes under C. C. P. art. 786.

Because a party meets another in a public road, and, after some conversation, got into an altercation and drew a derringer (from the bottom of his buggy), it does not necessarily follow that he was carrying the pistol unlawfully. *Maxwell v. State*, 38 Tex. 170. The statute was not intended to prevent persons traveling in carriages or buggies upon the public highway from placing arms in their vehicle for self-defense, or even from carrying them from place to place for an innocent purpose; and a traveler is not compelled to lock up his arms where they would be useless to him if attacked. *Id.*; *Smith v. State*, 42 Tex. 464. This was under the original act, which required persons traveling to keep their arms in their baggage.

One taking a wagon and going on a trip taking two or three days is a traveler. *Smith v. State*, 42 Tex. 464.

When found carrying a pistol, the defendant was en route with a herd of cattle driving the same from another county to a market in the state of Kansas. Held, that he was a traveler. *Rice v. State*, 10 App. 288. Under the former statute the exception as to a traveler was qualified by requiring that the weapon should be carried with his baggage. *Chaplin v. State*, 7 App. 87; *Lewis v. State*, 2 App. 26; *Woodward v. State*, 5 App. 296; *Smith v. State*, 42 Tex. 464. But as the law now is, he may carry the weapon on or about his person. *Chaplin v. State*, 7 App. 87. The accused when he carried the pistol on his person was going from his home in the county to the county site of said county, intending to return to his home the next day. Held, he was not a traveler. *Darby v. State*, 23 App. 407, 5 S. W. 90; *Campbell v. State*, 28 App. 44, 11 S. W. 832.

One starting on a journey did not lose his right to go armed by going out of his way to send a doctor to his home. *Irvin v. State*, 51 App. 52, 100 S. W. 779.

One going from his home to the county seat a distance of about 18 miles, to return next day is not a traveler. *Darby v. State*, 23 App. 407, 5 S. W. 90.

A fugitive from justice is not a traveler. *Shelton v. State*, 27 App. 443, 11 S. W. 457, 11 Am. St. Rep. 200.

A traveler can not claim the benefit of the exemption when he stops in his journey and engages in business or pleasure. *Stilly v. State*, 27 App. 445, 11 S. W. 458, 11 Am. St. Rep. 201; *Navarro v. State*, 50 App. 326, 96 S. W. 932; *Colson v. State*, 52 App. 138, 105 S. W. 507; *Ratigan v. State*, 33 App. 301, 26 S. W. 407.

A person going from his temporary residence to his permanent home in another county is a traveler. *Campbell v. State*, 28 App. 44, 11 S. W. 832.

Defendant had traveled a distance of twenty-five miles and was preparing to camp out; held, that he was a traveler. *Price v. State*, 34 App. 102, 29 S. W. 473.

When the defense is that defendant was a traveler and not liable, the burden is upon him to show that he was a traveler. *Blackwell v. State*, 34 App. 476, 31 S. W. 380.

Defendant borrowed a pistol to carry to his brothers in another county, but several days later he was seen in the county of his residence at a public gathering with the pistol; held, that he could not justify himself on the ground that he was a traveler. *Brownlee v. State*, 35 App. 213, 32 S. W. 1043.

One going to a place fifteen miles from home is not a traveler. *Stanfield v. State* (Cr. App.) 34 S. W. 116.

A person returning home from a trip one hundred and fifty miles distant is a traveler. *Thomas v. State*, 37 App. 142, 38 S. W. 1011. As is a railroad porter travelling that distance on his daily run. *Williams v. State*, 44 App. 494, 72 S. W. 380.

A person going a distance of eighteen miles is not a traveler. *Creswell v. State*, 37 App. 335, 39 S. W. 372, 935.

The evidence showed that defendant lived in another county than that of the prosecution, and about thirty-five miles from where he was seen with the pistol, that he went to the place and returned immediately home; held, that he was a traveler. *Bain v. State*, 38 App. 635, 44 S. W. 518.

Mere delay in pursuing a journey does not deprive one of the defense of traveling. *Irvine v. State*, 51 App. 52, 100 S. W. 779.

Evidence of intoxication was admissible in connection with trips to and from a saloon to show that defendant who claimed to be a traveler was not such when arrested. *Colson v. State*, 52 App. 138, 105 S. W. 507.

That defendant, while driving home from a business trip to another county, stopped in the road for a few minutes at a creditor's request to discuss the debt, did not deprive him of his character as a traveler. *Hunt v. State*, 52 App. 477, 107 S. W. 842.

An auditor on a railroad train engaged in his business of collecting tickets and fares of passengers is a traveler. *Barker v. Satterfield* (Civ. App.) 111 S. W. 438.

In a prosecution for carrying brass knucks about accused's person, conflicting evidence held to sustain a conviction on the theory that accused, who was a traveler, had the weapon on his person when he left his wagon and went into town. *Alexander v. State* (Cr. App.) 122 S. W. 387.

One who was a traveler, within the statute, could not carry concealed weapons around a town in his pocket while he was making purchases, but could leave them in his wagon on going out in town, and place them in his pocket again on returning to the wagon, without violating the law. *Alexander v. State* (Cr. App.) 122 S. W. 387.

A cessation of a journey on some legitimate business incident to the journey would not make one cease to be a person traveling. *Campbell v. State*, 58 App. 349, 125 S. W. 893, 21 Ann. Cas. 447.

A person going from one county to another, or contemplating a journey, about to board a train, is a person "traveling." *Campbell v. State*, 58 App. 349, 125 S. W. 893, 21 Ann. Cas. 447.

On a prosecution for carrying a pistol, the defense was that accused was a traveler, and he testified that on arriving at the city of W. at 4 o'clock in the evening he went with a friend to a hotel. On cross-examination he testified that he registered, but did not remember whether he registered, or whether his friend registered for both. It appeared from the register of the hotel that the name of accused was not upon it. Held, that it was error not to permit accused to prove that when he went to the hotel he requested his friend to register for him, and that he believed that he had complied with his request; such testimony being explanatory of a matter involving his veracity as a witness, and it appearing that if he had not stopped over night at the hotel, as he claimed, his whereabouts from the time he reached W. until the next day would be unaccounted for. *Ward v. State*, 61 App. 604, 136 S. W. 48.

A traveler, in going the nearest practicable route from a hotel to a permanent boarding house, would have a right to carry his pistol. *Ward v. State*, 61 App. 604, 136 S. W. 48.

Where a traveler was going from a hotel to a permanent boarding place on a direct line and on the way stopped to dine with a friend, it was not such a diversion from his line of travel as would amount to a violation of law because of his carrying a pistol. *Ward v. State*, 61 App. 604, 136 S. W. 48.

Where a merchant, charged with carrying a pistol, testified that he was going out to see some customers, who were owing him, his testimony disclosed that he was not a traveler within the meaning of the Code. *Hickman v. State*, 71 App. 483, 160 S. W. 382.

One who goes from a point in one county to a point in another is a "traveler" within the meaning of the law, which allows a traveler to carry arms; but after he arrives at his destination, secures a room, and remains there all night, he ceased to be a traveler, and, if he carries his pistol next morning while going

around the town, he is guilty of unlawfully carrying it. *Ballard v. State* (Cr. App.) 167 S. W. 340.

In a prosecution for unlawfully carrying a pistol, evidence held sufficient to warrant the judge in finding that the defendant, who had gone across the line to another state to procure some whisky, and was then returning, was not a traveler. *Williams v. State* (Cr. App.) 169 S. W. 1154.

The burden is upon one who is arrested while carrying a weapon upon his person to show that at the time he was a traveler—that is, one on a real journey—and the mere fact that he was crossing back and forth from one county or state to another is not decisive on the question. *Williams v. State* (Cr. App.) 169 S. W. 1154.

Defendant riding about a neighborhood, working at various places, or riding in search of work, intending, if he found none, to proceed to another county, was not within the definition of "traveler," as fixed by the statute relating to the unlawful carrying of weapons. *Younger v. State* (Cr. App.) 173 S. W. 1039.

In a prosecution for unlawfully carrying a pistol, an instruction that if the jury believed from the testimony that the defendant was, at the time he was arrested, a traveler, "you will acquit him," sufficiently submitted the issue of his being a traveler. *Younger v. State* (Cr. App.) 173 S. W. 1039.

10. Premises or place of business.—A person has the right to carry a pistol at his home or at his place of business, but he has no right to habitually carry a pistol between his home and his place of business. *Chambers v. State*, 34 App. 293, 30 S. W. 357; *Skeen v. State* (Cr. App.) 30 S. W. 218; *Oliver v. State* (Cr. App.) 33 S. W. 1077.

If accused had previously carried a pistol to the place where he was employed, and his employer asked him to take the pistol home, and on his way home with it he stopped at a store to buy supplies for supper, and while waiting for some one to wait on him was arrested, he was not guilty of unlawfully carrying a pistol. *Waterhouse v. State*, 57 App. 590, 124 S. W. 633.

In a prosecution for unlawfully carrying a pistol, evidence that accused was a bartender, and had been cleaning up the saloon just prior to his arrest, and was taking the pistol home with him to sell it, if believed, constituted a defense. *Kirby v. State*, 61 App. 1, 133 S. W. 682.

The place of business contemplated by the statute has reference to a particular locality appropriated exclusively to a local business, such as a farm, the store, the shop or dwelling place, and the business such only as is usually carried on upon that farm, in the store or shop or other appropriated local place. *Baird v. State*, 38 Tex. 599.

A person has no right to carry a pistol while hunting hogs in the range, or while hunting for anything off his own premises. *Baird v. State*, 38 Tex. 599; *Titus v. State*, 42 Tex. 578. Nor to take a pistol out on the range to kill a beef, although the defendant had no other means at hand to kill the beef. *Reynolds v. State*, 1 App. 616.

Where the premises were in the possession of a tenant of defendant under an unexpired lease, and the lease contained no reservation authorizing the defendant to enter upon the premises, it was held that such premises were not the defendant's within the meaning of the exception in the statute. *Zallner v. State*, 15 App. 23. The premises on which the pistol was carried belonged jointly to defendant's wife and one M., but were occupied by said M., and not by defendant or his wife. Held, that the premises were not the defendant's own within the meaning of this exception in the statute. *Brannon v. State*, 23 App. 428, 5 S. W. 132.

Proof that a pistol was found on the person of accused at his usual place of business will not sustain a conviction. *Short v. State*, 25 App. 379, 8 S. W. 281.

A person's temporary residence is his home and he has a right to carry a pistol there. *Campbell v. State*, 28 App. 44, 11 S. W. 832.

Carrying pistol on public road on premises where defendant lives is not a violation of the statute. *Ross v. State* (Cr. App.) 28 S. W. 199.

A private person cannot make a public office his business office so as to justify his carrying a pistol therein. *Featherstone v. State*, 35 App. 612, 34 S. W. 276, 938.

It is no defense that defendant was carrying the weapon on land leased by his father to another. *Fannin v. State* (Cr. App.) 34 S. W. 280.

Defendant having by contract right to use the office of another on occasions of dealing with the employes of the other held to have a right to carry a pistol in the office. *Smith v. State*, 50 App. 642, 100 S. W. 155.

An auditor on a railroad train engaged in his business of collecting tickets and fares of passengers is on his own premises and is at his place of business and is exempt from punishment for carrying a pistol at such time. *Barker v. Satterfield* (Civ. App.) 111 S. W. 438. Likewise a railroad porter engaged on a train. *Williams v. State*, 44 App. 494, 72 S. W. 380.

If accused resided at a livery barn, without the owner objecting, he is not amenable for carrying a pistol therein; ownership or lease of the barn by him being unnecessary. *Craig v. State*, 60 App. 195, 131 S. W. 562.

A rural mail carrier is not, while engaged in carrying and distributing mail as such in the vehicle used by him, on his own premises and place of business within this article, permitting the carrying of weapons on one's own premises or place of business. *Latimore v. State* (Cr. App.) 145 S. W. 588.

One does not violate the law against carrying a pistol, where he merely carries it from his place of business to his home, having on his person a considerable sum of money, not deviating from his nearest route, and stopping only for a moment's conversation, though he shoots at one assaulting him. *Bowles v. State* (Cr. App.) 147 S. W. 869.

Where accused rented a picnic ground for a day, the premises being temporary under his control, he was entitled to carry a pistol thereon without violating the law, but not where people were assembled or assembling. *Gibbs v. State*, 70 App. 278, 156 S. W. 687.

A person cannot lawfully carry a pistol into an assembly of people, although the premises on which the assembly is located belong to him. *Gibbs v. State*, 70 App. 278, 156 S. W. 687.

A person employed by a company to cut timber could lawfully carry a pistol in going from his and his partner's camp to the timber allotted to them for cutting, and from such allotment, when they finished cutting there, to another allotment; this being his "place of business" within the statute. *Hare v. State*, 71 App. 395, 160 S. W. 79.

Where accused did not claim, in a prosecution for unlawfully carrying a pistol, that he was on his own premises at the time, and even denied having a pistol, it was not error to refuse a request to charge that accused had a right to carry a pistol on his own premises. *Boyette v. State*, 72 App. 231, 162 S. W. 872.

No one can give to another permission to carry arms on his premises in violation of law. *Guthrie v. State* (Cr. App.) 166 S. W. 730.

A farm to which accused goes to forcibly take some corn claimed by his employer is not the "place of business" of accused within the statute so as to entitle him to carry a pistol. *Guthrie v. State* (Cr. App.) 166 S. W. 730.

An owner who lives on his premises, and who has rented a part thereof on shares, and who with his tenant jointly cultivates the crops, is on his own premises, and his act in carrying a pistol while there is not punishable. *Fields v. State* (Cr. App.) 166 S. W. 1166.

Where accused, having discovered that a neighbor whose land adjoined his own was shooting his hogs, armed himself and went to the creek which divided their property, and the neighbor left, accused was not guilty of violating the pistol law, because on returning to his residence he traveled part of the way on a public road. *Parker v. State* (Cr. App.) 174 S. W. 343.

On a trial for unlawfully carrying a pistol, it appeared that accused ordered a person to leave his residence; that in a scuffle which ensued he was knocked down; that he then went to a store where he had a pistol, obtained it, and as he started back was intercepted by persons who told him that B. wanted to see him; that he went upon the sidewalk with the pistol in his hand; and that such persons then took him across the street. The court refused to charge that it was not unlawful for him to have a pistol at his place of business or at his residence or to carry it from the one place to the other, and that, if he went to the store and secured the pistol, and had it for the purpose of returning to his residence, but was informed that B. desired to see him, and went into the street with a view to seeing B., the carrying of the pistol would not be unlawful. Held, that such instruction should have been given. *McQueen v. State* (Cr. App.) 177 S. W. 91.

The court should also have charged that, if accused was carried across the street with the pistol in his hand by the persons who intercepted him, this would not be a violation of law, as only a voluntary act on his part in traveling about the streets with the pistol would make him responsible. *McQueen v. State* (Cr. App.) 177 S. W. 91.

The court should also have charged with reference to accused's intent. *McQueen v. State* (Cr. App.) 177 S. W. 91.

In a prosecution for carrying a pistol, an instruction that if defendant, after purchasing the pistol, traveled home by the shortest and most practical route, he should be acquitted, otherwise convicted, is too stringent; and a requested charge that if defendant was taking the pistol home, and traveling a practical route, the mere fact that he stopped for the purpose of trading would not make him guilty, should have been given. *Waterhouse v. State*, 138 S. W. 386.

11. **Apprehension of attack and imminence of danger.**—Whether the fear of an unlawful attack was reasonable, or whether the danger was so imminent and threatening as not to admit of the arrest of the party about to make such attack, upon legal process, are mixed questions of law and fact, to be determined by the jury, under proper instructions from the court. *Young v. State*, 42 Tex. 462. See, also, *Strickland v. State*, 33 App. 559, 28 S. W. 466. Threats, retracted on the same day they were made, do not justify carrying a pistol. *Phillips v. State* (Cr. App.) 50 S. W. 1063.

Conviction of unlawfully carrying a pistol cannot be sustained on proof that accused had reasonable ground to fear an unlawful attack, the danger being imminent, and of a character not to admit of arrest of the threatening party. The actual presence of such party at the time the pistol was carried not essential to bring accused within the statute. *Short v. State*, 25 App. 379, 8 S. W. 281.

Defendant, a teacher, was notified before a school entertainment that several persons would attend it, and break it up; also, that it was currently rumored that he would have trouble, and that there would be a fight there that night. Defendant tried in vain to get an officer to attend, and stated to the officer that he could not ascertain who the persons were who had threatened to break up the entertainment. Held, that no such danger existed as to justify defendant in carrying a weapon. *Alexander v. State*, 27 App. 533, 11 S. W. 628.

The defense of apprehension of danger was not available under section 477 to a school teacher carrying arms in a school entertainment. *Alexander v. State*, 27 App. 533, 11 S. W. 628.

Defendant who had been assaulted and pursued by a more powerful man armed with a club and threatening his life was justified in arming himself. *Coleman v. State*, 28 App. 173, 12 S. W. 590.

Mere threats held not such a danger as to authorize defendant to carry arms. *O'Neal v. State*, 32 App. 42, 22 S. W. 25. But the receipt of several anonymous letters threatening the life of defendant held to give him the right to arm himself. *Short v. State*, 25 App. 379, 8 S. W. 281.

That defendant's life had been threatened held not imminent danger available as a defense. *O'Neal v. State*, 32 App. 42, 22 S. W. 25; *Thompson v. State*, 48 App. 146, 86 S. W. 1033.

In order to authorize the carrying by one of a pistol on his person, under the statute, the danger of an attack on him must be so imminent and threatening as not to admit of the arrest upon legal process of the party about to attack him. *O'Neal v. State*, 32 App. 42, 22 S. W. 25; *Thompson v. State*, 48 App. 146, 86 S. W. 1033.

To justify himself on the ground that he apprehends an attack on his person, defendant must show that the danger existed at the time he armed himself. *Brownlee v. State*, 35 App. 213, 32 S. W. 1043.

Where defendant, at her home, shot witness and then pursued him 200 to 500 yards from the premises she could not justify carrying the pistol on ground of self defense. *Woodroe v. State*, 50 App. 212, 96 S. W. 30.

Evidence of a quarrel was admissible on the intent of one claiming to be a traveler. *Irvine v. State*, 51 App. 52, 100 S. W. 779.

Defendant might testify to the apprehension of danger from persons who had previously threatened his life and whom he was informed were searching for him when he armed himself. *Johnson v. State*, 54 App. 168, 110 S. W. 451.

On defense of imminent danger evidence that on prior occasions defendant shot or attempted to shoot others was inadmissible. *Hargrove v. State*, 53 App. 541, 110 S. W. 913.

In a prosecution for carrying a pistol, a charge that if accused, when he armed himself, if he did so, had reasonable ground for fearing an unlawful attack by another, and the danger was so imminent as not to admit of the latter's arrest, the jury should acquit, was not objectionable as charging that accused must have had reasonable grounds for fearing an attack at the very time he armed himself, in order to authorize an acquittal, and was proper. *Hines v. State*, 57 App. 216, 123 S. W. 411.

One believing his life in danger has the legal right to carry a pistol from his residence to his store, and if he used the pistol, thinking his life was threatened, he would not be guilty of an illegal carrying; and hence, in a prosecution for carrying a pistol, where defendant claimed he was carrying it to his store, and that he used it, thinking his life was in danger, his right to use it should have been presented by the instructions. *Ellias v. State* (Cr. App.) 144 S. W. 1139.

Where a husband sold his corn crop and thereafter separated from his wife, who remained on the farm and resisted efforts of the purchaser to gather the crop, accused, hired by the purchaser to gather the crop, both knowing of the wife's claim and her intention to resist, is not authorized to carry a pistol. *Guthrie v. State* (Cr. App.) 166 S. W. 730.

It is no defense to a prosecution for unlawfully carrying a pistol that the defendant armed himself for the purpose of hunting another who had had adulterous relations with his wife in order to seek an explanation from him, even though that fact was such provocation as would reduce a homicide at their first meeting to murder, since it is not made one of the exceptions by the statute prohibiting the unlawful carrying of pistols, and the court cannot add another exception to those enumerated. *Ballard v. State* (Cr. App.) 167 S. W. 340.

Nor does the fact that the other had made threats to kill defendant under certain circumstances justify defendant's act in arming himself and going into another county to seek the other. *Ballard v. State* (Cr. App.) 167 S. W. 340.

Where accused had unsuccessfully attempted to compel a person to leave his residence, he had a right to go to his store and obtain a pistol which he had there, and carry it back to the house to defend himself in case he should be attacked while forcing such party to leave the house, especially where such person had knocked him down when he first attempted to compel him to leave. *McQueen v. State* (Cr. App.) 177 S. W. 91.

12. Evidence to rebut defense.—Evidence admissible to rebut defense. See *Briscoe v. State*, 32 App. 411, 24 S. W. 95.

13. Evidence.—Evidence held to sustain a conviction of unlawfully carrying a pistol. *Nolen v. State*, 72 App. 450, 162 S. W. 869; *Prewitt v. State*, 49 App. 323, 92 S. W. 800; *James v. State*, 51 App. 633, 103 S. W. 934; *Hutchins v. State*, 51 App. 339, 101 S. W. 795; *Brent v. State*, 57 App. 411, 123 S. W. 593; *Jones v. State*, 53 App. 313, 125 S. W. 914; *Veal v. State*, 58 App. 340, 125 S. W. 919; *Gentry v. State*, 61 App. 619, 136 S. W. 50; *Jones v. State*, 61 App. 656, 136 S. W. 57; *Vincent v. State*, 72 App. 193, 162 S. W. 840; *Lawless v. State*, 72 App. 366, 162 S. W. 890; *O'Hara v. State* (Cr. App.) 167 S. W. 1113. Contra, *Foster v. State*, 59 App. 44, 126 S. W. 1155, Ann. Cas. 1912A, 1206; *Waterhouse v. State*, 62 App. 551, 138 S. W. 386.

There should be such clearness and certainty in the proof as would amount to that which is morally certain; testimony that witness saw a belt on defendant, and beneath his coat something that looked like the handle of a pistol was not such certainty. *Smith v. State*, 10 App. 420.

The state having shown the carrying it devolved on defendant to show authority therefor. *Blair v. State*, 26 App. 387, 9 S. W. 890.

The purpose or reason for having a pistol are matters to be shown by defendant. *Skeen v. State*, 34 App. 308, 30 S. W. 554.

Evidence that defendant presented his pistol at another is admissible. *O'Neal v. State*, 32 App. 42, 22 S. W. 25.

On trial for carrying a pistol the defense was that defendant had repaired the pistol for the owner and was taking it home. The state was allowed to prove that shortly before defendant was found with the pistol on his person he had told an officer that another party had his drum and that he, defendant, would have to be arrested before night if he did not get his drum. *Briscoe v. State*, 32 App. 411, 24 S. W. 95.

That defendant was subsequently seen in possession of the same pistol was admissible to rebut his testimony that he was delivering a pistol to the purchaser. *Upton v. State*, 33 App. 231, 26 S. W. 197.

When, on trial for carrying a pistol the evidence shows that defendant had carried a pistol on several different occasions, it is sufficient, the presumption being that it was his custom to do so. *Skeen v. State*, 34 App. 308, 30 S. W. 554.

Evidence that defendant, when arrested on his way home at 2 o'clock in the morning, a few steps from his place of business, which he had just closed, had a pistol is insufficient to sustain a conviction of unlawfully carrying a pistol; he testifying that he was carrying it to his home, that he had not carried it except on one or two occasions mentioned by him, and that he was not in the habit of carrying it between his home and place of business; and there being evidence of his good reputation and fair dealing. *Mathonican v. State*, 51 App. 471, 102 S. W. 1123.

In a prosecution for unlawfully carrying a pistol, where it was claimed by both defendant and the city marshal in their testimony that the city marshal went to defendant and informed him there was a show coming to town, and that he wanted defendant to get his pistol and go with him to meet the train, to protect the town from thugs that accompanied the show, and that thereupon defendant procured a pistol, walked to the back door of the saloon, and fired it off, evidence that defendant and the marshal proceeded to get drunk, and went upon the streets, and whooped and hallooed, knocked one or two men down, and proceeded to make considerable noise, was admissible as tending to impeach and contradict the defendant and the city marshal, and as bearing on the intent of the defendant. *Schuh v. State*, 58 App. 165, 124 S. W. 908.

In a prosecution for unlawfully carrying a pistol, evidence held sufficient to sustain a finding that defendant had a pistol at the time alleged. *Holt v. State*, 58 App. 295, 125 S. W. 573.

In a prosecution for carrying a pistol, where the complaining witness was asked by accused's counsel why he waited so long before making the complaint, his testimony that he did not intend to make the complaint, but accused kept going around the country threatening him, was admissible. *Jones v. State*, 58 App. 213, 125 S. W. 914.

Where, in a prosecution for carrying knucks, the defense was that accused did not have the knucks, but that in the fight in which they were seen they were on his breast and rolled off when he arose, evidence that the wounds inflicted upon the accused in the fight in question were such as could not have been inflicted with a bare hand or fist, but must have been produced by some hard substance, would tend to show that the defendant did not have the knucks and is material. *Pope v. State* (Cr. App.) 143 S. W. 611.

In a prosecution for unlawfully carrying a pistol, evidence held to support a finding by the jury that the pistol was not so broken that it could not be fired, especially where the pistol was in evidence, although several witnesses testified that it could not be fired. *Farris v. State*, 64 App. 524, 144 S. W. 249.

It was not error to permit the officer, who arrested accused for unlawfully carrying a pistol, to state that he heard shooting in a certain direction and went there and found accused with a pistol; the officer being entitled to state what attracted his attention. *Crain v. State* (Cr. App.) 153 S. W. 155.

Where, in a prosecution for unlawfully carrying a pistol, accused claimed that he could not unbreec the pistol because the cylinder would not revolve, evidence was admissible that accused had the pistol in his hand and unbreecched and unloaded it. *Raspberry v. State*, 72 App. 13, 160 S. W. 682.

In a prosecution for carrying a pistol at a supper and dance, evidence as to the presence of intoxicating liquor, drunkenness, pistol shots, and a cutting scrape there, drawn out on cross-examination of defendant's witnesses, was admissible to show the occasion for the defendant having and presenting a pistol, and that he was the person who fired the shots, or one of them, though no witness swore who fired any of the shots, nor who was engaged in the cutting scrape. *Williams v. State* (Cr. App.) 170 S. W. 708.

On appeal from a conviction for unlawfully carrying a pistol on the street, defenses not supported by any evidence will not be considered. *Alexander v. State* (Cr. App.) 171 S. W. 224.

In a prosecution for unlawfully carrying a pistol, where defendant denied any admission that he had fired a pistol, and testified that he stood in the door of his boarding car and fired a pistol after another shooting had taken place, the evidence presented a defensive issue, the refusal to submit which to the jury was error. *Ranols v. State* (Cr. App.) 171 S. W. 1128.

14. Indictment and information and proof thereunder.—See C. C. P. art. 469.

An indictment charging carrying a pistol in a public assembly may be quashed as to the portion relating to the assembly and sustained as sufficient to charge carrying under this article. *Pickett v. State*, 10 App. 290.

If an information for unlawfully carrying a pistol into a ball room be defective, "into a ball room" may be rejected as surplusage and the indictment be good for unlawfully carrying a pistol. *Lomax v. State*, 38 App. 318, 43 S. W. 92.

Where defendant was convicted of carrying a pistol, the fact that the evidence showed the pistol was carried at a public gathering would not constitute a variance between the evidence and indictment; it being immaterial that his act constituted the further offense of carrying a pistol at a public assembly, since he was not indicted for that offense. *Walker v. State*, 52 App. 314, 106 S. W. 1166.

It was not a variance that the pistol was also carried at a religious meeting. *Veal v. State*, 58 App. 340, 125 S. W. 919.

To charge that the defendant "did have about his person a certain pistol," is equivalent to charging that he "did carry" it about his person. *State v. Carter*, 36 Tex. 89.

Under the original act, the exceptions embraced in this article were embodied in the enacting clause, and it was first held that these exceptions were matters of defense, and need not be negated in the indictment, *Jenkins v. State*,

36 Tex. 638; *State v. Carter*, 36 Tex. 89; but this ruling was afterward reversed, the court holding that each one of said exceptions should be substantially negatived. *State v. Duke*, 42 Tex. 455; *Smith v. State*, 42 Tex. 464. But they may have been negatived by necessary inference, *State v. Clayton*, 43 Tex. 410; *Woodward v. State*, 5 App. 296; *Leatherwood v. State*, 6 App. 244; but the state was not required to prove these negative averments. *Id.*; *State v. Duke*, 42 Tex. 455; *Summerlin v. State*, 3 App. 444; *Lewis v. State*, 7 App. 567. Under the present Code the indictment need only charge an unlawful carrying upon the person the prohibited weapon, *Lewis v. State*, 7 App. 567; *Zallner v. State*, 15 App. 23; and a conviction upon proof of that fact does not violate the constitutional right.

An indictment need not charge that the weapon was "unlawfully" carried. It is sufficient to use the words of the statute. *Pickett v. State*, 10 App. 290; *Tucker v. State* (Cr. App.) 145 S. W. 611. See, also, *Smith v. State*, 25 App. 454, 8 S. W. 645; *Lann v. State*, 25 App. 495, 8 S. W. 650, 8 Am. St. Rep. 445; *West v. State*, 26 App. 99, 9 S. W. 485; *Wilson v. State*, 27 App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Stilly v. State*, 27 App. 445, 11 S. W. 458, 11 Am. St. Rep. 201; *Tracy v. State*, 27 App. 496, 11 S. W. 484; *Campbell v. State*, 28 App. 44, 11 S. W. 832; *Jacobs v. State*, 28 App. 79, 12 S. W. 408; *Jenkins v. State*, 28 App. 86, 12 S. W. 411; *Coleman v. State*, 28 App. 173, 12 S. W. 590; *McNeil v. State*, 29 App. 48, 14 S. W. 393.

A conviction under art. 470, of going near a private residence of another, and rudely displaying a pistol, was not a bar to a conviction for carrying on and about the person a pistol, where defendant carried the pistol before and after the act for which he was formerly convicted. *Nichols v. State*, 37 App. 616, 40 S. W. 502.

An indictment which alleges that the knuckle carried on or about the person was made of any hard substance, without naming the substance is sufficient. *Prater v. State* (Cr. App.) 108 S. W. 687.

Charging disjunctively a carrying "on or about" the person is sufficient. *Lewellen v. State*, 54 App. 640, 114 S. W. 1179.

In a prosecution for unlawfully carrying a pistol, the fact that the evidence also showed that the pistol was carried at a religious gathering did not constitute a variance. *Veal v. State*, 58 App. 340, 125 S. W. 919.

Where defendant objected to the introduction of testimony that he was seen carrying a pistol on a certain date in 1911 because of uncertainty as to the year charged in the indictment and the clerk of the court testified that the blurred date was 1911, the evidence objected to was properly admitted. *Valigura v. State* (Cr. App.) 153 S. W. 856.

16. **Delivery of weapon to court and forfeiture thereof.**—See note under article 62 ante.

A defendant can not be required, upon conviction, to deliver the weapon to the court, and a judgment to that effect is a nullity. *Hudeburgh v. State*, 38 Tex. 535.

Forfeiture of the weapon cannot be decreed upon conviction. *Jennings v. State*, 5 App. 298.

17. **Defendant as witness for himself.**—See notes under C. C. P. art. 790.

18. **Verdict.**—See notes under C. C. P. art. 770.

19. **Harmless error.**—See notes under C. C. P. art. 938.

Art. 477. [340] Carrying arms in church or other assembly.—

If any person shall go into any church or any religious assembly, any schoolroom, ballroom, or other place where persons are assembled for amusement or for educational or scientific purposes, or into any circus, show or public exhibition of any kind, or social gathering, or to any election on the day or days of any election where any portion of the people of this state are collected to vote at an election, or to any other place where people may be assembled to muster or perform any other public duties, and shall have or carry about his person any pistol or other firearm, dirk, dagger, slungshot, swordcane, spear, brass knuckle, bowie knife, or any other kind of a knife made and manufactured for the purpose of offense and defense, he shall be punished by a fine of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars, or by confinement in the county jail not less than thirty days nor more than twelve months, or by both such fine and imprisonment. [Act Apr. 12, 1871, p. 25; Act 1915, p. 132, ch. 80, § 1, amending Art. 477, Pen. Code.]

See notes under article 475 ante.

Imminent danger, see note under art. 476.

Cited, *Brown v. State*, 71 App. 212, 158 S. W. 807.

Portion of former law unconstitutional.—A portion of this article which formerly declared that the weapon shall be forfeited was held unconstitutional. *Hudeburgh v. State*, 38 Tex. 535; *Jennings v. State*, 5 App. 298.

Intent.—The mere taking from its place in a house where there was a social gathering, and immediately replacing a weapon, without intending to violate the law, would not be an offense. *Brooks v. State*, 15 App. 88.

Intent is an essential element of this offense. *Schroeder v. State*, 50 App. 111, 99 S. W. 1003.

At the request of the owner, defendant for safe-keeping took a pistol from under the buggy seat, where it lay, and put it in the bar connected with the club in

whose ballroom the social function was taking place. He did not carry the pistol on or about his person while in the ballroom. Later he put it back into the buggy. Held, that defendant was not guilty of carrying a pistol into a social gathering. *Schroeder v. State*, 50 App. 111, 99 S. W. 1003.

Public Assembly.—A justice's court in session and engaged in a trial is a "public assembly" within the meaning of the preceding article. *Summerlin v. State*, 3 App. 444.

One's own premises as exception.—The owner of house in which a ball was going on, invited the defendant to act as doorkeeper and general manager, with authority to preserve peace and good order, and armed him with a pistol. Held, that such authority did not justify him in having the pistol on or about his person. *Owens v. State*, 3 App. 404. No person, unless he be a peace officer, can go into an assembly of people such as is named in the statute and have and carry about his person a prohibited weapon, without violating the law. Not even the owner of the premises is exempt under this article. *Brooks v. State*, 15 App. 88.

A school teacher cannot carry weapons in his own school room at a public entertainment given by the school. *Alexander v. State*, 27 App. 533, 11 S. W. 628.

A person not an officer has no right to carry a pistol at a picnic, though he is legally in possession and control of the premises. *Monson v. State*, 45 App. 426, 76 S. W. 570.

Bar-room adjacent to ball room.—The carrying of a pistol into a bar-room adjacent to a ball room in which there was a social gathering, is not an offense. To sustain the charge of carrying the pistol into a social gathering he must have carried it into the ball room. *Schroeder v. State*, 50 App. 111, 99 S. W. 1003.

Time of commission of offense.—Defendant procured a pistol on the east side of the square of the city of Tyler on an election day, put it in his pocket and walked across the east side of the square to the courthouse where people were voting. He was prosecuted under article 269, and his defense was that he should have been prosecuted under this article because of the lesser penalty; held, that the offense announced under article 269 was complete before the offense announced by this article was committed. *Burns v. State*, 36 App. 601, 38 S. W. 204.

Jurisdiction of offense.—Justices of the peace do not have jurisdiction of this offense, as the penalty may exceed two hundred dollars. Const., art. 5, section 19; C. C. P., article 106; *Anderson v. State*, 18 App. 17.

Indictment and proof thereunder.—See Willson's Cr. Forms, 243.

For indictments bad as to this section but good as to carrying, see note under art. 476.

An indictment charged that the defendant went upon the public square of a town where people had assembled to attend district court, and carried a pistol upon his person. It was held that to sustain this charge it was necessary to prove that people were assembled on the public square at the time and for the purpose alleged. *Scott v. State*, 40 Tex. 503.

Where the indictment was for carrying a weapon into a "ballroom," it was held that it was not necessary to allege that a ball or dance was going on, or that the persons there assembled were human beings. *Owens v. State*, 3 App. 404. But it must be alleged that persons had assembled. The purpose of the law is not the protection of the edifice or premises, but the protection of the persons there assembled. *Rainey v. State*, 8 App. 62, 34 Am. Rep. 736. It need not negate any of the exceptions in the statute, as none of them are now embraced in the enacting clause. See *Owens v. State*, 3 App. 404; *Summerlin v. State*, Id. 444, decided under the statute as it was before the revision. Indictments under article 477 approved. *Cooper v. State*, 25 App. 530, 8 S. W. 654; *Cooper v. State*, 26 App. 575, 10 S. W. 216; *Alexander v. State*, 27 App. 533, 11 S. W. 628; *Jacobs v. State*, 28 App. 79, 12 S. W. 408.

That defendant in violating art. 269 also violated this article was no defense to his prosecution under the former article. *Burns v. State*, 36 App. 601, 38 S. W. 204.

Art. 478. [341] Not applicable to whom.—The preceding article shall not apply to peace officers or other persons authorized or permitted by law to carry arms at the places therein designated. [Act April 12, 1871, p. 25.]

Peace officers.—See notes under article 476.

Invalidity of provision for forfeiture, see note under art. 477.

See C. C. P. arts. 43, 146, 147, 278.

The presumption is against existence of an exception, such as that defendant is a peace officer. *Young v. State*, 42 Tex. 462; *Williams v. State*, Id. 466; *Summerlin v. State*, 3 App. 444; *Lewis v. State*, 7 App. 567; *Zallner v. State*, 15 App. 23.

But it was not incumbent on him to show that he was then and there in the discharge of his duties as such. *Williams v. State*, 42 Tex. 466.

The statute does not limit the right of a peace officer to carry arms. *Williams v. State*, 42 Tex. 466.

Whether or not a peace officer de facto is within the meaning of this article, seems to be an open question. *Rainey v. State*, 8 App. 62, 34 Am. Rep. 736.

Appointment as bailiff to the grand jury invested appointee with no authority as a peace officer after adjournment of that body. *Alford v. State*, 8 App. 545.

All peace officers known to the law are carefully enumerated in the Code; and no such officer as deputy-marshal appearing there, it must be shown that the charter provides for such office before it is recognized. *Alford v. State*, 8 App. 545.

The constitution makes county judges peace officers, and when the legislature in enacting the pistol law, excluded from its operation all peace officers, a county judge is embraced in the list and as such peace officer he is authorized to carry a pistol. *Jones v. State*, 43 App. 283, 65 S. W. 92.

Judges of the courts are conservators of the peace authorized to carry arms under the circumstances provided, and hence under the election law the presiding officer at an election would have power to carry a pistol. *Hooks v. State*, 71 App. 269, 158 S. W. 808.

Others than peace officers.—See notes under the preceding article.

Peace officers only are excepted by the provisions of this article. The owner of the premises is not authorized to carry arms into the assembly, nor is a school teacher in a school room exempt. That the weapon was carried into the assembly in anticipation of an unlawful attack upon the person is not an available defense. *Alexander v. State*, 27 App. 533, 11 S. W. 628. And note case of an invalid appointment as a deputy sheriff. *Blair v. State*, 26 App. 397, 9 S. W. 890.

Art. 479. [342] Arrest without warrant; officer failing punished.—Any person violating any of the provisions of articles 475 and 477 may be arrested without warrant by any peace officer and carried before the nearest justice of the peace for trial; and any peace officer who shall fail or refuse to arrest such person on his own knowledge, or upon information from some credible person, shall be punished by fine not exceeding five hundred dollars. [Act April 12, 1871, p. 26.]

Arrest without warrant.—A person unlawfully carrying arms may be arrested by a peace officer without warrant upon his own knowledge or upon information of some credible person. *Jacobs v. State*, 28 App. 79, 12 S. W. 408; *Hodges v. State*, 6 App. 615; *Ex parte Sherwood*, 29 App. 334, 15 S. W. 812; *Miller v. State*, 32 App. 319, 20 S. W. 1103; *Montgomery v. State*, 43 App. 394, 65 S. W. 539, 55 L. R. A. 710; *Morawietz v. State*, 46 App. 436, 80 S. W. 997; *Brown v. King*, 41 Civ. App. 588, 93 S. W. 1019; *King v. Brown*, 100 Tex. 109, 94 S. W. 329, 330; *Hull v. State*, 50 App. 607, 100 S. W. 403; *Ricen v. State*, 63 App. 89, 138 S. W. 403; *Condron v. State* (Cr. App.) 155 S. W. 253; *Ex parte Sherwood*, 29 App. 334, 15 S. W. 812.

Evidence held to authorize submitting the issue as to whether an arrest without a warrant was legal as on information for carrying a pistol. *Earles v. State*, 47 App. 559, 85 S. W. 1.

The law presumes the credibility of a citizen who informs an officer of defendant's conduct. *Miller v. State*, 32 App. 319, 20 S. W. 1103.

This article only gives an officer the right to arrest without warrant when he knows that a person is carrying a pistol of his own knowledge, or when he derives the information from some credible person. But this does not specially apply to magistrates, or authorize them to require peace officers to make the arrest of persons unlawfully carrying pistols. *Morawietz v. State*, 46 App. 436, 80 S. W. 997.

There is no statute which authorizes a magistrate to require a peace officer to make an arrest in cases generally, where they may happen within the view or knowledge of the magistrate. This may be done only under statutes which specially provide therefor. *Id.*

Policemen are peace officers and may under this article arrest in certain cases without a warrant. *Hull v. State*, 50 App. 607, 100 S. W. 403.

Testimony of informant and of the officers as to the information was admissible. *Johnson v. State*, 51 App. 648, 104 S. W. 902.

Defendant, who was shooting off a pistol on a public road, was properly arrested without a warrant; the arresting officer having heard the shots and being informed by credible witnesses that defendant was the guilty party. *Ricen v. State*, 63 App. 89, 138 S. W. 403.

Holding armed person arrested for another offense.—Arresting one for gaming, and being subsequently informed that the party arrested had a pistol on his person at the time of arrest, the sheriff was authorized to hold him for that offense. *Garner v. State*, 50 App. 364, 97 S. W. 98, citing *Ex parte Richards*, 44 App. 561, 72 S. W. 838.

When a sheriff has arrested one and does not know at the time that he has a pistol but is subsequently informed of this fact, he is authorized to hold him in custody for said offense, though he had arrested him on another charge, and it is his duty to carry him before a justice of the peace for trial. *Garner v. State*, 50 App. 364, 97 S. W. 99, 100.

Neglect or refusal to arrest.—A peace officer is punishable who refuses or neglects to arrest, without warrant, on information of a credible person, or his own knowledge, one for carrying a pistol. *Miller v. State*, 32 App. 319, 20 S. W. 1103. And see *Brown v. King*, 41 Civ. App. 588, 93 S. W. 1017.

Indictment.—*Willson's Cr. Forms*, 244.

Art. 480. [343] Not applicable to frontier counties.—The provisions of this chapter shall not apply to or be enforced in any county which the governor may designate by proclamation as a frontier county and liable to incursions by hostile Indians. [Act April 12, 1871, p. 26.]

Revocation of proclamation.—The governor may revoke his proclamation at any time, and subject a county previously exempted, to the operation of the law. And may exercise this power by a new designation omitting counties previously designated. *State v. Clayton*, 43 Tex. 410. In such case, defendant can not plead as a defense ignorance of such revocation, as it is matter of law and not of fact. *Chaplin v. State*, 7 App. 87.

TITLE 10

OFFENSES AGAINST PUBLIC MORALS, DECENCY AND CHASTITY

Chap.	Chap.
1. Unlawful marriages.	4. Disorderly houses.
2. Incest.	4a. Pandering.
3. Of adultery and fornication.	5. Miscellaneous offenses.

CHAPTER ONE

UNLAWFUL MARRIAGES

Art.	Art.
481. "Bigamy" defined.	484. "Negro" and "white person" defined.
482. Preceding article not applicable, when.	485. Proof of marriage.
483. Intermarriage of whites and blacks.	

Article 481. [344] "Bigamy" defined.—If any person who has a former wife or husband living shall marry another in this state, such person shall be punished by imprisonment in the state penitentiary for a term not less than two nor more than five years. [Amended by Act March 23, 1887, p. 37; O. C. 384.]

Cited, *Walker v. State*, 64 App. 70, 141 S. W. 243.

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1. **Nature and elements of offense in general.**—For the constituent elements of bigamy, see *La Rose v. State*, 29 App. 215, 15 S. W. 33.

2. **Distinguished from adultery.**—Bigamy and adultery are different offenses. *Swancoat v. State*, 4 App. 105.

The fact of marriage would make the relation none the less adulterous if, after ascertaining their supposed legal marriage was unlawful and void, the parties continued to cohabit together. *Hildreth v. State*, 19 App. 196.

3. **Meaning of "former wife."**—The term "former wife" in this article is used in contradistinction to the person then being taken to wife. *Burton v. State*, 51 App. 196, 101 S. W. 227.

4. **Marriage in general.**—In a prosecution for bigamy a valid marriage of the defendant, and a subsequent marriage by him, or her, during the life of his or her lawful spouse must be proved. *May v. State*, 4 App. 424; *Dumas v. State*, 14 App. 464, 46 Am. St. Rep. 241.

A valid marriage is one solemnized with the legal prerequisites of, and in accordance with the *lex loci contractus*. In this state, a license is a legal prerequisite, and the rites of matrimony must be performed by some one of the functionaries authorized by the statute to perform them. *Dumas v. State*, 14 App. 464, 46 Am. St. Rep. 241.

That the minister celebrating a marriage was not ordained as provided by statute does not render the marriage void provided there was a valid common law marriage. *Holder v. State*, 35 App. 19, 29 S. W. 793.

Whatever be the form of ceremony, if parties agree to take each other as husband and wife and live in that relation, this proves marriage binding on the parties and will subject them to legal penalties for a disregard of its obligations. *Waldrop v. State*, 41 App. 194, 53 S. W. 131.

In a prosecution for bigamy, the fact that the woman with whom the alleged bigamous marriage occurred repudiated the marriage as soon as she discovered the want of a divorce from defendant's former wife was immaterial, as such repudiation could not dissolve the marriage. *Burks v. State*, 50 App. 47, 94 S. W. 1040.

It is not a prerequisite to the validity of a marriage that a license issue. *Burks v. State*, 50 App. 47, 94 S. W. 1040.

Whatever be the form of ceremony, or if there be no ceremony, if the parties agree to take each other for husband and wife, and from that time on live professedly in that relation, proof of these facts beyond a reasonable doubt in a prosecution for bigamy is sufficient proof of a marriage binding on the parties. *Hearne v. State*, 50 App. 431, 97 S. W. 1050.

Where a prior marriage is a nullity, a subsequent marriage does not constitute the offense of bigamy. *McCombs v. State*, 50 App. 490, 99 S. W. 1017, 9 L. R. A. 1036, 123 Am. St. Rep. 855, 14 Ann. Cas. 72.

The state must not only prove the two marriages, but it must prove the first

marriage, and it must prove the first marriage alleged in the indictment, and, of course, the identification of appellant, if it was appellant, must be shown as being the same person whose name was mentioned in the license issued and who is supposed to have solemnized the first marriage. And it must be further shown that the identical woman to whom he was first married by virtue of the first marriage was living at the time of the consummation of the second marriage. *Goat v. State*, 51 App. 393, 102 S. W. 121.

5. **Emancipated slaves.**—Emancipated slaves who were declared lawfully married by the constitution of 1869, are within the law defining and punishing bigamy. *Stewart v. State*, 7 App. 326.

Section 27 of article XII of the Constitution of 1869, validating common law marriages of slaves, was not annulled by the abrogation of that constitution. *Stewart v. State*, 7 App. 326.

6. **Mistake and duress.**—Bigamy is not committed by the intermarriage of a man and woman, one of them having a lawful spouse alive, if such marriage was entered into under a mistake of fact as to the death of the former spouse. *Hildreth v. State*, 19 App. 195; *Watson v. State*, 13 App. 76; *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207. But if after discovering such mistake they continue to cohabit together, they would be guilty of adultery, and the fact that they have been married to each other would be no defense to a prosecution against them for adultery. *Hildreth v. State*, 19 App. 195. Defense that defendant's wife had deserted him for more than three years and that he was informed and believed that his first marriage was therefore void, held no defense; if mistake at all, it was a mistake of law, and not of fact. *Medrano v. State*, 32 App. 214, 22 S. W. 684, 40 Am. St. Rep. 775.

Where one who is under arrest for seduction marries the female alleged to have been seduced, he cannot afterwards, in a prosecution for bigamy, claim that such marriage was under duress, as marriage under such circumstances is provided for by Pen. Code, art. 1449. *Medrano v. State*, 32 App. 214, 22 S. W. 684, 40 Am. St. Rep. 775.

An instruction that the statute provides that if a person, under mistake as to a fact, does an act otherwise criminal, he commits no offense; that the mistake must be such that, had the supposed fact existed, the person would have been excusable, and the mistake must not arise from want of care; that, therefore, if defendant had been informed and believed that his first wife was dead, and exercised proper care in ascertaining the truth, he was not guilty, but, if the mistake arose from want of proper care on his part, it would not avail him, was correct. *Welch v. State*, 46 App. 528, 81 S. W. 50.

Where the defense was that defendant believed his first wife was dead, it was not necessarily incumbent on the court to specify the sources of information, as shown by the evidence, which might have led to the alleged mistake. *Welch v. State*, 46 App. 528, 81 S. W. 50.

A mob visited the house where accused and the second wife were on the night preceding their marriage, and demanded that accused marry the woman at once. He promised to marry her, and the mob dispersed. That night he applied for a license, but was informed that no license would be issued until the following morning. On a renewal of his application the next morning, a license was issued, and he married the woman. Held, that accused was not under duress at the time he committed the bigamy. *Burton v. State*, 51 App. 196, 101 S. W. 226.

7. **Venue.**—See notes under C. C. P. art. 258.

8. **Indictment and proof thereunder.**—Willson's Cr. Forms, 246.

The indictment need not state the name of the first or lawful spouse of the defendant. *Watson v. State*, 13 App. 76. But it must allege a valid marriage of the defendant, and his or her subsequent marriage during the life of the lawful spouse. It need not negative the exceptions contained in article 482, as they are matters of defense. *Hull v. State*, 7 App. 593.

Indictment should distinctly aver a former marriage, the name of the former husband or wife, and the subsequent marriage on which the prosecution is based. (*Watson v. State*, 13 App. 76, overruled.) *McAfee v. State*, 38 App. 127, 41 S. W. 627; *Vinsant v. State*, 42 App. 413, 60 S. W. 550.

An indictment for bigamy must state the name of accused's first wife and aver that she is alive, but need not state her maiden name. *Richardson v. State*, 71 App. 111, 158 S. W. 517.

Indictment must conclude with the constitutional formula, "against the peace and dignity of the state." *Poss v. State*, 47 App. 486, 83 S. W. 1109.

Where the indictment charged that accused married "Ida A.," and the undisputed evidence showed that she was known as "Ida A.," that in German the English word "Ida" is pronounced "Eda," that the marriage license authorized the marriage of accused and "Eda A.," and that the record of the marriage showed the marriage of accused and "Eda A.," a charge that, if accused married "Ida A.," the mere circumstance that in the marriage license her name appeared as "Eda A.," was immaterial, was not erroneous, as on the weight of the evidence and as leading the jury to believe that it made no difference whether the woman's name was "Ida" or "Eda." *Nickelson v. State*, 53 App. 631, 111 S. W. 414.

An indictment for bigamy must state the name of the woman with whom the bigamous marriage is contracted. *Nickelson v. State*, 53 App. 631, 111 S. W. 414.

An indictment charged that accused on November 22, 1907, with force and arms, in the county and state, etc., did unlawfully marry R., he then and there having a lawful former wife then living, was fatally defective for failure to allege facts showing the validity and continued existence of a former marriage. *Bryan v. State*, 54 App. 18, 111 S. W. 744, 16 Ann. Cas. 515.

On a trial for bigamy, proof of the marriage of accused to a woman while his former wife was living, by witnesses present at the marriage and by the officer

performing the ceremony, and by the marriage license of accused and the woman, with the return of the officer performing the ceremony, was admissible as against the objection that there was no allegation in the indictment to support the same. *McMahan v. State*, 61 App. 489, 135 S. W. 558.

An indictment charging that accused unlawfully married J. while he then and there had a former wife T.—that is, that accused at the time of his marriage with J. had theretofore been and was then and there lawfully married to T. and, at the time of his second marriage, T. was then and there living, etc.—sufficiently charges bigamy. *Morville v. State*, 63 App. 553, 141 S. W. 102.

Under an indictment for bigamy charging that accused at the time of a second marriage was lawfully married to "Theresa Morville," evidence was admissible to show that the former marriage was with "Theresa Deignon," since the indictment did not charge that accused married her under the name of "Theresa Morville." *Morville v. State*, 63 App. 553, 141 S. W. 102.

9. Evidence.—Admissions of defendant are competent evidence to prove the first marriage. *Gorman v. State*, 23 Tex. 646.

Admission of guilt held to remove the presumption of innocence conflicting with presumption of continued existence of former wife. Circumstances and presumptions affecting evidence of continued existence of first marriage, discussed. *Gorman v. State*, 23 Tex. 646.

The jury may presume from the facts and circumstance that the first wife was alive at the date of the second marriage, there being no rule of law which requires this to be proved by direct evidence, *Gorman v. State*, 23 Tex. 646; but the presumption is one of fact and not of law, and it is error to instruct that the presumption of life continues for seven years, and the burden is on the defendant to show the contrary. *Hull v. State*, 7 App. 593.

Proof of the marriage of ex-slaves who were married by the constitution of 1869 is not proof by reputation; but the evidence must show that they were living together at the date said constitution took effect. *Steward v. State*, 7 App. 326.

The burden of proof is on the state to prove beyond a reasonable doubt that the lawful spouse was living at the date of the second marriage. This proof need not be made by direct or positive testimony, but, like any other fact, may be established by circumstantial evidence under the rules of law applicable to that character of evidence. *Hull v. State*, 7 App. 594; *Gorman v. State*, 23 Tex. 646.

It appears well settled that general reputation, cohabitation and admissions or confessions are all admissible to prove the first marriage. *Dumas v. State*, 14 App. 464, 46 Am. Rep. 241.

The marriage license and the return thereon, of the officer or minister who executed the same, or the testimony of witnesses who were present at the marriage, are legal and sufficient evidence of marriage. *Dumas v. State*, 14 App. 464, 46 Am. Rep. 241; *Frasher v. State*, 3 App. 263, 30 Am. Rep. 131. A certified copy of the marriage certificate from the records of another state, properly authenticated, was held competent and sufficient proof of marriage, in connection with evidence identifying each of the persons named in said certificate. For a full discussion of the questions relating to such evidence, the mode of authenticating the same, and of proving the laws of other states, see *Patterson v. State*, 17 App. 102.

Where on a trial for bigamy it was objected to the marriage license as evidence that the same did not show on its face to have been issued by the county clerk, held, that inasmuch as it was made to appear that at the time of the issuance of said license the offices of the county and district clerk were held by the same individual, the objection was not well taken. *Foster v. State*, 31 App. 409, 20 S. W. 823.

The mistake of a clerk who was filling the two offices of district and county clerk of his county, in the issuance of a marriage license which he signed as district instead of county clerk, will not invalidate a marriage solemnly consummated between the parties. *Foster v. State*, 31 App. 409, 20 S. W. 823.

A petition for divorce filed by defendant against an alleged former spouse is admissible to prove the former marriage. *Adkisson v. State*, 33 App. 296, 30 S. W. 357.

It is not error to confront the defendant with the two women to whom he is charged to be married for the purpose of being identified by defendant. *Hearne v. State* (Cr. App.) 58 S. W. 1009.

The admission in evidence of a contract signed by defendant, showing that he married his first wife because he had seduced her, was harmless error, in view of prior evidence to the same fact admitted without objection by defendant. *Welch v. State*, 46 App. 528, 81 S. W. 50.

The mere fact that appellant had permitted evidence to be introduced, without objection, proving or tending to prove seduction, and that he introduced a letter to disprove the seduction, would not authorize the state to introduce evidence to prove that he proposed to attempt an abortion upon his first wife. *Welch v. State*, 46 App. 528, 81 S. W. 50.

A witness was improperly allowed to state that, after the second marriage of defendant, the wife of the witness had remarked to defendant that she was afraid he had taken a wrong step, and that she was very much surprised, as the statement did not indicate any criminality calling for a response from defendant. *Welch v. State*, 46 App. 528, 81 S. W. 50.

In a prosecution for bigamy, error in allowing parol proof of a letter written by defendant to his daughter after the second marriage, in which he stated that he was going away and would never see her again, that he was "her poor ruined crazy papa," and that if she did not stop writing to him she would get him into trouble, was harmful to defendant, though his defense was insanity. *McCullough v. State*, 50 App. 132, 94 S. W. 1056.

In a prosecution for bigamy, where the guilt of accused depends on the validity of a certain marriage, the law will not presume that such marriage was val-

id, but the prosecution must prove such fact beyond a reasonable doubt. *McCombs v. State*, 50 App. 490, 99 S. W. 1017, 9 L. R. A. (N. S.) 1036, 123 Am. St. Rep. 855, 14 Ann. Cas. 72.

In a prosecution for bigamy, evidence examined, and held to show invalidity of the prior marriage, and hence insufficient to sustain a conviction. *McCombs v. State*, 50 App. 490, 99 S. W. 1017, 9 L. R. A. (N. S.) 1036, 123 Am. St. Rep. 855, 14 Ann. Cas. 72.

It was not error for the state, to call to the witness stand the former wife of accused, where she was not questioned, and did not testify to anything. *Burton v. State*, 51 App. 196, 101 S. W. 226.

Under *Sayles' Ann. Civ. St. 1897*, art. 2958, requiring the county clerk to record marriage licenses and the return thereto by the person officiating at the marriage, and article 2312, providing that certified copies of records of the county clerk's office may be admitted in evidence, provided they are filed and three days' notice given, a certified copy of a marriage license and the return thereto is inadmissible on a trial for bigamy, where the same had not been filed and three days' notice given to accused. *Burton v. State*, 51 App. 196, 101 S. W. 226.

Where, the state relied on a prior marriage regularly celebrated, and offered evidence establishing a common-law marriage, and did not call any witness present at the marriage ceremony, the admission in evidence of a certified copy of a marriage license issued to accused, and the return thereto, without complying with *Sayles' Ann. Civ. St. 1897*, art. 2312, was prejudicial. *Burton v. State*, 51 App. 196, 101 S. W. 226.

Specific acts of intimacy of one prosecuted for bigamy and his alleged wife are admissible in evidence. *Bryan v. State*, 63 App. 200, 139 S. W. 981.

Evidence, in a prosecution for bigamy, held to show prima facie that accused was previously married to another, so as to make the evidence of his second wife admissible. *Bryan v. State*, 63 App. 200, 139 S. W. 981.

Error in permitting the second wife's mother to testify that since the date of the second marriage she had seen a woman whom people called T., the person named in the indictment as the former wife, was harmless where the former marriage with T. was incontrovertibly proven. *Morville v. State*, 63 App. 553, 141 S. W. 102.

An instruction that the burden was on the state to show the issuance of a license for the first marriage was properly refused, since a license is not an absolute prerequisite to a lawful marriage. *Morville v. State*, 63 App. 553, 141 S. W. 102.

On a trial for bigamy, accused's marriage to two women could be proved by the testimony of those who were present when the marriage ceremonies were performed. *Cooper v. State*, 71 App. 489, 160 S. W. 382.

In a prosecution for bigamy, the fact that a child was born to the first alleged wife was inadmissible, as it would have no tendency to show that defendant was the person who, under another name, had married her at a certain place. *Harris v. State*, 72 App. 117, 161 S. W. 125.

In a prosecution for bigamy, a license to defendant to marry the alleged former wife was not admissible unless proven to be the original license issued by the proper officer, or unless a certified copy of it was filed with the papers at least three days before the trial and notice of such filing was given to defendant. *Harris v. State*, 72 App. 117, 161 S. W. 125.

Where a marriage license offered by the state was not admissible in a prosecution for bigamy, the state could not prove its contents by oral testimony. *Harris v. State*, 72 App. 117, 161 S. W. 125.

Evidence in a bigamy prosecution held to support a conviction. *Jones v. State* (Cr. App.) 165 S. W. 144.

An original marriage license, with the return thereon showing the marriage, having been filed and recorded in the county clerk's office, according to law, is admissible on a prosecution for bigamy; it having been filed with the papers in the case, and a copy thereof served on defendant at the previous term. *Edwards v. State* (Cr. App.) 166 S. W. 517.

On a trial for bigamy, evidence that the first wife of accused had been guilty of adultery about six months after her marriage to accused was inadmissible. *Harris v. State* (Cr. App.) 167 S. W. 43.

On a trial for bigamy, evidence held to support a finding that accused, who admitted his marriage to one woman, was the person who had previously married another woman. *Harris v. State* (Cr. App.) 167 S. W. 43.

Where, on a trial for bigamy, accused, H. M. H., alias J. M. H., admitted his marriage to C. in 1912, but denied his prior marriage to E., a marriage license for the marriage of J. M. H. and E. and the return of a justice of the peace of the marriage under the license were admissible. *Harris v. State* (Cr. App.) 167 S. W. 43.

In a prosecution for bigamy, it appeared that accused had been married three times. His first marriage had been dissolved by a valid decree of divorce, and accused claimed that, relying upon a letter written by his second wife informing him that she had procured a divorce, he celebrated a third marriage. On cross-examination it was brought out that he was informed of the dissolution of his first marriage by his sister, who wrote him that his first wife had procured a divorce and that in the same letter she inclosed a certified copy of the divorce decree. The copy was produced and identified. Held, that the copy of the decree, where limited solely to the question whether accused had used due care in ascertaining whether his second wife had procured a divorce before celebrating another marriage, was admissible; such decree not being necessary to show the dissolution of accused's first marriage, he having testified to that fact himself. *Coy v. State* (Cr. App.) 171 S. W. 221.

10. — **Burden of proof on defendant.**—See notes under art. 52 ante.

In a prosecution for bigamy, an instruction that, if the jury do not believe beyond a reasonable doubt that defendant married a woman who was alive at the time of his second marriage, they must acquit, was not objectionable as placing an unauthorized burden on defendant. *Hearne v. State*, 50 App. 431, 97 S. W. 1050.

11. **Husband and wife as witnesses.**—See notes under C. C. P., 794.

12. **Charge on mistake of fact.**—Instruction on mistake of fact and proper care under art. 47, held erroneous in defining those terms instead of merely leaving the issue to the jury. *Watson v. State*, 13 App. 78.

13. **Peremptory charge.**—Where the indictment charged that accused, having a wife in New Jersey, unlawfully married another, the fact that he had previously been married in Michigan will not justify a peremptory charge on the ground that the New Jersey marriage was invalid, where accused himself testified that his first marriage had been dissolved by a decree of divorce. *Coy v. State* (Cr. App.) 171 S. W. 221.

14. **Acquittal as bar to prosecution.**—See notes under C. C. P., art. 9.

In *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207, it is held that in a prosecution for adultery, the acquittal of one of the parties to the offense will not bar a prosecution against the other. The reason and doctrine of that decision seems applicable also to the offenses of bigamy and miscegenation.

Art. 482. [345] Preceding article not applicable, when.—The provisions of the preceding article shall not extend to any person whose husband or wife shall have been continually remaining out of the state, or shall have voluntarily withdrawn from the other and remained absent for five years, the person marrying again not knowing the other to be living within that time; nor shall the provisions of said article extend to any person who has been legally divorced from the bonds of matrimony. [O. C. 385.]

Cited, *Jones v. State* (Cr. App.) 165 S. W. 144.

Abandonment of spouse.—The provision that the preceding article shall not apply to one whose husband or wife shall have voluntarily withdrawn and remained absent for five years, applies to a person who was deserted by his wife in another state more than five years before the second marriage, although he has not resided in Texas five years prior to the second marriage. *Poss v. State*, 47 App. 486, 83 S. W. 1109.

The provision that the preceding article shall not extend to any person whose husband or wife shall have continuously remained out of the state for five years, does not apply to the case of a person who was abandoned by his wife in another state more than five years before his second marriage, but who has not lived in Texas five years. *Poss v. State*, 47 App. 486, 83 S. W. 1109.

Under the provision that the preceding article, shall not apply to a person whose husband or wife shall have continuously remained out of the state or shall have voluntarily withdrawn and remained absent for five years, proof by defendant in a prosecution for bigamy that his first wife voluntarily withdrew from him and remained absent more than five years prior to the second marriage is a complete defense, irrespective of the presumption of life or death after the absence of five years. *Poss v. State*, 47 App. 486, 83 S. W. 1109.

Proof entitling defendant to verdict.—If the defendant proves the essential features of either of the provisos as contained in this article he is entitled to a verdict. *Poss v. State*, 47 App. 486, 83 S. W. 1110.

Mistake.—See notes under preceding article.

Negating exceptions of article in indictment.—See notes under the preceding article.

Art. 483. [346] Intermarriage of whites and blacks.—If any white person and negro shall knowingly intermarry with each other within this state, or having so intermarried, in or out of the state, shall continue to live together as man and wife within this state, they shall be punished by confinement in the penitentiary for a term not less than two nor more than five years. [O. C. 386.]

Change in statute and constitutionality.—Prior to the revision of the Code the preceding article prescribed a punishment for the white person only. The negro was not punishable. Now both are punishable. Even before the change in the article it had been held to be valid, and not in conflict with the constitution of the United States, or of the act of congress known as the Civil Rights Bill. *Frasher v. State*, 3 App. 263, 30 Am. Rep. 131. Or of the constitution of this state. *Francois v. State*, 9 App. 144.

Marriage is a civil status left solely by the Federal Constitution and the laws to the discretion of the states under their general power to regulate their domestic affairs; this article is within the power of the state, and does not contravene the Federal Constitution. *Frasher v. State*, 3 App. 263, 30 Am. Rep. 131; *Francois v. State*, 9 Tex. 144.

Policy of state.—It has always been the policy of this state to maintain separate marital relations between whites and blacks. *Frasher v. State*; 3 App. 263, 30 Am. Rep. 131.

Marriage as element of offense.—A mere cohabitation within the state without marriage does not bring the offense within the statute. *Moore v. State*, 7 App. 608.

Indictment.—Willson's Cr. Forms, 247, 248.

Failure to name the name of the negro is not available in motion in arrest of judgment. *Frasher v. State*, 3 App. 263, 30 Am. Rep. 131.

The marriage must be positively averred. *Moore v. State*, 7 App. 608.

The indictment should have averred that defendant being a white person did knowingly intermarry with a negro without the state and did thereafter remove to this state and continue to cohabit with such negro within the state; or if the marriage occurred within this state, that fact should be alleged with the further allegation of continued cohabitation. *Moore v. State*, 7 App. 608.

Evidence.—In a prosecution for miscegenation, the fact of marriage must be proved. It must also be proved that one of the parties to the marriage was a white person, and the other a negro. The mere opinion of a witness that one of them looked like a white person, or, as the case may be, looked like a negro, is insufficient. The different race of the parties must be proved with certainty beyond a reasonable doubt. *Moore v. State*, 7 App. 608.

Where one testified in a civil suit that she was a white woman, held admissible against her on trial for intermarrying with a negro. *Bell v. State*, 33 App. 163, 25 S. W. 769. Evidence that her first husband was white is admissible as a circumstance against her. *Id.* Record of acquittal of paramour is inadmissible. *Id.*

To convict under this article the state has the burden of showing that one of the parties had sufficient negro blood to prohibit the marriage, and, where there is a reasonable doubt about it, accused must be acquitted. *Flores v. State*, 60 App. 25, 129 S. W. 1111.

Where, on the trial for a violation of this article, no witness testified to the quantity of negro blood in the woman whom accused married, and every witness, when asked with reference to the degree of negro blood in the woman, answered that they did not know, the refusal to charge that the burden of proof was on the state to show that he had violated the law in marrying the woman, and that the burden did not shift to him, was erroneous, though the court charged that, if the jury should find that the woman was a negro within the statute, accused was guilty. *Flores v. State*, 60 App. 25, 129 S. W. 1111.

Acquittal as bar to prosecution.—In *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207, it is held that in a prosecution for adultery, the acquittal of one of the parties to the offense will not bar prosecution against the other. The reason and doctrine of that decision seems applicable also to the offenses of bigamy and miscegenation.

Civil matters.—See notes under article 4613, *Vernon's Sayles' Civ. St.* 1914.

Art. 484. [347] "Negro" and "white person" defined.—The term "negro," as used in the preceding article, includes also a person of mixed blood descended from negro ancestry from the third generation, inclusive, although one ancestor of each generation may have been a white person. All persons not included in the definition of "negro" shall be deemed a white person within the meaning of this article.

Indictment.—Where an indictment charged that defendant, a white person, knowingly married a negro, the court properly refused to quash because it did not allege that he married a negro within the third generation inclusive. *Frasher v. State*, 3 App. 263, 30 Am. Rep. 131.

Instruction.—An instruction that the allegation that defendant married a negro was not sustained by evidence that he married a person of mixed blood unless it was shown that she was within the class designated in the law as negroes was misleading as authorizing the jury to find defendant guilty if he had married "a person of mixed blood descended from negro ancestry." *Frasher v. State*, 3 App. 263, 30 Am. Rep. 131.

Art. 485. [348] Proof of marriage.—In trials for the offenses named in the preceding articles of this chapter, proof of marriage by mere reputation shall not be sufficient.

See notes under article 481, ante.

Reputation in connection with other evidence.—General reputation alone, insufficient, may when taken with other evidence such as cohabitation and defendant's admission be sufficient to sustain a conviction. *Dumas v. State*, 14 App. 464, 46 Am. Rep. 241; *Adkisson v. State*, 34 App. 296, 30 S. W. 357.

Although general reputation of marriage is alone not sufficient evidence to prove marriage, it is admissible as tending to do so, and taken in connection with the cohabitation of the parties, and the admissions of the defendant, would be sufficient to sustain a conviction. See this subject fully discussed in *Dumas v. State*, 14 App. 464, 46 Am. Rep. 241. This article does not declare that reputation is not admissible evidence of marriage, but only that reputation alone, without other evidence, is insufficient to establish the fact of marriage. *Patterson v. State*, 17 App. 102.

Evidence held sufficient in connection with evidence of reputation. *Adkisson v. State*, 34 App. 297, 30 S. W. 357.

General reputation alone is insufficient, but, taken in connection with cohabitation and admission, makes prima facie case sufficient to sustain verdict for bigamy. *Waldrop v. State*, 41 App. 194, 53 S. W. 130.

While, under this article providing that proof of marriage by reputation is not sufficient in a prosecution for bigamy, general reputation alone is not sufficient to prove the previous marriage, it may be sufficient when taken in connection with evidence of cohabitation and accused's admissions. *Bryan v. State*, 63 App. 200, 139 S. W. 981.

Marriage of emancipated slaves.—Proof of the marriage of ex-slaves who were married by the Constitution of 1869 is not proof by reputation, but the evidence must show they were living at the date such Constitution took effect. *Steward v. State*, 7 App. 326.

CHAPTER TWO

INCEST

Art.	Art.
486. Punishment.	489. Relationship, how proved; proof of marriage unnecessary.
487. Certain marriages prohibited.	
488. Same subject.	

Article 486. [349] Punishment.—All persons who are forbidden to marry by the succeeding articles, who shall intermarry or carnally know each other, shall be punished by imprisonment in the penitentiary not less than two nor more than ten years.

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| 1. Nature and elements of offense. | 7. Testimony of husband and wife. |
| 2. Relationship of parties. | 8. Charge of court. |
| 3. Consent of female. | 9. Dismissal against paramour turning state's evidence. |
| 4. Indictment and proof thereunder. | 10. Conviction or acquittal as bar to prosecution. |
| 5. Evidence. | |
| 6. Testimony of prosecutrix or paramour. | |

1. Nature and elements of offense.—Incest is not an offense at common law. It was made a statutory offense in this state by the Act of 1848, which took effect January 1, 1849, and prior to said act a prosecution for said offense was not maintainable in this state. *Tuberville v. State*, 4 Tex. 128.

Under this article and article 489, a defendant who is indicted for committing incest by marrying his niece may be convicted on proof of his cohabiting with her without proof of a formal marriage between them. *Simon v. State*, 31 App. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

The act denounced by this and the following article is sexual intercourse, so that where there has been many separate acts, extending over a period of years, each completed act constitutes a separate offense. *Pridmore v. State*, 59 App. 563, 129 S. W. 1112, 29 L. R. A. (N. S.) 858.

2. Relationship of parties.—To prove incest with a stepdaughter it must be shown that girl's mother was defendant's lawful wife and if a prior marriage of either of the parties had existed, that it had been dissolved by death or divorce. *McGrew v. State*, 13 App. 340; *Harville v. State*, 54 App. 426, 113 S. W. 283; *Nance v. State*, 17 App. 385.

Relationship by affinity ceases with the dissolution of the marriage creating it. Incest, therefore, between parties whose relationship is one in affinity founded upon the marriage of one of them, is impossible after the dissolution of the marriage. *Johnson v. State*, 20 App. 609, 54 Am. Rep. 535; *Stanford v. State*, 42 App. 343, 60 S. W. 253.

Illegitimacy is no defense if the relationship exists. *Clark v. State*, 39 App. 179, 45 S. W. 576, 73 Am. St. Rep. 918; *Wadkins v. State*, 58 App. 110, 124 S. W. 959, 137 Am. St. Rep. 922, 21 Ann. Cas. 556.

Where accused, charged with incest with his stepdaughter, had been married prior to his marriage to the mother of prosecutrix, the state should clearly show that at the time of the second marriage his first wife was dead, or that the first marriage had been annulled. *Burford v. State* (Cr. App.) 151 S. W. 538; *Vickers v. State* (Cr. App.) 154 S. W. 578.

The illegality of the marriage interposed is no defense to incest. *Simon v. State*, 31 App. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

On the trial of a man for incest in marrying his half-niece, where the indictment charges and the evidence shows that his wife is the only daughter of his half-sister, naming her, it is not error to charge that, "if the jury believe defendant's wife is the daughter of a half-sister of defendant, you should find him guilty." *Simon v. State*, 31 App. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 102.

A marriage in one county on license issued in another county is legal. *Cummings v. State*, 36 App. 256, 36 S. W. 442.

While the mother is living, intercourse of her husband with the stepdaughter during the marriage relation is incestuous. *Stanford v. State*, 42 App. 343, 60 S. W. 254.

The depth of the penetration is not material to the crime of incest, where there is an emission. *Drake v. State* (Cr. App.) 151 S. W. 315.

Unless the mother of the girl with whom incest was charged to have been committed was the lawful wife of defendant, their intercourse would not constitute the crime. *Hamilton v. State* (Cr. App.) 153 S. W. 331.

Under this and the two following articles both the stepfather and stepdaughter

who have carnal intercourse are guilty of incest, although the intercourse takes place before the death of the woman's mother. *Vickers v. State* (Cr. App.) 169 S. W. 669.

3. Consent of female.—Consent by the female is no defense to the man. *Mercer v. State*, 17 App. 452; *Schoenfeldt v. State*, 30 App. 695, 18 S. W. 640.

That the female did not willingly consent, but accused used some force, is no defense to a prosecution for incest. *Jordan v. State*, 62 App. 388, 137 S. W. 114.

4. Indictment and proof thereunder.—Willson's Cr. Forms, 249-251.

See *Compton v. State*, 13 App. 271, 44 Am. Rep. 703.

An indictment for incest is not defective because it fails to charge that defendant knowingly entered into an unlawful marriage. *Simon v. State*, 31 App. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

Where the related parties marry, the indictment need not allege that accused "knowingly" entered into the unlawful marriage. Following the statute, and charging the intercourse as both incestuous and unlawful, was sufficient. *Simon v. State*, 31 App. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802; and by analogy an indictment for incest need not allege that the parties were not married. *Barrett v. State*, 55 App. 182, 115 S. W. 1187.

An indictment against a man for incest in marrying his half-niece is not fatally defective on the ground that it fails to charge affirmatively that there was a marriage, where it alleges that "the defendant did unlawfully intermarry." *Simon v. State*, 31 App. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

An indictment alleged that accused was the father of prosecutrix and had carnal knowledge with her; held, that it is not necessary to further allege that prosecutrix was a female. *Waggoner v. State*, 35 App. 199, 32 S. W. 896.

An indictment which in one count charges incest and in another count charges rape is good. *Owens v. State*, 35 App. 345, 33 S. W. 875; *Wiggins v. State*, 47 App. 538, 84 S. W. 821.

An indictment for incest, which alleges that prosecutrix was the daughter of a brother of accused, and that accused and the brother were children of the same father and mother, sufficiently shows that prosecutrix was a niece of accused; and it is not necessary to allege that accused and his brother were lawful issue of their parents; nor that there was a lawful marriage of their parents; nor to give the name of the mother of accused; nor to allege that prosecutrix was the lawful daughter of accused's brother; nor to give the name of her mother; nor that she was born of a lawful marriage. *Bailey v. State*, 63 App. 584, 141 S. W. 224.

Under Code Cr. Proc. arts. 453, 460, 476, providing that an indictment, charging the commission of the offense in ordinary language, so as to enable a person of common understanding to know what is meant, shall be sufficient, etc., an indictment for incest, which alleges that accused "did * * * unlawfully, canally know, and incestuously have carnal knowledge of," prosecutrix, is not bad; the word "canally" being intended for "carnally." *Bailey v. State*, 63 App. 584, 141 S. W. 224.

In a prosecution for incest, where the indictment charged accused with having intercourse with the daughter of his sister, proof merely that the female was his niece is not sufficient to warrant a conviction, and constitutes a fatal variance. *Blalack v. State*, 72 App. 375, 162 S. W. 865.

5. Evidence.—See notes under article 489 post.

Evidence of sexual acts between same parties prior to, or when indicating continuousness of illicit relations, subsequent to the act charged. *Burnett v. State*, 32 App. 86, 22 S. W. 47.

Proof of other acts than those charged is not admissible. *Clifton v. State*, 46 T. Cr. R. 18; *Kilpatrick v. State*, 39 App. 10, 44 S. W. 830; *Gillespie v. State*, 49 App. 530, 93 S. W. 556; *Wiggins v. State*, 47 App. 538, 84 S. W. 821. But, see, *Burnett v. State*, 32 App. 86, 22 S. W. 47.

In a prosecution for incest alleged to have been committed in December, evidence of other acts of intercourse by accused with the prosecuting witness in October and November was not admissible; one act of intercourse being sufficient to constitute the crime. *Skidmore v. State*, 57 App. 497, 123 S. W. 1129, 26 L. R. A. (N. S.) 446.

Where the state has elected to rely upon one act of incestuous intercourse, evidence of subsequent acts are inadmissible, and likewise acts leading up to the intercourse. *Gross v. State*, 61 App. 176, 135 S. W. 373, 33 L. R. A. (N. S.) 477.

In a prosecution for incest, prosecutrix may testify as to other acts of intercourse than those charged. *Cowser v. State*, 70 App. 265, 157 S. W. 758.

In a prosecution for incest, prior acts of intercourse between the parties, a stepfather and his young stepdaughter, are admissible as original evidence. *Vickers v. State* (Cr. App.) 169 S. W. 669.

Evidence of prior acts showing familiarity is admissible. *Pridmore v. State*, 53 App. 620, 111 S. W. 155.

Evidence held to sustain a conviction of incest. *Adams v. State*, 64 App. 61, 141 S. W. 527; *Lucas v. State*, 62 App. 316, 137 S. W. 354; *Bailey v. State*, 63 App. 584, 141 S. W. 224; *Contra, Tuberville v. State*, 4 Tex. 128; *Gay v. State*, 2 App. 127; *McGrew v. State*, 13 App. 340; *Cude v. State*, 50 App. 371, 97 S. W. 485; *Sauls v. State*, 30 App. 496, 17 S. W. 1066.

If the female with whom the incestuous intercourse is alleged to have been had, is shown to have knowingly, voluntarily, and with the same intent which actuated the accused, united with him in the commission of the offense, she is an accomplice in the crime, and her uncorroborated testimony is insufficient to support a conviction of the accused. On the other hand, if the evidence shows that in the commission of the incestuous act, she was the victim of force, threats, fraud, or undue influence, so she did not act voluntarily, and did not join in the act with the same intent that actuated the accused, then she is not an accomplice, and a conviction might stand even upon her uncorroborated testimony. *Mercer v. State*, 17 App. 452.

On trial for incest, it is error to allow the physician who attended the girl and delivered her child to state his opinion as to whose child it was. *Kilpatrick v. State*, 39 App. 10, 44 S. W. 830.

Where a man is indicted for marrying his half-niece, declarations of his deceased mother that he was illegitimate, and therefore not of kin to his wife, are not admissible for the purpose of showing that he married in good faith, where it is not shown that such declarations were made known to the defendant until about the time of his marriage. *Simon v. State*, 31 App. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

Where a man born in lawful wedlock is indicted for marrying his half-niece, declarations of his deceased mother that he is illegitimate, and therefore not of kin to his wife, are not admissible to rebut the family recognition and belief that has existed from his birth, nor the presumption that children born in wedlock are legitimate. *Simon v. State*, 31 App. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

Common law marriage is established by proof that the parties agreed to take each other to husband and wife, and from that time on lived professedly as such; and the common law marriage is subject to marriage liabilities. *Simon v. State*, 31 App. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

A marriage duly solemnized by proper authority is not invalid because the officer issuing the license, who held the positions of both district and county clerk under the law as it then existed, signed the license as district clerk instead of county clerk, and affixed to such license the seal of the district court instead of that of the county clerk, and hence the license is admissible in evidence on a prosecution of one of the parties to such marriage for bigamy. *Foster v. State*, 31 App. 409, 20 S. W. 823.

Evidence of cruelty of defendant to his daughter to compel her to submit to his embraces is admissible. *Clements v. State*, 34 App. 616, 31 S. W. 642.

Declarations of the prosecutrix to third parties not in defendant's presence, as to the paternity of the child should have been excluded. *Gillespie v. State*, 49 App. 530, 93 S. W. 556; *Poyner v. State*, 40 App. 640, 51 S. W. 376.

In a prosecution of a father for incest with his daughter, the state may show her age at the time the first indecent proposal was made; and anything showing a persistent effort to debauch and domination by brutal treatment or filthy familiarity is admissible in evidence. *Pridemore v. State*, 53 App. 620, 111 S. W. 155.

In a prosecution for incest alleged to have been committed with the daughter of accused's wife by a former husband, divorce from or death of the first husband before the wife's second marriage being essential to conviction, affirmative proof is necessary, and the statement by a witness that he understood that the former husband was dead was inadmissible. *Harville v. State*, 54 App. 426, 113 S. W. 283.

Where a prosecuting witness is shown by accused, on cross-examination of another witness, to have made statements out of court differing from his testimony at the trial, testimony of a witness for the state as to what the prosecuting witness had told him of the transaction is admissible, though accused was not present and the prosecuting witness was able to testify himself. *Harville v. State*, 54 App. 426, 113 S. W. 283.

The prosecution being dismissed as to one of two jointly indicted, the district attorney might properly tender her as a witness to the accused on trial. *Harville v. State*, 54 App. 426, 113 S. W. 283.

In a prosecution for incest, testimony was not admissible that witness, who had waited on prosecuting witness several months at her father's house, had never seen any misconduct by her, though accused had previously introduced evidence that prosecutrix had had intercourse with others. *Skidmore v. State*, 57 App. 497, 123 S. W. 1129, 26 L. R. A. (N. S.) 446.

In a prosecution for incest, where the state introduced evidence that, on September 17th following the intercourse which prosecutrix testified occurred in the previous December, she gave birth to a child, accused could prove that prosecutrix had intercourse with another during the months of September, October, November, and December previous to the birth of the child, to show that such other might have been the father of the child, and not accused. *Skidmore v. State*, 57 App. 497, 123 S. W. 1129, 26 L. R. A. (N. S.) 446.

Where defendant on a prosecution for incest with his sister sought to show that B, who married her, had had intercourse with her before their marriage, and that he, and not defendant, was the father of her child, it was proper to admit the testimony of B. that having been in love with her, and supposing her virtuous till she told him of her condition, he married her to save her name. *Harris v. State*, 64 App. 594, 144 S. W. 232.

In a prosecution for incest by a man with his stepdaughter, in which it was shown that accused had a son prior to his present marriage, the proof is sufficient that the former marriage was valid, though it would not be sufficient where the accused was a woman, since an illegitimate child is only the child of the mother, so as to require proof that such marriage had been dissolved before the present marriage. *Vickers v. State* (Cr. App.) 154 S. W. 578.

6. Testimony of prosecutrix or paramour.—See C. C. P. art. 801, and notes thereunder.

New trial will not be granted to procure for defendant the testimony of the female where unimpeached testimony showed her an accomplice. *Jones v. State*, 23 App. 501, 5 S. W. 138.

Where the conviction rested solely upon the testimony of the alleged injured female, and her own testimony showed that she willingly, knowingly, and voluntarily united with the defendant in the commission of the carnal act, she being his niece, it was held that in the absence of corroborating evidence the conviction could not stand. *Blanchett v. State*, 29 App. 46, 14 S. W. 392. See, also, *Dodson v. State*, 24 App. 514, 6 S. W. 548; *Shoenfeldt v. State*, 30 App. 695, 18 S. W. 640.

When the prosecuting witness on a trial for incest was impeached by several

witnesses as to statements by her contradictory of her evidence as to the paternity of her child, held permissible for the state to prove in support of her testimony her general good reputation for truth and veracity. *Tipton v. State*, 30 App. 530, 17 S. W. 1097; *Crook v. State*, 27 App. 198, 11 S. W. 444.

When the evidence tends to show the consent of prosecutrix, a conviction cannot stand on her uncorroborated testimony. *Coburn v. State*, 36 App. 257, 36 S. W. 442.

Testimony of prosecutrix is sufficiently corroborated when the whole evidence shows that defendant is the only person who had the opportunity to have intercourse with her, and that she was pregnant. *Jackson v. State*, 37 App. 612, 40 S. W. 498.

An isolated act of intercourse testified to by the prosecutrix alone, who consented to the intercourse, is insufficient to support a conviction. *Clark v. State*, 39 App. 179, 45 S. W. 576, 73 Am. St. Rep. 918.

The general reputation of the prosecutrix for chastity is immaterial, consequently she cannot be impeached by showing admissions of intercourse with other men. *Richardson v. State*, 44 App. 211, 70 S. W. 320.

The female, having denied the offense, may be contradicted by the state by testimony of grand jurors as to her testimony before that body. *Gibson v. State*, 45 App. 312, 77 S. W. 812.

The state cannot corroborate the prosecutrix by proving statements out of court and before the grand jury similar to her testimony, and that she never charged any one but accused with being the father of her child, unless an attempt has been made to impeach her testimony that he is its father by proof of contradictory statements made by her out of court; and such corroboration is not permissible, although the defense in cross-examining her has attacked her virtue and attempted to show that her testimony is false. *Pridemore v. State*, 53 App. 620, 111 S. W. 155.

Where it is not permissible for the state to corroborate its witness by showing similar statements to that sworn to in court, statements made by the prosecuting attorney in the presence of the jury of facts indirectly that have the illegal purpose of corroborating the witness are prejudicial, though the testimony suggested in such statement is excluded. *Pridemore v. State*, 53 App. 620, 111 S. W. 155.

The female consenting is an accomplice within the rules of evidence. *Skidmore v. State*, 57 App. 497, 123 S. W. 1129, 26 L. R. A. (N. S.) 446.

Evidence held to sufficiently corroborate the testimony of prosecutrix to justify a conviction of incest. *Jordan v. State*, 62 App. 388, 137 S. W. 114.

A female voluntarily submitting is an accomplice of accused charged with incest, and her testimony, to justify a conviction, must be corroborated. *Jordan v. State*, 62 App. 388, 137 S. W. 114.

That the female gave birth to a child in the usual period of gestation from the date of the intercourse as fixed by her testimony is corroborative of her testimony, and other testimony that accused was with her at the date and place testified to by her is also admissible to corroborate her testimony. *Jordan v. State*, 62 App. 388, 137 S. W. 114.

In a prosecution for incest, where the defense, in cross-examining the prosecuting witness, attempted to show that her statement that the act occurred while the parties were standing and that conception resulted was unreasonable, it was proper for the state to show on redirect examination that defendant and witness had previously had intercourse on numerous occasions. *Vickers v. State* (Cr. App.) 169 S. W. 669.

7. **Testimony of husband and wife.**—See notes under C. C. P. art. 795.

8. **Charge of court.**—In its charge to the jury the court is required to distinctly set forth the law applicable to the case as made by the evidence. The jury are the exclusive judges of the facts proved and of the weight to be given to the testimony, and it is usual for the court in its charge to instruct the jury that such is their province. See *Jackson v. State*, 22 App. 442, 3 S. W. 111, for a state of facts which demanded such an instruction, and because of the failure of the court to give it, the conviction was set aside.

When the evidence raises the issue as to the prosecutrix being an accomplice, the court should instruct the jury on the law of accomplices. *Coburn v. State*, 36 App. 257, 36 S. W. 442.

In an incest case, a question asked a witness whether he had ever heard accused or any member of his family deny that the other party to the offense was accused's stepdaughter, the daughter of his wife, was improper, as indirectly forcing accused's wife to testify against him; she being a member of his family. *Harville v. State*, 54 App. 426, 113 S. W. 283.

9. **Dismissal against paramour turning state's evidence.**—See notes under C. C. P. art. 729.

10. **Conviction or acquittal as bar to prosecution.**—See notes under C. C. P. art. 9.

The acquittal of one of the parties to the incestuous intercourse will not bar the prosecution and conviction of the other. One may be innocent and the other guilty of the offense. *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207.

Art. 487. [350] Certain marriages prohibited.—No man shall marry his mother, his father's sister or half-sister, his mother's sister or half-sister, his daughter, the daughter of his father, mother, brother or sister, or of his half-brother or sister, the daughter of his son or daughter, his father's widow, his son's widow, his wife's daughter, or the daughter of his wife's son or daughter.

See notes under the preceding article.

Indictment.—Willson's Cr. Forms, 249-251.

Art. 488. [351] Same subject.—No woman shall marry her father, her father's brother or half-brother, her mother's brother or half-brother, her own brother or half-brother, her son, the son of her brother or sister, or of her half-brother or half-sister, the son of her son or daughter, her mother's husband after the death of her mother, her daughter's husband after the death of her daughter, her husband's son, the son of her husband's son or daughter.

See notes under article 486 ante.

Indictment.—Willson's Cr. Forms, 249-251.

Art. 489. [352] Relationship, how proved; proof of marriage unnecessary.—Upon a trial for incest, the fact of the relationship between the parties may be proved in the manner in which that fact is established in civil suits; and proof of cohabitation or carnal knowledge shall be in all cases sufficient, without proof of marriage.

Relationship by affinity.—Where the step-father is charged with incest with his step-daughter, a legal marriage of the defendant with the mother of such daughter must be established before the carnal intercourse of such father and daughter can be held to be incest. *McGrew v. State*, 13 App. 340. The fact of such legal marriage may be proved by circumstantial as well as by direct evidence. *Nance v. State*, 17 App. 385. If there be evidence tending to show that the mother of the step-daughter, prior to her marriage with defendant, had been married to another man, it devolves upon the state to show that such former marriage was illegal, or had ceased to exist at the time of her marriage with defendant, otherwise her marriage with defendant would be illegal, and there would be no relationship between defendant and her daughter. *Nance v. State*, 17 App. 385; *McGrew v. State*, 13 App. 340.

Illegitimate relationship.—In a prosecution for incest with accused's illegitimate child, evidence was admissible that accused claimed prosecutrix, who was born to her mother out of wedlock, as his child when she was an infant, shortly after her mother's death, and took her to his home and recognized her as his child. *Wadkins v. State*, 58 App. 110, 124 S. W. 959, 137 Am. St. Rep. 922, 21 Ann. Cas. 556.

The legitimacy of a child cannot be impeached by proof that her color is different from that of her mother's husband, where she is the same color as her mother. *Foote v. State* (Cr. App.) 144 S. W. 275.

In a prosecution for incest, in order to show that the girl with whom the offense was claimed to have been committed was not the child of accused's brother, but an illegitimate child of such brother's wife, accused offered to show acts of illicit intercourse between his brother's wife and a man not her husband after her marriage to his brother by the testimony of the wife and the alleged paramour. The testimony was excluded. Held not error, since the illegitimacy of a child born in lawful wedlock can be established only by proof of nonaccess or impotency. *Foote v. State* (Cr. App.) 144 S. W. 275.

Evidence in general.—See notes under article 486 ante.

Indictment.—Willson's Cr. Forms, 251.

CHAPTER THREE

OF ADULTERY AND FORNICATION

<p>Art. 490. "Adultery" defined. 491. Proof of marriage. 492. Both parties guilty.</p>	<p>Art. 493. Punishment for adultery. 494. "Fornication" defined. 495. Punishment for fornication.</p>
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Article 490. [353] "Adultery" defined.—"Adultery" is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman when either is lawfully married to some other person.

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| <p>1. Changes in law.
2. Ordinance as conflicting with statute.
3. Nature and elements of offense.
4. Living together.
5. Habitual carnal intercourse.
6. Distinguished from statutory rape and bigamy.
7. Marriage.
8. Indictment and proof thereunder.</p> | <p>9. Transferring indictment or information to county court.
10. Evidence.
11. Testimony of husband or wife.
12. Testimony of accomplice.
13. Competency of indicted adulterer as witness for paramour.
14. Charge of court.
15. Acquittal or conviction as bar to prosecution.</p> |
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1. **Changes in law.**—By the Revised Penal Code, the offense of adultery has been materially changed, and the offense may now be committed in either of two modes; 1st, by the living together and having carnal intercourse with each other, of a man and a woman, of whom either is married to some other person; or, 2d, by the habitual carnal intercourse of such parties with each other, without living

together. The changes made in the law defining this offense, are such as require corresponding changes in the pleading, proof, and instructions to the jury, and many of the adjudications under the former law are now inapplicable. *Collum v. State*, 10 App. 708. Only such adjudications under the former statutes as seem to be still applicable are cited.

2. Ordinance as conflicting with statute.—An ordinance of the city of Ft. Worth, which under its special charter was given all the police power of the state as to acts which could be made minor offenses, making it unlawful for any white person and any negro to have sexual intercourse with each other within the city limits, each act to be a separate offense, and declaring its violation a misdemeanor, punishable by fine not exceeding \$200, was not invalid, as conflicting with this article nor with article 494, since one act alone between such white person and negro constitutes an offense, whether one or both are married to another, or neither is married. *Strauss v. State* (Cr. App.) 173 S. W. 663.

3. Nature and elements of offense.—The other essentials being present the crime may consist of either one of two circumstances: 1. The living together and carnal intercourse with each other. 2. Habitual carnal intercourse without living together. *Edwards v. State*, 10 App. 25; *Mitten v. State*, 24 App. 346, 6 S. W. 196; *Bird v. State*, 27 App. 635, 11 S. W. 641, 11 Am. St. Rep. 214; *Randle v. State*, 12 App. 250.

Continuing to live together after discovering that the wife's former marriage was not dissolved by death of the husband as was supposed was adultery. *Hildreth v. State*, 19 App. 195.

If the parties live together a single act will suffice. *Bird v. State*, 27 App. 635, 11 S. W. 641, 11 Am. St. Rep. 214; *Swancoat v. State*, 4 App. 105.

4. Living together.—If a married man and an unmarried colored woman lived together in the same room, with but one bed in the room, and with no other attendant but a small child, and thus live for a series of months, the jury might convict. *Richardson v. State*, 34 Tex. 142. It is the act of living together that constitutes the offense, and not the knowledge or intent; and such guilty knowledge need not be averred or proved. *Fox v. State*, 3 App. 329, 30 Am. Rep. 144. And subsequent marriage does not relieve the offenders. *Id.*

To constitute adultery there must be some sort of living together; a single act or occasional acts will not constitute adultery. *Swancoat v. State*, 4 App. 105; *Parks v. State*, *Id.*, 134.

It was not necessary to define "living in adultery" the meaning being plain; that is: the state of living of the parties described in the code, and necessarily involved the idea of unlawful carnal intercourse. *Parks v. State*, 4 App. 134.

The words "living together" not being defined in the code are to be construed in the sense in which they are understood in common language taking into consideration the context, and thus construed mean that the parties must "dwell or reside together—abide together in the same habitation as a common or joint residing place." *Bird v. State*, 27 App. 635, 11 S. W. 641, 11 Am. St. Rep. 214; *Burnett v. State*, 44 App. 226, 70 S. W. 207.

See opinion for facts held insufficient to support a conviction on an indictment charging defendants with living together. *McCabe and Cordway v. State*, 34 App. 418, 30 S. W. 1063.

Where the parties resided about a mile apart evidence of intimacy, frequent meetings, and tending to show that defendant had stayed a night in the woman's house did not show a living together. *Burnett v. State*, 44 App. 226, 70 S. W. 207.

Several acts of intercourse by defendant with a servant living in his house did not warrant conviction under the first provision as to living together. *Boswell v. State*, 48 App. 47, 85 S. W. 1076, 122 Am. St. Rep. 731.

To constitute the crime of adultery by living together, it is not necessary that the parties live together as man and wife, but only that they live together and have intercourse. *Shaw v. State*, 49 App. 379, 91 S. W. 1087.

Evidence of adultery between defendant and his wife's niece, who was living in his home, authorizes a conviction of adultery by "living together"; since it is not necessary to constitute that offense that the parties live together as man and wife, but only that they live together and have intercourse. *Bodkins v. State* (Cr. App.) 172 S. W. 216.

5. Habitual carnal intercourse.—Under the original Code (arts. 392, 393), carnal knowledge by an unmarried man with a married woman, as many as a half dozen times, his visits being stolen, and the parties not living together, did not constitute the offense. *Richardson v. State*, 37 Tex. 346. A single act will not suffice, but repeated interviews at a given place, or even at different appointed places, may. *Swancoat v. State*, 4 App. 105; *Parks v. State*, 4 App. 134; *Morrill v. State*, 5 App. 447.

The court need not define the word "habitual" it being a word of general signification, and not technical. *Collum v. State*, 10 App. 708; *Hilton v. State*, 41 App. 190, 53 S. W. 113.

The word "habitual" is not a technical word, but is only to be understood as it is commonly used and needs no definition in charge. *Hilton v. State*, 41 App. 190, 53 S. W. 113.

Four acts of carnal intercourse are not sufficient to sustain conviction on charge of habitual intercourse. *Hilton v. State*, 41 App. 190, 53 S. W. 113.

6. Distinguished from statutory rape and bigamy.—Bigamy and adultery though covering the same period as to time are distinct offenses. *Swancoat v. State*, 4 App. 105.

Carnal intercourse with a female under the age of consent being declared by the statute to be rape is that and nothing else, so that she is not an accomplice on the ground that she was guilty of adultery. *Donley v. State*, 44 App. 428, 71 S. W. 958.

7. **Marriage.**—If slaves were living together as man and wife at the date the constitution of 1869 took effect, and continued so to live until 1876, and the cohabitation of the woman with another man, she is deemed to have been legally married. But there must be evidence of living together at that time. *McKnight v. State*, 6 App. 158; *Webb v. State*, 24 App. 164, 5 S. W. 651.

That the marriage ceremony was not by an ordained minister would not cause a prosecution for adultery of one of the parties to fail if there was a common law marriage. *Holder v. State*, 35 App. 19, 29 S. W. 793.

8. **Indictment and proof thereunder.**—*Willson's Cr. Forms*, 252-254.

To support conviction for adultery it must be charged and proved that one of the parties is married to some person other than the *particeps criminis*. *Tucker v. State*, 35 Tex. 113.

The indictment need not aver that accused knew that his paramour was married; it is the act of living together that constitutes the offense. *Fox v. State*, 3 App. 329, 30 Am. Rep. 144.

If the indictment allege adultery by living together conviction cannot be had for habitual carnal intercourse without living together. *Randle v. State*, 12 App. 250; *Burns v. State*, 12 App. 394; *Bird v. State*, 27 App. 635, 11 S. W. 641, 11 Am. St. Rep. 214.

Though the statute uses the terms "man" and "woman" on indictment describing the parties as "a male" and "a female" is sufficient. *Holland v. State*, 14 App. 182.

It is sufficient to allege that one of the offenders is married to some person other than to the person with whom the adultery is charged. But it is not necessary that the name of such person be alleged; nor is it necessary to allege that one of the offenders is a man and the other a woman. *Hildreth v. State*, 19 App. 195; *Collum v. State*, 10 App. 708; *Holland v. State*, 14 App. 182; *Clay v. State*, 3 App. 499. The adultery need not be alleged with a *continuando*, but may be alleged as on a single, designated day. *Swancoat v. State*, 4 App. 105. An indictment which merely charges that the parties did "unlawfully cohabit together and carnally know each other," is insufficient. *Edwards v. State*, 10 App. 25.

Indictments for adultery approved. *Mitten v. State*, 24 App. 346, 6 S. W. 196; *Bird v. State*, 27 App. 635, 11 S. W. 641, 11 Am. St. Rep. 214; *Thomas v. State*, 28 App. 300, 12 S. W. 1098.

If, under an indictment for adultery, the carnal intercourse is established by proof of one act and that the parties lived together, or by proof of habitual intercourse, whether they lived together or not, and the state should fail to prove the marriage, as alleged the accused could be legally convicted of fornication. *Kelley v. State*, 32 App. 579, 25 S. W. 425.

Prosecution for adultery failing for proof of marriage only the defendant may be convicted of fornication; but conviction for adultery cannot be had on prosecution for fornication, as here the marriage is not alleged and the punishment is greater. *Kelley v. State*, 32 App. 579, 25 S. W. 425.

In criminal procedure at common law, in other states and in this state, under an indictment for adultery, with the proper allegations, a conviction can be had, under proper evidence, for fornication. The question is not whether one offense includes another. It is a question of allegation. The legislature cannot, by enacting that a certain offense includes another offense, relieve the state of the necessity of inserting in the indictment every allegation necessary to make a good indictment for the offense of which the accused has been convicted. *Cosgrove v. State*, 37 App. 249, 39 S. W. 367, 66 Am. St. Rep. 802.

A woman indicted for adultery with a man alleged to be married to a certain woman then living cannot be convicted of fornication on proof that the man was not so married, there being no allegation that the parties to the crime were not married. *Cosgrove v. State*, 37 App. 249, 39 S. W. 367, 66 Am. St. Rep. 802.

The allegations in such cases must contain the essentials of fornication, before conviction can be had therefor. *Id.*; *Pena v. State*, 46 Tex. Cr. 458, 80 S. W. 1014.

Allegation that defendant was married to a third party named was sufficient to charge that the parties were not married to each other. *Lee v. State*, 47 App. 464, 83 S. W. 1110.

Allegation that defendant was married to G. and proof of marriage to A. was fatal. *Garland v. State*, 51 App. 643, 104 S. W. 898.

May charge adultery in one count and fornication in another. *Garland v. State*, 51 App. 643, 104 S. W. 898; *Cosgrove v. State*, 37 App. 249, 39 S. W. 367, 66 Am. St. Rep. 802.

Under this article and article 492, it was held that it was sufficient in a prosecution of the woman to prove that the man was at the time married to another person then living, without proving that accused was then married, so that an allegation that she was could be rejected as surplusage. *Goodwin v. State*, 70 App. 600, 158 S. W. 274.

Where an indictment for adultery alleged the name of defendant's wife, and it was conclusively shown that defendant was married and living with his wife at the time of the acts charged, an instruction that did not require the jury to find that he was married to the person named in the indictment was not erroneous. *Bodkins v. State* (Cr. App.) 172 S. W. 216.

In an indictment for adultery, an allegation of the name of defendant's wife is surplusage. *Bodkins v. State* (Cr. App.) 172 S. W. 216.

9. **Transferring indictment or information to county court.**—See notes under C. C. P. art. 483.

10. **Evidence.**—Evidence held insufficient to support a conviction. *Eaton v. State*, 60 App. 429, 132 S. W. 356; *Smith v. State*, 58 App. 106, 124 S. W. 919; *Price v. State*, 64 App. 448, 142 S. W. 586.

A witness must not be allowed to testify his mere suspicions from general indications, as that, from the position in which he saw the parties, he received the impression that they had been having carnal intercourse. *McKnight v. State*, 6 App. 158.

It is not incumbent on the state to prove the name of the person to whom one of the adulterers is married. *Collum v. State*, 10 App. 708.

Nor to prove a guilty knowledge on the part of the accused. *Fox v. State*, 3 App. 329, 30 Am. Rep. 144.

The evidence should be confined to the particular kind of adultery charged, that is, to adultery by cohabitation and carnal intercourse or by habitual carnal intercourse, without cohabitation. Where but one of these modes of committing the offense is charged, evidence of its commission by the other mode is not admissible, and if admitted, will not support conviction. *Randle v. State*, 12 App. 250; *Burns v. State*, Id., 394.

Former acts of intimacy short of carnal intercourse, of recent date, may be shown; but acts of familiarity four years before the date of the alleged offense was too remote. *French v. State*, 47 App. 571, 85 S. W. 4.

In a prosecution for adultery, the state was permitted to prove acts of the parties occurring subsequent to the filing of the indictment, and in a county other than that of the prosecution. It was held that under the peculiar facts of that case, the evidence was admissible. *Funderburg v. State*, 23 App. 392, 5 S. W. 244.

Prosecutrix testified that defendant had intercourse with her several different times, always in the presence of his wife, and that she at first yielded to defendant's embraces at his wife's solicitations. The court holds this to be a most remarkable state of facts, but refuses to pass on the sufficiency of the evidence. *Hoy v. State*, 39 App. 340, 45 S. W. 916.

Declaration of paramour jointly indicted with defendant, not made in his presence, is not admissible against him. *Whicken v. State* (Cr. App.) 55 S. W. 48.

Evidence that defendant insisted that his paramour change her room from downstairs in the hotel where they were stopping to upstairs and near defendant's room was properly admitted. *Coons v. State*, 49 App. 256, 91 S. W. 1085.

Testimony that defendant's paramour, whose name was Mrs. Shaw, was called "Muggins" by defendant, was not objectionable. *Coons v. State*, 49 App. 256, 91 S. W. 1085.

Testimony that witness understood that defendant's paramour was a grass widow, and that defendant had said she was a widow, was not irrelevant or immaterial. *Coons v. State*, 49 App. 256, 91 S. W. 1085.

Evidence that witness supposed defendant to be a married man, and that he lived with a woman understood to be his wife several years before the prosecution, was admissible, and not objectionable as secondary or indefinite. *Coons v. State*, 49 App. 256, 91 S. W. 1085.

Testimony by defendant's alleged paramour that she and defendant boarded at the same hotel in another county is admissible, if shown to be shortly before or after the date alleged in the indictment. *Coons v. State*, 49 App. 256, 91 S. W. 1085.

Evidence held sufficient to support conviction for adultery. *Coons v. State*, 49 App. 256, 91 S. W. 1085.

The jury were not required to find that the parties had carnal intercourse on any particular occasion, provided they found, from the circumstances surrounding any occasion within the time covered by the indictment, that the parties lived together and had carnal intercourse. *Counts v. State*, 49 App. 329, 94 S. W. 220.

The state must show that defendant's wife was alive at the time of the offense. *Dixon v. State*, 50 App. 385, 97 S. W. 692.

Evidence held insufficient to show habitual carnal intercourse. *Green v. State*, 53 App. 540, 110 S. W. 908; *Sadler v. State*, 52 App. 439, 107 S. W. 352; *Quinn v. State*, 51 App. 155, 101 S. W. 248.

Acts of the parties prior to the finding of the indictment are admissible in prosecution for adultery, though the illicit intercourse occurred after the date alleged in the indictment. *Russell v. State*, 53 App. 500, 111 S. W. 658.

In a prosecution for adultery, evidence that defendant's horse was hitched at the home of his paramour is admissible. *Russell v. State*, 53 App. 500, 111 S. W. 658.

In a prosecution for adultery by means of habitual carnal intercourse without living together, corroboration of the female as to one act of intercourse will not warrant a conviction on her testimony. *Wallace v. State*, 63 App. 611, 141 S. W. 95.

Evidence in a prosecution for adultery by means of habitual carnal intercourse without living together held not to show habitual intercourse. *Wallace v. State*, 63 App. 611, 141 S. W. 95.

In a prosecution for adultery by means of habitual carnal intercourse without living together, evidence that the female is a prostitute is admissible, bearing on the issue of habitual intercourse. *Wallace v. State*, 63 App. 611, 141 S. W. 95.

That the complaining witness was a prostitute in the habit of having indiscriminate intercourse with other men, or that her reputation was that of an unchaste woman, were not defenses to a prosecution for fornication, and evidence of such facts was properly excluded. *Bailey v. State* (Cr. App.) 150 S. W. 915.

Evidence, held sufficient to justify the jury in finding that accused and the woman lived together as man and wife, and had sexual intercourse while living together. *Brown v. State* (Cr. App.) 154 S. W. 567.

On a trial for adultery with C., testimony that L., accused's housekeeper, married, and, after living with her husband but a short time, returned to keeping house for accused, was competent, especially where accused's witness testified to the same effect. *Brown v. State* (Cr. App.) 154 S. W. 568.

On a trial for adultery with C., testimony that she was a prostitute and had

previously been in a house of prostitution, and that accused visited her there ostensibly to urge her to return to her home, and went to her room with her, was competent. *Brown v. State* (Cr. App.) 154 S. W. 568.

Evidence that delivery wagons carried groceries to the house where it was claimed accused and a woman lived together as man and wife was competent. *Brown v. State* (Cr. App.) 154 S. W. 568.

Sexual intercourse while living together may be established by circumstantial testimony. *Brown v. State* (Cr. App.) 154 S. W. 567.

Evidence held insufficient to sustain a verdict of guilty. *Koger v. State* (Cr. App.) 165 S. W. 577.

In a prosecution of defendant for adultery with his wife's niece, who had been living in his home, evidence that the girl had gone from defendant's home to a home for fallen girls and had there given birth to a baby is admissible, when limited to the issue whether the niece had had intercourse with some man. *Bodkins v. State* (Cr. App.) 172 S. W. 216.

11. **Testimony of husband or wife.**—See notes under C. C. P. art. 795.

12. **Testimony of accomplice.**—See notes under C. C. P. art. 801.

13. **Competency of indicted adulterer as witness for paramour.**—See notes under C. C. P. art. 791.

14. **Charge of court.**—A charge which wholly ignores the question of the marriage of one of the parties, is erroneous. *Parks v. State*, 3 App. 337. When but one of the modes of committing adultery is charged in the indictment, it is a radical error to instruct that a conviction may be had upon evidence which proves the other mode not alleged. *Randle v. State*, 12 App. 251; *Burns v. State*, Id. 334; *Hildreth v. State*, 19 App. 195. Where evidence of the acts of the parties occurring in another county from that of the prosecution, and subsequent to the presentment of the indictment, was admitted as tending to prove the adultery charged, it was held error for the court to omit to instruct the jury, as to the purpose for which such testimony was admitted, and that they could not convict for adultery committed in another county. *Funderburg v. State*, 23 App. 392, 5 S. W. 244. When the adultery is charged to have been committed by "habitual carnal intercourse," without cohabitation, it is error to instruct the jury so as to permit a conviction without proof that the carnal intercourse was habitual. The phrase "habitual intercourse," is a familiar and untechnical expression, and need not be explained in the charge. *Collum v. State*, 10 App. 708.

Instruction properly refused. *Perry v. State* (Cr. App.) 34 S. W. 618.

When there is evidence of an act after complaint was filed, the court should instruct the jury that defendant could not be convicted on such testimony. *Proctor v. State*, 37 App. 366, 35 S. W. 172.

Appellant was charged by complaint filed on the 20th of July, 1895; information was filed on the 22d day of August; the evidence tended to show adultery to have been committed between the filing of the complaint and information. The charge of the court authorized the jury to convict on evidence at any time within two years prior to the filing of the information; held, error. *Proctor v. State*, 37 App. 366, 35 S. W. 172.

On a trial for adultery, where accused admitted he was married, a charge assuming the existence of the marriage is not objectionable as being on the weight of the evidence. *Russell v. State*, 53 App. 500, 111 S. W. 658.

15. **Acquittal or conviction as bar to prosecution.**—See notes under article 492 and C. C. P. arts. 9, 772.

Conviction of bigamy would not necessarily bar prosecution for adultery during the period covered by the bigamous marriage. *Swancoat v. State*, 4 App. 105.

Art. 491. [354] Proof of marriage.—The proof of marriage in such cases may be made by the production of the original marriage license and return thereon, or a certified copy thereof, or by the testimony of any person who was present at such marriage, or who has known the husband and wife to live together as married persons.

Proof is not limited to the statutory method and admissions of an accused that he is a married man are competent evidence against him. *Boger v. State*, 19 App. 91. *Holland v. State*, 14 App. 182.

Marriage license.—A marriage license held sufficient to show the marriage of defendant. *Thomas v. State* (Cr. App.) 26 S. W. 724.

Opinion evidence.—Marriage can not be proved by opinion. *Webb v. State*, 24 App. 164, 5 S. W. 651.

Other proof.—The preceding article does not prescribe the only mode of proving the marriage. It may be proved by the defendant's admissions, as may also the fact that his, or her, lawful spouse was living at the time of the adultery. *Boger v. State*, 19 App. 91. Of course such admissions would ordinarily be admissible evidence only against the party making them. Marriage can not be established by declarations of paramour made before prosecution was instituted. The paramour is an accomplice and her testimony must be corroborated. *Wiley v. State*, 33 App. 406, 26 S. W. 723.

When the defense is that the parties were legally married and that a former marriage by defendant was null, a petition in a suit for divorce filed by defendant against his former wife is admissible. *Holder v. State*, 35 App. 19, 29 S. W. 793.

Evidence, on a trial for adultery, held sufficient to justify the jury in finding that accused and the woman were both married, and that his wife and her husband were living. *Brown v. State* (Cr. App.) 154 S. W. 567.

Art. 492. [355] Both parties guilty.—When the offense of adultery has been committed, both parties are guilty, although only one of them may be married.

Acquittal or conviction of one party.—The acquittal of one of the parties to the adultery will not bar a prosecution and conviction of the other. *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207; *Ledbetter v. State*, 21 App. 344, 17 S. W. 427; *Solomon v. State*, 39 App. 149, 45 S. W. 706.

Instructing verdict in favor of one defendant on joint trial.—On a joint trial for adultery the court instructed a verdict of not guilty as to one of the defendants; held, no error; one defendant may be found not guilty and the other one guilty. *Solomon v. State*, 39 App. 140, 45 S. W. 706.

Subsequent marriage as defense or condonation.—A subsequent valid marriage of the parties does not condone the previous adultery, and is no defense to a prosecution for said offense. *Fox v. State*, 3 App. 329, 30 Am. Rep. 144. See, also, *Bird v. State*, 27 App. 635, 11 S. W. 641, 11 Am. St. Rep. 214.

Although the evidence may show that the parties married each other and lived together as man and wife, they may still be convicted of adultery. *Hildreth v. State*, 19 App. 195.

Proof of marriage.—Under this article and article 490, ante, it was held, that it was sufficient in a prosecution of the woman to prove that the man was at the time married to another person then living, without proving that accused was then married, so that an allegation that she was could be rejected as surplusage. *Goodwin v. State*, 70 App. 600, 158 S. W. 274.

Art. 493. [356] Punishment for adultery.—Every person guilty of adultery shall be punished by fine not less than one hundred nor more than one thousand dollars. [Act Feb. 12, 1858, p. 165; P. C. 392.]

Art. 494. [357] "Fornication" defined.—"Fornication" is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, both being unmarried.

See *Perigo v. State*, 25 App. 533, 8 S. W. 660.

When made an offense.—Prior to the adoption of the Revised Penal Code, the offense of fornication was not defined by the Code, and was therefore not punishable under article 3 of said Code as it then existed. *Wolff v. State*, 6 App. 195, and cases there cited. But it is now made an offense and is punishable. *Wells v. State*, 9 App. 160; *Powell v. State*, 12 App. 238.

Ordinance as conflicting with statute.—See art. 965, C. C. P., and notes.

Nature and elements of offense.—Under the original Code (arts. 392–395), the offense of "fornication," not being defined, was not punishable, but "a living together in fornication" was an offense. *State v. Foster*, 31 Tex. 578; *Fennell v. State*, 32 Tex. 379; *State v. Smith*, 32 Tex. 167; but afterward it was held that "a living together in fornication" was not punishable. *State v. Rahl*, 33 Tex. 76. But these cases have been criticised, and are hardly authority. *State v. Randle*, 41 Tex. 292. See, however, *Wolff v. State*, 6 App. 195.

"Living together" means that the parties dwell or reside together in the same habitation as a common or joint residing place. *Thomas v. State*, 28 App. 300, 12 S. W. 1098; *Mitten v. State*, 24 App. 346, 6 S. W. 196; *Bird v. State*, 27 App. 365, 11 S. W. 641, 11 Am. St. Rep. 214.

Fornication may be committed in one of two modes: 1. By living together and carnal intercourse with each other. 2. By habitual carnal intercourse with each other without living together. *Thomas v. State*, 28 App. 300, 12 S. W. 1098.

That the complaining witness was a prostitute in the habit of having indiscriminate intercourse with other men, or that her reputation was that of an unchaste woman, were not defenses to a prosecution for fornication, and evidence of such facts was properly excluded. *Bailey v. State* (Cr. App.) 150 S. W. 915.

Indictment and information.—*Willson's Cr. Forms*, 255, 256.

Included in indictment for adultery, see note under article 490.

Under a similar statute (*Hart. Dig.*, sec. 377), an indictment against a negro man and a certain woman, for living together in fornication, need not aver the descent of the woman. *Ashworth v. State*, 9 Tex. 490.

Under Pen. Code, art. 494, declaring that the offense of fornication may be committed by a man and woman living together, both being unmarried, and having carnal intercourse with each other, or by such man and woman having habitual carnal intercourse with each other without living together, an indictment charging that a man and woman had habitual carnal intercourse, but not alleging that they lived together at the time of such intercourse, or that they had the intercourse without living together, is fatally defective. *Jones v. State*, 29 App. 347, 16 S. W. 189.

It is not necessary that each count, conclude "against the peace and dignity of the state." *Stebbins v. State*, 31 App. 294, 20 S. W. 552.

An indictment alleging "neither of said persons being then and there lawfully married to another person then living" sufficiently charged that defendants were unmarried. *Stebbins v. State*, 31 App. 294, 20 S. W. 552.

State is not required to elect between counts in an indictment all charging misdemeanors. *Stebbins v. State*, 31 App. 294, 20 S. W. 552.

The indictment for fornication containing an allegation that the parties were

not living together, the charge should make the fact of their living apart necessary to conviction. *Mitchell v. State*, 38 App. 325, 42 S. W. 989.

May charge adultery in one count and fornication in another. *Garland v. State*, 51 App. 643, 104 S. W. 898; *Cosgrove v. State*, 37 App. 248, 39 S. W. 367, 66 Am. St. Rep. 802.

The information should follow the statute, and one merely charging habitual carnal intercourse was insufficient. *Cannedy v. State*, 58 App. 184, 125 S. W. 31.

An information for fornication, which charged accused with being an unmarried male and the person with whom the offense was committed with being an unmarried female, charged that accused was a man and that the other person was a woman. *Townser v. State*, 58 App. 453, 126 S. W. 572, 137 Am. St. Rep. 976.

Evidence.—As a general rule it is not competent for the state to prove that the female defendant has the reputation of a prostitute. *Perigo v. State*, 25 App. 533, 8 S. W. 660. But in view of the female's confession of the fact the error was not material. *Id.*

Proof, which, but for failure to prove marriage of one of the parties, would sustain conviction for adultery, would sustain conviction for fornication. *Kelley v. State*, 32 App. 579, 25 S. W. 425.

The paramour is not a competent witness, though not indicted. *Spencer v. State*, 31 Tex. 64.

A conviction of a woman upon the unsupported declarations of her paramour, testified to upon trial by third parties, can not be sustained. *Spencer v. State*, 31 Tex. 64; nor do the facts that the man and the woman lived together in the same house, but occupied different rooms, the woman having been the slave of the man, being nearly white, and wearing short hair, justify a conviction. *Smelser v. State*, 31 Tex. 95.

The state must show affirmatively that both parties were unmarried. *Wells v. State*, 9 App. 160.

Evidence held insufficient to sustain a conviction. *Cohen v. State*, 11 App. 337; *Smelser v. State*, 31 Tex. 95.

Evidence held insufficient to show a living together. *McCabe v. State*, 34 App. 418, 30 S. W. 1063.

Evidence that the woman had intercourse with other men was not admissible. *Rodes v. State*, 38 App. 328, 42 S. W. 990.

A prosecution for fornication, being an offense only against public decency, testimony that the particeps criminis, prior to her living in fornication with defendant, had borne a good reputation for chastity, was irrelevant. *Boatwright v. State*, 42 App. 442, 60 S. W. 760.

On a prosecution for fornication, the fact that witnesses testified without objection that the particeps criminis, prior to her alleged improper relations with defendant, had borne a good reputation for chastity, did not authorize the admission of similar testimony thereafter over objection. *Boatwright v. State*, 42 App. 442, 60 S. W. 760.

On a prosecution for fornication, the particeps criminis being on the stand, and having given material testimony against defendant, it was error to refuse to permit introduction of a letter written by her in which she had made statements contradictory to her testimony. *Boatwright v. State*, 42 App. 442, 60 S. W. 760.

On a prosecution for fornication, testimony that the witness, at the instance of defendant's brother, had endeavored to get the particeps criminis and defendant admitted to the county farm, was not reversible error on the ground that defendant was not a party to the arrangement, in view of the court's explanation that defendant was shown to have authorized his brother to procure such admission. *Boatwright v. State*, 42 App. 442, 60 S. W. 760.

On a trial for fornication, evidence held not to sufficiently corroborate the testimony of the woman with whom the alleged offense was committed. *Townser v. State*, 58 App. 453, 126 S. W. 572, 137 Am. St. Rep. 976.

A conviction of unlawful cohabitation and of having carnal intercourse with an unmarried woman cannot be sustained without proof that she was unmarried. *Watson v. State*, 62 App. 620, 138 S. W. 611.

Accused's testimony that he had intercourse with the complaining witness five or six times, that he remembered having intercourse twice in 1910, and three times in 1911, that he did not remember telling the grand jury that he had intercourse with her whenever he wanted to, that he guessed he could have had intercourse any time he wanted to, and that he went to see her until she told him she was pregnant, when he quit, sufficiently showed that the acts of intercourse were habitual to sustain a conviction for fornication. *Bailey v. State* (Cr. App.) 150 S. W. 915.

Charge of the court.—Charge of the court in fornication cases, see *Mitten v. State*, 24 App. 346, 6 S. W. 196.

On indictment for fornication in living together it was error for the charge to authorize conviction for habitual carnal intercourse without living together. *Powell v. State*, 12 App. 238.

When only one of the modes of committing fornication is charged in the indictment, it is radical error to instruct the jury that they may convict upon evidence proving that the offense was committed by the other mode not charged. *Powell v. State*, 12 App. 238.

Acquittal as bar to prosecution.—The acquittal of one of the alleged fornicators is no bar to the prosecution and conviction of the other. *Alonzo v. State*, 15 App. 378, 49 Am. Rep. 207.

Art. 495. [358] Punishment for fornication.—Every person guilty of fornication shall be punished by fine not less than fifty nor more than five hundred dollars.

CHAPTER FOUR

BAWDY AND DISORDERLY HOUSES

Art.		Art.
496.	"Bawdy house" and "disorderly house" defined.	502. Further defined.
497.	"Assignment house" defined.	503. Keeping same may be enjoined.
498.	Alluring females to visit same.	504. Who may be made party defendant.
499.	Includes any room, etc.	505. Duty of attorney general, district and county attorneys.
500.	Punishment for keeping.	506. Officers, their duties.
501.	Owner, lessee or agent controlling premises.	

Article 496. [359] "Bawdy house" and "disorderly house" defined.—A "bawdy house" 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; or any house located in any county, justice precinct or other subdivision of a county where the sale of intoxicating liquor has been prohibited under the laws of this state, in which such non-intoxicating malt liquor is sold or kept for the purpose of sale, as requires the seller thereof to obtain internal revenue license under the laws of the United States as a retail malt liquor dealer; or any house located in any county, justice precinct or other subdivision of a county in which the sale of intoxicating liquor has been legally prohibited, where the owner, proprietor or lessee thereof has posted license issued by the United States of America, authorizing such owner, proprietor or lessee thereof to pursue the occupation and business of a retail liquor dealer, or a retail malt liquor dealer. [Amended by Act April 4, 1889, p. 33; amended, Act 1907, p. 246; S. S. 1910, p. 32.]

See notes under articles 500, 502 and 503, post.

Cited, *State v. Country Club* (Civ. App.) 173 S. W. 577; *Mosher v. State*, 62 App. 42, 136 S. W. 467; *Snider v. State*, 70 App. 16, 155 S. W. 533; *Minter v. State*, 70 App. 634, 159 S. W. 286; *Cunningham v. State* (Cr. App.) 166 S. W. 519.

Constitutionality and repeal.—Acts 30th Leg. c. 132, P. C. arts. 496 et seq., was not repealed by Vagrancy Act 1909, c. 59, P. C. arts. 634 et seq. punishing as vagrants, among others, every common prostitute and every keeper of a house of prostitution, etc., and repealing all conflicting laws. *Weir v. State*, 64 App. 164, 141 S. W. 948; *Hitchings v. State* (Cr. App.) 143 S. W. 1164.

Acts 30th Leg. p. 246, c. 132, is not in conflict with Const. art. 16, § 20, requiring the Legislature to enact a law whereby the voters of any municipality may by a majority vote determine whether the sale of intoxicating liquors shall be prohibited within prescribed limits. *Joliff v. State*, 53 App. 61, 109 S. W. 176.

This law not unconstitutional, nor is it repealed by the act known as the *Baskin-McGregor bill*. *Joliff v. State*, 53 App. 61, 109 S. W. 177; *Bumbaugh v. State*, 56 App. 331, 120 S. W. 424.

Acts 30th Leg. c. 132, P. C. arts. 496 et seq. prohibiting disorderly houses, was not repealed by *Robertson-Fitzhugh Liquor Law* (Acts 31st Leg. [1st Ex. Sess.] c. 17) § 25, P. C. art. 626, forbidding presence of lewd women in places where liquor is sold. *Morgan v. State*, 62 App. 39, 136 S. W. 445.

Act April 18, 1907 (Acts 30th Leg. c. 132) P. C. arts. 496 et seq., relating to the offense of keeping a bawdyhouse, does not violate Const. art. 3, § 25, which requires that no bill shall contain more than one subject which shall be expressed in its title. *Richards v. State*, 63 App. 176, 140 S. W. 459.

This article, including in the definition of a disorderly house a place in prohibition territory where nonintoxicating malt liquors, requiring a United States retail liquor dealer's license are sold or kept for sale was a proper exercise of the state's "police power," which includes authority to restrict the pursuit of any business or occupation injurious to the health, peace, security, morals, or general welfare of society. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

Conflict with other articles.—This article and articles 589 and 611 are not conflicting. *Haynes v. State*, 63 App. 181, 139 S. W. 1155.

Statute as general.—Acts 30th Leg. p. 246, c. 132, prohibiting the keeping of a disorderly house where intoxicating liquors are sold or kept for sale without a license, is a general law and is applicable in local option territory as well as in nonlocal option territory *Joliff v. State*, 53 App. 61, 109 S. W. 176.

The disorderly house statute is a general law, and applies to all parts of the state, whether local option is in force or not. *Layton v. State*, 61 App. 507, 135 S. W. 557.

Lease of premises illegal.—A lease of premises to be occupied as a bawdyhouse by the lessee, executed by the lessor who had knowledge of the lessee's purpose, and who acquiesced in the use of the premises and collected the rent, is illegal, and neither party may demand relief therefrom or thereunder, within the rule that, where two persons participate in an unlawful transaction and are in pari delicto, neither a court of law nor equity will aid either, notwithstanding articles 496, 500, and 501, defining a bawdy house and punishing the keeper and owner thereof, unless the owner proceeds to prevent the keeping by giving information to the prosecuting attorney. *Eckles v. Nowlin* (Civ. App.) 158 S. W. 794.

Sale of liquor.—See notes under articles 500 and 503, post.

Sales without license in general, see art. 611, post.

Article 496, as enacted in 1907 (Acts 30th Leg. c. 132), and as amended in 1910 (Acts 31st Leg. 3d Ex. Sess. c. 14), defining a "disorderly house" as a house where intoxicating liquors are kept for sale and sold without a license, or any house located in prohibition territory in which nonintoxicating malt liquor is sold or kept for sale, so as to require the seller to obtain an internal revenue license under the federal laws, etc., does not include persons not previously included, but merely provides that, where by law a license is required, the carrying on of the business without a license gives to the house the quality of a disorderly house, and a club organized to maintain golf and other sports which maintains a clubhouse where its members may obtain intoxicating liquors, does not maintain a disorderly house. *State v. Duke*, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385.

Where a club is not organized in good faith for purposes authorized by law, but merely as a subterfuge for the sale of intoxicants, sales made by it are illegal and are subject to the penalties imposed by law. *State v. Duke*, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385.

The possession of an internal revenue liquor license by a club organized to maintain golf and other sports, and maintaining a clubhouse where intoxicants are sold to its members, does not fix on the directors of the club the liabilities and burdens of a retail liquor dealer, nor estop them from showing that they are not in the business of selling intoxicants, within the law. *State v. Duke*, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385.

A bona fide club, situated in a precinct, city, or town where liquor may be lawfully sold, organized for purposes sanctioned by law, and which, as a mere incident and without profit, furnishes liquors to its members, and not to the public generally, is not a person, under the laws, "engaged in the occupation or business of selling intoxicating liquors," though each individual act of such club in territory where the sale of liquor is prohibited by law is a sale. *State v. Duke*, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385.

Under Acts 23d Leg. c. 121, Acts 30th Leg. c. 138, and Acts 31st Leg. 1st Ex. Sess. c. 17, imposing a tax on every person, firm or association selling intoxicating liquors, etc., a club organized to maintain golf and other sports, and maintaining a clubhouse where intoxicating liquors are sold to the members only, does not sell intoxicating liquors. *State v. Duke*, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385.

A social club organized in Oklahoma, but which has not complied with the laws of Texas by filing its charter, etc., may not sell liquor in Texas without a license, even if it had a permit to do business in the state; there being no showing that the law of Oklahoma permitted a club to sell liquor without a license. *Pace v. State*, 70 App. 454, 156 S. W. 1192.

Article 496, providing that a house located in a prohibition district, in which nonintoxicating malt liquor is sold or kept for sale, requiring the seller to have an internal revenue license, shall be a disorderly house, should be construed as constituting a special exception to Rev. St. 1911, arts. 7476, 7477, providing for the licensing of persons to sell nonintoxicating malt liquors, with reference to particular territory, and was therefore not in conflict with such sections. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

This article in declaring that a house located in a district where the sale of intoxicating liquors is prohibited in which nonintoxicants, for the lawful sale of which an internal revenue license is required, are sold or kept for sale shall constitute a disorderly house, was not objectionable for uncertainty in referring to the laws of Congress to determine the conditions under which it should be applicable. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

Rev. St. 1911, art. 7476, levies a state tax on sellers of nonintoxicating malt liquors of \$2,000, and authorizes counties, incorporated cities, and towns to levy an additional tax not exceeding \$1,000 on such persons. Section 7477 requires persons engaged in the business to apply for a license and pay the taxes prescribed. Held, that Pen. Code, art. 496, defining a disorderly house as any house situated in territory where the sale of intoxicating liquors is prohibited where nonintoxicating malt liquors, requiring an internal revenue license, are sold or kept for sale, was not invalid as delegating to Congress the power of determining whether the business of selling nonintoxicating malt liquors shall be valid, and as conferring on another jurisdiction power to suspend a state law; since, if Congress should exempt sellers of nonintoxicating malt liquors from the internal revenue requirement, a person prosecuting such business in prohibition territory where the sale of intoxicating liquors is prohibited would owe his immunity from punishment, not to the suspension of the state law, but to the fact that he was not keeping a disorderly house under the conditions prescribed by the Penal Code. *Johnson v. Elliott* (Civ. App.) 168 S. W. 968.

While a bona fide club situated in a district where liquor may lawfully be sold, organized for purposes sanctioned by law, and selling liquor to its members, and not to the public as a mere incident to its organization and without profit, is not engaged in the occupation or business of selling intoxicating liquors, under the laws of the state, and cannot be enjoined under articles 496 and 503, providing for injunction against houses where liquor is illegally sold as disorderly houses, yet such protection does not extend to clubs not organized in good faith for purposes authorized by law but merely as a subterfuge to evade the law. *Soto v. State* (Civ. App.) 171 S. W. 279.

The fact that sales of liquor by a social club were not made for profit does not prevent the club from being engaged in the business of selling such liquors, since profit is not an essential element of engaging in such business. *State v. Country Club* (Civ. App.) 173 S. W. 570.

Accomplice.—See notes under article 79 ante.

Indictment.—Willson's Cr. Forms, 257, 258.

Art. 497. "Assignment house" defined.—An "assignment house" is a house, room or place where men and women meet by mutual appointment, or by appointment made by another, for the purpose of sexual intercourse, whether at such place vinous, spirituous or malt liquors are kept for sale or are used or not. [Act 1907, p. 246; S. S. 1910, p. 32.]

Restaurant.—One who maintained a restaurant in which he permitted lewd women to congregate and drink and to meet men for the purpose of arranging for unlawful sexual intercourse elsewhere is guilty of keeping a disorderly house within the purview of articles 497, 498, 499, and so his maintenance of such restaurant may be enjoined under the direct provisions of article 503. *Ex parte Yoshida*, 70 App. 212, 156 S. W. 1166.

Art. 498. Alluring females to visit same.—It shall be unlawful for any person to invite, solicit, procure, allure or use any means for the purpose of alluring or procuring any female to visit and be at any particular house, room or place for the purpose of meeting and having unlawful sexual intercourse with any male person, or to take part, or in any way participate in any immoral conduct with men or women, or to use at such place any intoxicating liquors, or to give to any person the name and address, or either, or photograph of any female for the purpose of enabling the person to whom such name, address or photograph of such female is given and furnished, to meet and have unlawful sexual intercourse, or to bring about or procure such unlawful sexual intercourse with such female by any other person. Any person violating any of the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than two hundred dollars, and, in addition thereto, shall be confined in the county jail not less than one nor more than six months. [Act 1907, p. 246.]

See arts. 506a-506e, post, and note under article 497 ante.

Constitutionality.—The punishment assessed in articles 359a and 361 refer to distinct, though allied, offenses, and hence Acts 30th Leg. 1907, p. 246, c. 132, adding and re-enacting such articles, and prohibiting the keeping of disorderly houses, is not unconstitutional, because of indefiniteness of the punishment prescribed. *Wilson v. State*, 55 App. 176, 115 S. W. 337.

Information.—An information charging that accused procured and allured a female to be at a certain place, a designated town, for the purpose of meeting and having unlawful intercourse with men, is sufficiently definite to charge a violation of this statute. *Sanders v. State*, 60 App. 34, 129 S. W. 605.

Such information was sufficient without stating any particular house or room in such town. *Sanders v. State*, 60 App. 34, 129 S. W. 605.

This article, making it unlawful for any person to solicit or procure any female to visit any particular house for the purpose of having unlawful intercourse with any male person, etc., creates the offense of alluring any female to go to a certain place for immoral conduct, and where a female is allured or invited, and she starts to the place of assignment, the offense is complete, and the information need not give the names of those she was to meet at such place. *Sanders v. State*, 60 App. 34, 129 S. W. 605.

Female as accomplice.—See notes to art. 79, ante.

Evidence.—On a trial for soliciting a female to visit a place for the purpose of having sexual intercourse with P., where the identity of the female was in issue, testimony of W. that he accompanied the prosecuting witness to the place where the crime was committed and had intercourse with such female was admissible for all purposes. *Dowd v. State* (Cr. App.) 148 S. W. 304.

Art. 499. [360] Includes any room, etc.—Any room or part of a building or other place appropriated or used for either of the purposes above enumerated is a disorderly house within the meaning of this chapter.

See note under article 497 ante.

Meaning of "house."—The house may be any kind of a structure, even a tent. *Killman v. State*, 2 App. 222, 28 Am. Rep. 432.

When one carries lewd women around through the country and stops at various places and the prostitution is carried on in a hack and wagon which are under his control and he receives part of the proceeds he is guilty of keeping a disorderly house. *Tracy v. State*, 42 App. 494, 61 S. W. 127, 128.

Art. 500. [361] Punishment for keeping, or owner of the house having information that his house is being kept or used, etc.—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 bawdy house or a disorderly house, in any house, building, edifice or tenement, or shall knowingly permit the keeping of a bawdy house 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 bawdy house 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. [Amended by Act April 4, 1889, p. 33; amended 1907, p. 246.]

See notes under article 496 ante.

Cited, *Cunningham v. State* (Cr. App.) 166 S. W. 519.

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| 1. Constitutionality, repeal, and amendment. | 6. Jurisdiction of justice courts. |
| 2. Validity of municipal ordinance. | 7. Transferring cases to county court. |
| 3. Nature and elements of offense and persons liable. | 8. Evidence. |
| 4. Accessories. | 9. Defendant as witness in own behalf. |
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| | 11. Former acquittal or conviction as bar to prosecution. |
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1. **Constitutionality, repeal, and amendment.**—See notes under article 504.

Offenses committed before the amendment were properly tried by the old law. *Johnson v. State*, 28 App. 562, 13 S. W. 1005.

Not "any person" as under the old law, but only "any owner, lessee or tenant" is declared guilty under the amendment April 4, 1889, Gen. Laws, 21 Leg. p. 33. *Lamar v. State*, 30 App. 693, 18 S. W. 788.

Under this amendment a servant of the owner merely taking care of the place cannot be punished. *Mitchell v. State*, 34 App. 311, 30 S. W. 810.

A husband may be liable though the wife owns the property. *Willis v. State*, 34 App. 148, 29 S. W. 787.

A mother of an owner held not liable, though she exercised some control over the premises and paid taxes thereon. *Cook v. State*, 42 App. 539, 61 S. W. 307.

Under the amendment the offenses were cognizable by a justices court, and as this gave the district court of Harris appellate jurisdiction by virtue of Rev. St. 1879, arts. 1496, 1497, it had not original and exclusive jurisdiction. *Davis v. State*, 32 App. 382, 23 S. W. 892.

The vagrancy act of 1909, p. 111, P. C. arts. 634 et seq., punishing as vagrants every keeper of a house of prostitution, etc., and repealing all conflicting laws, did not repeal this article. *Wilson v. State*, 61 App. 628, 136 S. W. 447.

Act April 18, 1907 (Acts 30th Leg. c. 132), amending Pen. Code 1895, tit. 10, c. 4, arts. 361, 362 (articles 500 and 502, post) does not violate Const. art. 3, § 36, which provides that no law shall be revived or amended by reference to its title; but in such case the act revived or the section or sections amended shall be re-enacted and published at length. *Richards v. State*, 63 App. 176, 140 S. W. 459.

2. **Validity of municipal ordinance.**—See art. 965, C. C. P., and notes.

3. **Nature and elements of offense and persons liable.**—If the house is kept for the purposes named in the statute it is immaterial how quietly and peaceably it is kept. *Sylvester v. State*, 42 Tex. 496.

It is only the keeper of the disorderly house that is subject to punishment. Prostitutes who may occupy rooms in such house, but who are not the keepers, or concerned in the keeping of such house, are not guilty of this offense. *Moore v. State*, 4 App. 127; *Stone v. State*, 22 App. 185, 2 S. W. 585. Nor is the owner of the house who has rented it for the purpose of its being kept as a disorderly house guilty of the offense of keeping such house. *Albertson v. State*, 5 App. 89.

A house is not necessarily a disorderly house within the meaning of the statute because it is resorted to by prostitutes and vagabonds. It must be kept for the purpose or as a resort. Proof that accused kept a combined retail grocery establishment and beer saloon, and that prostitutes and vagabonds resorted to that establishment for the purpose of buying and drinking beer was insufficient to support a conviction for "keeping a disorderly house." *McElhanev v. State*, 12 Tex. App. 231; *Harmes v. State*, 26 App. 190, 9 S. W. 487, 8 Am. St. Rep. 470.

On keeping a disorderly house as continuous offense. See *Huffman v. State*, 23 App. 491, 5 S. W. 134; *Fleming v. State*, 28 App. 234, 12 S. W. 605; *Novy v. State*, 62 App. 492, 138 S. W. 139.

The statute is violated if a prostitute is knowingly employed, or is permitted, after employment, to conduct herself in an indecent manner. *Johnson v. State*, 32 App. 504, 24 S. W. 411.

In making a case under the statute, all that is required of the state, as to the character of the woman, is to show such facts as would put a reasonable man on notice. *Id.*

A tenant is liable if he allows lewd conduct in his house. *Golden v. State*, 34 App. 143, 29 S. W. 779.

Defendant kept a house for the sale of spirituous, vinous and malt liquors; lewd women were allowed to stay about the place and to display and conduct themselves in a lascivious manner; held, that he was guilty of keeping a disorderly house. *Golden v. State*, 34 App. 143, 29 S. W. 779.

On trial for keeping a disorderly house the evidence showed that the defendant had made a request in writing to his tenant to vacate the premises; held, that this alone was insufficient. *Willis v. State*, 34 App. 148, 29 S. W. 787.

It is no defense that house is property of defendant's wife. *Willis v. State*, 34 App. 148, 29 S. W. 787.

A servant of the owner of a disorderly house can not be punished for taking care of the house. *Mitchell v. State*, 34 App. 311, 30 S. W. 810.

Agent having charge of the property is liable. *Flynn v. State*, 35 App. 220, 32 S. W. 1041.

Defendant may be convicted for keeping a disorderly house, although but one prostitute is in the house, if it is shown to be a place where men commonly resort, or acts of prostitution have been there committed. *Ramey v. State*, 39 App. 200, 45 S. W. 489.

To constitute tenancy the keeper must have a right of tenancy by virtue of contract with the owner or landlord. *Bates v. State*, 45 App. 420, 76 S. W. 463.

A mere trespasser is not owner, lessee or tenant. *Id.*

Under this article and article 496, defining a bawdyhouse, and punishing any person who directly, or as agent for another, keeps, or assists in keeping a bawdyhouse, etc., a tenant of a house, who keeps the house as a bawdyhouse, is guilty of a criminal offense. *Farrell v. State*, 64 App. 200, 141 S. W. 535.

One prosecuted for unlawfully keeping and knowingly permitting a house under her control to be kept as a place where prostitutes resort cannot be convicted, unless she had knowledge of the conduct of the inmates or knew that they were prostitutes. *Hitchings v. State* (Cr. App.) 143 S. W. 1164.

It is no offense for one to keep liquors for his own use. *Williams v. State* (Cr. App.) 148 S. W. 306.

The keeper of a disorderly house within article 496, defining a disorderly house as any assignation house, or theater or house where liquors are kept for sale and women of bad reputation are permitted, is guilty of an offense involving moral turpitude, and a witness for accused is properly cross-examined as to whether he is under an indictment for keeping a disorderly house (citing 5 Words and Phrases, p. 4580). *Bird v. State* (Cr. App.) 148 S. W. 738.

It is no defense to a prosecution for keeping a disorderly house where liquor is sold without a retail license that it was in territory where a license could not be obtained. *Gill v. State* (Cr. App.) 150 S. W. 616.

One who sells real estate to a purchaser who uses it for immoral purposes is not guilty of an offense, but one who leases property with knowledge that the lessee will use it for immoral purposes is guilty. *Compton v. State*, 71 App. 7, 158 S. W. 515.

A lease of premises to be occupied as a bawdyhouse by the lessee, executed by the lessor who had knowledge of the lessee's purpose, and who acquiesced in the use of the premises and collected the rent, is illegal, and neither party may demand relief therefrom or thereunder, within the rule that, where two persons participate in an unlawful transaction and are in pari delicto, neither a court of law nor equity will aid either, notwithstanding articles 496, 500, and 501, defining a bawdyhouse and punishing the keeper and owner thereof, unless the owner proceeds to prevent the keeping by giving information to the prosecuting attorney. *Eckles v. Nowlin* (Civ. App.) 158 S. W. 794.

Sayles' Ann. Civ. St. 1897, art. 2969, provides that all property of a wife, both real and personal, owned by her before marriage shall be her separate property, but during the marriage the husband shall have the sole management thereof. Held, that where a husband and wife lived together on property belonging to her, and it did not appear that he in fact was not in control thereof, or that the wife had ever objected to his control, it was no defense to a prosecution of the husband for maintaining a disorderly house thereon that the title was in the wife. *Key v. State*, 71 Tex. 485, 160 S. W. 354.

Where the owner of a house is charged with knowingly permitting it to be kept as a house of prostitution where prostitutes are permitted to resort or reside for the purpose of plying their vocation, knowledge that the occupants were prostitutes and were running houses of prostitution must be traced to accused. *Golden v. State*, 72 App. 19, 160 S. W. 957.

A woman in charge and control of a house on the night when parties met there for the purpose of having sexual intercourse, who had lived there continuously for

more than six months, and who admitted to witnesses that she was the keeper of the house, was the "keeper" thereof, within the statute. *Hearne v. State* (Cr. App.) 165 S. W. 596.

In a prosecution for permitting a disorderly house to be kept on defendant's premises, tried without a jury, where the state's evidence would authorize a conviction, and it appeared that defendant was informed of the character of the house some time in January or February and requested additional investigation, which was refused, the defendant's efforts in the following May, after prosecution had been commenced, to have the premises vacated, were too late to save him from prosecution. *Davidson v. State* (Cr. App.) 173 S. W. 1037.

4. **Accomplices.**—See notes under article 79 ante.

5. **Indictment, information and complaint.**—Willson's Cr. Forms, 258.

See C. C. P., art. 470, and notes.

See *Willis v. State*, 34 App. 148, 29 S. W. 787; *Young v. State*, 55 App. 383, 116 S. W. 1158.

An indictment without the approved beginning or conclusion and failing to allege that the assembly of disorderly persons permitted by defendant was at his house was insufficient. *Stephanes v. State*, 21 Tex. 206.

It is sufficient to charge that the defendant "did unlawfully keep a disorderly house, being then and there kept for the purpose of public prostitution." *Thompson v. State*, 1 App. 56; *Thompson v. State*, 2 App. 82; *Brown v. State*, Id. 189; *Killman v. State*, Id. 222, 28 Am. Rep. 432; *Lowe v. State*, 4 App. 34; *Brooks v. State*, Id. 567; *Loraine v. State*, 22 App. 640, 3 S. W. 340. But an averment that the defendant "did commit the offense of keeping a disorderly house" is insufficient. *Lasindo v. State*, 2 App. 59; *Tompkins v. State*, 4 App. 161. Since the amendment of the preceding article 496 the decision in *Springer v. State*, 16 App. 591, is not applicable. This offense is a continuous one, and a conviction bars all further prosecutions up to the time of such conviction. But if the indictment alleges certain dates within which the offense was committed, a conviction will not bar a prosecution for the same offense committed at a time not within the dates alleged. *Huffman v. State*, 23 App. 491, 5 S. W. 134; *Wilson v. State*, 16 App. 591; *Handley v. State*, Id. 444. No specific description of the house is necessary. *Lowe v. State*, 4 App. 34. Nor is it necessary to allege that prostitutes or vagrants did resort to the house. *Brooks v. State*, 4 App. 567. It may be alleged conjunctively that the offense was committed in all the modes specified in the statute, but if these modes be alleged disjunctively the indictment will be bad. *Tompkins v. State*, 4 App. 161.

Plea of former conviction does not avail, where the last indictment covers a different time. *Fleming v. State*, 28 App. 234, 12 S. W. 605.

Indictment must charge that the accused is either the owner, lessee, or tenant of the house. *Lamar v. State*, 30 App. 693, 18 S. W. 788. And on other essentials of indictment, see *Ex parte Garza*, 28 App. 381, 13 S. W. 779, 19 Am. St. Rep. 845; *Johnson v. State*, 28 App. 562, 13 S. W. 1005; *Harmes v. State*, 26 App. 190, 9 S. W. 487, 8 Am. St. Rep. 470.

Each day may be alleged in a separate count in the indictment and a conviction had on each count on the same trial. *Hall v. State*, 32 App. 474, 24 S. W. 407. Complaint alleging that defendant is the owner, tenant, and lessee of house is not demurrable. *Merrell v. State* (Cr. App.) 29 S. W. 41.

Under a statute against keeping a disorderly house, or knowingly permitting it to be kept, where such ways of committing the offense are included in the same general definition, and made punishable in the same manner they do not constitute distinct offenses, and may be charged conjunctively in one count in the indictment. *Willis v. State*, 34 App. 787, 29 S. W. 787.

The indictment alleged ownership in accused, the evidence showed that he was agent for the house and had control of it, and rented it knowing the purpose for which it would be used; held, that the ownership was properly alleged (distinguished from *Mitchell v. State*, 34 App. 311, 30 S. W. 810). *Flynn v. State*, 35 App. 220, 32 S. W. 1041.

An information for keeping a disorderly house need not name the house nor the lot on which it is situated. *Sprague v. State* (Cr. App.) 44 S. W. 837.

An indictment following the statute and stating conjunctively the acts constituting keeping a disorderly house was not duplicitous, nor bad for using the words "for prostitution" rather than the words "for the purpose of prostitution." *Schulze v. State* (Cr. App.) 56 S. W. 918.

An information alleging in substance that on February 2, 1907, and on each and every day from then until March 1, 1907, accused did as owner, tenant, and lessee, unlawfully keep a disorderly house for the purpose of public prostitution and as a common resort for prostitutes and vagabonds, is sufficient. *Wimberly v. State*, 53 Tex. Cr. 11, 108 S. W. 384.

An indictment charging one with keeping a disorderly house where liquors are sold or kept for sale without a license is sufficient when drawn with special reference to the forms laid down in Willson's Criminal Forms, No. 218. *Joliff v. State*, 53 App. 61, 109 S. W. 176.

An indictment under this article as amended by the act of 1907 need not allege that the liquors charged to have been kept are capable of producing intoxication. *Jelink v. State*, 52 Civ. App. 402, 115 S. W. 908.

Under article 496, defining a disorderly house as one where spirituous, vinous, or malt liquors are kept for sale without first having obtained a license, an indictment for keeping a disorderly house is not insufficient for failure to allege that the liquors kept for sale were intoxicating. *Tachini v. State*, 59 App. 55, 126 S. W. 1139.

Where the statute (Acts 30th Leg. c. 132), defining the offense of keeping a bawdyhouse, under which accused was prosecuted, went into effect in August, 1907, and the information charged that accused was the keeper of the house on

December 18, 1909, testimony was admissible as to the general reputation of the house from September 1 to December 18, 1909, and was not objectionable on the ground that it was not limited to the time of the allegations in the information, charging accused with keeping the house. *Gordon v. State*, 60 App. 570, 133 S. W. 255.

An information charging the keeping of a disorderly house sufficiently identified the house by alleging that it was in a certain county. *Wilson v. State*, 61 App. 628, 136 S. W. 447.

An information for keeping a bawdyhouse under this article, which declares that "any person who shall directly keep a bawdyhouse in any house, building, edifice, or tenement shall be deemed guilty of keeping the same," is sufficient without alleging that defendant was the owner, lessee, or tenant, etc., or the extent of his control over it. *Mosher v. State*, 62 App. 42, 136 S. W. 467.

An information charging that accused on a certain day, and on each succeeding day from that date to another fixed day, conducted a disorderly house, is not bad as stating a separate offense for each day covered by the period. *Novy v. State*, 62 App. 492, 138 S. W. 139.

An indictment for keeping a bawdyhouse, which substantially follows the form for an indictment laid down in the Penal Code, is sufficient. *Farrell v. State*, 64 App. 200, 141 S. W. 535.

An indictment, charging accused with keeping a bawdyhouse, which specifically charges that the house was in the county in which the indictment was found, need not give any further description of the location of the house. *Farrell v. State*, 64 App. 200, 141 S. W. 535.

Under this article and article 496, defining a bawdyhouse, and punishing any person who directly, or as agent for another, keeps, or assists in keeping, a bawdyhouse, etc., a tenant of a house, who keeps the house as a bawdyhouse, is guilty of a criminal offense; and an indictment charging the offense, need not allege that he knowingly permitted the keeping of the house. *Farrell v. State*, 64 App. 200, 141 S. W. 535.

The complaint and information in a prosecution for keeping a disorderly house charged that the house was kept by defendant directly and indirectly. Held that, as the rest of the information followed the statute, the words "and indirectly" are surplusage, not affecting the validity of the information. *Davis v. State* (Cr. App.) 145 S. W. 939.

Under this article and article 496, defining a bawdyhouse, and punishing any person who shall, directly or as agent for another, or through any agent, keep or be concerned in keeping a bawdyhouse, an indictment, alleging that accused did unlawfully keep and was concerned in keeping a bawdyhouse, where women of ill fame were permitted to resort and reside, is not objectionable as duplicitous, but is valid, within the rule that, where several ways are set forth in a statute by which an offense may be committed, and all are embraced in the same offense and made punishable in the same manner, they may be charged conjunctively in the same count. *Cabiness v. State* (Cr. App.) 146 S. W. 934.

Striking out as surplusage the words "and directly and indirectly" from an indictment charging that defendant did unlawfully and directly and indirectly keep and was concerned in keeping a house where spirituous, vinous, and malt liquors were kept for sale in quantities of a gallon and less, without having first obtained a license under the laws of the state to retail such liquors, it charges the offense denounced by article 500, of keeping and being concerned in keeping a disorderly house, defined by article 496 as a house where spirituous, vinous, or malt liquors are sold or kept for sale, without having first obtained a license under the laws of the state to retail such liquors. *Gill v. State* (Cr. App.) 150 S. W. 616.

An indictment for keeping a house where intoxicants were sold in quantities of a gallon or less without having obtained a license to "retain" such liquors should be amended to use the word "retail," instead of "retain"; it being no violation of law to "retain" liquors in any quantity, since the laws only prohibit the retailing of liquors. *Minter v. State* (Cr. App.) 150 S. W. 783.

In a prosecution under this article, declaring it a misdemeanor for one knowingly to permit the keeping of a disorderly house in a building owned by him, the information need not allege that defendant had not immediately proceeded to prevent the keeping of it, and that he had not given the county attorney notice that it was being kept on his premises, since such matters, not made a part of the definition of the offense, were matters of defense. *Davidson v. State* (Cr. App.) 173 S. W. 1037.

A prosecution on a complaint charging defendant as a vagrant, in that she was the keeper of a house of prostitution, where prostitutes resorted etc., held not a prosecution under articles 496, 500, which fixes the punishment. *State ex rel. Bergeron v. Travis County Court* (Cr. App.) 174 S. W. 365.

6. Jurisdiction of justice courts.—See notes under C. C. P. art. 106.

7. Transferring cases to county court.—See notes under C. C. P., art. 483.

8. Evidence.—Evidence held sufficient to sustain a conviction, see *Watts v. State*, 22 App. 572, 3 S. W. 769; *Brown v. State*, 2 App. 189; *Couch v. State*, 24 Tex. 557; *Morris v. State*, 38 Tex. 603; *Huffman v. State*, 23 App. 491, 5 S. W. 134; *Sweeney v. State*, 59 App. 370, 128 S. W. 390; *Tachini v. State*, 59 App. 55, 126 S. W. 1139; *Wilson v. State*, 61 App. 628, 136 S. W. 447; *Sullivan v. State*, 61 App. 657, 136 S. W. 456; *Cabiness v. State* (Cr. App.) 146 S. W. 934; *Davis v. State* (Cr. App.) 148 S. W. 1090; *Gill v. State* (Cr. App.) 150 S. W. 616; *Hogue v. State* (Cr. App.) 151 S. W. 805; *Dimitri v. State*, 70 App. 17, 155 S. W. 535; *Hearne v. State* (Cr. App.) 165 S. W. 596; *Clifford v. State* (Cr. App.) 178 S. W. 365. Contra, see *McElhaney v. State*, 12 App. 231; *Smalley v. State*, 11 App. 147; *Sara v. State*, 22 App. 639, 3 S. W. 339; *Loraine v. State*, Id. 640, 3 S. W. 340; *Morse v. State* (Cr. App.) 47 S. W. 989; *Layton v. State*, 61 App. 507, 135 S. W. 557; *Harden v. State*, 62 App. 84, 136 S. W. 768.

The character of the house alleged to be disorderly may be established by proof of its general reputation as such, and such proof is sufficient to warrant the finding that the house is disorderly. *Stone v. State*, 22 App. 185, 2 S. W. 585; *Burton v. State*, 16 App. 156; *Allen v. State*, 15 App. 320; *Sylvester v. State*, 42 Tex. 494; *Morris v. State*, 38 Tex. 603; *Wimberly v. State*, 108 S. W. 384. But while the character of the house may be thus established, such evidence will not be sufficient or competent to prove that the defendant kept, or was concerned in keeping, the house. The evidence must directly connect the defendant with keeping the house. *Sara v. State*, 22 App. 639, 3 S. W. 339; *Burton v. State*, 16 App. 156; *Allen v. State*, 15 App. 320; *Gamel v. State*, 21 App. 358, 17 S. W. 158. The general reputation of the occupants of a house is also admissible to prove the character of the house, but not that the defendant was the keeper of the house. *Allen v. State*, 15 App. 320. Evidence offered by the defendant, which tends to show that another person was the keeper of the house at the time of the alleged offense, is admissible. *Stone v. State*, 22 App. 185, 2 S. W. 585.

The general reputation of a house and the character of its occupants may be proved. *Harkey v. State*, 33 App. 100, 25 S. W. 291, 47 Am. St. Rep. 19. Evidence that the owner of a disorderly house lives in an adjoining room is admissible to show notice. *Forbes v. State*, 35 App. 24, 29 S. W. 784.

On trial for keeping a disorderly house, evidence of the reputation of the house and its inmates is clearly admissible. *Golden v. State*, 34 App. 143, 29 S. W. 779; *Forbes v. State*, 35 App. 24, 29 S. W. 784.

That lewd women visited the house with men was competent to show that the owner who lived in an adjoining house had notice of the purposes for which the house was being kept. *Id.*

The evidence in this case shows that defendant, who was a grocery merchant, kept store about seventy yards from his residence; that a woman came to his store. After night, a number of men being there, said that he took the woman to his residence and there had sexual intercourse with her; that some ten of the other men who were around the store had sexual intercourse with the woman at defendant's residence that night. Defendant denies having intercourse with the woman, and denies knowing that others were having intercourse with her until about midnight, when he immediately drove her away from his house; held, that the evidence is sufficient to support a conviction for keeping a disorderly house. *Stokeley v. State*, 37 App. 638, 40 S. W. 971.

It is not error to permit testimony of reputation of the house for two or three years previous to the alleged offense, where defendant was the owner during all that time. *Sprague v. State* (Cr. App.) 44 S. W. 837.

Evidence of the general reputation of the house and its inmates is admissible in a prosecution for keeping a disorderly house. *Sprague v. State* (Cr. App.) 44 S. W. 837.

While proof of the general reputation of a disorderly house is admissible on the trial of its alleged keeper, such evidence alone is insufficient to convict him. *Ramey v. State*, 39 App. 200, 45 S. W. 489; *Clifford v. State* (Cr. App.) 178 S. W. 365.

It is not admissible to prove the reputation of the house subsequent to the filing of the complaint or that defendant permitted it to be kept after that time. *Brady v. State* (Cr. App.) 57 S. W. 647.

Testimony that the accused rendered the property alleged to be disorderly house for taxes is admissible to show ownership. *Hamilton v. State* (Cr. App.) 60 S. W. 39.

State can prove by the officer that he took acknowledgment of deed to defendant conveying the property alleged to be a disorderly house. *Hamilton v. State* (Cr. App.) 60 S. W. 40.

Evidence by the superintendent of a gas company that defendant's house had four gas meters in it, and that all of them were used most of the time, the account being in the name of the defendant, and never having been changed at any time, was admissible to show that defendant still had control over the house during an absence, when it was alleged another controlled the house, and as a circumstance to show ownership. *Frazier v. State*, 47 App. 24, 81 S. W. 532.

Testimony by the tax collector that he issued an occupation license to defendant to sell beer on the premises in question was admissible to show assertion of ownership of the premises by defendant. *Frazier v. State*, 47 App. 24, 81 S. W. 532.

A deed of the premises to defendant, made eight years before the alleged offense, was admissible; its remoteness going to its weight, and not its admissibility. *Frazier v. State*, 47 App. 24, 81 S. W. 532.

In a prosecution for keeping a disorderly house during a certain month, evidence of the reputation of the house for two or three years prior to said month, during all of which time it was occupied by defendant, was admissible. *Frazier v. State*, 47 App. 24, 81 S. W. 532.

Testimony of a minister, who had visited the alleged house and talked with accused, held admissible as tending to show accused's occupation, her manner of living, and the character of the house she was keeping. *Wimberly v. State*, 53 App. 11, 108 S. W. 384.

In a prosecution for keeping a disorderly house, the general reputation of the house in question is admissible. *Wimberly v. State*, 53 App. 11, 108 S. W. 384.

Since general reputation of the house has long been held admissible, where one is charged with keeping a disorderly house, though independent evidence must appear that accused was engaged in keeping such house as owner, lessee, or tenant, where the Legislature made a house where liquors were sold or kept for sale without a license also a disorderly house, they must have contemplated that the same rule of evidence would apply to the new offense. *Joliff v. State*, 53 App. 61, 109 S. W. 176.

On a trial for keeping a disorderly house where liquors were sold and kept for sale without a license, the testimony of a witness that on a designated day he

saw a United States internal revenue license in the name of accused posted in the house was competent to prove the fact of the possession by accused of such a license. *Joliff v. State*, 53 App. 61, 109 S. W. 176.

On a trial for keeping a disorderly house where liquors were sold and kept for sale without a license, evidence that persons other than accused sold intoxicating liquors in the house in accused's absence is competent to prove the sale and keeping for sale of intoxicating liquors. *Joliff v. State*, 53 App. 61, 109 S. W. 176.

The court properly received the testimony of the tax assessor, who stated that he knew accused by another name and recognized her original assessment of the property in question as signed by her. *Moore v. State*, 53 App. 113, 110 S. W. 911.

Evidence held to show that accused was in control of the house, authorizing a conviction. *Moore v. State*, 53 App. 113, 110 S. W. 911.

Accused's connection with the house as owner or lessee must be shown by other testimony than by general reputation. *Moore v. State*, 53 App. 113, 110 S. W. 911.

Evidence of the general reputation of the house kept by accused is admissible. *Moore v. State*, 53 App. 113, 110 S. W. 911.

In a prosecution for keeping a disorderly house, a question to a witness for the state whether he had ever had any business transaction in the house in question and at what time he had been in the house was proper, as introductory and leading up to the particular transaction which was evidence of the offense. *Tachini v. State*, 59 App. 55, 126 S. W. 1139.

Evidence that a person who was being prosecuted for keeping a disorderly house rendered for taxation the property where the house was located for his wife and made an affidavit as to the ownership and value of said property is admissible to show ownership of the property, and as connecting defendant with the keeping of the house. *Tachini v. State*, 59 App. 55, 126 S. W. 1139.

In a prosecution for keeping a disorderly house, evidence of the general reputation of the house during the period set out in the indictment is admissible. *Tachini v. State*, 59 App. 55, 126 S. W. 1139.

Where, in a prosecution for keeping a disorderly house where liquors were sold, there is evidence that one other than defendant rented the house in which the liquors were sold, and that he was frequently seen about the place, and defendant is not shown to have made more than one or two sales, and at a time later than any act for which he was found guilty, an internal revenue license issued to such lessee is admissible, though not shown to have been in the place of business before the day of trial. *Lockhart v. State*, 58 App. 438, 126 S. W. 575.

In a prosecution for keeping a disorderly house where intoxicating liquors were sold, a witness, though he may show the general reputation of the house as a place where liquors are sold, cannot be permitted to answer a question, asked him, whether the sales were "without there first having been obtained a license to retail liquors under the law." *Lockhart v. State*, 58 App. 438, 126 S. W. 575.

In a prosecution for keeping a disorderly house where liquors were sold, evidence of sales made by defendant after the last act charged in the indictment is admissible for the purpose at least of showing defendant's connection with the business. *Lockhart v. State*, 58 App. 438, 126 S. W. 575.

In a prosecution of appellant and another for keeping a bawdy and assignation house, in which it was admitted by appellant that the other was his housekeeper, evidence as to the character and conduct of the inmates, and conversations had with them, and offers by the other defendant to procure women for persons visiting the house, was admissible, and was not objectionable on the ground that such matters occurred in appellant's absence. *Hickman v. State*, 59 App. 88, 126 S. W. 1149.

In a prosecution for keeping a disorderly house, evidence that, when witness went to accused's house, no one was there but accused and an unknown man, and that he jumped over the back fence on seeing the officers who were with witness, was admissible to prove the character of the house, when taken in connection with the rest of the evidence. *Finn v. State*, 60 App. 521, 132 S. W. 805.

The above evidence would not be inadmissible because the act occurred after accused's arrest, since it occurred on the same day, thereby making it closely related to the time covered by the indictment, and since in the nature of things the character of the house was not fixed necessarily by the transaction of a single day. *Finn v. State*, 60 App. 521, 132 S. W. 805.

In a prosecution for keeping a bawdyhouse, testimony was admissible to show the character of the house, that, when witness visited it, accused tried to get him to buy a bottle of beer, and stated that it cost \$1 a bottle. *Gordon v. State*, 60 App. 570, 133 S. W. 255.

Defendant, accused of keeping a disorderly house, can show by any one cognizant of the facts that people had not frequented the house for immoral purposes at or about the time made by the state's proof. *Thompson v. State*, 61 App. 250, 134 S. W. 350.

In a prosecution for keeping a disorderly house, in that intoxicating liquors were illegally sold and kept for sale therein, there was error in admitting evidence of sales to and purchases by persons who were not shown to be employes of or connected in business with defendant. *Layton v. State*, 61 App. 507, 135 S. W. 557.

In a prosecution for keeping a disorderly house, evidence of the general reputation of the house as a place where intoxicants were sold, and of the inmates as being prostitutes, was admissible; the extent of witness' information as to the reputation of the house and the number of persons whom he had heard speak thereof going rather to the weight of the evidence than to its admissibility. *Wilson v. State*, 61 App. 628, 136 S. W. 447.

In a trial for keeping a disorderly house where intoxicating liquors were sold, testimony of what was done and said, not only by accused, but by his clerks or other employes, tending to show unlawful keeping of intoxicants for sale, is admissible. *Novy v. State*, 62 App. 492, 138 S. W. 139.

Since under this article keeping a disorderly house and keeping such disorderly house through an agent are separate offenses, in a trial for the former offense it is improper to authorize conviction on evidence showing the latter. *Novy v. State*, 62 App. 492, 138 S. W. 139.

On a trial for keeping a disorderly house, evidence of the general reputation of the house, that it had the reputation of being a disorderly house where lewd women resorted and resided, was admissible. *Barker v. State*, 64 App. 106, 141 S. W. 529.

In a prosecution for unlawfully keeping and knowingly permitting a house under one's control to be kept as a place where prostitutes resort and reside for the purpose of plying their vocation, the general reputation of the house may be testified to by witnesses cognizant of the facts. *Hitchings v. State* (Cr. App.) 143 S. W. 1164.

In a prosecution for keeping a house in which intoxicating liquors were sold and kept without a license, the burden is upon the defendant to show he had a license. *Milan v. State* (Cr. App.) 146 S. W. 185.

Evidence of a live federal liquor license on the wall of defendant's place of business was admissible, though such license ran to a person other than defendant, and it was not shown that defendant had any connection with such license. *Milan v. State* (Cr. App.) 146 S. W. 185.

In a prosecution for keeping a disorderly house in which spirituous liquors were sold and kept for sale, without first having obtained a license to retail such liquors, orders of the commissioners' court, putting prohibition in force in that county, were inadmissible as not tending to support any allegation in the information. *Williams v. State* (Cr. App.) 148 S. W. 306.

Evidence held insufficient to support a conviction for keeping a house for the sale of liquor without having a license, in violation of the liquor laws. *Minter v. State* (Cr. App.) 150 S. W. 783.

Where accused was prosecuted under this article for keeping a disorderly house as defined by article 496, as any place where spirituous, vinous, or malt liquors are sold without a license, testimony as to the general reputation of the place was admissible. *Johnson v. State* (Cr. App.) 153 S. W. 875.

In a prosecution for keeping a disorderly house, an objection to a question asked a witness for the state on cross-examination as to whether he had visited the place after the filing of the complaint was properly sustained, even if the answer was expected to show that it was running in an orderly manner at that time, since the manner of running the place after the filing of the complaint was immaterial. *Johnson v. State* (Cr. App.) 153 S. W. 875.

In a prosecution for keeping a disorderly house, in that liquors were sold there without a license, evidence held to warrant the submission of whether there was a club, and, if one in fact existed, whether it was but a subterfuge to cover an unlawful purpose. *Johnson v. State* (Cr. App.) 153 S. W. 875.

In a prosecution for knowingly permitting property to be used as a house of prostitution, evidence of an inmate that she paid defendant \$1.50 a day as rent, that she was a prostitute, and that she plied her vocation in the house in question was admissible. *Clyman v. State* (Cr. App.) 155 S. W. 231.

In a prosecution for keeping a disorderly house, evidence by police officer that he arrested 12 prostitutes in the house and they all pleaded guilty was admissible. *Dimitri v. State*, 70 App. 17, 155 S. W. 535.

It is not error to prove that the general reputation of the house was bad. *Pace v. State*, 70 App. 454, 156 S. W. 1192.

Where defendant admitted the ownership of the property, but claimed that it was rented to a club the members of which used the liquor, evidence that after the time of the commission of the offense with which accused was charged, the selling of liquor in that place was enjoined is inadmissible, because merely being the opinion of the judge as to the legality of the sales and coming long after the commission of the alleged offense. *Allen v. State*, 71 App. 158, 158 S. W. 508.

Where accused claimed that he rented the premises to a club the members of which used the liquor, evidence that the place was located near a white school is inadmissible. *Allen v. State*, 71 App. 158, 158 S. W. 508.

In a prosecution against one Allen for maintaining a place where intoxicating liquors were sold without a license, where he admitted his ownership of the premises, but claimed that they were rented to an association the members of which used the liquor, evidence that the property was known as "Allen's Garden" is inadmissible, generally, tending to prejudice accused, and if admitted should be limited to prove ownership. *Allen v. State*, 71 App. 158, 158 S. W. 508.

On the trial of the owner of a house for knowingly permitting it to be kept as a house of prostitution, evidence of the general reputation of the house was admissible. *Golden v. State*, 72 App. 19, 160 S. W. 957.

In a prosecution for keeping a disorderly house, in which accused, his wife, and certain other women resided, evidence of the general reputation of such women, and that they had confessed and pleaded guilty to being prostitutes when arrested on that charge, and that accused had gone on their bonds in connection with such charge, was admissible. *Key v. State*, 71 App. 485, 160 S. W. 354.

In a prosecution for keeping a disorderly house, evidence of the conduct of the inmates was admissible. *Key v. State*, 71 App. 485, 160 S. W. 354.

Where, in a prosecution for keeping a disorderly house, it was shown that defendant's wife was the owner of the premises, the fact that records showed that accused had no interest in the property was immaterial. *Key v. State*, 71 App. 485, 160 S. W. 354.

On a trial for keeping a disorderly house, evidence that a woman, who frequently visited such house, and who would be followed shortly by a man, bore the reputation of being a woman who made dates with men and met them at assignation houses, was admissible. *Smith v. State*, 72 App. 206, 162 S. W. 835.

On a trial for keeping a house of prostitution where prostitutes were permitted

to resort and reside for the purpose of plying their vocation, it was necessary for the state to show that the inmates were prostitutes plying their vocation in such house or resorting to it for that purpose. *Bowman v. State* (Cr. App.) 164 S. W. 846.

On a trial for keeping a bawdyhouse, the testimony of a witness that while she was rooming with accused, men would come there and she would go to other places and have sexual intercourse with them was admissible, as it tended to show that accused kept a house where prostitutes resided; especially where the witness further testified that she had sexual intercourse with men many times in the room rented from accused. *Farris v. State* (Cr. App.) 170 S. W. 310.

On a trial for keeping a house where prostitutes resorted and resided for the purpose of plying their vocation, and where men and women met for sexual intercourse, evidence that accused's husband took men and women there to engage in unlawful cohabitation was admissible, as it tended to show that accused was keeping a bawdyhouse, especially as all parties aiding and abetting the commission of a misdemeanor are "principals," and such acts rendered him liable as a principal offender. *Farris v. State* (Cr. App.) 170 S. W. 310.

In a prosecution for keeping a disorderly house, the testimony of a policeman that he found a young man in a room with defendant and that they both paid fines, and the testimony of another witness that he found defendant in bed with a man, was admissible. *Nichols v. State* (Cr. App.) 170 S. W. 304.

On a trial for keeping a bawdyhouse, evidence that the witness had sexual intercourse at other places with one of accused's roomers for whom he would call at accused's house was admissible; especially where there was evidence tending to show that accused knew the roomer was a prostitute. *Farris v. State* (Cr. App.) 170 S. W. 310.

On a trial for keeping a bawdyhouse, evidence that a witness for the state had tried to get R., an inmate of accused's house, to engage rooms with other persons for the purpose of entrapping them was properly excluded, where it was not contended that he brought her to accused's house or sought to get her to bring other women there, as this might tend to show animosity towards R., but not towards accused. *Farris v. State* (Cr. App.) 170 S. W. 310.

In a prosecution for permitting the keeping of a disorderly house on defendant's premises, testimony that the general reputation of the keeper of the house, and of an inmate, for virtue and chastity, were bad, was admissible. *Davidson v. State* (Cr. App.) 173 S. W. 1037.

It is not necessary to sustain a conviction that the defendant be proved to be the owner, lessee, or tenant of the house. *Clifford v. State* (Cr. App.) 178 S. W. 365.

9. **Defendant as witness in own behalf.**—See C. C. P. art. 790.

10. **Charge of the court.**—It is advisable though not necessary that the word "prostitution" be defined in the charge. *Bigby v. State*, 5 App. 101. It is not error, when the evidence warrants it, to instruct the jury that if the defendant, either alone, or in connection with another, kept a disorderly house, or was in any way concerned in keeping such house, he would be guilty. *Stone v. State*, 22 App. 185, 2 S. W. 585. Where a witness for the state was an accomplice in keeping a disorderly house, the court must charge the law relating to accomplice testimony. *Stone v. State*, 22 App. 185, 2 S. W. 585.

For charge of the court, see *Gamel v. State*, 21 App. 357, 17 S. W. 158.

The court, over defendant's objection, read the article of the Penal Code relating to keeping a disorderly house, and the punishment therefor, and then verbally instructed them that if they believed beyond a reasonable doubt that defendant owned, rented, or leased "that house" they should find defendant guilty. Held, that this was error. *Harkey v. State*, 33 App. 100, 25 S. W. 291, 47 Am. St. Rep. 19.

When requested the court should instruct the jury that defendant could not be guilty of keeping a disorderly house unless he be the owner, lessee or tenant of the house. *Mitchell v. State*, 34 App. 311, 30 S. W. 810.

In a prosecution of two persons for keeping a disorderly house, a charge that, if the jury believed that only one or either of the defendants rented the house, they should find both not guilty, while incorrect, was not prejudicial to defendants. *Marx v. State*, 44 App. 506, 72 S. W. 590.

Where the court charged to convict, if jury found that offense was committed within two years from filing indictment, not reversible error in absence of statement of facts showing when offense was committed. The fact may have been that the offense was committed after the law of 1907 became effective. *Matlook v. State*, 52 App. 544, 109 S. W. 193.

Where, on a trial for keeping a disorderly house in violation of Acts 30th Leg. 1907, p. 246, c. 132, the evidence was conflicting on the issue whether accused controlled the house and permitted women to go there, the court was required to submit the issue to the jury. *Young v. State*, 55 App. 383, 116 S. W. 1158.

An instruction that any part of a building used in keeping for sale and selling intoxicants, and where lewd women, etc., are permitted to conduct themselves in a lewd, etc., manner, is a disorderly house, was erroneous, as ignoring accused's defense that he was not connected with the restaurant in the rear of his saloon, in which the disorderly conduct was permitted. *Morgan v. State*, 62 App. 39, 136 S. W. 445.

In a prosecution for keeping a disorderly house, in that liquors were being sold there without a license, where there was no allegation in the information as to Sunday sales, requested instructions relative to Sunday sales were properly refused. *Johnson v. State* (Cr. App.) 153 S. W. 875.

Where accused admitted his ownership of the premises, but claimed that he rented them to an association, the members of which used the liquor, and offered evidence to that effect, special charges submitting his defense should be given. *Allen v. State*, 71 App. 158, 158 S. W. 508.

Where, in a prosecution of a husband for keeping a disorderly house on property owned by his wife, there was no proof that the wife objected to his control of the property, or that he in fact was not in control thereof, the court did not err in refusing to charge that the husband was not bound to assume control of the separate property of his wife. *Key v. State* (Cr. App.) 160 S. W. 354.

Under an information for keeping a disorderly house in a house owned by another and leased by the defendant, an instruction authorizing a conviction if defendant himself was the owner was reversible error, since he could not be charged with committing an offense in one way and be convicted for its commission in another way. *Hall v. State*, 72 App. 161, 161 S. W. 457.

Under an information charging that defendant was the lessee of the premises and kept a house of prostitution, where the evidence fully supported such allegation, error in defining the offense by copying the entire statute as to such offenses was not reversible error. *Dean v. State*, 72 App. 274, 161 S. W. 974.

On a trial for keeping a house of prostitution where prostitutes were permitted to resort and reside for the purpose of plying their vocation, where no witness testified that the inmates of such house were prostitutes or that they committed any act of prostitution, accused was entitled to an instruction to acquit unless they were prostitutes and resided in, or resorted to, such house to ply the vocation of a prostitute. *Bowman v. State* (Cr. App.) 164 S. W. 846.

On a trial for keeping a disorderly house, an instruction that the jury must believe, beyond a reasonable doubt, that accused unlawfully and knowingly permitted prostitutes to resort or reside in such house for the purpose of plying their vocation, or that she unlawfully and knowingly kept such house for the purpose of prostitution, and in order to convict, and that though they believed that prostitutes did resort or reside there for such purpose, they could not convict, unless they believed, beyond a reasonable doubt, that accused had knowledge of their character, and knowingly permitted them to ply their vocation there, was properly refused, since it is necessary only for the state to prove such facts as would put her upon notice and inquiry which, if followed up, would result in knowledge. *Cunningham v. State* (Cr. App.) 166 S. W. 519.

Where the indictment charged the offense of keeping an assignation house, the submission of the wholly different, though allied, offense of keeping a house of prostitution, was error. *Bodine v. State* (Cr. App.) 174 S. W. 609.

11. **Former acquittal or conviction as bar to prosecution.**—See notes under C. C. P. art. 9.

12. **Injunction.**—See notes under arts. 503-505, post, and arts. 4689, 4690, *Vernon's Sayles' Civ. St.* 1914.

Art. 501. Owner, lessee or agent controlling premises.—Any owner, lessee, or the agent of either, controlling the premises, having information that the premises are being kept, used or occupied as a bawdy or disorderly house, shall be held guilty of knowingly permitting the premises to be kept as a bawdy or disorderly house, as the case may be, unless he shall immediately proceed to prevent the keeping, using or occupying of such house, building, edifice or tenement for such purpose by giving such information to the county or district attorney, against the person or persons violating the provisions of this act, or take such other action as may reasonably accomplish such result. [*Id.* p. 246.]

Illegality of lease.—A lease of premises to be occupied as a bawdyhouse by the lessee, executed by the lessor who had knowledge of the lessee's purpose, and who acquiesced in the use of the premises and collected the rent, is illegal, and neither party may demand relief therefrom or thereunder, within the rule that, where two persons participate in an unlawful transaction and are in *pari delicto*, neither a court of law nor equity will aid either, notwithstanding articles 496, 500, and 501. *Eckles v. Nowlin* (Civ. App.) 158 S. W. 794.

Art. 502. [362] "Disorderly house" further defined.—Any person who shall directly, as agent for another, or through an agent, knowingly employ or have in his service in any capacity in any theater, playhouse, dance house, or house where spirituous or malt liquors are kept for sale, any prostitute, lewd woman or women of bad reputation for chastity, or permit any such woman to display or conduct herself therein in an indecent manner, shall be guilty of keeping a disorderly house, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by confinement in the county jail for twenty days for each day that such person is kept in service or employed or permitted to display or conduct herself as hereinbefore provided. [Act April 4, 1889, p. 33; amended 1907, p. 246.]

See notes under articles 496 and 500.

See *Ex parte Bell*, 32 App. 308, 22 S. W. 1040, 40 Am. St. Rep. 778.

Constitutionality.—Act April 18, 1907 (Acts 30th Leg. c. 132), amending Pen. Code 1895, tit. 10, c. 4, arts. 361, 362 (articles 502 and 500, ante), does not violate Const. art. 3, § 36, which provides that no law shall be revived or amended by reference to its title; but in such case the act revived or the section or sections amended shall be re-enacted and published at length. *Richards v. State*, 63 App. 176, 140 S. W. 459.

Variety show or theater.—Any variety show or theater combining the elements set forth in the statute comes within the prohibition of law, and is a disorderly house, whatever be the name given to it by the proprietors or the public. Without these elements it cannot be declared illegal. Where these elements exist, the inmates and proprietor may, under proper ordinance, be arrested and convicted of vagrancy, or may be punished as prescribed by the statute. Disorderly houses are forbidden by law, and a variety show, to come within the prohibition, must, in effect, be a disorderly house. *Ex parte Bell*, 32 App. 308, 22 S. W. 1040, 40 Am. St. Rep. 778.

On the prosecution of the manager of a theater for keeping a disorderly house, the state proved that the women employed in the theater were prostitutes, and had borne that reputation for several years before their employment by defendant; that their reputation for chastity was not only bad, but it had been so testified to in trials in defendant's presence, while he had them in his employ; and that, after the theater was over, it was their custom to conduct themselves in an indecent manner with the patrons. Held, that such facts warranted a conviction, without positive proof of actual knowledge by defendant of the acts and doings of the women he employed, since the law requires him to use reasonable diligence to ascertain their character, and all that the state need do is to prove facts which would put a reasonable man on notice. *Johnson v. State*, 32 App. 504, 24 S. W. 411.

An indictment, under the article before the Revised Penal Code took effect, which charged that defendant was the owner and manager of a theater and dance house where liquors were sold, and that he unlawfully kept and employed therein lewd women and prostitutes, was sufficient. *Callaghan v. State*, 36 App. 536, 38 S. W. 188.

Conflicting powers of state and municipalities.—See notes under art. 965, C. C. P.

Art. 503. [362a] Keeping same may be enjoined.—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. [*Id.*, p. 246.]

See arts. 4689, 4690 Vernon's Sayles' Civ. St. 1914, and notes.

Constitutionality.—This law is constitutional. *Clopton v. State* (Civ. App.) 105 S. W. 994.

Statute to be construed strictly.—The statute is at least quasi penal, and must be strictly construed. *State v. Duke*, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385.

Nature and scope of remedy in general.—This article contemplates issuance of an injunction only in independent suits primarily to abate the unlawful thing, and not as an ancillary proceeding to gain possession in suits of trespass to try title. *Eckles v. Nowlin* (Civ. App.) 158 S. W. 794.

The granting of an injunction under this article at the suit of an owner executing a lease of premises with knowledge of the lessee's purpose to use the same as a bawdyhouse, is in effect the granting of relief to the owner from his illegal contract, and equity cannot issue the injunction. *Eckles v. Nowlin* (Civ. App.) 158 S. W. 794.

Under article 496, an injunction restraining defendants from selling or keeping for sale spirituous, etc., liquors on the premises, was too broad; the court being only authorized to restrain defendants' use of the house for the sale of liquor without a license. *Soto v. State* (Civ. App.) 171 S. W. 279.

Adequacy of other remedy.—The fact that remedy by criminal prosecution is adequate is no ground for refusing the injunction. *Clopton v. State* (Civ. App.) 105 S. W. 994.

Restraining sale of liquor.—Under this article and article 496, ante, defining a "disorderly house" to be any house in which liquors are sold or kept for sale without a license, an injunction restraining defendants from selling or keeping for sale spirituous, etc., liquors on the premises, was too broad; the court being only authorized to restrain defendants' use of the house for the sale of liquor without a license. *Soto v. State* (Civ. App.) 171 S. W. 279.

— **Sale by club.**—See notes under article 496, ante.

An injunction to restrain a club from selling intoxicating liquors to its members cannot be granted under this article, unless the persons doing the acts complained of may be prosecuted under the statute. *State v. Duke*, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385.

While a bona fide club situated in a district where liquor may lawfully be sold, organized for purposes sanctioned by law, and selling liquor to its members, and not to the public as a mere incident to its organization and without profit, is not engaged in the occupation or business of selling intoxicating liquors, under the laws of the state, and cannot be enjoined under articles 496 and 503, providing for injunction against houses where liquor is illegally sold as disorderly houses, yet such protection does not extend to clubs not organized in good faith for

purposes authorized by law but merely as a subterfuge to evade the law. *Soto v. State* (Civ. App.) 171 S. W. 279.

Restraining maintenance of restaurant.—One who maintained a restaurant in which he permitted lewd women to congregate and drink and to meet men for the purpose of arranging for unlawful sexual intercourse elsewhere is guilty of keeping a disorderly house within the purview of articles 497, 498, and 499, defining an assignation house as a place where persons meet by appointment for the purpose of sexual intercourse, that it shall be unlawful for any person to use at such place intoxicating liquors, and that any part of a room or building used for such purposes is a disorderly house, and so his maintenance of such restaurant may be enjoined under the direct provisions of article 503. *Ex parte Yoshida*, 70 App. 212, 156 S. W. 1166.

Petition.—Preliminary injunction. See notes under article 505 post.

A petition under this article need not negative the matters contained in the proviso of article 504. The exception contained in the proviso is a matter of defense. *Lane v. Bell*, 53 Civ. App. 213, 115 S. W. 919.

The description of the house as "being situated in the town of G. on the north side of West Church street in a locality generally known as Silver City," is sufficient under this article. *Id.*

Under article 496, defining a "disorderly house" as one where spirituous, vinous, or malt liquors are sold or kept for sale, without a license and article 503 held, that a petition alleging defendants' possession and control of a house commonly known as the "Ureka Club and Socorro Mutua Mexicana," and that defendants were habitually using the premises as a disorderly house, and contemplate continuing such use in that therein spirituous, vinous, and malt liquors were sold in quantities of one gallon and less, to be drunk on the premises, and so kept for sale without a license to retail such liquor, and that there was no person or corporation having a license under the law to retail liquor on the premises, was sufficient to justify an injunction against the maintenance of the place. *Soto v. State*, 171 S. W. 279.

Art. 504. Who may be made parties defendant.—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 article and article 505 shall not apply to, nor be so construed as to interfere with the control and regulation of bawds and bawdy houses 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. [*Id.*, p. 246.]

See notes under article 503 ante, and arts. 4689, 4690 *Vernon's Sayles' Civ. St.* 1914.

License of bawdy houses or prohibition thereof except in defined districts.—See notes under article 500 ante.

It is competent for the legislature by special act to empower municipalities to license, within limits, disorderly houses, and such license is a valid defense to a prosecution by the state for keeping such a house. *Davis v. State*, 2 App. 425.

Under authority granted a city council by the city charter to prohibit or to segregate and regulate bawdy houses and variety shows, the granted rights must be legally exercised in harmony with the criminal laws of this state. *Ex parte Bell*, 32 App. 308, 22 S. W. 1040, 40 Am. St. Rep. 778.

The Dallas ordinance prohibiting bawdy houses except in a defined district is not void as conflicting with the Penal Code prohibition against keeping such houses; no penalty being prescribed nor license given. *Hatcher v. City of Dallas* (Civ. App.) 133 S. W. 914.

Prohibiting bawdy houses except in a defined district constitutes legitimate exercise of police power. *Hatcher v. City of Dallas* (Civ. App.) 133 S. W. 914.

The Dallas ordinance prohibiting bawdy houses except in a defined district does not infringe the constitutional prohibition against damaging property for public use without adequate compensation, on account of injury resulting to property adjoining such district. *Hatcher v. City of Dallas* (Civ. App.) 133 S. W. 914.

Under the express terms of Dallas City Charter, and under this article as added by Laws 1907, c. 132, the city is empowered to prescribe limits outside of which bawds shall not reside. *Hatcher v. City of Dallas* (Civ. App.) 133 S. W. 914.

The use of real property for prostitution being contrary to the laws of the state, a city has no authority to set apart and designate any portion thereof for the purposes of permitting prostitutes to resort and reside therein for the purpose of plying their vocation. *Clyman v. State* (Cr. App.) 155 S. W. 230.

Art. 505. Duty of attorney general, district or county attorney.—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. [Id., p. 246.]

See notes under art. 4690 Vernon's Sayles' Civ. St. 1914.

Validity of statute.—This article in authorizing suit to restrain the keeping of a disorderly house to be brought by any citizen without showing that he is personally injured by the acts complained of, is not invalid. *Ex parte Morgan*, 57 App. 551, 124 S. W. 99, 136 Am. St. Rep. 996.

Repeal of statute.—This article, authorizing suit to restrain the keeping of a disorderly house to be brought by any citizen, without showing that he is personally injured by the acts complained of, is not repealed by article 4643, Vernon's Sayles' Civ. St. 1914, which has reference largely to the practice with reference to granting writs, hearing thereof, and appeals and orders granted therein, but does not by its terms or necessary implication repeal the former provision. *Ex parte Morgan*, 57 App. 551, 124 S. W. 99, 136 Am. St. Rep. 996.

Preliminary injunction—Notice.—A preliminary injunction should not ordinarily be granted without notice; the status quo being maintained in the meantime by the issuance of a restraining order. *Soto v. State* (Civ. App.) 171 S. W. 279.

— **Petition.**—Under this article providing that the procedure to enjoin the maintenance of a liquor nuisance as a disorderly house shall be the same as in other suits for injunction, as near as may be, except that the petition need not be verified, a verified petition is not necessary to a preliminary injunction in such cases. *Soto v. State* (Civ. App.) 171 S. W. 279.

Where, in a suit to enjoin a liquor nuisance as a disorderly house, the petition prayed an injunction restraining defendants from using the premises to sell spirituous, etc., liquors, and from keeping for sale therein such liquors and from selling the same on the premises, it was sufficient to justify the issuance of a preliminary injunction. *Soto v. State* (Civ. App.) 171 S. W. 279.

Violation of injunction and punishment therefor.—Where relator was adjudged guilty of contempt in violating an injunction restraining him from continuing to run a disorderly house, a writ of commitment for contempt, where showing that the order was made in the court which had issued the injunction, is not invalid because through a clerical error it was recited that it was given in another court. *Ex parte Yoshida*, 70 App. 212, 156 S. W. 1166.

The complaint calling to the court's attention the fact that relator had violated an injunction restraining him from maintaining a disorderly house, when signed by the county attorney officially, is sufficient, though not verified by him. *Ex parte Yoshida*, 70 App. 212, 156 S. W. 1166.

Art. 506. [363] Sheriffs and other officers, district judges and grand juries, their duties in the premises.—Sheriffs and their deputies, constables and their deputies, mayors, marshals, chiefs of police, their deputies and assistants, and policemen of towns and cities are especially charged diligently to discover and report to the proper legal authorities, and by all lawful means to aid in the enforcement of the law for all violations of the articles of this chapter; the district judges are required to give them specially in charge to the grand juries, and grand juries are required at every term of the district court of their county to call before them each and all officers charged with the enforcement of the articles of this chapter and examine them under oath touching their knowledge and information of violations thereof, and as to their diligence in their enforcement. [Act April 4, 1889, p. 33.]

Enforcement of law by policemen—Falsely pretending to be officer.—Code Cr. Proc. arts. 43, 44, respectively, declare that policemen of an incorporated municipality are peace officers, and that it shall be the duty of every peace officer to preserve peace, while Pen. Code, arts. 506, 561, 611, require peace officers, including policemen, to aid in the enforcement of the law against disorderly houses, gambling, and the unlawful sale of intoxicants, and article 349, defining the term "officer," states that it includes any peace officer, marshal, or policeman of a city or town. Held that, while an executive officer is one whose duties are mainly to cause the laws to be executed, a policeman is an executive officer within the purview of Pen. Code, art. 424, providing that any person who shall falsely assume or pretend to be a judicial or executive officer of the state shall be punished, for a policeman is a public officer of the state expressly charged by the statutes with enforcing a large body of the criminal law. *Ex parte Preston*, 72 App. 77, 161 S. W. 115.

— **Bribery of policeman.**—Under article 496, defining a “disorderly house,” among other definitions, as one in which liquors are kept for sale without a license, or as any house in any county, etc., in which the sale of intoxicating liquor is prohibited, where there is posted a United States retail liquor or malt liquor dealer’s license, article 500, making it an offense to keep, assist, or permit the keeping of a disorderly house, article 506, requiring policemen to discover and report to the proper legal authorities, and by all lawful means to aid in the enforcement of the law for all violations of that chapter, articles 548 to 563, inclusive, denouncing gaming or keeping of premises therefor, or permitting the keeping of any place therefor, article 564, requiring policemen to avail themselves of all lawful means to suppress violations of that law, article 611, prohibiting sales of intoxicating liquor without a license, article 631, requiring peace officers having knowledge of violations of that chapter to report them to the county attorney, article 349, and Code Cr. Proc. art. 43, both providing that policemen are peace officers, Code Cr. Proc. art. 44, requiring peace officers to preserve the peace within their jurisdiction by using all lawful means, to interfere without warrant where authorized by statute to prevent or suppress crime, to give notice to some magistrate of offenses committed in his jurisdiction where he has good reason to believe there has been a violation of the penal law, and to arrest offenders without warrant where authorized by law, and article 261, authorizing municipal authorities to establish rules authorizing the arrest without warrant of persons found in suspicious places and under circumstances reasonably showing that they have been guilty of a felony or breach of the peace or are about to commit some offense against the law, peace officers are required to do all things necessary or proper to prevent, suppress, and punish crime, and hence an indictment for bribing a policeman not to arrest, report, and file a complaint against accused for keeping a gambling house or place where liquor was unlawfully sold was not defective on the ground that the law did not require police officers to report and file complaints against violators. *Minter v. State*, 70 App. 634, 159 S. W. 286.

CHAPTER FOUR A

PANDERING

Art.	Art.
506a. Pandering.	506d. Same; keeping rendezvous for females; employment of procurers.
506b. Same; defense; venue.	
506c. Same; female as competent witness; marriage to accused; proviso.	506e. Same; marriage as defense.

Article 506a. Pandering.—Any person who shall procure or attempt to procure or be concerned in procuring, with or without her consent, a female inmate for a house of prostitution, or who, by promises, threats, violence or by any device or schemes, shall cause, induce, persuade or encourage a female person to become an inmate of a house of prostitution, or shall procure a place as inmate in a house of prostitution for a female person, or any person who shall, by promises, threats, violence or by any device or scheme, cause, induce, persuade or encourage an inmate of a house of prostitution to remain therein as such inmate, or any person who shall, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procure any female person to become or remain an inmate of a house of ill fame, or to enter any place in which prostitution is encouraged or allowed in this State, or to come into this State or leave this State for the purpose of prostitution, or who shall procure any female person to become an inmate of a house of ill fame within this State, or to come into this State or to leave this State for the purpose of prostitution, or who shall give or agree to receive or give any money or thing of value for procuring, or attempting to procure, any female person to become an inmate of a house of ill fame within this State, or to come into this State or leave this State for the purpose of prostitution, shall be guilty of pandering, and, upon conviction for an offense under this Act, shall be deemed guilty of a felony and shall be punished by confinement in the penitentiary for any term of years, not less than five. [Act 1911, p. 29, ch. 23, § 1.]

Regulation of interstate commerce.—The statute making it a felony to procure a female to leave the state for the purpose of prostitution, is not a regulation of interstate commerce, since it is not the transportation of the girl that is made punishable, but the acts within the state by which she was induced to leave. *Hewitt v. State* (Cr. App.) 167 S. W. 40.

Nature and elements of offense.—In a prosecution for pandering, an instruction that, if it was understood between defendant and prosecutrix, his wife, that they should leave H. county and enter a house of prostitution, and they did so enter the house of J., or if they formed such understanding at that time and entered and remained in such house of J., the jury should find defendant not guilty, was properly refused, since, if defendant left H. county with prosecutrix and carried her to B. county with the understanding that she was to enter a house of prostitution, and he procured her admission thereto, he was guilty, though he did so with her consent and at her request. *Stevens v. State* (Cr. App.) 150 S. W. 944.

In a prosecution for procuring a woman to come into the state for prostitution, her previous immorality is no defense. *McDowell v. State* (Cr. App.) 155 S. W. 521.

To constitute the offense of procuring a woman to come into the state for prostitution, it is not necessary that the procuring be by fraud, duress, etc. *McDowell v. State* (Cr. App.) 155 S. W. 521.

The term "prostitution" has different meanings according to the sense in which it is used. Illicit intercourse, which in a sense is prostitution, may be adultery, where one of the parties is married, or fornication where both are unmarried, and in a sense the offense of pandering means the procuring of a place for a female with or without her consent in a house of prostitution, and inducing her to practice illegal sexual intercourse with others. *Hewitt v. State*, 71 App. 243, 158 S. W. 1120.

The term "pandering" used to define the offense created by this article means, and is limited to, the procuring of a female to become an inmate of a house of ill fame or to prostitute her body to other men; the term "pander" meaning one who caters to the lust of others, a male bawd, a pimp, or procurer, the offense not being established by proof of illicit intercourse between the female and the alleged panderer. *Hewitt v. State*, 71 App. 243, 158 S. W. 1120.

This article in providing that any person who shall procure, attempt to procure, or be concerned in procuring, with or without her consent, a female inmate for a house of prostitution, or who by promises, threats, violence, shall cause any female to become an inmate of a house of prostitution, shall be guilty of a felony and be punished, etc., was intended to cover all acts, devices, etc., to induce any female to submit her body to other men for the purposes of prostitution, whether they succeeded or not, and it is immaterial whether she prior thereto, was virtuous or not; and to reach solicitors for such houses, as well as those acting on their own initiative and behalf, whether they were connected, either directly or indirectly, at the time, with any such house. *Currington v. State*, 72 App. 143, 161 S. W. 478.

Indictment.—An indictment charging pandering in the language of the statute was sufficient. *Jones v. State*, 72 App. 496, 162 S. W. 1142.

An indictment under this article need not allege the state into which the female was induced to go; the offense being complete even though there was no particular destination determined upon. *Hewitt v. State* (Cr. App.) 167 S. W. 40.

Under article 3, forbidding punishment of any act or omission not made a penal offense by written law, and under this article defining the offense of pandering as committed by "any person who shall by fraud or artifice or by duress of person, * * * or by abuse of * * * confidence, procure any female person to become an inmate of a house of ill fame, or to enter any place in which prostitution is * * * allowed," an indictment charging that defendant "by fraud, etc., and by abuse of confidence, etc., did * * * procure and induce * * * the said female to submit her body and person to men for the purpose of prostitution," is insufficient to sustain a conviction, as failing to allege that the woman was induced to remain in or enter a house of prostitution. *Houseman v. State* (Cr. App.) 173 S. W. 1036.

An indictment charging the offense of pandering in the words of the statute is sufficient without specific averments as to the house of prostitution into which the woman was inveigled. *Clark v. State* (Cr. App.) 174 S. W. 354.

Evidence.—In a prosecution for pandering, evidence held to sustain a conviction. *Stevens v. State* (Cr. App.) 150 S. W. 944.

In a prosecution for pandering, evidence of the prosecutrix's prior immoral character, and that her prior reputation was bad, related to a collateral issue, and was inadmissible as matter of defense. *Stevens v. State* (Cr. App.) 150 S. W. 944.

In a prosecution for pandering, evidence that prosecutrix had previously lived an immoral life and was willing to accompany accused to the place where she was taken was no defense. *Stevens v. State* (Cr. App.) 150 S. W. 944.

Evidence held to sustain a conviction of procuring a woman to come into the state for prostitution. *McDowell v. State* (Cr. App.) 155 S. W. 521.

In a prosecution under this article for attempting to procure a woman to enter a house of prostitution, evidence of defendant's other acts, though tending to prove other crimes, was admissible as being so connected with the crime charged that it would tend to establish his intent therein. *Currington v. State*, 72 App. 143, 161 S. W. 478.

In a prosecution under this article for endeavoring to procure a woman to enter a house of prostitution, the jury must find beyond a reasonable doubt the requisites of the offense. *Currington v. State*, 72 App. 143, 161 S. W. 478.

In a prosecution under this article for attempting to procure a woman to enter a house of ill fame, the burden of proof was on the state. *Currington v. State*, 72 App. 143, 161 S. W. 478.

In such prosecution there was a presumption of innocence in defendant's favor. *Currington v. State*, 72 App. 143, 161 S. W. 478.

On a trial for procuring a place for a woman in a house of prostitution, the court did not err in refusing to require such woman and the proprietress of such house, who admitted that they were going under assumed names, to disclose their

true names, unless such information could be of some useful purpose to accused, and hence a bill of exceptions which did not show why accused desired to know their true names presented nothing for review. *Jones v. State*, 72 App. 496, 162 S. W. 1142.

On a trial for procuring a place for a woman in a house of prostitution, evidence that the house in question had the general reputation of being a house of prostitution was admissible. *Jones v. State*, 72 App. 496, 162 S. W. 1142.

On a trial for procuring a place for a woman in a house of prostitution as an inmate, evidence that accused visited her at such house was admissible. *Jones v. State*, 72 App. 496, 162 S. W. 1142.

On a trial for procuring a place for a woman as an inmate of a house of prostitution, the admission of evidence that accused, while visiting her at such house, cursed her for refusing to give him money was not reversible error where the jury assessed the minimum penalty. *Jones v. State*, 72 App. 496, 162 S. W. 1142.

Such evidence should, however, be excluded on proper objection. *Jones v. State*, 72 App. 496, 162 S. W. 1142.

In a prosecution for procuring a female to leave the state for the purpose of prostitution, where the defendant contended that the girl had insisted on going with him, and that he endeavored to persuade her to return home, evidence that the defendant had borrowed money from the girl's father to enable him to search for her when he already knew where she was was admissible as contradicting his defense. *Hewitt v. State* (Cr. App.) 167 S. W. 40.

In a prosecution for procuring a girl to leave the state for the purpose of prostitution, evidence held sufficient to show that the defendant had such purpose when he induced the girl to leave and at all other times. *Hewitt v. State* (Cr. App.) 167 S. W. 40.

In a prosecution for procuring a female to leave the state for the purpose of prostitution, evidence that the defendant had taken the prosecuting witness to a certain place in another state was admissible to prove that he had procured her to leave the state. *Hewitt v. State* (Cr. App.) 167 S. W. 40.

In a prosecution for the procuring of a woman to have sexual intercourse with another man, evidence that during the intercourse she robbed the man, and gave part of the money to accused, is admissible as part of the *res gestæ*. *Bybee v. State* (Cr. App.) 168 S. W. 526.

In a prosecution for procuring a woman for another man to have sexual intercourse with, evidence of the other man's conversation with accused before the appearance of the female, of the fact that the woman had sexual intercourse with him, and of the man's payment to her, is admissible. *Bybee v. State* (Cr. App.) 168 S. W. 526.

In a prosecution for pandering, evidence that witnesses had arrested prostitutes in the house into which the woman was inveigled is admissible; the state being bound to show that the woman was taken to a place where prostitution was allowed or encouraged. *Clark v. State* (Cr. App.) 174 S. W. 354.

That the arrests occurred a year before does not render the evidence inadmissible on account of remoteness. *Clark v. State* (Cr. App.) 174 S. W. 354.

Question for jury.—Evidence in a prosecution for pandering held for the jury. *Clark v. State* (Cr. App.) 174 S. W. 354.

Charge of court.—Where, in a prosecution of defendant for pandering, by taking his wife to the house of J., all the evidence showed that prosecutrix while in the house was engaging in sexual intercourse with others than defendant, her husband, and that defendant knew it was a house of prostitution when he placed his wife therein, a request to charge that, if defendant procured a room in the house from J. for the use of himself and wife, and remained in the house for that purpose, he should be found not guilty, though the jury should also find that the house was a house of prostitution, was properly refused as not supported by the evidence. *Stevens v. State* (Cr. App.) 150 S. W. 944.

Since this article, prohibiting and punishing pandering, was intended only to cover those acts, conduct, and devices of a person to induce a female to submit her body to other men for prostitution, as distinguished from other sexual crimes as adultery, fornication, etc., where accused, while not denying intercourse with prosecutrix, did deny that he had ever attempted to induce her to submit her person to prostitution, and there was no evidence that she had been induced so to do, it was error for the court to refuse to define "prostitution" under the statute prohibiting pandering; it being the claim of accused that the state's case showed a commission of adultery, but not the offense charged. *Hewitt v. State*, 71 App. 243, 158 S. W. 1120.

This article makes procurement a felony punishable by imprisonment. Code Cr. Proc., art. 58, and Pen. Code, art. 10, declare that all words used in the Code are to be taken and understood in their usual acceptation in common language, except when particularly defined by law. Held that, as the word "procured" had no other meaning than that in which it was commonly understood, there was no error in failing to define it. *Currington v. State*, 72 App. 143, 161 S. W. 478.

Where the court submitted only those grounds charged in the indictment and restricted the jury to a consideration thereof, the fact that in defining the statutory offense of pandering he copied the entire section relating thereto is harmless. *Clark v. State* (Cr. App.) 174 S. W. 354.

In a prosecution for pandering, the court need not define the terms "prostitution" and "house of ill fame." *Clark v. State* (Cr. App.) 174 S. W. 354.

Female procured as accomplice.—See notes under article 79 ante.

Art. 506b. Same; defense; venue.—It shall not be a defense to a prosecution for any of the Acts prohibited in the foregoing section, that any part of such act or acts shall have been committed

outside this State, and the offense shall in such case be deemed and alleged to have been committed and the offender tried and punished in any county in which the prostitution was intended to be practiced, or in which the offense was consummated, or in which any overt acts in furtherance of the offense shall have been committed. [Id., § 2.]

Art. 506c. Same; female as competent witness; marriage to accused; proviso.—Any such female person referred to in the foregoing sections shall be a competent witness in any prosecution under this Act to testify for or against the accused as to any transaction or as to any conversation with the accused or by such accused with another person or persons in her presence, notwithstanding her having married the accused before or after the violation of the provisions of this Act, whether called as a witness during the existence of the marriage or after its dissolution; provided, however, that any testimony or statement given by such female during the trial for any such offense above named shall not be used as evidence against her in any criminal prosecution. [Id., § 3.]

Wife as witness.—Under the express provisions of this article, a wife is a competent witness against her husband in a prosecution for pandering. Stevens v. State (Cr. App.) 150 S. W. 944.

Exemption from rule governing accomplices.—The provision of the statute against pandering that the female for whom a room in a house of prostitution is alleged to have been procured may testify for or against accused shows an intention not to bring such witnesses within the rule governing accomplices' testimony, since, under the law, an accomplice cannot testify for a codefendant, and hence the court properly refused to charge that such female and the proprietor of the house of prostitution were accomplices. Jones v. State, 72 App. 496, 162 S. W. 1142.

The female induced to leave the state for the purpose of prostitution is not an accomplice, even though she went voluntarily. Hewitt v. State (Cr. App.) 167 S. W. 40.

Art. 506d. Same; keeping rendezvous for females; employment of procurers.—Any person who shall keep, or be concerned in keeping or maintaining, any house or station or place of rendezvous or place of resort for females, under the guise of securing, for such female, a place of employment, but with the intent to place such female in a house of prostitution or in the possession of another person, to be used for prostitution, shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for a term of years not less than five. Any person keeping such house or station or place of rendezvous or resort for females, who shall employ any other person to procure any female to go to such place of resort, shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for any term of years not less than five. [Id., § 4.]

Art. 506e. Same; marriage as defense.—The act or state of marriage shall not be a defense to any violation of this Act. [Id., § 5.]

CHAPTER FIVE

MISCELLANEOUS OFFENSES

Art.	Art.
507. "Sodomy" defined and punished.	510. Desecration of graves.
508. Indecent publications and exposures.	511. Interference with dead bodies.
509. Disseminating scandals and lechery.	512. College, physician or surgeon receiving dead bodies.
	513. Punishment for.

Article 507. [364] "Sodomy" defined and punished.—If any person shall commit with mankind or beast the abominable and detestable crime against nature, he shall be deemed guilty of sodomy,

and, on conviction thereof, he shall be punished by confinement in the penitentiary for not less than five nor more than fifteen years. [Act Feb. 11, 1860, p. 97.]

Nature and elements of offense.—It was formerly held that this offense was not punishable, because not defined. *Fennell v. State*, 32 Tex. 373; *Frazier v. State*, 39 Tex. 390. But it is no longer necessary that the offense, to be punishable, should be expressly defined, and "sodomy" being an offense *eo nomine* with a penalty affixed thereto, is now punishable. *Ex parte Bergen*, 14 App. 52; *Cross v. State*, 17 App. 476.

Whilst sodomy is punished by this article, it is only generally defined as the "abominable and detestable crime against nature, with mankind or beast," and we must look to the common law for the elements of the crime. At common law, the act in a child's mouth did not constitute the offense, and such being the nature of the detestable act of which defendant was proven guilty, in this case, the conviction can not stand. *Prindle v. State*, 31 App. 551, 21 S. W. 360, 37 Am. St. Rep. 833.

Copulation in the mouth not sufficient. *Prindle v. State*, 31 App. 551, 21 S. W. 360, 37 Am. St. Rep. 833; *Lewis v. State*, 36 App. 37, 35 S. W. 372, 61 Am. St. Rep. 831; *Mitchell v. State*, 49 App. 535, 95 S. W. 500.

Woman is included in the term mankind as used in this article. *Lewis v. State*, 36 App. 37, 35 S. W. 372, 61 Am. St. Rep. 831. A venereal affair against the order of nature with a woman is sodomy. *Adams v. State*, 48 App. 90, 86 S. W. 334, 122 Am. St. Rep. 733.

An instruction, on a trial for sodomy, that if the jury had a reasonable doubt as to penetration of the animal they should acquit, sufficiently covered the question of penetration. *Moody v. State*, 121 S. W. 1117.

Indictment.—*Willson's Cr. Forms*, 259-261.

It is not enough to charge this offense in the very language of the statute. The facts which will put the defendant upon notice of the specific act must be averred. *State v. Campbell*, 29 Tex. 44, 94 Am. Dec. 251. An indictment which charged that the defendant "did unlawfully and wilfully commit with a mare, the same being a beast, the abominable and detestable crime against nature, by then and there having carnal connection with said beast, and did then and there commit the crime of sodomy with said beast" was held sufficient. The objection to said indictment that it did not allege the genus of the mare, or that said mare was a female of her species, was not a valid one. A mare is the female of the horse or equine genus of quadrupeds. *Cross v. State*, 17 App. 476.

Motion to quash indictment because the indictment does not allege the term of the court at which the grand jury was organized. The indictment alleges that the court was then in session for the fifty-fourth judicial district, and alleges the indictment to be the act of the grand jury of McLennan county, and that it was presented in open court; held, that it was sufficient. *Wright v. State*, 35 App. 367, 33 S. W. 973.

The indictment need not allege the sex of the person on whom the crime was committed and this though it alleges a name applicable to either sex. *Adams v. State*, 48 App. 90, 86 S. W. 334, 122 Am. St. Rep. 733.

Indictment charging copulation with a "sow" sufficiently described the animal. *Langford v. State*, 48 App. 561, 89 S. W. 830.

An indictment for sodomy, charging that the offense was committed by copulation with a woman, in that he penetrated her fundament or anus with his private parts, is sufficient. *James v. State*, 61 App. 232, 134 S. W. 699.

Evidence.—Carnal knowledge is as essentially an element of this offense as it is of rape, and the rules of evidence which apply in a prosecution for rape should be observed in prosecutions for sodomy. Penetration, as in rape, must be proved, though to no particular depth. The jury may infer penetration from circumstances, without direct proof. *Cross v. State*, 17 App. 476.

Evidence held insufficient. *Langford v. State*, 48 App. 561, 89 S. W. 830; *Mullins v. State*, 45 App. 465, 76 S. W. 560.

For evidence, see *Richardson v. State*, 49 App. 391, 94 S. W. 1016, and notes under C. C. P. art. 783 et seq.

Evidence held to support a conviction of sodomy. *Moody v. State*, 57 App. 76, 121 S. W. 1117.

Punishment.—A term of two years for one 16 years old was unauthorized. The court should have told the jury that if they found that defendant was guilty and was 16 or under and they assessed his punishment at 5 years, they might in their discretion confine him in the reformatory rather than the penitentiary. *Brown v. State*, 50 App. 626, 99 S. W. 1001.

A verdict of guilty against two, not assessing separate punishment was bad. *Medis v. State*, 27 App. 194, 11 S. W. 112, 11 Am. St. Rep. 192.

Accomplice.—If there was consent, the person participating was an accomplice and his testimony required corroboration. *Medis v. State*, 27 App. 194, 11 S. W. 112, 11 Am. St. Rep. 192.

Questions for jury.—If the evidence leave the question of consent in doubt it is for the jury. *Medis v. State*, 27 App. 194, 11 S. W. 112, 11 Am. St. Rep. 192.

Art. 508. [365] Indecent publications and exposures.—If any person shall make, publish or print any indecent and obscene print, picture or written composition, manifestly designed to corrupt the morals of youth, or shall designedly make any obscene and indecent exhibition of his own or the person of another, in public, he shall be fined not exceeding one hundred dollars.

Nature and elements of offense.—The publicity contemplated had reference to persons rather than place. An exhibition in a public road might not be "in public" while a similar act in a private place might be "in public" within the meaning of the law, depending on persons who did or could see the act. *Moffit v. State*, 43 Tex. 346.

The "obscene and indecent exhibition" means an exposure of the parts of the person commonly considered as private, and does not mean or include obscene or indecent print, picture or written composition placed on the clothes worn on the person. *Tucker v. State*, 28 App. 541, 13 S. W. 1004.

"Stay with me after school. I have secured a powder through the mail that will make you safe" is not such an "indecent composition" as is "manifestly designed to corrupt the morals of youth" within the meaning of this article. A female over 21 years of age is not a youth within the meaning of this article. *Edwards v. State*, 47 App. 611, 85 S. W. 797.

One charged with delivering an obscene picture to a female about 15 years of age may not show in justification that she had previously received other lewd pictures. *Holcomb v. State*, 60 App. 408, 132 S. W. 362.

Indictment.—Willson's Cr. Forms, 262, 265.

An indictment for indecent publication should allege or set out the publication sufficiently to enable the court to judge of its character. *State v. Hanson*, 23 Tex. 232. An indictment for an indecent exposure of person is sufficient, if the offense be charged in the language of the statute. *Moffit v. State*, 43 Tex. 346; *State v. Griffin*, *Id.* 538.

An indictment charging that defendant on a day stated did then and there designedly make an obscene and indecent exhibition of his person in public contrary to law and against the peace and dignity, etc., was sufficient. *State v. Griffin*, 43 Tex. 538.

When, in charging the making, etc., of an indecent, etc., written composition, the composition being set out in *haec verba*, it is unnecessary to charge the manner and means of the making of the same, or the circumstances attending its publication. *Smith v. State*, 24 App. 1, 5 S. W. 510.

Where the defendant is indicted for making and publishing an indecent and obscene written composition, it is the province of the judge to determine whether it is indecent and obscene. *Smith v. State*, 24 App. 1, 5 S. W. 510.

A recital in an indictment for making and publishing an obscene composition that certain words were "manifestly designed to corrupt the morals of youth," does not mean that the composition of itself and upon its face must manifestly produce that effect, but refers to the intention and purpose of the defendants in making the composition. *Smith v. State*, 24 App. 1, 5 S. W. 510.

For an indictment setting out a medical advertisement, held not "manifestly designed," etc., and therefore insufficient on its face, see *Abendroth v. State*, 34 App. 325, 30 S. W. 787.

Art. 509. Disseminating scandals and lechery.—Every person or persons who shall, within this state, engage in the business of editing, publishing or disseminating any newspaper, pamphlet, magazine, or any printed paper, devoted mainly to the publication of scandals, whoring, lechery, assignations, intrigues between men and women, and immoral conduct of persons; or any person or persons who shall knowingly have in his or her possession for sale, or shall keep for sale, or distribute, or in any way assist in the sale, or shall gratuitously distribute, or give away, any such newspaper, pamphlet, magazine, or printed paper, in this state, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years. [Act 1897, p. 160.]

Indictment.—Willson's Cr. Forms, 263, 264.

Art. 510. [366] Desecration of grave.—If any person shall wrongfully destroy, mutilate, deface, injure or remove any tomb, monument, gravestone or other structure in any place used or intended for the burial of the dead, or any fence, railing or curb for the protection of such structure, or any inclosure for any such place of burial, or shall wrongfully injure, cut, remove or destroy any tree or shrub growing within any such inclosure, he shall be punished by imprisonment in jail not exceeding six months, or by fine not exceeding five hundred dollars. [Act Feb. 12, 1858, p. 166.]

Intent.—Where the defendant had placed a new fence instead of the old one, and his fence was a good one, this was held to be no defense. Having done what the law forbade, it would not avail him that in doing it, he intended an ultimate good. *Phillips v. State*, 29 Tex. 226.

In a prosecution hereunder the fact that the graveyard was neglected and had grown up in a wilderness, and was situated near defendant's house, and had become the rendezvous of polecats, who preyed on his chickens, and that he merely cut down some of the bushes in order to get out the polecats, raises a question for the jury as to whether the act was wrongfully done. *Bird v. State*, 46 App. 135, 79 S. W. 25.

It is error, in instructing on the elements of the offense, to omit the word "wrongfully." *Bird v. State*, 46 App. 135, 79 S. W. 25.

Indictment.—Willson's Cr. Forms, 266-268.

See *Phillips v. State*, 29 Tex. 226.

Questions for jury.—In this case, for cutting shrubs, etc., growing in an inclosure, a graveyard, it should be left to the jury to determine whether or not the act was wrongfully done. *Bird v. State*, 46 App. 135, 79 S. W. 25.

Charge of court.—Where it appears that one string was gone from the graveyard fence, and that it was broken down in other places, it is error to refuse to instruct that the word "inclosure" means the act of inclosing, the separating of land from common ground into distinct possession by a fence, and if the jury have a reasonable doubt as to whether the graveyard was an inclosure as thus defined they should acquit. *Bird v. State*, 46 App. 135, 79 S. W. 25.

It is error in a prosecution under this article to refuse to charge defining the word "inclosure" and instructing the jury that if they have a reasonable doubt as to whether the graveyard was an inclosure as defined to acquit the defendant. *Bird v. State*, 46 App. 135, 79 S. W. 25.

Art. 511. [367] Interference with dead bodies.—If any person not authorized by law, or by a relative or friend, for the purpose of reinterment, shall disinter, remove or carry away any human body, or the remains thereof, or shall conceal the same, knowing it to be so illegally disinterred, he shall be punished by fine not exceeding two thousand dollars.

Indictment.—See Willson's Cr. Forms, 269, 270.

The dead body should be specified or designated by the name by which it was known, in order to identify the transaction and point out the particular offense with which accused is charged, and if this cannot be done sufficient reason should be alleged in the pleading why this is not done. *Leach v. State*, 44 App. 523, 72 S. W. 600. Followed by *Harris v. State* (Cr. App.) 72 S. W. 1134.

Art. 512. College, physician or surgeon receiving dead bodies.—No school, college, physician or surgeon shall be allowed or permitted to receive any such body or bodies until bond shall have been given to the state by such physician or surgeon, or by or in behalf of such school or college, to be approved by the clerk of the county court in and for the county in which such physician or surgeon may reside, or in which such school or college may be situated, and to be filed in the office of said clerk, which bond shall be in the penal sum of one thousand dollars, conditioned that all such bodies which the said physician or surgeon or said college shall receive thereafter shall be used; and all such experiments on the lower animals shall be conducted only for the promotion of medical science; and whoever shall sell or buy such body or bodies, or in any way traffic in the same, or shall transmit or convey, or cause or procure to be transmitted or conveyed, said bodies to any place outside the state, shall be guilty of a misdemeanor, and shall, on conviction, be liable to a fine not exceeding two hundred dollars for each offense, or to be imprisoned for a term not exceeding two years in the county jail. [Act 1907, p. 119.]

Civil provisions, see *Vernon's Sayles' Civ. St.* 1914, arts. 5756-5763.

Art. 513. Punishment for.—Any person having duties imposed upon him by the provisions of this law who shall refuse, neglect or omit to perform said duties, or any of them, as required by said law, shall, on conviction thereof, be liable to a fine of not less than one hundred dollars nor more than five hundred dollars for each offense. [Id., p. 119.]

TITLE 11

OFFENSES AGAINST PUBLIC POLICY AND ECONOMY

Chap.		Chap.	
1.	Illegal banking, passing spurious money, and bank guaranty.	8a.	Pool halls.
1a.	Rural credit unions.	9.	Vagrancy.
1b.	Co-operative savings and contract loan companies.	9a.	Abandonment of wife or children.
2.	Of lotteries and raffles.	10.	Miscellaneous offenses.
3.	Bucket shops—defining and prohibiting same.	11.	Insurance companies.
4.	Gaming.		Fire insurance.
5.	Neglect of officers to arrest or prosecute in gaming cases.		Fraternal Beneficiary Associations.
6.	Betting on elections.		Accident Insurance Companies.
7.	Unlawfully selling intoxicating liquor.		Mutual fire, lightning, hail, and storm insurance companies.
8.	Violation of the law regulating the sale of intoxicating liquor.		Co-operative life insurance companies.
			Indemnity contracts.
		12.	Building and loan associations.

CHAPTER ONE

ILLEGAL BANKING, PASSING SPURIOUS MONEY, AND BANK GUARANTY

Art.		Art.	
514.	Issuing bills to pass as money.	524.	Director borrowing funds.
515.	Includes corporations.	525.	Officer or director, failure of duty.
516.	Also indorsements of foreign bills.	526.	Commissioner of insurance, etc., not to be interested in.
517.	Passing paper of broken bank.	527.	Penalty for.
518.	Not applicable to United States banks.	528.	Certifying check without funds, penalty for.
519.	Misappropriating funds of savings bank.	529.	Failure to notify commissioner of banking of violation of law.
520.	Penalty for.	530.	Examiner violating oath of office.
521.	State banks, authority to do business.	531.	Duty of commissioner of insurance and banking.
522.	Non-interest bearing and unsecured deposits protected.	532.	Receiving deposits when insolvent.
523.	Embezzling or misapplying funds.		

Article 514. [368] Issuing bills to pass as money.—If any person within this state shall issue any bill, promissory note, check or other paper intended to circulate as money, he shall be fined not less than ten dollars nor more than fifty dollars for each bill, promissory note, check or other paper so issued.

Decisions under former statutes.—See *Orton v. Engledow*, 8 Tex. 206; *State v. Williams*, Id. 256; *State v. Williams*, 14 Tex. 98; *Williams v. State*, 23 Tex. 264; *Mills v. State*, Id. 295.

Essentials of offense.—Where it is shown that the bills were issued, and were used, with the knowledge of the party issuing them, by the community as a circulating medium, the offense is complete. *Luckey v. State*, 26 Tex. 362.

— **Bills redeemable in Confederate notes.**—That the bills issued were redeemable in Confederate notes would not repel the intention manifested in issuing them that they should circulate as money. *Luckey v. State*, 26 Tex. 362.

— **Value as circulating medium.**—That the bills were not regarded by the community in which they were issued as of equal value with gold and silver as a circulating medium, would not tend to show that accused did not violate the law. *Luckey v. State*, 26 Tex. 362.

Indictment.—*Willson's Cr. Forms*, 271.

Where an indictment charged that the defendant, without authority of law, did issue certain "bills," intended to circulate as money, and set out copies thereof, from which it appeared that the bills were drawn for "one dollar in currency," made payable to bearer, "when twenty dollars are presented," and accepted by the drawee, the instruments were properly termed bills, and if improperly designated, it was immaterial error. *Luckey v. State*, 26 Tex. 362.

— **Requisites in general.**—See Code Cr. Proc. arts. 447-481.

— **Surplusage.**—Where the bills were alleged in the indictment to have been engraved, whereas they were printed, the allegation might be regarded as surplusage, and the bills admitted in evidence. *Luckey v. State*, 26 Tex. 362.

Art. 515. [369] Includes corporations.—Any officer of any banking company or body corporate, who signs his own name, or that of another, by the authority of such other, to any bank bill,

promissory note, check or other paper, being evidence of a promise to pay, and intended to circulate as money, is guilty of the offense punishable by the preceding article.

Indictment.—Willson's Cr. Forms, 272.

— **Requisites in general.**—See Code Cr. Proc. arts. 447-481.

Art. 516. [370] Also indorsement of foreign bills.—Any person who may bring into this state any bank bill, purporting to be issued by any bank in any other state or territory of the Union, or in any foreign country, and shall sign or indorse the same to be circulated as money in this state, shall be deemed guilty of the offense mentioned in article 514.

Indictment.—Willson's Cr. Forms, 273.

— **Requisites in general.**—See Code Cr. Proc. arts. 447-481.

Art. 517. [371] Passing paper of broken bank.—If any person shall fraudulently pass or transfer, or offer to pass or transfer, any paper purporting to be bank paper, and to be issued by any bank, which, having once existed, has since broken, or the money of the same becomes valueless, he shall be punished by confinement in the penitentiary not less than two nor more than five years.

Indictment.—Willson's Cr. Forms, 269, 270, 274.

— **Requisites in general.**—See Code Cr. Proc. arts. 447-481.

Art. 518. [372] Not applicable to United States banks.—The provisions of this chapter shall not apply to any bank incorporated under the laws of the United States, nor to bills issued by such bank. [Act Feb. 12, 1858, p. 166.]

Art. 519. Misappropriating funds of savings banks.—It shall be unlawful for any director or officer of any bank or banking and trust company, which shall establish or maintain, or continue to maintain, a savings department, or which shall use the word "savings," as provided in this article, to knowingly misappropriate any moneys or funds belonging to such savings department, or to use or consent to the use of any such moneys or funds otherwise than for the payment of lawful demands of savings depositors, and in the making of such investments as are prescribed by law, and in the payment of such dividends to the shareholders as are allowed by the law to be paid therefrom, or to borrow any of the funds belonging to such savings department, or to in any way be an obligor for moneys loaned by or borrowed of such savings department, or to receive or accept, directly or indirectly, any commission, brokerage or other valuable thing or favor of any kind by reason or on account of any loan or investment made out of the funds of such savings department, or to sell such savings department any security or other investment, or wilfully and knowingly do, or perform, any act or transaction by or as a result of which at any time the assets of such savings department, including cash, shall not at least equal in amount the deposits in such savings department, at least fifteen per cent of which shall be actual cash in such savings department. [Act 1909, p. 406.]

Civil provisions, see Vernon's Sayles' Civ. St. 1914, arts. 445-517.

Art. 520. Penalty for.—Any officer or director of any state bank or banking and trust company, who shall knowingly violate the provisions of this article, shall be deemed guilty of a felony, and shall, upon conviction, be punished by imprisonment in the state penitentiary for a term of not less than one nor more than five years. [Id., p. 406.]

Art. 521. State banks, authority to do business.—All state banks transacting business in this state shall be required, on or after the first day of January, 1910, to hold a certificate of authority to transact a banking business, issued by the commissioner in compliance

with the provisions of this law, and to keep the same conspicuously posted at all times in the banking house where such business is transacted. It shall be the duty of the commissioner of insurance and banking to issue to each state bank, which the state banking board shall have approved and certified to him as provided by law as being entitled to transact a banking business, a certificate of authority in such form as the state banking board shall approve, to be signed by him under his official seal, certifying that such state bank is authorized under the laws of this state to engage in the banking business. Such certificate of authority, when issued to guaranty fund banks, shall contain the following statement on the face thereof in bold type: "The non-interest bearing and unsecured deposits of this bank are protected by the state bank guaranty fund." And, when issued to bond security banks, shall contain the following statement on the face thereof in bold type: "All deposits of this bank are protected by security bond under the laws of the state of Texas." And, when issued to the state banks other than guaranty fund banks and bond security banks, it shall contain neither of these nor any similar statement. The commissioner of insurance and banking shall close all state banks which the state banking board shall disapprove and determine not entitled under the laws of this state to transact a banking business, and shall proceed in such cases in the manner provided by law with respect to insolvent banks, unless such banks shall go into voluntary liquidation; provided, that hereafter the secretary of state shall, on issuance of any charter to any bank or banking and trust company, deliver the same to the commissioner of insurance and banking, who shall deliver such charter to such corporation, together with the certificate herein provided for, upon such corporation showing to the satisfaction of the state banking board that it has complied with the state banking laws. Any person or persons who shall in any capacity transact, or hold themselves out as transacting, the business of banking for or on behalf of any state bank or state banking and trust company, after the first day of January, 1910, without such bank or banking and trust company shall hold a certificate of authority, as herein provided for, except in cases where such certificates shall not yet have been issued to newly incorporated banks as herein provided for, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished for each offense, each day being considered as a separate offense, by a fine of not less than one hundred dollars and not exceeding one thousand dollars, or by imprisonment in the county jail for not less than one nor more than twelve months, or by both such fine and imprisonment. [Id., p. 406.]

Art. 522. Non-interest bearing and unsecured deposits protected.—All guaranty fund banks provided for by law are hereby authorized and empowered, if they desire so to do, to publish, by any form of advertising which they may adopt, or upon their stationery, the following words: "The non-interest bearing and unsecured deposits of this bank are protected by the depositors guaranty fund of the state of Texas." All bond guaranty banks provided for by law are hereby authorized and empowered, if they desire so to do, to publish, by any form of advertising which they may adopt, or upon their stationery, the following words: "The deposits of this bank are protected by guaranty bond under the laws of this state." Said banks are authorized to use the terms "guaranty fund bank," or "guaranty bond bank," as the case may be, but they are hereby prohibited from describing said forms of guaranty by any other terms or words than herein named. Any guaranty fund bank

or bond security bank or any officer, director, stockholder, or other person, for any such bank who shall write, print, publish, or advertise in any manner or by any means, or permit any one for them, or for said bank, to write, print, publish or advertise any statement that the deposits of any such bank are secured otherwise than as permitted in this article, or who shall make or publish any advertisement or statement to the effect that the state of Texas guarantees or secures the deposits in any such bank or banking and trust company, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred dollars nor more than five hundred dollars, or confined in the county jail for not less than three months nor more than twelve months, or by both such fine and imprisonment. Any person who shall write, print, publish or advertise the above statement, authorized to be used by bond security banks or guaranty fund banks, other than as herein authorized, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred dollars nor more than five hundred dollars, or confined in the county jail for not less than three months nor more than twelve months, or by both such fine and imprisonment. [Id., p. 406.]

Art. 523. Embezzling or misapplying funds.—Every president, cashier, director, teller, clerk or agent of any state bank, or banking and trust company, incorporated under the laws of Texas, who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of such state bank, or who, without authority from the directors, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree, or who makes any false entry in any book, report or statement of such state bank, with intent in either case to defraud such state bank, or any other corporation, body politic or any individual, person, firm or association, or to deceive any officer of such state bank, the commissioner of insurance and banking, or any examiner or special agent, authorized by law to examine the affairs of any such state bank, and every person who, with like intent, aids or abets any officer, clerk or agent in any violation of this article, shall be deemed guilty of a felony, and shall, upon conviction, be imprisoned in the state penitentiary for a term of not less than five years nor more than ten years. [Id., p. 406.]

Art. 524. Director borrowing funds.—Any director of a state bank or banking and trust company, incorporated under the laws of this state, who shall, either directly or indirectly, borrow any of the funds of such bank in excess of ten per cent of its capital and surplus, without the consent of a majority of the directors of the bank first having been obtained and made a matter of record at a regular meeting of the board, or without the written consent of such majority of the directors, other than the borrowers, being jointly executed by them and filed in the archives of such bank before the loan is made; and any officer of a state bank who shall knowingly become indebted to such bank, directly or indirectly, in any sum whatever, without the consent of a majority of the board, other than the borrower, obtained or recorded or filed in like manner, and any officer or director of such bank who shall knowingly loan or assent to the loaning of any of its funds to any officer, or any of its funds to any director in excess of ten per cent of its capital and surplus, without such consent being first obtained and recorded or filed, or who shall knowingly permit any such officer or director to become indebted to the bank or liable to it without such consent, shall be deemed guilty of a felony, and shall be punished by im-

prisonment in the state penitentiary for a term of not less than two years, upon conviction thereof. [Id., p. 406.]

Art. 525. Officer or director, failure of duty.—Any officer, director or employé of any state bank or trust company, who knowingly or wilfully fails or refuses to perform any duty imposed upon him by law, or who shall do or perform or assist in doing or performing any act or transaction prohibited by the provisions of this law, for the punishment of which provision is not otherwise herein made, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than five hundred nor more than one thousand dollars, or by imprisonment in the county jail for a term of not less than thirty days nor more than ninety days, or by both such fine and imprisonment. [Id., p. 406.]

Art. 526. Commissioner of insurance, etc., not to be interested in.—Neither the commissioner of insurance and banking, nor any regularly appointed clerks or employés of the department of insurance and banking, nor any state bank examiner, shall, at any time during his incumbency, be financially interested, directly or indirectly, in any state bank or banking and trust company, subject to the supervision of the department of insurance and banking, or knowingly be or become indebted, either directly or indirectly, to any such state bank or banking and trust company. [Id., p. 406.]

Art. 527. Penalty for.—Any officer or employé, named in the foregoing article, violating its provisions shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding five hundred dollars; and the venue in such case shall be in the county wherein such state bank or banking and trust company is located. The violation of the provisions of this article shall work a forfeiture of the office or position held by the person guilty of such violation. [Id., p. 406.]

Art. 528. Certifying check without funds, penalty for.—Any officer, clerk or agent of any state bank or banking and trust company incorporated under the laws of Texas, who shall wilfully certify to any check, or checks, before the amount thereof shall have been regularly entered to the credit of the drawer, upon the books of such state bank or banking and trust company, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by fine of not less than five hundred nor more than five thousand dollars, or by imprisonment in the state penitentiary for not more than one year, or by both such fine and imprisonment. [Id., p. 406.]

Art. 529. Failure to notify commissioner of banking of violation of law.—Any state bank examiner, or special agent, who shall knowingly and intentionally fail or refuse to notify the commissioner of insurance and banking in writing of any violation of the criminal provisions of this law within ten days after the same shall come to his notice or attention, unless such notice shall, within his knowledge, have been previously given by some other bank examiner or special agent, or any commissioner of insurance and banking, who shall knowingly and intentionally fail or refuse to notify in writing the county or district attorney charged by law with the duty of the prosecution thereof, of any such violation, within ten days after the same shall have come to his knowledge or attention, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment

in the county jail for not less than three nor more than twelve months, or by both such fine and imprisonment, and, upon conviction, shall be removed from office. [Id., p. 406.]

Art. 530. Examiner violating oath of office.—For any violation of his oath of office, or of any duty imposed upon him by law, any examiner shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding five years, and upon indictment of any such examiner for any violation of this law, he shall be disqualified from further discharging the duties of such office, until such indictment is fully disposed of. [Act 1905, p. 514, § 68.]

Art. 531. Duty of commissioner of insurance and banking.—It shall be the duty of the commissioner of insurance and banking, not less than twice during any one year, to call upon each bank organized under this act, and trust company or savings bank, doing business under the provisions of this law for a statement as provided by law; and he may call upon any one or more of such corporations to make such statements at any time, though it be more than a second statement within the year; and the commissioner shall give no notice to any person whatsoever of the day on which he will call for such statement. For a violation of this prohibition, or of any other duty herein imposed upon him, he shall be deemed to have committed a misdemeanor in office, and, upon conviction of the same, upon indictment or information of any parties, in the name of the state, before a competent tribunal, he shall be punished by removal from office, and by a fine of not less than five hundred dollars for each violation of this law. Should any president, cashier or secretary, or any officer of such corporation, or any director thereof, refuse to make the statement so required of him or them, or wilfully and corruptly make a statement, he or they, and each of them, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, upon information, punished by a fine for each offense not exceeding five hundred dollars, and not less than one hundred dollars, or by imprisonment not less than one nor more than twelve months in the city or county jail, or by both such fine and imprisonment. [Id., p. 507, § 49.]

See art. 520 Vernon's Sayles' Civ. St. 1914.

Art. 532. Receiving deposits when insolvent.—If any president, director, manager, cashier, or other officer, of any banking institution, or the owner, agent, or manager, of any private bank or banking institution, or the president, vice president, secretary, treasurer, director, or agent, of any trust company or institution, doing business in this state, shall receive or assent to the reception of any deposit of money or other valuable thing into such bank or banking institution, or trust company or institution, or if any such officer, owner, or agent, of such bank or banking institution, or if any president, vice president, secretary, treasurer, director, or agent, of such trust company or institution, shall create or assent to the creation of any debt, debts, or indebtedness, in consideration of or by reason of which indebtedness any money or valuable property shall be received into such bank or banking institution, or trust company or institution, after he shall have had knowledge of the fact that such bank, banking institution, or trust company or institution, or the owner or owners of any such private bank, is insolvent or in failing circumstances, he shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for a term of not less than two nor more than ten years; provided, that the failure of any such bank or banking institution, or trust company or institution, shall be

prima facie evidence of knowledge on the part of any such officer or person that the same was insolvent or in failing circumstances when the money or property was received on deposit. [Act 1897, p. 130.]

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| 1. Explanatory. | 6. — Instructions. |
| 2. Constitutionality. | 7. Persons liable. |
| 3. What constitutes insolvency. | 8. — Accomplice. |
| 4. — Time of receiving deposit. | 9. Indictment. |
| 5. — Evidence. | 10. — Requisites in general. |

1. **Explanatory.**—Subsequent to the enactment in 1897 of the above article, the legislature, in 1905, passed an act making bank officers personally liable for any deposits received or debts incurred by the bank while insolvent. (See Vernon's Sayles' (Civ. St. 1914, art. 554.) The later act does not expressly repeal the earlier provision. Whether an implied repeal resulted is a question for judicial determination.

2. **Constitutionality.**—The provision of this article that failure of the bank shall be prima facie evidence of knowledge by the bank officers of its insolvency is unconstitutional because not embraced in the title of the act. *Roby v. State*, 41 App. 152, 51 S. W. 1114.

3. **What constitutes insolvency.**—"Insolvency," means that accused did not have sufficient assets to pay his debts, and is synonymous with "failing circumstances." *Brown v. State*, 71 App. 353, 162 S. W. 339. "Assets," means the property of accused, real and personal, his bills receivable, notes, obligations due him, of any and every character, considering the solvency of the makers, indorsers, and guarantors, and the value of the securities thereon, if any, and all stocks held by him as his property. *Fleming v. State*, 62 App. 653, 139 S. W. 598; *Brown v. State*, 71 App. 353, 162 S. W. 339.

4. — **Time of receiving deposit.**—A charge that accused in fact must have been insolvent at the time the deposit was received and must have known the fact, coupled with an instruction that the deposit must have been received "after" accused knew the bank was insolvent, etc., was not objectionable as not properly fixing the time. *Brown v. State*, 71 App. 353, 162 S. W. 339.

5. — **Evidence.**—See Code Cr. Proc. art. 783.

The state must prove the property owned by accused at the time he received the deposit, its condition and value, the amount of his indebtedness and liabilities, to enable the jury to determine the fact of insolvency. The value of property claimed to be owned by accused at the time of receiving the deposit, if it had no market value, could be ascertained by describing it and proving its cost, etc., and the reasonable value of stock in corporations owned by him could be fixed by proving the productive capacity of their plants, the market price of the stock, if any, and from any facts or circumstances which would enable the jury to correctly determine the actual value. Evidence as to the value of each separate piece of property or assets was also admissible. Evidence of the cashier of another bank instituted and controlled by accused that there was no capital paid in at the time of its organization together with the value of its assets was admissible. Evidence of the trustee in bankruptcy of accused's estate who had taken possession of all his property that no person within witness' knowledge, other than accused, had ever asserted or claimed any interest in the bank, together with the character and amount of the property received and the investigations made as to its value and condition, was admissible. Where accused also owned another bank, it was proper for the state to prove the conditions of that bank on the issue of his insolvency on the date the deposit was received. And where the state bank commissioner testified that he had checked and verified a statement of the assets and liabilities of that bank after it had been prepared by one of his subordinates and that the same was correct, such statement was properly admitted. Where accused claimed as part of his assets certain shares of stock in another bank, it was permissible for the commissioner of banking to testify that such shares were valueless. Where the state bank commissioner testified that after examining another bank owned by defendant he objected to certain loans and demanded that they be withdrawn from the bank and replaced with cash or other proper security and accused withdrew these notes and replaced them with others alleged to have been given by purchasers of stock in a corporation of which defendant was president, evidence that the notes so substituted were uncollectible, given by persons of small means and under contracts providing that the sales should be void if the corporation did not pay specified dividends, etc., was admissible as bearing on the issue of accused's insolvency and as tending to show his bad faith in making the substitution. *Brown v. State*, 71 App. 353, 162 S. W. 339.

6. — **Instructions.**—See Code Cr. Proc. art. 735.

The court should charge the proper rule for determining the question of solvency. *Brown v. State* (Cr. App.) 151 S. W. 561.

7. **Persons liable.**—Accused, establishing a private bank, and placing the same in charge of employes who were authorized to do a general banking business, gives, in law, his assent to each and every act of such employes within the scope of the business authorized by him to be done by his agents and employes, and is liable for their acts in receiving deposits while he and the bank were insolvent, though he was not present when the deposit was received, did not expressly authorize it, and had no actual knowledge thereof. *Brown v. State*, 71 App. 353, 162 S. W. 339.

8. — **Accomplice.**—See notes under article 79, ante.

9. **Indictment.**—See Willson's Cr. Forms, 276, 277. *Roby v. State*, 41 App. 152, 51 S. W. 1114.

An indictment, alleging that accused was the president of a bank, that as president he received as a deposit a bank check on another bank, payable to the order of a third person, that the check was deposited by the third person, that the president received the deposit after he knew that the bank was in failing circumstances and insolvent, does not charge the offense denounced by this article because it does not allege affirmatively the insolvency of the bank at the time of the deposit, and because it does not show that the check was transferred as a deposit to the bank. *Fleming v. State*, 62 App. 653, 139 S. W. 598.

An indictment alleging that accused received and assented to the reception of a deposit of money in the bank of E., "unincorporated," accused then and there being president of said bank and the bank being insolvent, and that accused then knew that such bank and the owner and owners of said bank was and were insolvent, etc., charges that the E. bank was a private bank, and was bad for not alleging that accused was its owner, agent, or manager, and the names of the owners, and that they were insolvent when the money was received. *Brown v. State* (Cr. App.) 151 S. W. 561. But an indictment alleging that accused unlawfully assented to the reception of a deposit of the value of \$50 from and by D., which money was placed to the credit of D.'s open account on the books of a specified bank, unincorporated, which was a private bank of which accused was the owner, and then and there insolvent and in failing circumstances at the time of receiving the deposit, and knowing that the bank and its owner were insolvent, etc., was not objectionable for failure to sufficiently allege the names of the persons composing the bank. *Brown v. State*, 71 App. 353, 162 S. W. 339.

10. — **Requisites in general.**—See Code Cr. Proc. arts. 447-481.

CHAPTER ONE A

RURAL CREDIT UNIONS

Art.	Art.
532a. Rural credit unions; examination by State Bank Commissioner; embezzlement of funds.	532b. Same; prosecution for misapplication of funds.

Article 532a. Rural credit unions; examination by State Bank Commissioner; embezzlement of funds.—Ten or more citizens of this State may associate themselves together, by articles of agreement, and form a rural credit union, and upon the approval of the State Banking Board may become a corporation upon complying with such provisions of the Act regulating State banks as may be applicable to the transaction of the business herein authorized to be done. The State Banking Board may permit the formation of such corporation when it is satisfied that the proposed field of operation is favorable to the success of a rural credit union, and that the standing of the proposed members is such as to give assurance that its affairs will be administered in accordance with the spirit of this Act, and it shall be the duty of the Commissioner of Banking to issue a charter to said rural credit union to do business in conformity with the provisions of this Act. The State Bank Commissioner, or his deputy, shall have authority to examine the accounts, books and papers of rural credit unions herein authorized to be organized. Any rural credit union violating the provisions of this Act shall be subject to the forfeiture of its charter, and any officer or member misapplying or embezzling funds belonging to such rural credit union, shall be subject to prosecution and punishment as already provided for violating the provisions of the State Banking laws. [Act 1913, p. 163, ch. 87, § 3.]

See Vernon's Sayles' Civ. St. 1914, arts. 7046a-7046x.

Art. 532b. Same; Prosecution for misapplication of funds.—The State Bank Commission shall require such rural credit unions to keep such books as he may deem necessary for the proper conduct of their business; may make examination and report of the transaction of such rural credit unions' business and institute necessary proceedings for the prosecution of any officer or director misapplying the rural credit unions' funds. The rural credit unions shall be subject to the general supervision of the State Bank Commissioner. [Id., § 5.]

CHAPTER ONE B

CO-OPERATIVE SAVINGS AND CONTRACT LOAN
COMPANIES

Art. 532c. Pecuniary interest of corporate officers prohibited; penalty.	Art. 532e. Engaging in business contrary to law; proviso.
532d. Fraudulent representations by officers.	532f. Partial invalidity; application of general corporation laws.

Article 532c. Pecuniary interest of corporate officers prohibited; penalty.—No director or officer of any company transacting business in this State or organized under the laws of this State shall receive any money or valuable thing for negotiating, procuring, recommending or aiding in any purchase or sale by any such company of any property or any loan from such company, nor be pecuniarily interested, directly or indirectly, either as principal, co-principal, agent or beneficiary in any such purchase, sale or loan; provided that nothing contained in this article shall prevent the company from making a loan upon a contract by the borrower not in excess of the reserve value thereof. Any person violating any provision of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished by fine of not less than one hundred nor more than five hundred dollars. [Act 1915, 1st S. S., p. 14, ch. 5, § 25.]

Art. 532d. Fraudulent representations by officers.—Any officer or agent of any company acting under the provisions of this Act who shall knowingly misrepresent any material fact relative to the contract or certificate issued or to be issued and sold by any such company to any purchaser thereof, shall be guilty of a felony and upon conviction shall be punished by fine of not less than five hundred dollars or by imprisonment in the penitentiary for any period of time not more than three years or by both such imprisonment and fine. [Id., § 26.]

Art. 532e. Engaging in business contrary to law; proviso.—No person, firm, corporation, or association of persons or joint stock company shall hereafter engage in this State in the business provided for in this Act, except in compliance with this Act, and any corporation which does so engage shall have its charter forfeited by suit of the Attorney General and shall be liable to a penalty of not less than one hundred dollars a day nor greater than five hundred dollars a day for each day that it does so engage; all such suits to be brought as other penalty suits which the Attorney General is authorized to bring; any person who does so engage in violation of the provisions hereof shall be guilty of a misdemeanor for each and every day such person is so engaged and shall be punished by fine not less than one hundred nor more than five hundred dollars for each offense; provided each day shall be a separate offense; provided, however, that existing corporations, individuals, associations and joint stock companies engaged in the business defined in this Act at the time this measure goes into effect shall have twelve months thereafter to adjust their business affairs and bring their business under the terms of this Act; provided, however, that they must within sixty days after this Act goes into effect submit a statement of their business to the Commissioner of Insurance and Banking, together with the certificate of their intention to accept the provisions of this Act, and comply therewith. [Id., § 27.]

Art. 532f. Partial invalidity; application of general corporation laws.—Should any section of this Act be held unconstitutional—

al or void for any reason or as to any particular company, corporation, individual or association, such holding shall not affect the remainder of the Act. The general corporation laws of this State where not in conflict herewith shall govern corporations chartered or operating under this Act; and the general laws specifying charges which may be made by the Commissioner of Insurance and Banking shall apply to corporations chartered or operating hereunder. [Id., § 29.]

CHAPTER TWO

OF LOTTERIES AND RAFFLES

Art.	Art.
533. Establishing a lottery.	536. Dealing in futures.
534. Selling lottery tickets.	537. Permitting premises to be used for such purposes.
535. Raffle for over five hundred dollars.	

Article 533. [373] Establishing a lottery.—If any person shall establish a lottery or dispose of any estate, real or personal, by lottery, he shall be fined not less than one hundred nor more than one thousand dollars.

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| 1. Constitutional provision. | 6. — Revolving spindle. |
| 2. Persons liable. | 7. — Knife rack. |
| 3. What constitutes a lottery. | 8. — Subscription schemes. |
| 4. — Raffle distinguished. | 9. Accomplices. |
| 5. — Slot machines. | 10. Indictment. |

1. **Constitutional provision.**—See Const., art. 3, sec. 47.

2. **Persons liable.**—That accused was present, handled tickets and operated the policy wheel, does not show that he established the lottery. *Howard v. State*, 49 App. 327, 91 S. W. 785.

3. **What constitutes a lottery.**—Any scheme for the distribution of prizes by chance is a lottery. *State v. Randle*, 41 Tex. 292; *Randle v. State*, 42 Tex. 580; *Holoman v. State*, 2 App. 610, 28 Am. Rep. 439; *Prendergast v. State*, 41 App. 358, 57 S. W. 850. And it matters not by what name such a scheme may be known, it comes within the prohibition of this article. *State v. Randle*, 41 Tex. 292. It is no less a lottery because the scheme includes no blanks if the prizes are of unequal value. *Randle v. State*, 42 Tex. 580; *Holoman v. State*, 2 App. 610, 28 Am. Rep. 439. A sale of boxes of candy, some of which contain money or a prize, the purchaser selecting in ignorance of contents, is a device in the nature of lottery. *Holoman v. State*, 2 App. 610, 28 Am. Rep. 439.

4. — **Raffle distinguished.**—A lottery is a game in which there is a keeper or exhibitor, who has the real fund, and against which the better stakes his money, which may be evidenced by tickets. A raffle is a game of perfect chance, in which every participant is equal with every other, in the proportion of his risk and prospect of gain. The prize is a common fund, or that which is purchased by a common fund. Each is an equal actor in developing the chances, in proportion to his risk. Whether they be developed with dice, or some other instrument, is not material. The successful party takes the whole prize, and all the rest lose. The element of one against the many, the keepers against the betters, either directly or indirectly, is not to be found in it. It has no keeper, dealer, or exhibitor, and is not a banking game. *Stearnes v. State*, 21 Tex. 692; *Risein v. State*, 44 App. 413, 71 S. W. 974. See, also, *Martin v. State* (Cr. App.) 171 S. W. 712.

5. — **Slot machines.**—A slot machine is a lottery and a person who keeps one in his saloon is guilty of establishing a lottery. *Prendergast v. State*, 41 App. 358, 57 S. W. 851.

6. — **Revolving spindle.**—A device operated by accused, constructed so that a spindle would turn, and the players playing equal sums were entitled to whatever article the spindle pointed to when it stopped, such articles being of different values, constitutes a lottery. *Barry v. State*, 39 App. 240, 45 S. W. 571.

7. — **Knife rack.**—A knife rack is not a lottery, and in any event the imposition of a tax by the state and exaction of a license for its operation would eliminate it from the category of offenses. *McRae v. State*, 46 App. 489, 81 S. W. 741.

8. — **Subscription schemes.**—A subscription scheme involving club membership and weekly dues of a stipulated sum, and final drawing from a bag of tickets for a suit of clothes, is a lottery. *Grant v. State*, 54 App. 403, 112 S. W. 1068, 21 L. R. A. (N. S.) 876, 130 Am. St. Rep. 897, 16 Ann. Cas. 844.

9. **Accomplices.**—See notes under article 79 ante.

An employee in a saloon where a slot machine is used is not an accomplice in keeping it, even though he puts nickels in the slot. *Prendergast v. State*, 41 App. 358, 57 S. W. 851.

10. **Indictment.**—See Code Cr. Proc. arts. 447-481; Willson's Cr. Forms, 278.

An indictment for establishing a lottery is defective where it alleges the dis-

position of a single prize to be distributed among the purchasers of the tickets.—*Risein v. State*, 44 App. 413, 71 S. W. 974.

Where one is indicted only under first clause, he cannot be convicted under second, and it is improper to admit evidence of violation of second clause. *Howard v. State*, 49 App. 327, 91 S. W. 785.

Where the proof, under an indictment charging accused with establishing a lottery for the purpose of disposing of suits of clothes by lot to be disposed of "among the persons who should become the purchasers of tickets therein, which said tickets were then and there issued by 'accused' in the form of membership contracts in a club," the proof failed to show that tickets were issued, but did show that the parties were to pay a dollar a week and when the first dollar was paid a receipt was given, there was a variance. *Robinson v. State*, 60 App. 592, 132 S. W. 944.

Art. 534. [374] Selling lottery tickets.—If any person shall sell, offer for sale or keep for sale, any ticket or part ticket in any lottery, he shall be fined not less than ten nor more than fifty dollars.

Cited, *Ex parte Napoleon* (Cr. App.) 144 S. W. 269.

Persons liable.—*Kaufman v. State* (Cr. App.) 38 S. W. 771.

What constitutes sale.—*Anderson v. State* (Cr. App.) 39 S. W. 109.

Indictment.—*Willson's Cr. Forms*, 279.

See *Anderson v. State* (Cr. App.) 39 S. W. 109.

Art. 535. [375] Raffle for over \$500; offering for sale ticket in raffle for over \$500.—If any person shall establish a raffle for, or dispose by raffle of, any estate, real or personal, exceeding five hundred dollars in value, he shall be fined not less than one hundred dollars nor more than one thousand dollars; or if any person shall establish a raffle for, or shall dispose by raffle of, any estate, real or personal, of the value of five hundred dollars, or less, he shall be fined not less than five dollars nor more than two hundred dollars. If any person shall offer for sale or keep for sale any chance, ticket or part ticket, in any raffle of real estate, real or personal, of any value whatever, he shall be fined not less than ten dollars nor more than fifty dollars, and all laws and parts of laws in conflict with this article are hereby repealed. [Amended Act 1909, p. 98.]

Elements of offense.—See *Stearnes v. State*, 21 Tex. 692; *Risein v. State*, 44 App. 413, 71 S. W. 974.

Where accused, to dispose of a gun, placed numbers from 1 to 40 in envelopes, and sold the envelopes for the number of cents corresponding with the number in the envelope drawn, and the names of the buyers were placed on a circular board, whirled and shot at, and the person's number to which the shot came nearest won the article, accused disposed of the article by a raffle. *Hickman v. State*, 64 App. 161, 141 S. W. 973.

For the owner of a buggy to sell cigars for a dollar apiece, at the same time allowing purchasers to draw numbers, one of which would entitle the holder to the vehicle, constitutes the offense of raffling. *Martin v. State* (Cr. App.) 171 S. W. 712.

— **Value of property.**—The value of the property raffled must exceed \$500. *Long v. State*, 22 App. 194, 2 S. W. 541, 58 Am. Rep. 633. See, also, *Rosales v. State*, 22 App. 673, 3 S. W. 344, and *Risein v. State*, 44 App. 413, 71 S. W. 974.

— **Purpose of raffle.**—It is immaterial whether the raffle be for religious, benevolent or profane purposes. *Long v. State*, 22 App. 194, 2 S. W. 541, 58 Am. Rep. 633.

— **Lottery distinguished.**—See note to article 533, ante.

Indictment.—See Code Cr. Proc. arts. 447–481; *Willson's Cr. Forms*, 280, 281.

— **Description of property.**—An indictment, alleging that accused unlawfully established a raffle and disposed by raffle of "certain personal estate * * * less than \$500 in value," is fatally bad for failing to name the property. *Hickman v. State*, 64 App. 161, 141 S. W. 973.

— **Duplicity.**—See Code Cr. Proc. art. 481.

Art. 536. [377] Dealing in futures.—If any person shall, directly or through an agent or agents, manage or superintendent for himself, or shall as agent or representative of any other person, firm or corporation, conduct, carry on or transact any business which is commonly known as dealing in futures, in cotton, grain, lard, any kinds of meats or agricultural products, or corporation stocks, or shall keep any house, or manage, conduct, carry on or transact any business commonly known as a produce or stock exchange, or bucket shop, where future contracts are bought and

sold with no intention of an actual bona fide delivery of the article or thing so bought or sold, such person, whether acting for himself or for another, as aforesaid, shall be deemed guilty of a misdemeanor, and shall be fined in any sum not less than one hundred nor more than five hundred dollars, and, in addition thereto, shall be imprisoned in the county jail not less than thirty days nor more than six months; provided, that each day that such business or house is carried on or kept shall constitute a separate offense. [Act March 1, 1887, p. 10, § 1.]

Explanatory.—It would seem that the act which makes up this article and the following article had been superseded by Acts 1907, p. 172 (arts. 538-547, post) at the time that the two acts were carried into the revised Penal Code.

Elements of offense.—Contracts for the future delivery of products, when it is contemplated by the parties that there shall be no delivery are violative of this article. *Seeligson v. Williams*, 65 Tex. 215, 57 Am. Rep. 593; *Floyd v. Patterson*, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787; *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363; *Norris v. Logan* (Civ. App.) 94 S. W. 127. It must be shown that both parties to the contract contemplated that there should be no delivery of the thing sold. It is not sufficient that only one so contemplated. *Scales v. State*, 46 App. 296, 81 S. W. 949, 950, 66 L. R. A. 730, 108 Am. St. Rep. 1014. Where bona fide delivery is contemplated, the transaction is not an offense. *Scales v. State*, 46 App. 296, 81 S. W. 947, 66 L. R. A. 730, 108 Am. St. Rep. 1014. And a contract for the sale of goods to be delivered in the future, though the seller may not then have them, is valid. *Seeligson v. Williams*, 65 Tex. 215, 57 Am. Rep. 593; *Floyd v. Patterson*, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787; *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363.

A contract with cotton brokers for future delivery of cotton where margins are put up, where contracts for future delivery are sold and not the cotton itself, where the names of the purchasers are not known nor any day specified for delivery, violates this article. *Logan v. Norris*, 100 Tex. 228, 97 S. W. 820.

— **Place of transaction.**—The business must be carried on in this state, the sales and purchases being made in the state. *Scales v. State*, 46 App. 296, 81 S. W. 947, 66 L. R. A. 730, 108 Am. St. Rep. 1014; *Salmon v. State*, 56 App. 408, 120 S. W. 427. An agent in this state merely receiving orders to be conveyed to parties in another state, and purchases and sales there made, does not come within the inhibition of this law. *Scales v. State*, 46 App. 296, 81 S. W. 947, 66 L. R. A. 730, 108 Am. St. Rep. 1014; *Salmon v. State*, 56 App. 408, 120 S. W. 427. But one who in this state, controlling none of the commodity, accepts the money of purchasers, telegraphs their orders to brokers in another state, notifies them of the acceptance of the offers, then keeps them advised of the fluctuations of the market and requires them to cover margins, does come within the statute. *Fullerton v. State* (Cr. App.) 75 S. W. 534.

— **Hedging contracts.**—See note to art. 543, post.

— **Indictment.**—Willson's Cr. Forms, 281, 717. See, also, Code Cr. Proc. arts. 447-481.

The indictment need not allege an actual sale. *Scales v. State*, 46 App. 296, 81 S. W. 947, 66 L. R. A. 730, 108 Am. St. Rep. 1014 (following *Fullerton v. State* [Cr. App.] 75 S. W. 531, and overruling *Goldstein v. State*, 36 App. 193, 36 S. W. 278, and *Cothran v. State*, 36 App. 196, 36 S. W. 273). It should show that there was no intent to deliver the article or thing bought or sold. *Goldstein v. State*, 36 App. 197, 36 S. W. 278. It must name the article bought or sold. *Goldstein v. State*, 36 App. 197, 36 S. W. 278.

— **Duplicity.**—See Code Cr. Proc. art. 481.

Evidence.—See Code Cr. Proc. art. 783; *De Lam v. State*, 50 App. 4, 95 S. W. 532.

The burden is on the State to show before either party to the contract (dealing in futures) can be convicted, that both parties engaged in a wagering contract. *Scales v. State*, 46 App. 296, 81 S. W. 949, 950, 66 L. R. A. 730, 108 Am. St. Rep. 1014.

Charge.—See Code Cr. Proc. art. 735; *De Lam v. State*, 50 App. 4, 95 S. W. 532.

Cited, *Mackay Telegraph-Cable Co. v. Bain* (Civ. App.) 163 S. W. 98.

Art. 537. [378] Permitting premises to be used for such business.—Whoever knowingly permits any such business to be carried on in his building, house, booth, arbor or erection of which he is the owner, or has the possession, care, management or renting, shall be guilty of a misdemeanor, and, on conviction, fined in any sum not less than one hundred nor more than five hundred dollars. Each day he so permits shall constitute a separate offense. [Act March 1, 1887, p. 10, § 2.]

See note under art. 536.

Historical.—Section 3 of Act March 1, 1887, p. 10, repeals Act March 31, 1885, p. 86, upon the same subject.

Indictment.—Willson's Cr. Forms, 718. See, also, Code Cr. Proc. arts. 447-481.

CHAPTER THREE

BUCKET SHOPS—DEFINING AND PROHIBITING SAME

Art.	Art.
538. A bucket shop defined.	543. Penalty for making future contract.
539. Futures or dealing in futures defined.	544. Telegraph or telephone company.
540. Punishment for.	545. Proof prima facie.
541. Renting or leasing property used for.	546. What constitutes prima facie case.
542. Agent or broker making contract.	547. Persons not exempt from testifying.

Article 538. A bucket shop defined.—A bucket shop, within the meaning of this law, is any place wherein dealing in futures is carried on contrary to any of the provisions hereof. [Act 1907, p. 172.]

See art. 536, ante, and note.

Art. 539. Futures or dealing in futures defined.—By each of the expressions, “futures,” “dealing in futures,” and “future contracts,” as these terms are used in this law is meant: 1. A sale or purchase, or contract to sell, or any offer to sell or purchase, any cotton, grain, meat, lard, or any stocks or bonds of any corporation, to be delivered in the future, when it was not the bona fide intention of the party being prosecuted under this chapter, at the time that such sale, contract, purchase, or offer to sell or purchase, was made, that the thing mentioned in such transaction should be delivered and paid for as specified in such transaction. 2. Any such sale, purchase, offer or contract, where it was the intention of the party being prosecuted hereunder at the time of making such contract or offer, that the same should, or, at the option of either party, might be settled by paying or receiving a margin or profit on such contract. 3. Any purchase, sale or offer of sale or purchase, or contract for future delivery of any of the things mentioned in this article on, by or through any exchange or board of trade, the rules, by-laws, customs or regulations of which permit such contract or transaction to be settled or closed by delivery or tender of any grade or grades of the thing mentioned in such contract or transaction, other than the grade upon which the price is based in said transaction, at any price other than the actual price for spot delivery of such other grade or grades, at the time and place of delivery or tender. [Id., p. 172.]

Cited, Mackay Telegraph-Cable Co. v. Bain (Civ. App.) 163 S. W. 98.

Art. 540. Penalty for.—If any person shall, either directly or indirectly, carry on or conduct, or be in any wise interested in carrying on or conducting, any bucket shop, he shall be punished by two years confinement in the penitentiary. [Id., p. 172.]

Art. 541. Renting or leasing property used for.—If any owner or person, in the management or control of any property, shall knowingly rent or lease the same to be used as a bucket shop, or shall knowingly permit the same to be used, he shall be fined not less than one hundred nor more than two thousand dollars, and may, in addition thereto, be confined in the county jail not less than one nor more than six months. [Id., p. 172.]

Indictment.—Willson's Cr. Forms, 718.

Art. 542. Agent or broker making contract.—If any person shall act or offer to act as the agent or broker of any other person in making or offering to make any future contract, he shall be fined not less than one hundred nor more than two thousand dollars, and shall be confined in the county jail not less than one nor more than six months. [Id., p. 172.]

Art. 543. Penalty for making future contract.—If any person shall make or offer to make for himself any future contract, he shall be fined not less than one hundred nor more than five hundred dollars, and may be confined in the county jail not less than ten nor more than thirty days; provided, it may be shown in defense of any prosecution under this law that the transaction out of which such prosecution arose was a “hedging” contract between parties in this state and a party or parties without this state; and if such contract was made in whole or in part by any message sent by telegraph or telephone, that such message was delivered to the telegraph or telephone company sending the same by the defendant himself, and not through or by any broker or agent, and that such company rendering such service was a common carrier, exclusively so engaged, with no direct or indirect connection with or interest in such transaction, other than the transmission of such message and receiving the charges therefor which are not in excess of the usual rate for commission messages between the points of transmission and receipt of such message. [Id., p. 172.]

Hedging contracts.—Under this article persons doing business in Texas could lawfully hedge against loss on cotton bought by them by the sale through brokers of cotton futures in Liverpool, England, so that a telegram advising the brokers in England to hedge on behalf of such persons was not in furtherance of an illegal act; “hedging” contracts being where one buys certain cotton at the current price and sells an equal amount for future delivery, so as to protect himself from loss due to fluctuation in the market. *Mackay Telegraph-Cable Co. v. Bain* (Civ. App.) 163 S. W. 98.

Art. 544. Telegraph or telephone company.—If any telegraph or telephone company, or any agent thereof, shall knowingly permit any telegraph or telephone wire or instrument to remain in any bucket shop, or shall knowingly permit any of the wires, instruments or equipments of such telegraph or telephone company, to be used by any person engaged in any business rendered unlawful by this law, whether or not the same be leased by the person or persons so illegally using the same, such company or agent shall be fined not less than one hundred nor more than one thousand dollars, and each day that this article is violated shall constitute a separate offense. [Id., p. 172.]

Art. 545. Proof prima facie.—In any prosecution under this law in which it shall be a material issue as to whether or not in the offer to or contract to sell or purchase for future delivery anything mentioned in this law, it was the intention of the defendant that such thing should be delivered and paid for in accordance with the terms of such offer or contract, proof by the state that such contract was for the future delivery of such thing, shall constitute a prima facie case for the state on this issue, and the burden shall be upon the defendant to prove that the thing so contracted for, or offered to be contracted for, was in fact delivered in accordance with the terms of such contract, or that it was the bona fide intention of the defendant, at the time of making such contract, that such thing should be so delivered; and the court trying the case shall so charge the jury. [Id., p. 172.]

Art. 546. What constitutes prima facie case.—If, in any prosecution under this law, it shall be a material issue as to whether or not the rules, regulations, by-laws or customs of any exchange or board of trade on, by or through which any contract or offer for future delivery was made, permitted such contract or transaction to be settled or closed by the delivery or tender of any grade or grades of the thing mentioned in such contract or transaction, other than the grade upon which the price was based in said transaction, at any price other than the actual price for spot delivery of such other grade or grades, at the time and place of such delivery or

tender, proof that the same was made or offered or pretended to be made by, through or upon any exchange or board of trade shall constitute a prima facie case for the state. [Id., p. 172.]

Art. 547. Persons not exempt from testifying.—No person shall be exempt from testifying as to any violation of the provisions of this law by reason of being himself guilty of such violation, but no person called by the state or a grand jury to testify shall be prosecuted for any violation of any of the provisions of this law testified to by such person. [Id., p. 172.]

CHAPTER FOUR

GAMING

Art.	Art.
548. Playing cards in a public place.	565. When justice to issue search warrant.
549. What included in preceding article.	566. Gambling house public nuisance.
550. Offense complete without betting.	567. Used for, terminates lease.
551. Keeping or exhibiting table or bank.	568. Officers to seize gaming tables, etc.
552. Table or bank includes, what.	569. Same destroyed by order of court.
553. Games specifically enumerated.	570. Persons interested in same, rights of.
554. Indictment.	571. Indictment for, sufficiency of.
555. Proof.	572, 573. [Superseded.]
556. "Played," "dealt" and "exhibited" defined.	574. Procedure in gaming cases.
557. Gaming table, bank, etc., betting at.	575. Betting on base ball or foot ball.
558. [Renumbered.]	576. Penalty for.
559. Keeping or renting for.	577. Pool selling or book making.
560. Betting at place resorted to.	578. Betting on horse races.
561. Persons equipping gaming house.	579. Owner or lessee using place for pool selling.
562. Persons permitting device on premises.	580. Penalty for three preceding articles.
563. Persons going in gaming house.	581. Buying pools, penalty for.
564. Officers to suppress same.	582. Evidence sufficient to convict.

Article 548. [379] Playing cards in a public place.—If any person shall play at any game of cards at any house for retailing spirituous liquors, store house, tavern, inn, or other public house, or in any street, highway or other public place, or in any outhouse where people resort, or at any place except a private residence occupied by a family; or, if any person shall bet or wager any money or other thing of value, or representative of either, at any game of cards, except in a private residence occupied by a family, and the provisions of the act that permits gaming in a private residence shall not apply in case such residence is one commonly resorted to for the purpose of gaming, he shall be fined not less than ten nor more than twenty-five dollars. [Act 1901, p. 26.]

1. Construction in general.	13. What constitutes playing at game of cards.
2. House for retailing spirituous liquors.	14. Necessity of bet or wager.
3. — Club rooms.	15. What constitutes bet or wager.
4. Store house.	16. Accomplices.
5. Tavern, inn, or hotel.	17. Acquittal of joint defendants.
6. — Private room of inn, etc., within article 549.	18. Indictment or information.
7. Other public house.	19. — Joinder of offenses.
8. Other public place.	20. — Venue.
9. Outhouse.	21. — Description of place or house.
10. Private residence occupied by a family.	22. — Ownership or occupancy of house.
11. — As a public place.	23. — Playing in general.
12. — Commonly resorted to for gaming.	24. — Playing at cards.
	25. — Betting money.
	26. Evidence.
	27. Instructions.

1. **Construction in general.**—Gaming is not per se an offense. The games prohibited and made penal by this chapter are divided into two classes: 1. Playing at cards in particular places; 2. Gaming tables and banks. Sheppard v. State, 1 App. 304.

It is an offense to play cards at any place except at a private residence. Elliott v. State, 59 App. 1, 127 S. W. 547.

2. **House for retailing spirituous liquors.**—In the earlier cases it was held that a house for retailing spirituous liquors included the whole house, from cellar to garret, regardless of approaches. *McGaffey v. State*, 4 Tex. 156; *Cole v. State*, 9 Tex. 42; *Pierce v. State*, 12 Tex. 210; *Redditt v. State*, 17 Tex. 610. But these decisions have been overruled. The room in which the game is played must be shown to have the inhibited character. It is not necessary that it is in the main business room. If it be auxiliary to, or used in connection with the business of the principal room, this will suffice. *Holzclaw v. State*, 26 Tex. 682; *Horan v. State*, 24 Tex. 161; *O'Brien v. State*, 10 App. 544. If the room has no connection with the saloon it is not within the inhibition. *Galbreath v. State*, 36 Tex. 200; *Harcrow v. State*, 2 Tex. App. 511; *O'Brien v. State*, 10 App. 544; *Watson v. State*, 13 App. 160; *Early v. State*, 23 App. 364, 5 S. W. 122; *Stewart v. State*, 34 App. 33, 28 S. W. 806. But see *Reeves v. State*, 34 App. 147, 29 S. W. 786, holding that a dugout, though disconnected with the saloon, but used as a storing place for the saloon's liquor supplies, is within the statute. If the room is connected with the saloon so that drinks may be served therein it is within the inhibition. *Watson v. State*, 13 App. 160; *Hasley v. State*, 14 App. 217; *Stebbins v. State*, 22 App. 32, 2 S. W. 617. And a conviction may be had although the room used was rented to and under the control of another. *Cherry v. State*, 30 Tex. 439.

3. — **Club rooms.**—A hall used by a club, and where liquors are furnished to members only without profit, is not a house for retailing liquors. *Winters v. State*, 33 App. 395, 26 S. W. 839.

4. **Store house.**—A house where drugs are kept and vended is a store house. *Redditt v. State*, 17 Tex. 611.

Where the playing was done in a back room of a store house, used for a bed room, and to which customers had free access, such room was used for the purposes of the store, and was a part of the store house. *Sheppard v. State*, 1 App. 304.

5. **Tavern, inn, or hotel.**—"Tavern," "inn" and "guest" at hotel, defined. *Comer v. State*, 26 App. 509, 10 S. W. 106.

6. — **Private room of inn, etc., within article 549.**—A guest room in a hotel is a part of the public hotel or tavern, in that it is for the use of the public business of the house in the entertainment of its guests. To make such a room a private room within the exception in article 549, it must have been taken by a guest or lodger, seeking rest for a night or day, or a residence for a time or by one desiring to use it for a temporary habitation, that is a "place of abode." And so a room in an inn, engaged temporarily for the purpose of private gaming, is not a private room, especially where the person so engaging it has other apartments in the same inn, which he occupies as his abode. *Comer v. State*, 26 App. 509, 10 S. W. 106. See, also, *Bordeaux v. State*, 31 App. 37, 19 S. W. 603.

7. **Other public house.**—The term "public house" is generic, and includes all houses made public by the occupation carried on in them. *Shihagan v. State*, 9 Tex. 430; *State v. Barns*, 25 Tex. 654; *Cole v. State*, 23 App. 536, 13 S. W. 859. It signifies a house commonly open to the public either for business, pleasure, religious worship, the gratification of curiosity, and the like. *State v. Alvey*, 26 Tex. 155; *Parker v. State*, 26 Tex. 204; *Cole v. State*, 23 App. 536, 13 S. W. 859; *Grant v. State*, 33 App. 527, 27 S. W. 127; *Gomprecht v. State*, 36 App. 434, 37 S. W. 734. It may be applied to a house either on account of its proprietorship or purpose. *Lockhart v. State*, 10 Tex. 275; *Gomprecht v. State*, 36 App. 434, 37 S. W. 734. It is a place usually accessible to the neighboring public, and it may be public during some hours of the day and private during other hours. *Gomprecht v. State*, 36 App. 434, 37 S. W. 734; *Turbeville v. State*, 37 App. 145, 38 S. W. 1010. And the evidence should show that the house by its uses was public at the time the game was played. *Turbeville v. State*, 37 App. 145, 38 S. W. 1010. It includes all those houses designated by the statute, a fact of which the courts will take judicial knowledge. *Grant v. State*, 33 App. 527, 27 S. W. 127.

A common gambling house is a public house. *Rice v. State*, 10 Tex. 545. A dwelling or business house, by being used as a common resort for gaming, becomes a public house. *Wheelock v. State*, 15 Tex. 257. A room kept as a common resort for persons desiring to play cards, although all who desire may not be permitted to have access to it, is a public house. *Lockhart v. State*, 10 Tex. 275. A conviction of playing at a game with cards in a place where people commonly resorted for the purpose is supported by evidence that defendant played cards in an upper room of a building, and that it was resorted to on several occasions for the purpose of gaming. *Robinson v. State* (Cr. App.) 39 S. W. 662. A school house is a public house. It is none the less so on a day when there is no school and the building is temporarily vacant, or being used for other purposes. *Cole v. State*, 28 App. 536, 13 S. W. 859, 19 Am. St. Rep. 856. The back room of a physician's office occupied as a bed room, his drugs being kept in the front room, is a public house. *Redditt v. State*, 17 Tex. 611.

Whether a house named in the statute is public, is a question of law; but whether a house not named is public, is a question of fact. *Shihagan v. State*, 9 Tex. 430; *State v. Alvey*, 26 Tex. 155; *Elsberry v. State*, 41 Tex. 158.

8. **Other public place.**—The term "public place" does not mean a place solely devoted to the public. It means a place which is public in point of fact as distinguished from a place that is private; a place that is visited by many persons, and usually accessible to the neighboring public. *Parker v. State*, 26 Tex. 204. One having an office for the transaction of business cannot during business hours close his office and thereby make it a private room so as to justify gaming therein. An allegation in an indictment for playing cards, alleging that the playing was in "a public place, being a certain insurance office commonly open to the public for business purposes," is sustained by proof that accused was an insur-

ance agent, doing a large business, which was transacted in said office, that the games were played in said office by parties invited to it by accused, and that during the time they were so played the office was kept closed to the general public, and business applicants were turned away. *Gomprecht v. State*, 36 App. 434, 37 S. W. 734. But see *Turbeville v. State*, 37 App. 145, 38 S. W. 1010, holding that a conviction cannot be had for playing cards in a public place on evidence merely that the place was a printing office which was in the daytime a public place, without any proof that it was such at night, when the playing was done, where there was evidence that the office was shut and that blinds were on all the windows except one opening into the back yard, and that the office was not open to the public or to their observation.

A gin not being one of the places designated by statute as a public place, the facts which make it a public place must be alleged. *Dailey v. State*, 27 App. 569, 11 S. W. 636. A jail house is not necessarily a public place. *State v. Alvey*, 26 Tex. 155. Nor a "quirt" shop. *Tummins v. State*, 18 App. 13. Nor a livery stable. *Fossett v. State*, 16 App. 375. Whether or not a room in a livery stable is a public place is a question for the jury, a livery stable not being mentioned in the statute. *Sisk v. State*, 35 App. 462, 34 S. W. 277.

A secluded spot in the woods, to become a public place, must be a place commonly resorted to for gaming or other purposes. *Bledsoe v. State*, 21 Tex. 223; *Gerrells v. State* (Cr. App.) 26 S. W. 394; *Crutcher v. State*, 39 App. 233, 45 S. W. 594.

A bona fide social club is not a public place. *Koenig v. State*, 33 App. 368, 26 S. W. 835, 47 Am. St. Rep. 35. The rooms of a commercial club, to which only the club members and invited visitors are admitted, except when the club has under discussion some question affecting the public interest, are not a public place. *Grant v. State*, 33 App. 527, 27 S. W. 127.

A jury room in a court house is a public place, and the fact that it is occupied as a sleeping apartment will not make it a private place unless such occupancy is by permission of the commissioners' court of the county. *Wilcox v. State*, 26 Tex. 145.

Under an indictment alleging that the playing was at a public place, to wit, a house where people commonly resorted for the purpose of gaming, a conviction could not be sustained on proof of the playing of but a single game. *Fossett v. State*, 18 App. 330.

An office used for the manufacture of medicine to which the public are admitted is a public place. *Williams v. State* (Cr. App.) 34 S. W. 271.

An indictment charging in one count that the offense was committed in a public place, to wit, a gaming house, and in another count that the offense was committed in a house attached to a storehouse, is not supported, on either count by evidence that the room was over a storehouse, that it was entered by a stairway from the outside, and was not connected with the store, where there was a failure to show that it was commonly resorted to for gaming purposes. *Gomprecht v. State*, 36 App. 434, 37 S. W. 734.

9. Outhouse.—The term "outhouse" means any house standing out and apart from houses occupied and used as dwelling or business houses—an unoccupied house not used as a dwelling, or as a business house. *Wheelock v. State*, 15 Tex. 253; *Sisk v. State*, 28 App. 432, 13 S. W. 647. That a room in it is occupied as a sleeping room, does not take it out of the statute. *Sisk v. State*, 28 App. 432, 13 S. W. 647. To bring an outhouse within the inhibition of the statute it must be one to which people resort for gaming or other purposes. It must have been resorted to on more than one occasion, or by more persons than were actually engaged in the gaming. *Wheelock v. State*, 15 Tex. 260; *State v. Norton*, 19 Tex. 102; *Lynn v. State*, 27 App. 590, 11 S. W. 640.

A charge of playing cards in an outhouse is amply supported by proof that defendant played in such outhouse, and that there were tables and chairs in the house, and that men were frequently seen resorting to such house. *Armstrong v. State*, 34 App. 645, 31 S. W. 666.

The house in which accused and others played cards was in the inclosure of the dwelling house of one of the participants, but was an outhouse about 250 yards therefrom, in a field, and various vegetables and implements were stored therein, and it was closed, but not locked, and contained no furniture, and no betting was done at the games, the outhouse was not a "residence," within the statutes, and accused was guilty of the offense of gaming. *Soape v. State* (Cr. App.) 150 S. W. 612.

10. Private residence occupied by a family.—A room used by a single man as his bed room is his private residence. *Stewart v. State*, 34 App. 33, 28 S. W. 806; *Alphin v. State* (Cr. App.) 29 S. W. 159. But see *Beard v. State*, 51 App. 61, 101 S. W. 796, holding that a room back of a shop where a single man cooks his meals, eats and sleeps, is not a private residence, and *Patterson v. State*, 55 App. 393, 116 S. W. 1151, holding that where a man who has never been married lives alone in a house of only one room, it is not a private residence.

A private residence occupied by a family does not mean a hotel, does not mean a saloon, does not mean a public street or highway nor an outhouse where people resort. *Wilkerson v. State*, 44 App. 455, 72 S. W. 852, 853. It is not the private residence that protects the gaming from being unlawful, but the fact that the residence is at the time occupied by a family. The length of time that the family is not occupying it is immaterial, so long as they are not occupying it at the time of the offense. *Stallings v. State* (Cr. App.) 170 S. W. 153. So, where a number of persons, none of whom resided in a certain residence, obtained permission from the owner to go to his house in the absence of himself and his family for the purpose of playing dominoes, and after having gone there under this permission proceeded to gamble with cards and bet money on the game,

they were trespassers, and the house was not a private residence. *Sloan v. State* (Cr. App.) 170 S. W. 156; *Stallings v. State* (Cr. App.) 170 S. W. 159.

A camp occupied by defendant and his son held a private residence. *Hipp v. State*, 45 App. 200, 75 S. W. 28, 62 L. R. A. 973.

An abandoned private residence held not a private residence within this article. *McCollum v. State*, 49 App. 383, 92 S. W. 848.

11. — **As a public place.**—A private residence becomes a public place only when spirituous liquors are sold there. *White v. State*, 39 App. 269, 45 S. W. 702, 46 S. W. 825.

A private residence cannot be an appurtenance to a public road, near which it is, so as to authorize prosecution for permitting gaming therein, as in a public place. *Dunn v. State*, 72 App. 170, 161 S. W. 467.

12. — **Commonly resorted to for gaming.**—Under this article, construed with article 557, post, the playing of cards in a private house is an offense only when there is betting, and when the house is used as a resort for gaming. *Purvis v. State*, 62 App. 302, 137 S. W. 701, Ann. Cas. 1913C, 536. See, also, *Robinson v. State*, 72 App. 616, 163 S. W. 434. When parties constantly resort to a private residence for the purpose of gaming it is a gaming house. *Morgan v. State*, 42 App. 422, 60 S. W. 764. The number of times that games are played is not the sole criterion of whether a private residence is commonly resorted to for gaming. A man, his friends, and invited guests may play frequently without violating the law, if the main object and purpose is not to gamble for money, while if a man throws open the doors of his home to any and all who desire to enter therein for the purpose of gambling with cards there is a violation of the law, though evidence that this was continuously or frequently done would add additional strength to the evidence. *Sloan v. State* (Cr. App.) 170 S. W. 156. Where there was evidence that for six months a number of games were played at the residence, witnesses saying that they knew six or eight times when they were there and played cards for money, a finding that the residence was commonly resorted to for the purpose of gaming was sustained. *Floekinger v. State*, 45 App. 199, 75 S. W. 303. Where the only evidence was to the effect that defendant and another were sitting opposite each other at a table on which were money and a deck of cards, there could be no conviction. *Purvis v. State*, 62 App. 302, 137 S. W. 701, Ann. Cas. 1913C, 536.

To constitute the offense of gaming in a private room or residence, it must appear that the room or residence is a gaming house, or that the room is attached to a public house and commonly used for gaming purposes, or that it is a private room in an inn or tavern and commonly used for gaming purposes, or that it is a room or house where spirituous liquors are sold. *Miller v. State*, 35 App. 650, 34 S. W. 959.

13. **What constitutes playing at game of cards.**—"Monte" is known as a banking game, or a game which is played, kept, dealt, or exhibited. It is a game which cannot properly be said to be played with cards. Card playing is contradistinguished from gaming tables or banks. So, where an indictment charges unlawful playing at a game of cards in a public place, and the evidence shows that the game played was monte, a conviction thereunder cannot be sustained. *Averheart v. State*, 30 App. 651, 18 S. W. 416.

If appellant's act was a trick or joke, if he was playing at a game with cards where spirituous liquors were retailed, he was guilty. *Toler v. State*, 41 App. 659, 56 S. W. 917.

14. **Necessity of bet or wager.**—Under former laws betting was necessary to constitute the offense. *Reeves v. State*, 9 Tex. 447. But under the present law it is an offense to play cards even without betting at any place, except at a private residence occupied by a family. *Borders v. State*, 24 App. 333, 6 S. W. 532; *Gallegos v. State*, 50 App. 190, 95 S. W. 124; *Lamar v. State*, 49 App. 563, 95 S. W. 511.

15. **What constitutes bet or wager.**—A bet may be an implied understanding that the loser shall pay for the whisky. *Bachelor v. State*, 10 Tex. 258.

Money may be bet without being in sight. *Pierce v. State*, 12 Tex. 210.

One cannot be convicted of playing or betting on a game of cards upon evidence showing that he, as banker, exhibited a monte bank at which the other players bet, since he could not bet at his own banking game. *Vinson v. State*, 58 App. 47, 124 S. W. 652. Nor can one be convicted of unlawfully playing at a game of cards at a place other than a private residence occupied by a family, on evidence that, if gambling at all, he was betting at a game of "monte." *Arredondo v. State*, 58 App. 145, 124 S. W. 930.

16. **Accomplices.**—See notes under article 79, ante.

17. **Acquittal of joint defendants.**—See notes under Code Cr. Proc. art. 9.

18. **Indictment or information.**—Willson's Cr. Forms, 282-286. See, also, Code Cr. Proc. arts. 447-481.

19. — **Joinder of offenses.**—See Code Cr. Proc. art. 481.

20. — **Venue.**—See Code Cr. Proc. art. 451, subd. 5.

21. — **Description of place or house.**—If the playing was in one of the houses specifically named in the statute it is sufficient to use the designation used in the statute, as that the playing was at "a house for retailing spirituous liquors" or at "a store house," or "a tavern," or "an inn." *Sheppard v. State*, 1 App. 304; *Royal v. State*, 9 Tex. 449; *Watson v. State*, 13 App. 160; *Askey v. State*, 15 App. 558; *Bacchus v. State*, 18 App. 15; *Early v. State*, 23 App. 364, 5 S. W. 122; *Horan v. State*, 24 Tex. 161. But if the house be one not specifically named in the statute, the indictment must not only allege that it was a public house, but must also allege the facts which show that it was public. *Jackson v. State*, 16 App. 373; *Fossett v. State*, 16 App. 375; *Bowman v. State*, 16 App. 613; *Tummins*

v. State, 18 App. 13; State v. Barns, 25 Tex. 654; Millican v. State, 25 Tex. 664; State v. Alvey, 26 Tex. 155; State v. Fuller, 31 Tex. 559; State v. Mansker, 36 Tex. 364; Elsberry v. State, 41 Tex. 158. An indictment which alleges that the gaming was done at a public house, to-wit, a house commonly resorted to for the purpose of gaming, sufficiently alleges the public character of the house. Williams v. State, 42 App. 368, 60 S. W. 248, 249. Where a room in a house is designated as the place where the gaming occurred, the indictment alleges that the room was, at the time of the gaming, attached to one of the public houses named in the statute, or to some house commonly known as public. O'Brien v. State, 10 App. 544; Weiss v. State, 16 App. 431; Tummins v. State, 18 App. 13; Bacchus v. State, 18 App. 15; Early v. State, 23 App. 364, 5 S. W. 122. An indictment, charging in one count that accused played at a game with cards "at a house for retailing spirituous liquors," and in another count alleging the place as a "certain room attached to a house for retailing spirituous liquors," charges a statutory offense in each count. Early v. State, 23 App. 364, 5 S. W. 122. An indictment for playing at a game with cards in a private room of a public house must allege that spirituous liquors were sold at such house, unless it was a gaming house. Miller v. State, 35 App. 650, 34 S. W. 959.

If the gaming was at a public place, designated as such by the statute, as a "street" or "highway," it is sufficient to so allege, but if at a public place, not specifically named as such in the statute, the facts which constitute the place a public one, must be averred. Shihagen v. State, 9 Tex. 430; Rice v. State, 10 Tex. 545; State v. Lopez, 18 Tex. 33; State v. Barns, 25 Tex. 654; Cherry v. State, 30 Tex. 439; Metzger v. State, 31 App. 11, 19 S. W. 254; Elsberry v. State, 41 Tex. 158; Sheppard v. State, 1 App. 304; Scribner v. State, 12 App. 173; Jackson v. State, 16 App. 373; Fossett v. State, 16 App. 375; Bowman v. State, 16 App. 513; Dailey v. State, 27 App. 569, 11 S. W. 636; Chapman v. State, 63 App. 494, 140 S. W. 442. If the playing was not done at any of the places named in the statute as public places, it is only necessary to state that the said place was then and there not a private residence occupied by a family. Osborn v. State (Cr. App.) 72 S. W. 592. In an indictment under this article for playing cards it is sufficient to allege that the same was not played at a private residence without stating where it was played. Russell v. State, 44 App. 465, 72 S. W. 190, 191; Hankins v. State, (Cr. App.) 72 S. W. 191. An allegation that accused "did then and there unlawfully play at a game of cards in a public place, to wit, the Commercial Union Clubrooms, which club room was then and there a place to which people did then and there commonly resort for the purpose of business, amusement, and recreation, and which club room was then and there a "public place," is sufficient. Grant v. State, 33 App. 527, 27 S. W. 127. An information for unlawfully playing cards in a public place describing the place as being in a certain pasture about 340 yards from the I. & G. N. Ry. Depot was too indefinite. Crutcher v. State, 39 App. 233, 45 S. W. 594. A count charging accused with playing cards in a club room in a certain hotel sufficiently charges playing in a public place. So, also, is a count charging accused with playing cards in a private room of an inn, commonly used for gaming. Goldstein v. State (Cr. App.) 35 S. W. 239. An indictment alleging that defendant did then and there unlawfully play at a game with cards in a public place, to wit: a printing office, commonly resorted to by the public is sufficient. Turbeville v. State, 37 App. 145, 38 S. W. 1010. An indictment charging that defendant played cards in a room in a certain house which room was commonly resorted to, etc., is insufficient. Burk v. State (Cr. App.) 35 S. W. 659.

An indictment charging that defendant unlawfully bet at a game of cards, but not negating that the game was at a private house, or charging that it was at a place prohibited under the statute, is insufficient. Purvis v. State, 62 App. 302, 137 S. W. 701, Ann. Cas. 1913C, 536; Chapman v. State, 63 App. 513, 140 S. W. 441; Chapman v. State, 63 App. 494, 140 S. W. 442; George v. State (Cr. App.) 143 S. W. 621; Johnson v. State (Cr. App.) 143 S. W. 621; George v. State (Cr. App.) 144 S. W. 1138; Shelton v. State (Cr. App.) 145 S. W. 349; (overruling Hodges v. State, 44 App. 444, 72 S. W. 179; Wilkerson v. State, 44 App. 455, 72 S. W. 850, 851; Purvis v. State, 52 App. 343, 107 S. W. 55; Singleton v. State, 53 App. 625, 111 S. W. 736). An information charging accused with unlawfully playing cards at a certain place on a certain river near a fish trap in the pasture of another, about four miles from a certain town, the same not then and there being a private residence occupied by a family, negated the fact that the game was at a private residence, and charged an offense. Elliott v. State, 59 App. 1, 127 S. W. 547.

If the gaming was at an out house, it is sufficient to so allege in the language of the statute, that is, that it was "at an out house where people did then and there resort." State v. Norton, 19 Tex. 102; State v. Stewart, 35 Tex. 499.

The information must allege that the gaming was at a private residence occupied by a family, but was one commonly resorted to for the purpose of gaming. Williams v. State, 48 App. 325, 87 S. W. 1156. An information charging that accused unlawfully played, bet, etc., at a game of cards in the private residence of C., "said private residence being then and there occupied by a family, and said private residence being then and there one commonly resorted to for the purpose of gaming," is sufficient. Floeckinger v. State, 45 App. 199, 75 S. W. 303.

An indictment for gaming with cards in a room which is a common resort for gaming does not charge gaming in a public place or house. Nail v. State (Cr. App.) 50 S. W. 704.

22. — **Ownership or occupancy of house.**—If the playing was in a house it need not be alleged who owned or occupied the house. Prior v. State, 4 Tex. 383; Wilson v. State, 5 Tex. 21; Sublett v. State, 9 Tex. 53; Sheppard v. State, 1 App. 304.

23. — **Playing in general.**—An indictment against two or more persons for playing cards, which charges them jointly, must allege that they played together.

Lewellen v. State, 18 Tex. 538; State v. Roderica, 35 Tex. 507; Galbreath v. State, 36 Tex. 200; Herron v. State, Id. 285; State v. Homan, 41 Tex. 155. Unless the indictment, by its averments, clearly shows that the defendants are indicted for separate offenses. Parker v. State, 26 Tex. 204. If the indictment be against one person only, it need not allege with whom he played. Johnson v. State, 36 Tex. 198; Day v. State, 27 App. 143, 11 S. W. 36. Or that he played with any one. State v. Shult, 41 Tex. 548.

24. — **Playing at cards.**—An allegation that accused "did play at a game of cards" is sufficient. Johnson v. State, 36 Tex. 198; State v. Mansker, 36 Tex. 365; State v. Shult, 41 Tex. 548.

25. — **Betting money.**—It is not necessary to give a description of the thing bet. Handy v. State, 49 App. 381, 92 S. W. 848; Herrin v. State, 50 App. 351, 97 S. W. 88.

An allegation that money was bet is not supported by proof that bank notes or property was bet. Hale v. State, 8 Tex. 171.

An indictment, which, after describing the public place, alleges that defendant did, then and there, in the house aforesaid, play at a game with cards with one M., upon the result of which said game a sum of money was then and there bet, to-wit: the sum of twenty-five cents, contrary, etc., is sufficient, without averring that defendant bet the money, or knew that it was bet. State v. Ward, 9 Tex. 370.

While it would have been sufficient for the information to allege that accused bet at a game of cards, without alleging that he bet money, where it specifically alleged that he bet money, it was necessary to prove such fact in order to avoid a variance. Melton v. State, 58 App. 86, 124 S. W. 910.

26. **Evidence.**—See Code Cr. Proc. art. 783.

Evidence held not to sustain a conviction for unlawfully playing cards. Thomas v. State (Cr. App.) 146 S. W. 878; Bowen v. State (Cr. App.) 153 S. W. 306.

That a witness saw money on the table, where defendant and others were playing cards, is sufficient to authorize the jury to find that money was bet. Rice v. State, 10 Tex. 545.

Evidence that defendant played a game of poker at a schoolhouse supports the allegation of an unlawful game of cards not at a private residence. Inman v. State, 47 App. 609, 85 S. W. 796.

Where the evidence fails to show at what time the card playing occurred it is insufficient to support a conviction. Fallwell v. State, 48 App. 35, 85 S. W. 1069.

There being no direct evidence of card playing circumstantial evidence held insufficient to support a conviction. Ables v. State, 49 App. 292, 92 S. W. 414.

Evidence that but one game was played in a tent used as defendant's residence held insufficient to support a conviction. Spencer v. State, 49 App. 382, 92 S. W. 847.

Evidence showing that three or four games were played in which five or six parties indulged in defendant's residence and in which the two witnesses participated held sufficient to sustain a conviction. Herrin v. State, 50 App. 351, 97 S. W. 88.

On trial for gaming in an out house where people resort, evidence that accused, with three others, played a game of cards in a "seed-house," three others being present, and that, so far as witnesses knew, it was the only game ever played therein, without any evidence that people at any other time ever resorted there for any other purpose, is insufficient to support a conviction. Hopkins v. State (Cr. App.) 33 S. W. 975.

A conviction for playing cards in a gaming house is sustained by evidence that the room where the parties played was used for the purpose of gaming, and was fitted up with a regular poker outfit, and that there were "take-offs out of each pot" for the owner of the game. Wartelsky v. State (Cr. App.) 33 S. W. 1079.

Evidence that accused had before been convicted of gambling is inadmissible. Goldstein v. State (Cr. App.) 35 S. W. 289.

Evidence that money was bet on the game is admissible. Goldstein v. State (Cr. App.) 35 S. W. 289.

On a trial for playing at a game with cards in an outhouse, evidence that during the time covered by the indictment lights were frequently seen in said house, is admissible. Moore v. State (Cr. App.) 37 S. W. 747.

On a trial for gaming at a public place where people had assembled for amusement, evidence showing that whiskey was sold at the place is admissible as tending to show its public character. White v. State, 39 App. 269, 45 S. W. 702, 46 S. W. 825.

A question as to the value of poker chips used in the game, asked to show their market value, and not their value as representing money in the particular game, which gave the market value of the chips, is not admissible. Melton v. State, 58 App. 86, 124 S. W. 910.

27. **Instructions.**—See Code Cr. Proc. art. 735; O'Brien v. State, 10 App. 544; Askey v. State, 15 App. 558; Bacchus v. State, 18 App. 15.

Cited Minter v. State, 70 App. 634, 159 S. W. 286; Bell v. State (Cr. App.) 171 S. W. 239.

Art. 549. [380] What included in preceding article.—All houses commonly known as public, and all gaming-houses, are included within the meaning of the preceding article. Any room attached to such public house and commonly used for gaming, is also included, whether the same be kept closed or open. A private room of an inn or tavern is not within the meaning of public places, unless such room is commonly used for gaming; nor is a private business office

or a private residence to be constructed as within the meaning of a public house or place; provided, said private residence shall not be a house for retailing spirituous liquors. [Act Feb. 11, 1866, pp. 97, 98.]

See notes to article 548, ante.

Indictment.—Willson's Cr. Forms, 282.

Art. 550. [381] Offense complete without betting.—In prosecutions under the two preceding articles, it shall not be necessary for the state to prove that any money or article of value, or the representative of either, was bet at such game, when the prosecution is for playing cards at a house for retailing spirituous liquors, store house, tavern, inn or any other public place, or in any street, highway or other public place, or in any outhouse where people resort, or at any place except a private residence occupied by a family; provided, that nothing in this title shall be so construed as to prevent the playing of any game for amusement at a private residence occupied by a family. [Amended Act 1901, p. 26.]

See notes to article 548, ante.

Indictment.—Willson's Cr. Forms, 282.

Art. 551. [382, 388a] Gaming table, bank, etc., keeping or exhibiting.—If any person shall, directly or as agent or employé for another or through any agent or agents, keep or exhibit, for the purpose of gaming, any policy game, any gaming table, bank, wheel or device of any name or description whatever, or any table, bank, wheel or device for the purpose of gaming, which has no name, or any slot machine, any pigeon hole table, any jenny lind table, ten pin alley or table or alley of any kind whatsoever, regardless of the name, or whether named or not, or of the number of pins, balls, or rings used for gaming, shall be guilty of a felony, and, upon conviction, shall be punished by confinement in the penitentiary not less than two nor more than four years, regardless of whether any of the above mentioned games, tables, banks, alleys, wheels, devices or slot machines are licensed by law or not; provided, that any such alley, table, bank, wheel, machine or device shall be considered as used for gaming, if the table fees, alley fees, or money or anything of value is bet thereon. [Act 1905, ch. 22; Act 1907, p. 108; Act 1913, p. 277, ch. 137, §§ 1, 2.]

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| 1. Explanatory. | 13. — "Monte" game. |
| 2. Historical. | 14. — Grand raffle. |
| 3. Offense in general. | 15. — Game of cards. |
| 4. Continuing offense. | 16. — Billiard or pool table. |
| 5. Keeping. | 17. — Part owner. |
| 6. Exhibiting. | 18. Occupation tax or license. |
| 7. Game defined. | 19. Accomplices. |
| 8. Gaming table or bank. | 20. Jurisdiction of justice of the peace. |
| 9. — Ten-pin alley. | 21. Indictment or information. |
| 10. — Poker game or table. | 22. Evidence. |
| 11. — Dice or crap game. | 23. Questions for court. |
| 12. — Slot machine. | 24. Instructions. |

1. **Explanatory.**—Acts 1913, p. 277, ch. 137, §§ 1, 2, repeal "article 551, title 2 [11], chapter 4, of the Revised Criminal Statutes of the State of Texas, 1911," and declares that "article 558, of title 2 [11], chapter 4, shall be amended by re-numbering said article 551, to take the place of the repealed article."

2. **Historical.**—This article (Pen. Code 1911, art. 558) makes felonies the same acts made misdemeanors by Pen. Code 1911, art. 551. It followed said article 551 in the Code of 1911. It is in irreconcilable conflict with said art. 551, which, however, does not make both articles void. This article was passed later than said article 551, which was re-enacted in the Code of 1911 by mistake, repeals said article 551, and is the law now in force. *Stevens v. State*, 70 App. 565, 159 S. W. 505; *Robertson v. State*, 70 App. 307, 159 S. W. 713.

Unconstitutionality of prior amendatory act, see *Hunt v. State*, 22 App. 396, 3 S. W. 233; *Wright v. State*, 23 App. 313, 5 S. W. 117; *Ford v. State*, 23 App. 520, 5 S. W. 145.

3. **Offense in general.**—One who keeps or exhibits any kind of table or device for the purpose of gaming is guilty of a misdemeanor (under superseded and repealed article). *Dalton v. State* (Cr. App.) 74 S. W. 25.

That a game was played with dice at a private residence is not necessarily a defense to a prosecution under this article. *Faucett v. State*, 46 App. 113, 79 S. W. 548.

It is not necessary that the dealer or exhibitor should have any interest against the bettors. *Dalton v. State* (Cr. App.) 74 S. W. 27.

4. **Continuing offense.**—Exhibiting a gaming table or bank is not a continuous offense. Each act of exhibiting is a separate offense. It has not been decided, however, that keeping such table or bank is not a continuous offense. *Kain v. State*, 16 App. 282; *Smith v. State*, 28 App. 102, 12 S. W. 412.

5. **Keeping.**—“Keeping” is holding the table or bank in readiness for the purpose of obtaining bettors. *Wolz v. State*, 33 Tex. 331.

6. **Exhibiting.**—Exhibiting a gaming table or bank is a distinct offense from keeping a table for gaming. *Kain v. State*, 16 App. 282.

7. **Game defined.**—A game is a trial of skill, or of chance between two or more contending parties, according to some rule by which each one may fail or succeed in the trial; of skill, as chess or billiards; of chance, as raffle and simple lottery; of chance and skill combined, as backgammon, whist, faro, etc. *Stearnes v. State*, 21 Tex. 692. See, also, *Faucett v. State*, 46 App. 113, 79 S. W. 548.

8. **Gaming table or bank.**—The constituent elements of a gaming table or bank are as follows:—it is a game; it has a keeper, dealer or exhibitor; it is based on the principle of the one against the many—the keeper, dealer or exhibitor against the bettors, directly or indirectly; and it must be exhibited, that is, displayed for the purpose of obtaining bettors. *Stearnes v. State*, 21 Tex. 692; *Lyle v. State*, 30 App. 118, 16 S. W. 765, 28 Am. St. Rep. 893; *Averheart v. State*, 30 App. 651, 18 S. W. 416; *Bell v. State*, 32 App. 187, 22 S. W. 687; *Shaw v. State*, 35 App. 394, 33 S. W. 1078. Any change, cover, disguise, or subterfuge in any such ingredients, or in relation to the structure upon which the game is exhibited, or the instruments by which the result is developed, for the purpose of evasion, will not change the character of the game. It is difficult to imagine any species of table or bank, or gaming device resembling either, that is kept for gaming, that would not be included in the clauses of the Code. *Stearnes v. State*, 21 Tex. 692. It matters not how the table or bank is constructed or operated if it is kept or exhibited for gaming purposes. *Doyle v. State*, 19 App. 410. Whether or not the table was designed for gaming purposes is immaterial—it is the game or character of play on it that determines its status. *Estes v. State*, 10 Tex. 300; *Stearnes v. State*, 21 Tex. 692; *Chappell v. State*, 27 App. 310, 11 S. W. 411; *Bird v. State* (Cr. App.) 148 S. W. 738. Contra, see *Whitney v. State*, 10 App. 377; *Smith v. State*, 17 Tex. 191. An indictment will lie against any gaming table or bank, though it be not enumerated in the statute. *Randolph v. State*, 9 Tex. 521.

To constitute a “bank” there must be a fund of money offered and ready to be staked on all bets others may make against the banker, on the game which he keeps or exhibits. This element is the distinguishing feature between a bank and a gaming table, and is perhaps the only real difference between them. *Webb v. State*, 17 App. 205.

9. — **Ten-pin alley.**—One may be guilty of exhibiting or keeping a ten-pin alley on evidence showing that the players at the game contributed an equal amount towards the purchase of a knife, which was given to the player making the highest score, the keeper of the alley depending on the profit on the knife for his remuneration. *Blades v. State*, 43 App. 409, 66 S. W. 565.

10. — **Poker game or table.**—A poker game is not a banking game. *Gillen v. State* (Cr. App.) 55 S. W. 48. The dealer in a game of “senate poker,” a game played with cards on any flat surface, who takes no part in the game; but merely receives a percentage of the bets as his fees, and who gives “chips” in change for money, which are used in the betting, and which are cashed by him at the end of the game, is not exhibiting a gaming bank and table. *Hairston v. State*, 34 App. 346, 30 S. W. 811. A table upon which poker is played, having a hole in its center, into which the players put a chip for the proprietor when they hold certain hands, is not a gaming table, and its proprietor can not be convicted of keeping and exhibiting a gaming table. *Lyle v. State*, 30 App. 118, 16 S. W. 765, 28 Am. St. Rep. 893.

11. — **Dice or crap game.**—A game of “craps,” in which the exhibitor played the game as against the many, received the bets and paid the losses out of the bank fund which he kept before him on the table, is a banking game. *Copeland v. State*, 36 App. 576, 38 S. W. 189, reversing *Bell v. State*, 32 App. 187, 22 S. W. 687, and distinguishing *Chappell v. State*, 27 App. 310, 11 S. W. 411, in which it was held that a game called craps, played by one man throwing dice on a table, and betting on certain numbers, while another party bet against him, played on a flat surface, without the intervention of any third party, was not a game to be “played, dealt, kept, or exhibited,” and that where such a game was played in a saloon, an employé of the proprietor, who stood by and received fees from the players, was not guilty of keeping a gaming table; *Faucett v. State*, 46 App. 113, 79 S. W. 548. That the game of craps can be played without a table does not prevent a table specially designed for such game, and exhibited, from being a gaming table, though there are games which cannot be played without a table, and though the dealer in such games can take but one bet at a time, and the better throws the dice. *Bell v. State*, 32 App. 187, 22 S. W. 687. See, also, *Shaw v. State*, 35 App. 394, 33 S. W. 1078.

The proprietor of a saloon, keeping therein a table, on which dice are thrown for drinks and money, and on which games of dominoes are played, is not guilty of keeping and exhibiting a gaming table. *Whitney v. State*, 10 App. 377.

12. — **Slot machine.**—This article prohibits the keeping of a slot machine in which checks may be drawn for merchandise, even if no blanks are drawn. *Lytle v. State* (Cr. App.) 100 S. W. 1161.

13. — **“Monte” game.**—That in a prosecution for keeping and exhibiting, for the purpose of gaming, a gaming table and bank, where there was no question that, if monte was dealt or exhibited, it was for the purpose of obtaining bets, failure to charge that the banking or dealing of the game of monte at a place not usually resorted to for gaming is not a felony is not error. *Morris v. State*, 57 App. 163, 121 S. W. 1112.

14. — **Grand Raffle.**—“Grand raffle” contains all the elements of a gaming table or bank. *Stearnes v. State*, 21 Tex. 692.

15. — **Game of cards.**—One having charge of an ordinary game of cards played on a blanket in a shed room to a barn, by negroes as an attachment to a negro dance, and at which money was bet, is not running a gambling house. *Hanks v. State*, 54 App. 1, 111 S. W. 402, 17 L. R. A. (N. S.) 1210.

16. — **Billiard or pool table.**—One who exhibits a billiard table, and who takes the bets of the players throwing dice, without himself throwing dice, is guilty of “exhibiting a gaming table.” *Bird v. State* (Cr. App.) 148 S. W. 738. One who keeps a table on which is played the game known as fifteen ball pool, the same being a billiard or pool table, the game being usually played on such table with the understanding that the loser was to pay for the drinks or cigars ordered from defendant’s bar, money also being bet on the game, is guilty of exhibiting a gaming table, but not guilty of exhibiting a bank. *Webb v. State*, 17 App. 205. Evidence that a game of pool was played on a pool table by several persons, with the understanding among themselves, to which defendants were not parties, that the loser should pay to defendants the sum of five cents for each cue used in the game, defendants in no way participating in the game, is insufficient to support a conviction for exhibiting a gaming table. *Smith v. State*, 28 App. 102, 12 S. W. 412.

17. — **Part owner.**—One who is a part owner of a table belonging to a gambling establishment, kept and exhibited for the purpose of gaming is guilty of keeping and exhibiting a gaming table, though not actually present at the time it was exhibited. *Buchanan v. State* (Cr. App.) 33 S. W. 339.

18. **Occupation tax or license.**—Under this article as it now stands (also under article 557) it is no defense to a prosecution that accused has paid the occupation tax and been granted a license. *Blades v. State*, 43 App. 409, 66 S. W. 565. See, also, *Reeves v. State*, 12 App. 199, and *Parker v. State*, 13 App. 213, holding to the same effect, under a prior occupation tax act, which, while authorizing a license to be granted, inhibited the exhibiting or betting at any of the prohibited games. Other decisions to the contrary, under prior laws are *Houghton v. State*, 41 Tex. 136; *State v. Johnson*, 41 Tex. 504; *Longworth v. State*, 41 Tex. 508; *Chiles v. State*, 1 App. 28; *Harris v. State*, 9 App. 308; *Rutherford v. State*, 39 App. 137, 45 S. W. 579; *Hill v. State* (Cr. App.) 66 S. W. 555; *Harris v. State* (Cr. App.) 66 S. W. 565.

19. **Accomplices.**—See ante art. 79.

20. **Jurisdiction of Justice of the Peace.**—See Code Cr. Proc. art. 106.

21. **Indictment or information.**—Willson’s Cr. Forms, 289. See, also, Code Cr. Proc. arts. 447–481.

22. **Evidence.**—See notes to article 555, post.

23. **Questions for court.**—See Code Cr. Proc. art. 734.

24. **Instructions.**—See Code Cr. Proc. art. 735.

Cited, *Austin v. State* (Cr. App.) 135 S. W. 1167; *Minter v. State*, 70 App. 634, 159 S. W. 286; *Minter v. State*, 70 App. 634, 159 S. W. 289.

In a prosecution for keeping and exhibiting, for the purpose of gaming, a gaming table and bank, the game being monte, failure to charge what is a banking game is not error; the statute expressly defining monte to be a banking game. *Morris v. State*, 57 App. 163, 121 S. W. 1112.

Art. 552. [383] Table or bank includes, what.—It being intended by the foregoing article to include every species of gaming device known by the name of table or bank, of every kind whatever, this provision shall be construed to include any and all games which in common language are said to be played, dealt, kept or exhibited.

See notes to article 551, ante.

Indictment.—Willson’s Cr. Forms, 289.

Art. 553. [384] Games specifically enumerated.—Lest any misapprehension should arise as to whether certain games are included within the meaning of the foregoing articles, it is declared that the following games are within the meaning and intention of said articles, viz.: Faro, monte, vingt et un, rouge et noir, roulette, A B C, chuck-a-luck, keno, pool and rondo; but the enumeration of these games specially shall not exclude any other properly within the meaning of the two preceding articles. Any game played for money upon a billiard table, or table resembling a billiard table, other than the game of billiards licensed by law, is punishable under the provisions of this chapter.

See notes to article 551, ante.

Indictment.—Willson’s Cr. Forms, 289, 290, 292.

Art. 554. [385] Indictment.—In any indictment or information for the class of offenses named in the three preceding articles, it is sufficient to state that the person accused kept a table or bank for gaming, or exhibited a table or bank for gaming, without giving the name or description thereof, and without stating that the table or bank, or gaming device, was without any name, or that the name was unknown.

Complaint, indictment, or information.—Willson's Cr. Forms, 289. See, also, Code Cr. Proc. arts. 447-481.

— **Allegations in general.**—Where the table or bank exhibited is one specifically named in the statute, it is not necessary to allege in the indictment that it was kept or exhibited for the purpose of gaming. *Wardlow v. State*, 18 App. 356; *Doyle v. State*, 19 App. 410; *Short v. State*, 23 App. 312, 4 S. W. 903. If, however, the table or bank be not one specifically named, it must be alleged that it was kept and exhibited for gaming purposes. *Ben v. State*, 9 App. 107; *Anderson v. State*, 9 App. 177; *Doyle v. State*, 19 App. 410; *Booth v. State*, 26 Tex. 203; *State v. Blair*, 41 Tex. 30. The indictment need only follow the statute. *Estes v. State*, 10 Tex. 300; *State v. Kelly*, 24 Tex. 182; *Polk v. State* (Cr. App.) 154 S. W. 988. The latitude allowed by this article is not intended to be exclusive. Other modes of description equally as certain may be adopted. *Estes v. State*, 10 Tex. 300; *State v. Kelly*, 24 Tex. 182. An allegation that defendant "did unlawfully keep and exhibit a gaming table and bank, for the purpose of gaming," is sufficient. *Campbell v. State*, 2 App. 187; *Parker v. State*, 13 App. 213; *Webb v. State*, 17 App. 205; *Perkins v. State* (Cr. App.) 33 S. W. 341; *Rabby v. State* (Cr. App.) 37 S. W. 741; *Moore v. State*, 35 App. 74, 31 S. W. 649; *Ranirez v. State* (Cr. App.) 40 S. W. 278. On a trial for "keeping a cue alley table for the purpose of gaming," evidence that money, alley fees, or other things of value were bet on the cue alley, is properly admitted, without further allegations descriptive of the offense. *State v. Howery*, 41 Tex. 506.

— **Joint or separate indictment.**—Where more than one join in the commission of an offense, all or any number of them may be jointly indicted for it, or each may be separately indicted. An indictment charging that accused and M. "did unlawfully keep and exhibit a bank for gaming purposes is not objectionable. *Webb v. State*, 17 App. 205.

Duplicity.—See Code Cr. Proc. art. 481.

Cited, *Minter v. State*, 70 App. 634, 159 S. W. 286.

Art. 555. [386] Proof.—In prosecutions under articles 551, 552 and 553, it shall be sufficient to prove that any game therein mentioned was played, dealt or exhibited, without proving that money or other articles of value were won or lost thereon.

Evidence.—See Code Cr. Proc. art. 783.

Where an indictment avers that accused kept and exhibited a gaming table in the city of D., such averment must be strictly proved, though it was not necessary to allege that the offense was committed in such city. *Withers v. State*, 21 App. 210, 17 S. W. 725.

Evidence that one, while a game was proceeding at a gaming table, from his position at the table, opposite the dealer, picked up the dice, and threw or handed them back to him, is sufficient to authorize a finding that he was exhibiting a game. *Smith v. State* (Cr. App.) 33 S. W. 871.

On a trial for keeping and exhibiting for gaming purposes a gaming table in a room, it is proper to permit a witness to describe the room where the alleged gambling took place, though he shows that there was a bar in the room where intoxicants were sold; there being no effort to prove that accused sold intoxicants in violation of law. *Bird v. State* (Cr. App.) 148 S. W. 738.

— **Accomplice testimony.**—See notes under Code Cr. Proc. art. 801.

— **Reputation of accused.**—In a prosecution for keeping and exhibiting a gaming table, evidence offered by the accused to prove his reputation as an industrious, hard-working man was properly excluded as it was not an issue in the case. *Stevens v. State*, 70 App. 565, 159 S. W. 505.

— **Sufficiency.**—Cited, *Minter v. State*, 70 App. 634, 159 S. W. 286.

Evidence held sufficient to support conviction. *Gomprecht v. State*, 36 App. 434, 37 S. W. 734; *Robinson v. State* (Cr. App.) 39 S. W. 662; *Dalton v. State* (Cr. App.) 74 S. W. 27; *Morris v. State*, 57 App. 163, 121 S. W. 1112. Evidence held insufficient to support a conviction. *Wells v. State*, 22 Tex. App. 18, 2 S. W. 609; *Erwin v. State*, 25 App. 330, 8 S. W. 276; *Polly v. State*, 33 App. 410, 26 S. W. 727; *Spriggs v. State*, 58 App. 191, 125 S. W. 27.

Art. 556. [387] "Played," "dealt" and "exhibited" defined.—The words "played" and "dealt" have the meaning attached to them in common language. The word "exhibited" is intended to signify the act of displaying the bank or game for the purpose of obtaining bettors.

See notes to article 551, ante.

Art. 557. [388] Gaming table, bank, etc., betting at.—If any person shall bet or wager at any gaming table, or bank, or pigeon

hole, or jenny lind table, or nine or ten-pin alley, such as are mentioned in the six preceding articles, or shall bet or wager any money or other thing of value at any of the games included in the six preceding articles, or at any of the following games, viz.: Poker-dice, jack-pot, high-dice, high-die, low-dice, low-die, dominoes, euchre with dominoes, poker with dominoes, sett with dominoes, muggins, crack-loo, crack-or-loo, or the game of matching money or coins of any denomination for such coins, or for other things of value, or at any game of any character whatever that can be played with cards, dice, or dominoes, or at any table, bank or alley, by whatsoever name the same may be known, or whether named or not, and without reference as to how the same may be played, and without reference as to how the same may be constructed or operated, or shall bet or wager upon anything in any place where people resort for the purpose of betting or wagering, he shall be fined not less than ten dollars nor more than fifty dollars; provided, no person shall be indicted under this article for playing said games with dominoes or cards at a private residence occupied by a family, unless same is commonly resorted to for the purpose of gaming; and provided, further, that no banking game played with cards or dominoes shall be exempted from the provisions of this chapter on account of being played at a private residence occupied by a family; and provided, further, that for betting on any gaming table or bank, the court or jury may, in addition to said fine, impose a jail penalty of not less than ten nor more than thirty days. [Act 1907, p. 108.]

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| 1. Constitutionality. | 14. Place commonly resorted to for gaming. |
| 2. Repeal. | 15. License or occupation tax. |
| 3. Betting in general. | 16. Complaint, indictment or information. |
| 4. Betting for drinks. | 17. — Bet in general. |
| 5. Paying table fees. | 18. — Betting at game played with dice. |
| 6. Betting at crack loo. | 19. — Betting at game of cards. |
| 7. Playing pin pool. | 20. — Playing pool. |
| 8. Raffle. | 21. — Negating exceptions. |
| 9. Betting at game played with dice. | 22. Evidence. |
| 10. — Distinct offenses. | 23. — Venue. |
| 11. Betting at game of cards. | |
| 12. Playing at game of cards in private residence. | |
| 13. Playing game with cards at private residence. | |

Cited, *Minter v. State*, 70 App. 634, 159 S. W. 286; *Stevens v. State*, 70 App. 565, 159 S. W. 505.

1. **Constitutionality.**—Act March 28, 1907 (Acts 30th Leg. c. 49, amending this article is not unconstitutional on the ground that its provisions are not expressed in the title. *Singleton v. State*, 53 App. 625, 111 S. W. 737; *Simons v. State*, 56 App. 339, 120 S. W. 210.

This article does not discriminate against the negro race, because it permits card playing—a white man's game—while it wholly prohibits craps, which is a negro game. *Sparks v. State*, 64 App. 610, 142 S. W. 1183.

2. **Repeal.**—Act March 28, 1907 (Acts 30th Leg. c. 49), of which this article is a part repealed articles 382, 389, and 390 of the Code of 1895, notwithstanding their inclusion in the Revision of 1911 as articles 551, 572, and 573. *Robertson v. State*, 70 App. 307, 159 S. W. 713.

3. **Betting in general.**—A bet is the mutual agreement and tender of a gift of something valuable, which is to belong to the one or the other of the contracting parties, according to the result of the trial of chance or skill, or both combined. *Stearnes v. State*, 21 Tex. 692; *Long v. State*, 22 App. 194, 2 S. W. 541, 53 Am. Rep. 633. The rules of the game constitute the terms of the agreement, and define the contingency upon which one or the other is to receive the gift. The staking of money or property, besides being a tender, is an ostensible adoption or sanction of the agreement. *Stearnes v. State*, 21 Tex. 692. Betting, of itself, is not a violation of law. It is the betting at games, tables, or banks, which are inhibited that constitutes the offense denounced by the preceding article. *Houghton v. State*, 41 Tex. 136; *Chiles v. State*, 1 App. 28. It is not an offense to bet at a game unless something of value is bet. *Portwood v. State*, 71 App. 447, 160 S. W. 345. A bet may be made by acts without words. *Emmons v. State*, 34 App. 98, 29 S. W. 474, 475; *Rainbolt v. State*, 51 App. 153, 101 S. W. 217.

Where accused was charged with betting on a banking game, evidence that he, as keeper of the bank, bet with a player that he (the player) had made a bad bet against the bank, the charge was not sustained by the evidence, since the bet was a bet by the keeper of the bank against a player, and not against the bank,

and the keeper was guilty of exhibiting a bank, but not of betting against it, as charged in the indictment. *Askey v. State*, 20 App. 443.

There is no distinction between playing and betting, and, when it is charged that an accused "played" at cards, it means that he was betting, or, if it was a banking game, that he exhibited it for the purpose of obtaining bets, and generally the word has such meaning in statutes with reference to gaming. *Purvis v. State*, 62 App. 302, 137 S. W. 701, Ann. Cas. 1913C, 536.

4. **Betting for drinks.**—Betting for drinks of liquor is in effect a betting of money. *Bachelor v. State*, 10 Tex. 258. Where accused and another played for the drinks on a pool table, and the loser paid for the drinks, but there was no prior agreement that he should do so, there is a betting on a gaming table. *Dunbar v. State*, 34 App. 596, 31 S. W. 401.

5. **Paying table fees.**—Paying of "table fees" is also a betting. *Tuttle v. State*, 1 App. 365; *Vanwey v. State*, 41 Tex. 639; *Humphreys v. State*, 34 App. 434, 30 S. W. 1066; *Hall v. State* (Cr. App.) 34 S. W. 122. But evidence that accused, the loser in a game of pool, paid the fees for use of the table, and that this was the general custom, is insufficient to sustain a conviction for gaming, in the absence of evidence of knowledge of such custom on accused's part. *Ellis v. State*, 58 App. 319, 125 S. W. 892.

6. **Betting at crack loo.**—Betting at "crack loo" is prohibited by this article though it is not played with dice or dominoes. *Donathan v. State*, 43 App. 427, 66 S. W. 781.

7. **Playing pin pool.**—One may be convicted of playing pin pool without proof that he actually put up money, where it is shown that the game required the pool played for to be made by the persons playing for it by putting up a certain amount of money, and that he was playing when the pool was up. *Cohen v. State*, 17 Tex. 142.

8. **Raffle.**—A raffle for a gun of the value of seven dollars, played with dice at a saloon, was held to be an unlawful betting within the purview of said act. It does not make any difference whether such betting or raffle be for religious, benevolent, or profane purposes. *Long v. State*, 22 App. 194, 2 S. W. 541, 58 Am. Rep. 633.

9. **Betting at game played with dice.**—It is an offense to bet on any game played with dice, wherever played. *Day v. State*, 27 App. 143, 11 S. W. 36; *Bowles v. State* (Cr. App.) 150 S. W. 626; *Scott v. State* (Cr. App.) 155 S. W. 226. By whatever name the game is known. *Day v. State*, 27 App. 143, 11 S. W. 36. This includes a private residence, though it is occupied by a private family, and is not commonly resorted to for purpose of gaming. *Bowles v. State* (Cr. App.) 150 S. W. 626; *Knowles v. State* (Cr. App.) 150 S. W. 777. *Contra*, *Borders v. State*, 24 App. 333, 6 S. W. 532; *Stewart v. State*, 34 App. 33, 28 S. W. 806; *Borders v. State* (Cr. App.) 66 S. W. 1103; *Barton v. State*, 50 App. 161, 95 S. W. 111; *Thompson v. State* (Cr. App.) 96 S. W. 1085; *Marks v. State*, 51 App. 218, 101 S. W. 805. These cases were decided on the law as it was prior to the amendment of 1907.

Where the evidence showed that defendant threw all the dice, stood behind the table and took all the bets, it has been held that the game was a banking game, defendant was the dealer, and could not be convicted of betting at a game with dice. *Shaw v. State*, 35 App. 394, 33 S. W. 1078. On trial for betting at a game with dice commonly called "craps," it makes no difference whether it was a banking or table game or not, if he bet it was a violation of the law. *Thompson v. State*, 37 App. 227, 38 S. W. 785, 39 S. W. 298.

10. — **Distinct offenses.**—Each separate act of betting at a game played with dice constitutes a distinct offense. The consecutive throwing of dice from nightfall until daybreak does not constitute a continuous game, and the consecutive betting on the different throws does not constitute a continuous offense. *Day v. State*, 27 App. 143, 11 S. W. 36; *Kain v. State*, 16 App. 282.

11. **Betting at game of cards.**—Under this article (as amended by Acts 30th Leg. c. 49, Acts 1907, p. 107) it is an offense to bet on a game of cards, without reference to where the game is played. Hence, it is an offense to bet at a game of cards in a private residence, though it is occupied by a private family, and is not commonly resorted to for the purpose of gaming. *Purvis v. State*, 52 App. 342, 107 S. W. 55; *Singleton v. State*, 53 App. 625, 111 S. W. 736; *Vinson v. State*, 58 App. 47, 124 S. W. 652.

That defendant and another were sitting opposite each other at a table on which was some money and a deck of cards, is insufficient to sustain a conviction for betting at a game of cards played at a private residence. *Purvis v. State*, 62 App. 302, 137 S. W. 701, Ann. Cas. 1913C, 536.

12. **Playing at game of cards in private residence.**—Under this article, construed with article 548, ante, the playing of cards in a private residence is an offense only when there is betting, and when the house is used as a resort for gaming. *Purvis v. State*, 62 App. 302, 137 S. W. 701, Ann. Cas. 1913C, 536.

It is only games played with cards and dominoes that are not offenses when played at a private residence occupied by a family. *Scott v. State* (Cr. App.) 155 S. W. 226.

See, also, notes to article 548, ante.

13. **Playing game with cards at private residence.**—The place at which defendant, a bachelor and farmer, played cards, a house occupied by him alone, except that a man, who was a stone mason, was stopping with him, was not a "private residence occupied by a family," within the exception to the gaming law. *Robbins v. State*, 57 App. 8, 121 S. W. 504.

14. **Place commonly resorted to for gaming.**—Where defendant was convicted for gaming in a dugout, a place commonly resorted to for gaming purposes, it was immaterial that the place was also used for other purposes, such as the sale of liquors at retail. *Reeves v. State*, 34 App. 147, 29 S. W. 786.

15. **License or occupation tax.**—See note to article 551, ante.

16. **Complaint, indictment or information.**—See Code Cr. Proc. arts. 447-481; Willson's Cr. Forms, 290, 291.

17. — **Bet in general.**—An allegation that defendant "bet," includes the averment that the betting was something of value, and it is not necessary to allege what was bet, or that it was something of value. Long v. State, 22 App. 194, 2 S. W. 541, 58 Am. Rep. 633. See, also, Harrison v. State 15 Tex. 239.

18. — **Betting at game played with dice.**—An indictment for betting at a game played with dice need not allege that accused played the game with, or bet at the game with, another person. Day v. State, 27 App. 143, 11 S. W. 36.

An indictment for betting at a game played with dice commonly called "craps" is not objectionable on the ground that, as the game was a banking game, the indictment should have been for betting at a banking game. Thompson v. State, 37 App. 227, 38 S. W. 785, 39 S. W. 298.

19. — **Betting at game of cards.**—An information by a county attorney, upon affidavit attached, presenting that defendant unlawfully bet at a game of cards at a place not then and there a private residence occupied by a family, and that affiant had reason to believe and did believe that defendant then played at cards at a place not then and there a private residence, is defective, in that it does not present to the court that accused had violated a law, but only that some affiant charged him with committing the offense. Zinn v. State (Cr. App.) 151 S. W. 825.

20. — **Playing pool.**—An indictment charging one with betting at a game called "pool" is sufficient. Thompson v. State (Cr. App.) 28 S. W. 684.

21. — **Negating exceptions.**—Since it is an offense to bet on any game played with dice, wherever played, an allegation, in an information charging accused with betting on a game played with dice called "craps," at a party's private residence, that such private residence was commonly resorted to for the purpose of gaming is surplusage, and need not be proved. Bowles v. State (Cr. App.) 150 S. W. 626. Under the old law it was necessary to negative that the game was played at a private residence. Colchell v. State, 23 App. 584, 5 S. W. 139; Borders v. State (Cr. App.) 66 S. W. 1103.

An indictment for betting at monte need not allege that the betting was not at a private residence occupied by a family. Mares v. State, 71 App. 303, 158 S. W. 1130.

22. **Evidence.**—Where the state proved that accused bet on a game of cards, and he introduced no evidence, a conviction of gaming was supported by the evidence. Coots v. State, 57 App. 276, 122 S. W. 543. Evidence held not to sustain a conviction for gaming. Lucas v. State, 57 App. 198, 122 S. W. 387.

Evidence that "checks" were used in betting is sufficient, without any further evidence that the checks represented money, or other property. Walton v. State, 14 Tex. 381.

Proof of betting money by accused upon the game charged to have been played upon the table is sufficient proof, as against the party charged with the betting, that the table was at the time kept or exhibited for gaming. Ramey v. State, 14 Tex. 409.

Evidence that a witness saw accused betting at faro, at the place charged in the indictment, within the county, within one year before the finding of the indictment, is sufficient, although the witness could not state what was bet, whether money, property, or the representative of either, although he was positive that the bank was exhibited for gaming. Harrison v. State, 15 Tex. 239.

The state must prove that the offense was committed within one year prior to the presentment of the indictment. Manning v. State, 35 Tex. 723.

Evidence in a prosecution for betting at dice held to sustain a conviction. Scott v. State (Cr. App.) 155 S. W. 226.

23. — **Venue.**—See Code Cr. Proc. art. 257.

Art. 558. [388a] Amended by renumbering the article 551. See art. 551, and note thereunder.

Art. 559. [388b] Keeping or renting for.—If any person shall rent to another, or shall keep or be in any manner interested in keeping, any premises, building, room or place for the purpose of being used as a place to bet or wager, or to gamble with cards, dice, dominoes, or to keep or exhibit for the purpose of gaming, any bank, table, alley, machine, wheel or device whatsoever, or as a place where people resort to gamble, bet or wager upon anything whatever, or shall knowingly permit property or premises of which he is owner, or which is under his control, to be so used, shall be guilty of a felony, and, upon conviction, shall be punished by confinement in the penitentiary not less than two nor more than four years, regardless of whether any of the above mentioned games, tables, banks, alleys, machines, wheels or devices, or things, are licensed by law or not; and any place or device shall be considered as used for gaming or to gamble with or for betting or wagering, if any fees, money, or anything of value is bet thereon, or if the same is resorted to for the purpose of gaming or betting. [Act 1907, p. 108.]

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| 1. Constitutionality. | 12. ——— Renting premises, etc. |
| 2. Repeal. | 13. ——— Keeping and being interested in keeping, etc. |
| 3. Keeping room for use as place to bet, etc. | 14. ——— Permitting premises under control to be used, etc. |
| 4. Keeping gaming devices. | 15. ——— Permitting gaming, etc. |
| 5. Resort for gaming. | 16. ——— Gambling. |
| 6. Nature of place kept. | 17. Evidence. |
| 7. Nature of device kept or used. | 18. ——— Keeping or maintaining room, etc. |
| 8. Permitting property under control to be used, etc. | 19. ——— Permitting house under control, etc. |
| 9. Control of building, etc. | 20. Instructions. |
| 10. Continuing offense. | |
| 11. Indictment or information. | |

1. **Constitutionality.**—Act 30th Leg. c. 49, of which this article is a part, held to comply with Const. art. 3, § 38, requiring the presiding officers of each house to sign bills when passed after their titles have been publicly read and the fact of signing to be entered on the journals. *Parshall v. State*, 62 App. 177, 138 S. W. 759; *Knox v. State*, 62 App. 512, 138 S. W. 787. In the above cited cases it was held that said constitutional provision did not require the journals of the two houses to affirmatively show what the title of the bill was or that the full title thereof was read. Act 30th Leg. c. 49, of which this article is a part, does not, by making it an offense to wager money at cards, contravene Const. art. 3, § 35, providing that no bill shall contain more than one subject, which shall be expressed in its title. *Parshall v. State*, 62 App. 177, 138 S. W. 759; *Knox v. State*, 62 App. 512, 138 S. W. 787.

2. **Repeal.**—This article was not repealed by the vagrancy act of 1909 (Acts 31st Leg. c. 59), articles 634-640, post. *Austin v. State* (Cr. App.) 135 S. W. 1167; *Parshall v. State*, 62 App. 177, 138 S. W. 759; *Goodwin v. State* (Cr. App.) 143 S. W. 939.

Acts 30th Leg. c. 49 (Acts March 28, 1907), of which this article is a part, repeals articles 382, 389, and 390 of the Code of 1895, notwithstanding their inclusion in the Revision of 1911 as articles 551, 572, and 573. *Robertson v. State*, 70 App. 307, 159 S. W. 713; *Williams v. State*, 71 App. 6, 159 S. W. 732 (overruling *Simons v. State*, 56 App. 339, 120 S. W. 210).

3. **Keeping room for use as place to bet, etc.**—It is not necessary to show that accused was the owner or proprietor of the room kept. And it is no defense that the principal use of the room is lawful. *Parshall v. State*, 62 App. 177, 138 S. W. 759.

4. **Keeping gaming devices.**—Where rented premises are used for gambling purposes by a sublessee, with the lessee's knowledge and consent, the lessee may be convicted as a keeper of gambling devices. *Strong v. State*, 70 App. 89, 156 S. W. 656.

5. **Resort for gaming.**—Where a person opens a house under his control and permits persons to gather there and gamble without invitation, it becomes a "resort for gambling." *Davis v. State* (Cr. App.) 151 S. W. 313. It must appear that people resorted to the place for gambling and engaged in gambling after resorting there, with the knowledge and consent of the keeper. *Moore v. State*, 62 App. 326, 137 S. W. 690. Where accused rented premises used as a restaurant and pool hall, and permitted negroes to assemble therein to throw dice, he being present and taking a commission from the games, a prosecution is properly brought under this article. *Goodwin v. State* (Cr. App.) 143 S. W. 939.

6. **Nature of place kept.**—An "appurtenant" is not a portion of the principal thing, but is something belonging or pertaining to something else which is its principal. So, where a game of cards was played in a part of a saloon, and not in an appurtenant thereto, a conviction could not be supported. *Ballew v. State*, 26 App. 483, 9 S. W. 765.

7. **Nature of device kept or used.**—In a prosecution for permitting betting on dominoes in a public house under defendant's control, it is not error to refuse an instruction for acquittal if defendant did not keep a table and dominoes specially for gaming purposes. *Humphreys v. State*, 34 App. 434, 30 S. W. 1066.

8. **Permitting property under control to be used, etc.**—The offense of permitting gaming to be carried on may be proven without showing that accused kept the place in question as a gambling house, or that it was kept for the purpose of using it as such, although this article makes that an offense. The words "was used" not relating back to and making it necessary, in order to commit the offense of knowingly permitting the property to be used for gaming, that it shall also be kept as a gambling house, but applying to that part of the article making it an offense to keep property or premises to be used as a gaming place, so as to make that a distinct and separate offense. *Robertson v. State*, 70 App. 307, 159 S. W. 713. In a trial of a tenant for knowingly permitting his subtenant to use the leased premises for gambling purposes, instructions were proper and sufficient which, taken in a whole, required the jury to find that the premises were used for gambling purposes with the defendant's knowledge and permission before finding him guilty, and further required that they acquit the defendant if they had a reasonable doubt upon the question of whether he rented the premises to be used as a barber shop, and did not know they were being used for gaming purposes. *De Los Santos v. State* (Cr. App.) 146 S. W. 919. Where a room in a saloon is rented to a third party for gaming purposes, the owner of the saloon is guilty of permitting gaming on his premises. *Rankin v. State*, 42 App. 1, 56 S. W. 929.

The act of a person in engaging with others in gambling on premises under his control constitutes permission to the others to gamble. And where an unmarried

man takes possession of a private house, by permission or otherwise, during the owner's absence, and permits gambling therein, he is guilty of unlawfully permitting property under his control to be used as a resort for gambling. *Davis v. State* (Cr. App.) 151 S. W. 313.

9. **Control of building, etc.**—One cannot be convicted of permitting a game of monte to be played in a house under his control, where it is shown that the game was played during the occupancy of the house by a tenant who was then in possession and carried the keys. *Kimbrough v. State*, 25 App. 397, 8 S. W. 476. One could not be convicted of permitting a game of cards to be played upon his premises, on evidence that the premises had been rented to, and was under the control of, another, although he might be convicted of renting the premises to another to be used as a place for playing, etc. *Nairn v. State*, 18 App. 260; *Borchers v. State*, 31 App. 517, 21 S. W. 192.

The word "control" has the meaning of "manage," and a party may be in control who was neither a tenant nor an owner. Defendant, who rented and had control of the second floor and the control of a door thereto from the ground floor, and of a room on the second floor which was the only access to an attic reached by a ladder, and who knew that from day to day and from month to month and both day and night many negroes congregated in the attic, and was frequently in the attic and knew gambling was going on there, and was himself in charge of games, and from time to time stopped gambling there, was in such "control" of the place that he might be convicted of those offenses. *Robertson v. State*, 70 App. 307, 159 S. W. 713. One who rents the whole of a building and uses a part of it and sublets other parts is in control of the whole building within the meaning of the gaming laws. *De Los Santos v. State* (Cr. App.) 146 S. W. 919.

Though a lease of rooms restricts their use to a particular purpose, the lessor does not thereby retain any control over them, which renders it his duty to prevent their use for illegal gaming. *Robinson v. State*, 24 Tex. 152.

10. **Continuing offense.**—In a prosecution for keeping a room for the purpose of being used as a place to gamble with cards, the state is not confined to one particular case of such use; the offense charged being a continuous one, and the state being entitled to show many and continuous acts of gambling in the particular room. *Parshall v. State*, 62 App. 177, 138 S. W. 759.

11. **Indictment or information.**—Willson's Cr. Forms, 295-297. See, also, Code Cr. Proc. arts. 447-481.

12. — **Renting premises, etc.**—An indictment alleging that accused unlawfully rented to another a house to be used as a place for "playing games with cards, dice, and dominoes, and dealing and exhibiting faro monte, and other games inhibited by law," is insufficient in that it does not allege that the house is any one of the houses inhibited by the statute for the playing at games with cards, nor that, as to dice and dominoes, it is not a private residence, nor that the banking and table games were kept and exhibited for the purpose of gaming. *Eylar v. State*, 37 App. 257, 39 S. W. 665.

13. — **Keeping and being interested in keeping, etc.**—An indictment charging defendant with keeping and being interested in keeping certain premises for the purpose of being used as a place to bet with cards and dice charges an offense under the laws of the state. *Polk v. State* (Cr. App.) 152 S. W. 907. An indictment charged that accused, on September 5, 1907, in T. county, did unlawfully keep, and was then and there interested in keeping, a building, room, or place to be used as a place to bet, wager, and gamble with cards, and was then and there interested in the keeping of such building, etc., where people resorted for that purpose. Another count charged that defendant, in the same place, on the same day, did unlawfully and knowingly permit the building, room, and place which was then and there under his control to be used as a place to bet, wager, and gamble with cards, and as a place where people resorted for that purpose. Held, that such counts stated an offense under this article. *Razor v. State*, 57 App. 10, 121 S. W. 512.

14. — **Permitting premises under control to be used, etc.**—An indictment for permitting property under the defendant's control to be used as a resort for gambling, need not describe the premises, further than to say that it is a house under defendant's control, or allege that the house was a public place, or name the games played therein. *Davis v. State* (Cr. App.) 151 S. W. 313. An indictment for permitting premises to be used as a "place to keep and exhibit for the purposes of gaming a gaming table and bank," is not insufficient because it fails to describe the kinds of table or bank. *De Los Santos v. State* (Cr. App.) 146 S. W. 919.

A count in an indictment charging that defendant unlawfully and knowingly permitted property under his control to be used as a place to gamble with cards, and a count charging that he knowingly permitted property under his control to be used as a place where people resorted to gamble with cards, sufficiently charges a violation of so much of this article as makes it an offense to keep any place for use as a place to gamble or as a place where people resort to gamble. *Robertson v. State*, 70 App. 307, 159 S. W. 713.

15. — **Permitting gaming, etc.**—It is not necessary to aver that money or property was bet on the game. *McGaffey v. State*, 4 Tex. 156; *Bosshard v. State*, 25 Tex. Supp. 207; *State v. Flores*, 33 Tex. 444. Contra, *Johnson v. State*, 34 App. 227, 29 S. W. 1083. Nor is it necessary to name the persons who played. *McGaffey v. State*, 4 Tex. 156. Nor is it necessary to name the particular game played. *State v. Ake*, 9 Tex. 322; *Horan v. State*, 24 Tex. 161.

The house in which the gaming must be permitted must be alleged to be one of those inhibited by the statute. *Wallace v. State*, 12 App. 479. Contra, *Nairn v. State*, 18 App. 260. An indictment charging accused with "unlawfully permitting

a game with dice to be played and bet at a house under his control," the said "house being then and there a public place, to wit, a house for retailing spirituous liquors," is good. *Robinson v. State*, 24 App. 4, 5 S. W. 509. See, also, *Ballew v. State*, 26 App. 483, 9 S. W. 765; *Galloway v. State* (Cr. App.) 26 S. W. 67. An information charging accused with unlawfully permitting a game of cards to be played upon his premises, the said house being then and there appurtenant to a public place, to-wit, a house for retailing spirituous liquors, is sufficient. *Borchers v. State*, 31 App. 517, 21 S. W. 192.

A house for retailing spirituous liquors is a public house, and an indictment for permitting cards to be played in such house is not bad because the letter "e" is left off of "public;" the words "a publi place" could be eliminated and the indictment still be sufficient. *Williams v. State*, 35 App. 391, 33 S. W. 1080.

16. — **Gambling.**—An indictment charging that "defendant did unlawfully and knowingly keep a room in the Star hotel to be used for gambling, and did knowingly permit said room to be used for gambling," held bad, because the word "gambling," was not used in the code as indicating any of the gaming prohibited, and as being too general. *State v. Bullion*, 42 Tex. 77.

17. **Evidence.**—See Code Cr. Proc. art. 783.

18. — **Keeping or maintaining room, etc.**—Evidence held sufficient to support a conviction for keeping a gaming resort. *Parshall v. State*, 62 App. 177, 133 S. W. 759; *Knox v. State*, 62 App. 512, 133 S. W. 787; *Goodwin v. State* (Cr. App.) 143 S. W. 939; *Boswell v. State* (Cr. App.) 150 S. W. 432; *Robertson v. State*, 70 App. 307, 159 S. W. 713.

In a prosecution for keeping a gambling room, evidence that witnesses had seen gambling carried on at the place many times within six weeks immediately before the offense relied on for conviction was claimed to have occurred was admissible, under the rule that evidence of acts of control, ownership, and direction by accused of the place where the gambling was done, both before and immediately after the time charged in the indictment, is admissible to prove the offense charged. So, also, evidence that a deputy sheriff, in raiding the room, found several persons there playing poker while sitting at a table with chips in front of them, and that K., who was co-operating with accused, was there cashing chips, but that defendant was not there, together with a description of the table and a washstand in which chips and cards were found, is admissible. *Razor v. State*, 57 App. 10, 121 S. W. 512.

19. — **Permitting house under control, etc.**—To warrant a conviction for permitting a banking game to be exhibited in defendant's house it is not necessary to prove an express authority or liberty given by defendant. It is sufficient to show that he permitted it to be done, that is, knowing the game was being exhibited in his house, he tacitly acquiesced in its being done. *Robinson v. State*, 15 Tex. 311. But it is not sufficient to merely prove that the house was owned by defendant. There must be evidence, either positive or presumptive, that defendant permitted the game. *Harris v. State*, 5 Tex. 11.

Evidence held to sustain a finding that defendant permitted a house under his control to be used as a resort for gambling, etc. *De Los Santos v. State* (Cr. App.) 146 S. W. 919; *Davis v. State* (Cr. App.) 151 S. W. 313.

On indictment for permitting a game of cards to be played in his store room, it is not incumbent on the state to prove the permission expressly. The other facts being proved, the permission will be presumed, unless accused adduces proof to negative the presumption. *McGaffey v. State*, 4 Tex. 156.

Where, on an indictment for permitting a game of dice to be played in a house under accused's control, the said house being a public place commonly resorted to for the purpose of gaming, the evidence showed the playing of but a single game of dice, and there was no other proof that the house was a public place, a conviction can not be had. *Fossett v. State*, 18 App. 330.

An indictment for permitting a game at cards to be played on premises appurtenant to a house for retailing liquors, a deed of conveyance to defendant is admissible to show ownership in him. But where such a deed has been introduced in evidence to show such ownership, evidence by one of the grantors that defendant was not present when the deed was signed, that it was not delivered to him, that he did not pay the grantor anything, or that he had any knowledge of the deed other than that derived from the indictment is improperly excluded. *Biles v. State*, 25 App. 441, 8 S. W. 650.

An indictment for permitting a game of cards to be played upon accused's premises, the said premises then and there being appurtenances to a public place, to-wit a house for retailing spirituous liquors, is not supported by evidence that the playing was in a room which was a part of a saloon. Nor can a conviction be had where all the witnesses testified that they did not know whether the premises belonged to accused. *Ballew v. State*, 26 App. 483, 9 S. W. 765.

Where, on a prosecution for permitting betting on dominoes played in a public house under defendant's control, it appears that defendant has not only knowingly permitted the gaming, but has himself participated in the games, it is not error to exclude evidence that defendant had a rule not to allow betting on dominoes. *Humphreys v. State*, 34 App. 434, 30 S. W. 1066.

One may not be convicted of permitting gaming in a house under his control on evidence that there was gaming on the third floor of a building leased by defendant's firm, defendant having no knowledge of any gambling. *Brown v. State*, 49 App. 419, 93 S. W. 723.

In a trial for permitting gambling on premises under defendant's control, evidence that one night shortly before the grand jury met he requested that gambling stop did not present the issue that the gambling took place without his consent, where it appeared that he engaged in the games on all prior occasions. *Davis v. State* (Cr. App.) 151 S. W. 313.

20. Instructions.—See Code Cr. Proc. art. 735.

Cited, *Austin v. State* (Cr. App.) 135 S. W. 1167; *Minter v. State*, 70 App. 634, 159 S. W. 286; *Dunn v. State*, 72 App. 170, 161 S. W. 467; *Hodges et al. v. State* (Cr. App.) 165 S. W. 697.

On trial for permitting a prohibited game to be played in a house under the control of accused, it was error to instruct the jury to convict if they found that the room in which the gaming was done had been leased by accused to another for a gaming house, since the offense for which accused was on trial is a distinct offense from that of renting a room, etc., for use for playing, etc. *Nairn v. State*, 18 App. 260.

Where on a trial for keeping a gambling house the state showed that accused's house was resorted to for gambling, and that gambling was carried on there, and accused contradicted the state's evidence, and showed that if gambling was carried on he did not know it, the refusal to charge that to convict accused the jury must believe that he kept the house for the purpose of gambling or knowingly permitted the house to be used for that purpose, was error. *Moore v. State*, 62 App. 326, 157 S. W. 690.

In a prosecution for keeping a room as a place in which to gamble with cards, the refusal of requested charges that "kept for the purpose of gambling" means the chief purpose, and that the accused must have been personally interested in keeping, or have been the proprietor of, the room in question, if error, was harmless. *Parshall v. State*, 62 App. 177, 138 S. W. 759.

Art. 560. [338c] Betting at places resorted to.—If any person shall bet or wager at any gaming table or bank, or other thing, mentioned in this law, or shall bet or wager upon anything in any place to which people resort for the purpose of betting or wagering, he shall be punished by a fine of not less than ten nor more than fifty dollars; provided, that where the conviction is for betting at any gaming table or bank, the court or jury may, in addition to said fine, impose a jail penalty of not less than ten nor more than thirty days. [Id., p. 108.]

Betting.—See notes to article 557, ante.

Cited, *Austin v. State*, 61 App. 573, 135 S. W. 1167; *Minter v. State*, 70 App. 634, 159 S. W. 286.

Art. 561. [388d] Persons equipping gaming house.—If any person shall, in any manner, aid in equipping or furnishing any gaming house, or place where people resort for the purpose of gaming, wagering or betting, he shall be punished by confinement in the county jail for a period of not less than thirty nor more than ninety days. [Id., p. 108.]

Cited, *Austin v. State*, 61 App. 573, 135 S. W. 1167; *Minter v. State*, 70 App. 634, 159 S. W. 286.

Art. 562. [388e] Persons permitting device on premises.—If any person shall knowingly permit any gaming paraphernalia, table, or device or equipment of a gaming house, of any character whatever, to remain in his possession or on premises under his control or of which he is owner, and to be used for gaming purposes, he shall be punished by confinement in the county jail for a period of not less than thirty days nor more than one year. [Id., p. 109.]

Indictment.—See Code Cr. Proc. arts. 447-481.

Cited, *Austin v. State*, 61 App. 573, 135 S. W. 1167; *Minter v. State*, 70 App. 634, 159 S. W. 286.

An indictment charging accused with permitting a game in a prohibited place should specify some inhibited game. *Meyers v. State*, 41 App. 508, 55 S. W. 818.

Art. 563. [388f] Persons going in gaming house.—If any person shall go into or remain in any gambling house, knowing the same to be such, or shall remain in any place where any of the games prohibited by this act or, within his knowledge, being played, dealt or exhibited, he shall be punished by a fine or not less than twenty-five nor more than fifty dollars. Gambling house and gaming house, as used in this law, is meant any place where people resort for the purpose of gaming, betting or wagering. [Id., p. 109.]

Constitutionality.—This article is not violative of Const. art. 1, § 3, providing that all men when they form a social compact have equal rights, etc., nor of article 4, § 2, nor of art. 3, § 35, section 1 of the fourteenth amendment of the federal Constitution. *Barfield v. State*, 62 App. 400, 137 S. W. 920.

Place.—The "place" referred to in this article means a place in which gaming is being conducted in a sense continuously, and does not embrace a dwelling

house in which a prohibited game is played for the time being, and is not shown to be a place to which people resort for the purpose of gaming. Hence a person remaining in a private dwelling house, not shown to be a place frequented for the purpose of gaming, while a prohibited game was being played therein, is guilty of no offense. *Walters v. State*, 58 App. 240, 125 S. W. 11.

Complaint and information.—See Code Cr. Proc. arts. 447–481.

A complaint and information charging that defendant unlawfully and knowingly went into and remained at a place where a game of cards was being played, which was not a private residence occupied by a family, and he knew that the game was being played, etc., sufficiently charges an offense under this article. *Barfield v. State*, 62 App. 400, 137 S. W. 920.

Evidence.—See Code Cr. Proc. art. 783.

Cited, *Austin v. State*, 61 App. 573, 135 S. W. 1167; *Minter v. State*, 70 App. 634, 159 S. W. 286.

On a trial under an information charging, in two counts, that accused played cards at a place other than a private residence occupied by a family, and that he knowingly went into and remained at a place where a game of cards was being played, evidence held sufficient to support a conviction for going into and remaining at a place where cards were being played. *Sloan v. State* (Cr. App.) 170 S. W. 156.

Art. 564. [388g] Officers to suppress same.—Whenever it shall come to the knowledge of any sheriff, constable, police officer or other peace officer, by affidavit of a reputable citizen, or otherwise, that any of the provisions of this law are being violated, it shall be the duty of such officer to immediately avail himself of all lawful means to suppress such violation; and he shall be authorized, by any search warrant that is issued by virtue of this law, to enter any house, room or place to be searched, using such force as may be necessary to accomplish such purpose. [Id., p. 109.]

Cited, *Austin v. State*, 61 App. 573, 135 S. W. 1167; *Minter v. State*, 70 App. 634, 159 S. W. 286; *Ex parte Preston*, 72 App. 77, 161 S. W. 115.

Art. 565. [388h] When justice to issue search warrant.—Upon the filing with any justice of the peace, county or district judge, or any other magistrate, of an affidavit in writing, made by a reputable citizen, that gaming, betting or wagering, as prohibited by this law, is being conducted in any building, room, premises or place, describing the same sufficiently for identification, it shall be the duty of such officer, with whom said affidavit is filed, to immediately issue a warrant, commanding the peace officer to whom same is directed, to immediately enter and search such building, room, premises or place, and in the event the same is a gaming house, as defined in this law, to arrest all parties found therein, or making their escape therefrom, and to take possession of any gambling paraphernalia, device or equipment found therein; and it shall be the duty of such officer to immediately take the persons arrested before the nearest magistrate, and lodge the proper complaint against each person so arrested. [Id., p. 109.]

Search warrant in general.—See Code Cr. Proc. art. 356.

Cited, *Austin v. State*, 61 App. 673, 135 S. W. 1167.

Art. 566. [388i] Gambling house public nuisance.—The existence of any gambling house, or gaming table, or bank, or gaming paraphernalia, or device of whatever kind or character, and all equipments of such gambling house, is hereby declared to be against public policy, and the same is hereby declared to be a public nuisance; and no suit shall be brought or maintained in any of the courts of this state for the recovery of same, or for any insurance thereon, or for damages by reason of any injury to or for the destruction of same. [Id., p. 109.]

Injunction.—See *Vernon's Sayles' Civ. St.* 1914, arts. 4685–4688.

Indictment.—*Willson's Cr. Forms*, 297. See, also, Code Cr. Proc. arts. 447–481. Cited, *Austin v. State*, 61 App. 573, 135 S. W. 1167.

Art. 567. [388j] Used for, terminates lease.—The use of any house, property or premises, by any tenant or lessee for any purpose, made unlawful by this law, shall terminate all rights and interests of such tenant or lessee in same, and shall entitle the own-

er thereof to the immediate possession of said house, property or premises. [Id., p. 110.]

Termination of lease.—Cited, *Austin v. State*, 61 App. 573, 135 S. W. 1167.

This article operates to terminate a lease to a sublessee who uses the premises for gambling purposes, and, if the illegal use be with the lessee's knowledge and consent, the lessee is punishable under article 559, punishing the keeper of gambling devices. *Strong v. State*, 70 App. 89, 156 S. W. 656.

Art. 568. [388k] Officers to seize gaming tables.—It shall be the duty of every sheriff, constable, police officer or other peace officer, by virtue of the warrant authorized by this act, to seize and take into his possession all gaming tables, devices and other equipments or paraphernalia of gambling houses, the existence of which has come to his knowledge, and to immediately file with the justice of the peace, county judge or district judge, a list in writing of the property seized, and shall designate the place where same was seized, and the owner of same, or person from whom possession was taken. Thereupon it shall be the duty of said justice of the peace, county or district judge, to note same upon his docket, and to issue, or cause the clerk of the court to issue, a notice in writing to the owner or person in whose possession the articles seized were found, commanding him to appear at a designated time, not earlier than five days from the service of such notice, and show cause why such articles should not be destroyed. If personal service can not be had upon the person to whom same is directed, a copy of said notice shall be posted for not less than five days, either upon the court house door of the county where the proceedings are begun or upon the building or premises from which the property seized was taken. [Id., p. 110.]

Cited, *Austin v. State*, 61 App. 573, 135 S. W. 1167.

Art. 569. [388l] Same destroyed by order of court.—If, upon a hearing of the matter referred to in the preceding section, the justice of the peace, county judge or district judge, before whom the cause is pending, shall determine that the property seized is a gaming table, or bank, or is used as equipment or paraphernalia for a gambling house, and was being used for gaming purposes, he shall order same to be destroyed; but any part of same may, by order of the court, be held as evidence to be used in any prosecution or case until the prosecution or case is finally disposed of. Property not of that character or not so used shall be ordered returned to the person entitled to possession of the same. It shall be the duty of the officer, within not less than fifteen nor more than thirty days from the entry of said order, to destroy all property, the destruction of which has been ordered by the court, unless the owner, lessee or person entitled to possession under this law, shall, before the destruction of said property, file a suit to recover same. [Id., p. 110.]

Cited, *Austin v. State*, 61 App. 573, 135 S. W. 1167.

Art. 570. [388m] Persons interested in, rights of.—Any person having interest in, or entitled to possession of, any property seized under this law, shall have the right at any time before the destruction of such property, as in ordinary civil cases, to try the issue of whether or not such property is a gaming table, or bank or device or was used as equipment or paraphernalia of any gambling house, and to recover the possession of the same, and to maintain any other character of suit not inconsistent with this law; and it shall be the duty of the officer having said property in his possession, after notice of the pendency of said suit, to safely keep said property, pending the same. [Id., p. 110.]

Cited, *Austin v. State*, 61 App. 573, 135 S. W. 1167.

Art. 571. [388n] Indictment for, sufficiency of.—In any indictment or information for keeping or exhibiting a gaming table, alley, machine, wheel, device or bank, it shall be sufficient to state that the person accused kept the table, alley, machine, wheel, device or bank for gaming, or exhibited the same for gaming, without giving the name or description thereof and without stating that the table, bank, alley, machine, wheel or gaming device was without any name, or that the same was unknown; and it shall not be necessary in the prosecution to prove that money or other articles of value were won or lost thereon. [Id., p. 110.]

See notes under art. 559, ante.

See, also, Code Cr. Proc. arts. 447-481.

Cited, *Austin v. State*, 61 App. 573, 135 S. W. 1167.

Arts. 572, 573. [389, 390] Superseded. See art. 559, and notes below.

Repeal.—See notes to article 559, ante.

This article was repealed by Act March 28, 1907 (Acts 30th Leg. c. 49). *Robertson v. State*, 70 App. 307, 159 S. W. 713; *Williams v. State*, 71 App. 6, 159 S. W. 732; (overruling *Simons v. State*, 56 App. 339, 120 S. W. 210).

Indictment.—Willson's Cr. Forms, 292-294.

Art. 574. [391] Procedure in gaming cases.—Any court, officer or tribunal, having jurisdiction of the offenses enumerated in this chapter, or any district or county attorney, may subpoena persons and compel their attendance as witnesses to testify as to the violations of any of the provisions of the foregoing articles. Any person so summoned and examined shall not be liable to prosecution for any violation of said articles about which he may testify; and, for any offense enumerated in this chapter, a conviction may be had upon the unsupported evidence of an accomplice or participant.

Constitutionality.—This article is constitutional. *Wright v. State*, 23 App. 313, 5 S. W. 117.

Immunity to persons testifying.—See Code Cr. Proc. arts. 4, 37, 729.

Bettors at the same game are not exempt from testifying. And if they testify under this article they are exempt from prosecution. *Stone v. State*, 3 App. 675. This exemption applies whether the one testifying is or is not under indictment for the offense. *Griffin v. State*, 43 App. 428, 66 S. W. 782. But the protection extended to an offender who testifies, is limited to the identical acts about which he testified, and the burden is upon him, when claiming such protection, to show that he testified about the very act for which he is being prosecuted. *Kain v. State*, 16 App. 282.

Defendant was entitled to prove that he had been summoned and testified before the grand jury as to the violation of the gaming laws, and especially the occurrence for which he was prosecuted. *Griffin v. State*, 43 App. 428, 66 S. W. 782.

Accomplices.—Accomplices in general. See ante, art. 79.

Accomplice testimony in general. See Code Cr. Proc. art. 801.

See, also, notes to article 582, post.

Bettors at the same game are not accomplices, and their testimony needs no corroboration. *Stone v. State*, 3 App. 675; *Razor v. State*, 57 App. 10, 121 S. W. 512.

Art. 575. Betting at baseball or football.—It shall be unlawful for any person in this state to enter into an agreement with another, either orally, written or implied, whereby either one or both shall bet or wager money or anything of value, or otherwise become a party to any gambling scheme based upon the final result or outcome, or any play or portion thereof of a game of baseball, or football; provided, that nothing herein shall prohibit contesting baseball or football teams, or their duly authorized agents or managers from entering into an agreement as to the manner of disposition of gate receipts derived from such games. [Act 1907, p. 222.]

Indictment.—Willson's Cr. Forms, 305b. See, also, Code Cr. Proc. arts. 447-481. Cited, *Barnes v. State* (Cr. App.) 152 S. W. 1043; *Bell v. State* (Cr. App.) 171 S. W. 239.

Art. 576. Punishment for.—Any person found guilty of violating this law shall be subject to a fine of not less than five dollars nor more than one hundred dollars. [Id., p. 222.]

Art. 577. Pool selling or book making.—It shall be unlawful for any person, association of persons, or any corporation to, at any place in this state, engage or assist in pool selling or book making on any horse race, or, by means of any pool selling or book making, to take or accept any bet, or aid any other person in betting or taking or accepting any bet upon any horse race to be run, trotted or paced in this state. [Act 1903, ch. 50. Act 1905, ch. 165. Act 1909, p. 91.]

Constitutionality.—This article is constitutional. Ex parte Hernan, 45 App. 343, 77 S. W. 225; Ex parte Walsh, 59 App. 409, 129 S. W. 118.

Bet.—A "bet" is defined as that which is laid, staked, or pledged as between two persons upon the event of a contract or any contingent issue, the act of giving such a pledge, and to be synonymous with "wager" applied both to the contract of betting and wagering and to the thing or sum bet or wagered. [Citing 1 Words and Phrases, 764.] Ex parte Walsh, 59 App. 409, 129 S. W. 118.

Indictment.—Willson's Cr. Forms, 324. See, also, Code Cr. Proc. arts. 447-481. Cited, Serrato v. State (Cr. App.) 171 S. W. 1133.

Art. 578. Betting on horse racing.—That it shall be unlawful for any person or association of persons, or any corporation, at any place in this state, by pool selling or book making or by means of telegraph, telephone or otherwise, to aid or assist any other person in wagering, betting or placing a bet, or in offering to wager, bet or place a bet of anything of value on any horse race to be run, trotted, or paced at any place in this state or elsewhere. [Act 1909, p. 91.]

Constitutionality.—This article is constitutional. Ex parte Walsh, 59 App. 409, 129 S. W. 118.

Offering or tendering bet.—See notes to article 577, ante.

It was not a violation of the former law to offer or tender a bet. Windsor v. State, 46 App. 140, 79 S. W. 312.

Aiding or assisting.—This article does not attempt to regulate transactions outside the state, but merely to prevent the aiding or assisting of another in betting or placing a bet or in offering to wager or place a bet upon a horse race, the aiding and offering contemplated taking place in the state, and it being immaterial whether the race be run there, or whether it be run at all. Such aiding or assisting and offering to place, and the placing of money with telegraph companies to be wagered on a horse race, are proper objects of police control. Ex parte Walsh, 59 App. 409, 129 S. W. 118.

Art. 579. Owner or lessee using place for pool selling.—It shall be unlawful for the owner, agent or lessee of any property in this state to permit the same to be used as a place for selling pools, or book making, or wagering, or receiving or assisting any person in placing any bet of, or in receiving or transmitting any offer to bet, anything of value on any horse race to be run, trotted or paced at any place in this state or elsewhere. [Id., p. 91.]

Indictment.—Willson's Cr. Forms, 296. See, also, Code Cr. Proc. arts. 447-481.

Art. 580. Penalty for three preceding articles.—Any person, violating any one of the provisions of articles 577, 578 and 579, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than ninety days. And any corporation holding a charter, or foreign corporation holding a permit, to do business in this state, which shall violate any of said provisions of articles 577, 578 and 579, shall thereby forfeit its charter or permit to do business in this state, as the case may be, and, in addition thereto, shall be liable to the state for a penalty of not less than two hundred nor more than five hundred dollars; and the person or persons, acting for said corporation in the violation of any of the provisions of either of said articles, shall, upon conviction, be punished by a fine of not less than two hundred nor more than five hundred dollars, and by imprisonment in the county jail for not less than thirty days nor more than ninety days. [Id., p. 91.]

Art. 581. Buying pools, penalty for.—If any person shall, at any place in this state, buy pools or otherwise wager anything of

value on any horse race to be run, trotted or paced, at any place in this state or elsewhere, or shall offer to wager, or shall offer to place any money or other thing of value with any other person, to be transmitted to any other place, to be wagered on any such horse race, he shall, upon conviction, be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars. [Id., p. 91.]

Constitutionality.—This section is not violative of Const. art. 3, § 35. *Ex parte Walsh*, 59 App. 409, 129 S. W. 118.

Indictment.—Willson's Cr. Forms, 130, 295. See, also, Code Cr. Proc. arts. 447-481.

Art. 582. Evidence sufficient to convict.—A conviction for the violation of any of the provisions herein may be had upon the unsupported evidence of an accomplice or participant, and such accomplice or participant shall be exempt from prosecution for any offense under this law about which he may be required to testify. [Id., p. 91.]

See notes to article 574, ante.

Immunity to witness in general.—See Code Cr. Proc. arts. 4, 37, 729.

Materiality of testimony.—An indictment for perjury committed by defendant, in testifying before the grand jury that he had not played any card games, was not subject to a motion to quash on the ground that his statement could not have concerned a material inquiry because of the provision in this article, that any person examined before a grand jury shall not be liable to prosecution for any offense about which he may be required to testify. *Bell v. State* (Cr. App.) 171 S. W. 239.

Unsupported evidence of accomplice.—The error, if any, in allowing one of two witnesses, testifying that they and accused gambled on the occasion in question, to state, that he had pleaded guilty to gaming was not prejudicial to accused. *Sparks v. State*, 64 App. 610, 142 S. W. 1183.

CHAPTER FIVE

NEGLECT OF OFFICERS TO ARREST OR PROSECUTE IN GAMING CASES

<p>Art. 583. Justice of the peace, etc., failure to prosecute. 584. Peace officer failing to inform.</p>	<p>Art. 585. "Offense against gaming laws" defined.</p>
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Article 583. [392] Justice of the peace, etc., failing to prosecute.—If any justice of the peace, mayor or recorder, shall know the fact that an offense against the gaming laws has been committed by any person, and shall fail or neglect to cause such person to be arrested and prosecuted for the same, he shall be punished by fine not less than twenty-five nor more than one hundred dollars. [Act February 12, 1858, p. 167.]

Cited, *Dodson v. State* (Cr. App.) 174 S. W. 1048.

Indictment.—Willson's Cr. Forms, 298. See, also, Code Cr. Proc. arts. 447-481.

Art. 584. [393] Peace officer failing to inform.—If any peace officer shall know that any person has committed an offense against the gaming laws, and shall neglect or fail to give information thereof to some justice of the peace, mayor or recorder, having jurisdiction to try such offense, he shall be punished by fine not less than twenty-five nor more than one hundred dollars. [Act February 12, 1858, p. 167.]

Indictment.—Willson's Cr. Forms, 299. See, also, Code Cr. Proc. arts. 447-481.

Art. 585. [394] "Offense against gaming laws" defined.—By the term "offense against the gaming laws," as used in the two preceding articles, is meant any offense included within the provisions of chapter three of this title. [Act February 12, 1858, p. 167.]

CHAPTER SIX

BETTING ON ELECTIONS

Art.
586. Penalty.
587. "Public election" defined.

Art.
588. What "bet or wager" includes.

Article 586. [395] Penalty.—If any person shall, whether before or after the happening of any public election held under authority of law within any election precinct of this State for any purpose whatever, wager or bet in any manner whatever upon the result of any such election, he shall be fined not less than One Hundred Dollars nor more than One Thousand Dollars, or by confinement in the county jail for not less than twenty nor more than sixty days, or by both such fine and imprisonment. [Act Feb. 12, 1858, p. 167; Act 1915, p. 37, ch. 22, § 1, amending art. 586, Penal Code 1911.]

Elections to which applicable.—This article applies only to elections held in this state. *Covington v. State*, 28 App. 225, 14 S. W. 126.

Stakeholder as accomplice.—See notes under article 79, ante.

Indictment.—Willson's Cr. Forms, 304-305a.

The day election was held or to be held must be alleged. If two or more are jointly indicted for betting together, it should be so alleged. If for jointly betting with some other person, so allege, naming the person, or alleging that his name is to the grand jurors unknown, if such be the fact. If it is intended to charge the defendants severally, and not jointly, the indictment should allege that they "did severally bet," etc. *Lewellen v. State*, 18 Tex. 538. It is sufficient to allege a bet, without alleging that anything of value was bet. *Long v. State*, 22 App. 194, 2 S. W. 541, 58 Am. Rep. 633.

Evidence.—On trial for betting on the result of a public election between two candidates, the evidence should show whether the election was for city or county officers, or whether it was a special election, and should show for what office the parties were candidates. *Rich v. State*, 38 App. 199, 42 S. W. 291, 38 L. R. A. 719.

Art. 587. [396] "Public election" defined.—A public election, within the meaning of the preceding article, is any election held under authority of law in any election precinct in this State for any purpose whatever. [Act 1915, p. 37, ch. 22, § 2, amending art. 587, Pen. Code 1911.]

Indictment.—Willson's Cr. Forms, 304-305a.

Art. 588. [397] What "bet or wager" includes.—The bet or wager may be of money or of any article of value, and any device in the form of purchase or sale or in any other form made for the purpose of concealing the true intention of the parties, is equally within the meaning of a bet or wager.

See notes to article 557, ante.

Indictment.—Willson's Cr. Forms, 305a.

CHAPTER SEVEN

UNLAWFULLY SELLING INTOXICATING LIQUOR

Art. 589. Pursuing occupation in local option districts, punishment for.	Art. 598. Preceding article shall not apply, when.
590. United States revenue license prima facie proof of.	599. Failure to cancel prescription.
591. What constitutes pursuing occupation of.	600. Giving prescription illegally.
592. Selling to wild Indians.	601. "Blind tiger" defined, penalty for, procedure against.
593. Giving or delivering to minors.	602. Repeal of law does not exempt offender, offender not an accomplice.
593a. Sale or other disposition of liquors in bawdy houses.	603. Entries in book of internal revenue collector admissible in evidence.
593b. Same; definition of terms.	604. Person, firm or association engaged in business of keeping and storing intoxicating liquor.
593c. Same; incriminating testimony.	605. Penalty for.
594. Selling and permitting same to be drunk on premises.	
595. Selling to habitual drunkards.	
596. "Habitual drunkard" defined.	
597. Selling in prohibited districts.	

Art.	Art.
606. Shipping intoxicating liquor, words to be placed on package.	606j. Shipment to licensed dealers not prohibited.
606a. Delivery of liquor for shipment within state.	606k. Wine for sacramental purposes excepted.
606b. Reception of liquor for shipment within state.	606l. Negating exceptions.
606c. Shipment of liquor within state.	606m. Affidavit by persons using liquor for medical, etc., purposes.
606d. Shipment of liquor from without the state to place within the state where sale is prohibited.	606n. Penalties and suits therefor.
606e. Soliciting orders for intoxicating liquors in local option territory.	606o. Violation of act a felony.
606f. Medicinal, mechanical and scientific purposes excepted.	606p. Conviction on testimony of accomplice; exemption from prosecution.
606g. Not applicable to licensed dealer.	606q. Invalidity of part of act.
606h. Proprietors of vineyards not prohibited from shipping grape juice and wine.	607. Evidence where persons are jointly indicted.
606i. Liquors for private use excepted.	608. Members of firm liable personally.
	609. If owner is unknown, person selling is liable.
	610. Procedure in case of firm.

Article 589. Pursuing occupation in local option districts, punishment for.—If any person shall engage in or pursue the occupation or business of selling intoxicating liquors, except as permitted by law, in any county, justice precinct, city, town or subdivision of a county, in which the sale of intoxicating liquor has been or shall hereafter be prohibited under the laws of this state, he or she shall be punished by confinement in the penitentiary not less than two nor more than five years. [Act 1909, p. 284.]

See arts. 597, 598, post. See, also, notes under C. C. P. art. 464. Cited, *Edmanson v. State*, 64 App. 413, 142 S. W. 887.

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1. **In general.**—The law applies to territory that had at a previous election adopted local option. *Beaty v. State*, 72 App. 634, 162 S. W. 877; *Fitch v. State*, 58 App. 366, 127 S. W. 1040; *Slack v. State*, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112; *Dozier v. State*, 62 App. 258, 137 S. W. 679. *Contra*, *Doyle v. State*, 59 App. 60, 127 S. W. 815; *Gonzales v. State* (Cr. App.) 128 S. W. 905.

A conviction in the county court for illegally selling intoxicants in a dry county would not bar a subsequent prosecution for unlawfully pursuing the occupation of selling intoxicants in prohibition territory. *Wilson v. State* (Cr. App.) 154 S. W. 571.

2. **Legislative power.**—The power to legislate for the enforcement of local option laws is not taken away from the Legislature by the adoption of local option, except as to those offenses defined and punishment attached which were in existence when local option was adopted; and, if new offenses grow out of the violation of the local option law, not covered by existing laws, it is the duty of the Legislature to pass efficient laws to meet such emergencies. *Fitch v. State*, 58 App. 366, 127 S. W. 1040.

It is within the power of the Legislature to make the pursuing and engaging in the occupation of retail liquor dealer as a business in local option territory a separate offense from an individual sale of liquor therein, and to prescribe a penalty therefor, and for the enforcement of such penalty in any territory where local option prevails, without reference to when the county has adopted local option. *Mizell v. State*, 59 App. 226, 128 S. W. 125.

The court should not, by construction, take away the power of the Legislature to enact a statute, if it is not inhibited by the Constitution. *Dozier v. State*, 62 App. 258, 137 S. W. 679.

Intoxicating liquors are peculiarly within the control of the police power of the state. *Ex parte Peede* (Cr. App.) 170 S. W. 749.

3. **Constitutionality.**—This article is constitutional. *Fitch v. State*, 58 App. 366, 127 S. W. 1040; *Clark v. State*, 61 App. 597, 136 S. W. 260; *Wilson v. State* (Cr. App.) 154 S. W. 571.

4. **Relation to other statutes.**—The pursuing and engaging in the occupation of retail liquor dealer as a business in local option territory is an offense separate from that of making individual sales of such liquor in local option territory. *Mizell v. State*, 59 App. 226, 128 S. W. 125; *Oliver v. State* (Cr. App.) 152 S. W. 1066; *Kinnebrew v. State* (Cr. App.) 150 S. W. 775; *Byrd v. State* (Cr. App.) 151 S. W. 1068.

This article is not in conflict with art. 496 or art. 611. *Haynes v. State*, 63 App. 181, 139 S. W. 1155.

This article is to be construed in connection with arts. 150 and 597. *Barnes v. State* (Cr. App.) 170 S. W. 548, L. R. A. 1915C, 101.

5. **Election, and contest thereof.**—See Vernon's Sayles' Civ. St. 1914, arts. 5715-5730 and notes.

6. **Offense.**—To constitute an offense the accused must have been engaged in the business of selling intoxicating liquors, and also must have made at least two sales. *Floyd v. State* (Cr. App.) 147 S. W. 264; *Hernandez v. State*, 64 App. 73, 141 S. W. 268; *Thomas v. State* (Cr. App.) 147 S. W. 262; *Molthrop v. State* (Cr. App.) 147 S. W. 1159; *Sain v. State* (Cr. App.) 148 S. W. 566; *Moreno v. State*, 71 App. 460, 160 S. W. 361; *Dawson v. State* (Cr. App.) 164 S. W. 5.

Pursuit of the business or occupation of unlawfully selling intoxicating liquor in prohibition territory does not require that it be the principal business of the defendant. *Campbell v. State* (Cr. App.) 164 S. W. 850; *Clark v. State*, 61 App. 597, 136 S. W. 260; *Creech v. State*, 70 App. 229, 158 S. W. 277; *Moreno v. State*, 71 App. 460, 160 S. W. 361.

Although the statute requires proof of two sales two isolated sales would not, in themselves, without other facts or circumstances, constitute such offense. *Robinson v. State* (Cr. App.) 147 S. W. 245.

The mere delivery of whisky belonging to another to a person who had purchased it from its owner, by one not an owner of it, upon the request of the purchaser to turn it over to him, with no knowledge that a sale had been made, would not make the person delivering a participant in the sale and liable as a seller. *Thomas v. State* (Cr. App.) 147 S. W. 262.

To sustain a conviction the record must show that prohibition was in force in the county at the time of the alleged offense. *Kinnebrew v. State* (Cr. App.) 150 S. W. 775.

A party may be guilty of engaging in the business or occupation of selling intoxicating liquors in local option territory without obtaining a license. *Flowers v. State* (Cr. App.) 152 S. W. 925.

Accused must be engaged in that business as his principal business, or in some way as a business proposition, and it is insufficient that he has intoxicants in his possession and makes several sporadic sales. *Oliver v. State* (Cr. App.) 152 S. W. 1066.

The sale of a pint of whisky on two occasions about two weeks apart would not constitute "engaging in the business" or occupation of selling intoxicants contrary to the statute. *Oliver v. State* (Cr. App.) 152 S. W. 1066.

Where a person made one sale of intoxicating liquor in local option territory without carrying on the business, or without being connected with the ownership of the liquor, or where he aided or abetted the owner to sell, he could not be convicted of pursuing the occupation in local option territory because one sale was insufficient. *Lester v. State* (Cr. App.) 153 S. W. 861.

Where accused made many sales of liquor in connection with the operation of a restaurant, she was properly prosecuted for pursuing the business or occupation of selling intoxicating liquor instead of for making several single sales of liquor. *Moreno v. State*, 71 App. 460, 160 S. W. 361.

7. **Principals and accomplices.**—See post, art. 602; *Creed v. State* (Cr. App.) 155 S. W. 240; *Hightower v. State* (Cr. App.) 165 S. W. 184.

8. **Indictment.**—Willson's Cr. Forms, 315a.

An indictment need not negative exceptions. *Weeks v. State*, 64 App. 445, 142 S. W. 571; *Beaty v. State*, 72 App. 634, 162 S. W. 877; *Slack v. State*, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112; *Jones v. State* (Cr. App.) 174 S. W. 349. Contra, *Keith v. State*, 58 App. 418, 126 S. W. 569; *Sutphen v. State*, 59 App. 500, 129 S. W. 144; *Riggins v. State*, 61 App. 301, 135 S. W. 126.

The statute denouncing the offense of pursuing the business of selling intoxicating liquors in violation of law requiring proof of two sales, the indictment must allege the names of the persons to whom the sales are made. *Whitehead v. State* (Cr. App.) 147 S. W. 583; *Fitch v. State*, 58 App. 366, 127 S. W. 1040; *Murphy v. State*, 59 App. 479, 129 S. W. 138; *Sutphen v. State*, 59 App. 500, 129 S. W. 144; *Flores v. State*, 60 App. 200, 131 S. W. 588; *Jones v. State* (Cr. App.) 174 S. W. 349.

The indictment must allege that at least two sales were made. *Jones v. State* (Cr. App.) 174 S. W. 349; *Fitch v. State*, 58 App. 366, 127 S. W. 1040; *Flores v. State*, 60 App. 200, 131 S. W. 588; *Rhodes v. State* (Cr. App.) 172 S. W. 252.

An indictment was fatally defective where it failed to allege the time and place of the sales. *Murphy v. State*, 59 App. 479, 129 S. W. 138; *Sutphen v. State*, 59 App. 500, 129 S. W. 144.

An indictment which does not aver the fact of any sale or sales by appellant is insufficient. *Flores v. State*, 60 App. 200, 131 S. W. 588; *Sutphen v. State*, 59 App. 500, 129 S. W. 144.

An indictment that, on or about a certain day and year before presentment of the indictment, in a stated precinct and county, without being permitted by law, accused unlawfully engaged in and pursued the occupation and business of selling intoxicating liquors after local option had been adopted is insufficient. *Fitch v. State*, 58 App. 366, 127 S. W. 1040.

The indictment, alleging that accused, on or about December 1, 1909, made two different sales of intoxicating liquor to one Tom Calloway, and on or about said date made other sales of intoxicating liquors in violation of the law to persons to the grand jurors unknown, and did in such county, during the months of August, September, October, November, and December, 1909, and January, 1910, anterior to the presentment of the indictment, make more than at least two sales of intoxicating liquors, sufficiently alleged that as many as two sales were made within three years from the date of the indictment, without expressly stating that they were made within such time. *Mizell v. State*, 59 App. 226, 128 S. W. 125.

An indictment simply alleging that accused "did unlawfully engage in and pursue the occupation and business of selling intoxicating liquors," without naming any persons to whom the intoxicants were sold, or that any intoxicants were sold, was insufficient. *Chapa v. State*, 60 App. 365, 132 S. W. 127.

Where the indictment only charged sales of whisky, the admission of evidence that witness, among other packages delivered to accused, delivered a cask marked "Beer," was not reversible error. *Stephens v. State*, 63 App. 382, 139 S. W. 1141.

An indictment alleging that prohibition had been adopted in F. county, and that thereafter and on specified dates defendant did unlawfully and not as permitted by law engage in the occupation of selling intoxicating liquors in violation of law, and did make certain sales specifically described, at least more than twice, was sufficient. *Stephens v. State*, 63 App. 382, 139 S. W. 1141.

An indictment charged a sale to one "Joy Benge," and on cross-examination accused testified that his name was George, but stated that he was called "Joy" by three persons. Held, insufficient to show that he was commonly known as Joy, or was as well known by that name as by his real name, and that the indictment did not therefore properly allege his name as a purchaser of the liquor. *Roberts v. State* (Cr. App.) 144 S. W. 940.

An indictment, charging accused with selling "spirituous, vinous and malt liquors," is not sufficient, in that it does not allege that the liquors were intoxicating. *Floyd v. State* (Cr. App.) 147 S. W. 264.

While the statute necessitates the allegations of only two sales, proof of other sales is admissible if tending to show a pursuit of the business, and so, where the indictment has alleged the names of two persons to whom sales were made, it is proper for it to generally allege the making of other sales. *Whitehead v. State* (Cr. App.) 147 S. W. 583.

An indictment charging that defendant on or about December 18, 1911, unlawfully engaged in and pursued the occupation of selling intoxicating liquors in violation of law, after the prohibitory law had been theretofore put in force, and that on or about that date he made two different sales of intoxicating liquors to one G., and on or about the same date made other sales to other persons to the grand jury unknown, and during the months of November and December of the year 1911 made more than two sales, was sufficient. *Atkinson v. State* (Cr. App.) 149 S. W. 114.

A person indicted for pursuing the business of selling intoxicating liquors cannot be convicted for making a single sale. *Leonard v. State* (Cr. App.) 152 S. W. 632.

An indictment held sufficient to show that the violation charged occurred while the prohibition law was in force, although it did not allege the time when the order declaring the result and ordering publication was made, or the time when the publication was made. *Leonard v. State* (Cr. App.) 152 S. W. 632.

An indictment which, after alleging that prohibition was in force in a certain county, averred that accused did unlawfully pursue the business of selling intoxicating liquors therein, the same not then and there being permitted, and that he made sales to certain specified persons, is sufficient. *Misher v. State* (Cr. App.) 152 S. W. 1049.

An indictment which averred that an election was held, and it was determined that the sale of liquor should be prohibited, is sufficient, although not averring that the election held was a legal and valid one. *Monroe v. State*, 70 App. 245, 157 S. W. 154.

It need not be proved that the sale of liquor was the principal business of the defendant. *Creech v. State*, 70 App. 229, 158 S. W. 277.

In a prosecution of "James Walter Brown," an examined copy of entries in the books of the internal revenue collector, showing the issuance of a liquor license to James Brown at G., Tex., where accused was engaged in business, was admissible; there being no evidence that there was any other James Brown in that place. *Brown v. State*, 72 App. 33, 160 S. W. 374.

An indictment charging at least two sales within three years from the date of the indictment was sufficient. *Beaty v. State*, 72 App. 634, 162 S. W. 877.

An indictment may charge that a sale was made to the person who received the liquor and paid the price, though others contributed to the price. *Jones v. State* (Cr. App.) 174 S. W. 349.

There is no fatal variance between an indictment alleging that accused pursued the occupation of selling intoxicating liquor and making "two different sales * * * to M. and H.," though construed to charge two sales jointly, and the proof of a separate sale to H., in which M. was interested, because contributing a part of the price, and a sale to M., in which H. was interested, for the same reason. *Jones v. State* (Cr. App.) 174 S. W. 349.

Where an indictment charged that the notice of the result of the election was published the necessary four weeks in a newspaper selected in the manner required by law by the county judge of the county for such publication, and that the selection and publication were duly certified by the county judge, and the certificate entered of record in the minutes of the commissioners, the indictment sufficiently showed that the county judge ordered the publication for the necessary time in a selected newspaper. *Mills v. State* (Cr. App.) 178 S. W. 367.

An indictment that failed to allege that the sale was not permitted by law was not void, and evidence of the commission of the offense was admissible, since it is matter of defense to be shown that the sale was permitted by law; the burden of proof being on defendant to show that he had the legal right to sell intoxicants under the statute. *Mills v. State* (Cr. App.) 178 S. W. 367.

9. Evidence — Presumptions and burden of proof.—See notes under art. 52, ante, and art. 785, C. C. P.

Validity of election, see *Vernon's Sayles' Civ. St.* 1914, art. 5728.

The state must show that local option was in effect. *Lester v. State* (Cr. App.) 153 S. W. 861.

The state need not prove each specific sale alleged, but need only prove that accused followed the business or occupation, and made at least two sales. *Hightower v. State* (Cr. App.) 165 S. W. 184.

The state must prove at least two sales to persons named in the indictment. *Rhodes v. State* (Cr. App.) 172 S. W. 252.

10. — **Admissibility.**—See notes under art. 783, C. C. P.

Evidence of other sales than those alleged is admissible to show that accused was engaged in the occupation of selling intoxicants. *Wilson v. State* (Cr. App.) 154 S. W. 571; *Clay v. State* (Cr. App.) 144 S. W. 280; *Byrd v. State* (Cr. App.) 151 S. W. 1068; *Mitchell v. State*, 71 App. 185, 159 S. W. 1073; *Brown v. State*, 72 App. 33, 160 S. W. 374.

Testimony of an express agent as to shipments to accused held admissible. *Clark v. State*, 61 App. 597, 136 S. W. 260; *Dawson v. State* (Cr. App.) 164 S. W. 5.

The state was properly permitted to show the amount of liquor received by accused and that it was delivered at the place where he carried on the business. *Byrd v. State* (Cr. App.) 151 S. W. 1068.

The refusal to permit accused to show that it was the custom of patrons of his place of business to have him order intoxicating liquors for them was proper where each witness called to testify was permitted to state whether or not he had requested accused to order liquor for him. *Byrd v. State* (Cr. App.) 151 S. W. 1068.

Express books and entries therein held sufficiently identified, and accused's connection therewith and signatures thereto sufficiently proven to justify the admission of the books in evidence. *Leonard v. State* (Cr. App.) 152 S. W. 632.

Where witnesses testified as to their purchase of intoxicants, but could not fix the date as before or after prohibition went into effect, other evidence to fix the date as after the time when prohibition went into effect is admissible, particularly where the witnesses were unwilling. *Misher v. State* (Cr. App.) 152 S. W. 1049.

Evidence that large quantities of intoxicating liquors were hauled to the barn of accused's employer, and that accused was present and assisted in placing them therein, and that the liquors were carried from the barn to the bar of the hotel which accused managed for his employer, and that he sold them indiscriminately, is proper to be considered by the jury. *Creed v. State* (Cr. App.) 155 S. W. 240.

Evidence that drunken people were frequently seen in defendant's place of business was admissible. *Brown v. State*, 72 App. 33, 160 S. W. 374.

The books of express companies, showing the quantity of liquor received by accused prior to the return of the indictment, and during the time he was alleged to have been engaged in the prohibited business were admissible. *Brown v. State*, 72 App. 33, 160 S. W. 374.

Testimony that defendant at various other times, after selling to witness, solicited him to make purchases is admissible. *Harris v. State*, 72 App. 117, 161 S. W. 125.

Evidence of whisky and alcohol being frequently shipped and delivered to defendant is admissible. *Miller v. State*, 72 App. 151, 161 S. W. 128.

Evidence of other sales should be confined to the time subsequent to the publication of the order made by the judge after the prohibition election, where such time is within three years prior to the indictment. *Rhodes v. State* (Cr. App.) 172 S. W. 252.

The original records showing that local option is in force in a county are admissible, without having given notice. *Jones v. State* (Cr. App.) 174 S. W. 349.

It was error to admit testimony by the county attorney that a paper, which a United States revenue agent had dropped and which the attorney picked up, was an application signed by defendant for an internal revenue license to sell liquor, without a showing that the paper had been lost or destroyed. *Barnes v. State* (Cr. App.) 174 S. W. 1051.

Testimony by the county attorney that he told a United States revenue agent, out of the presence of the defendant, that he thought the agent could sell a liquor license to defendant, was inadmissible. *Barnes v. State* (Cr. App.) 174 S. W. 1051.

The testimony of a witness that he met accused and asked for whisky, that accused said he would try and get some whisky, and that a little later the witness found a bottle in his wagon, was admissible; the witness having no other person to procure whisky for him. *Jackson v. State* (Cr. App.) 178 S. W. 521.

11. — **Sufficiency.**—Evidence held sufficient. *Arias v. State* (Cr. App.) 174 S. W. 340; *Mills v. State* (Cr. App.) 178 S. W. 367; *Dawson v. State* (Cr. App.) 164 S. W. 5; *Callicoate v. State*, 61 App. 420, 135 S. W. 124; *Dozier v. State*, 62 App. 258, 137 S. W. 679; *Hernandez v. State*, 64 App. 73, 141 S. W. 268; *Craft v. State* (Cr. App.) 147 S. W. 1163; *Atkinson v. State* (Cr. App.) 149 S. W. 114; *Leonard v. State* (Cr. App.) 152 S. W. 632; *Thompson v. State*, 72 App. 6, 160 S. W. 685; *Waits v. State* (Cr. App.) 171 S. W. 708; *Robertson v. State* (Cr. App.) 178 S. W. 1191.

Evidence held insufficient. *Floyd v. State* (Cr. App.) 147 S. W. 264; *Thompson v. State*, 57 App. 408, 123 S. W. 593; *Thomas v. State* (Cr. App.) 147 S. W. 262; *Molthrop v. State* (Cr. App.) 147 S. W. 1159.

Evidence held to sufficiently establish defendant's identity as the person by whom the liquor was sold and to sustain a conviction. *Craig v. State*, 62 App. 299, 137 S. W. 667.

Proof of several sales of intoxicating liquors by accused, and that about that time he received, by express, 84 quarts of whisky, was sufficient to support a finding that he was engaged in the business of selling. *Robinson v. State* (Cr. App.) 147 S. W. 245.

Proof of two or even three isolated sales of intoxicating liquors is insufficient. *Whitehead v. State* (Cr. App.) 147 S. W. 583.

Evidence held sufficient to show that the signatures for shipments by express of intoxicating liquors were the genuine signatures of accused, and that he received the liquors. *Leonard v. State* (Cr. App.) 152 S. W. 632.

Proof of two illegal sales is sufficient to support a conviction, although a greater number have been alleged in the indictment. *Misher v. State* (Cr. App.) 152 S. W. 1049.

Evidence held to show a sale of whisky to J., and not to show that accused was merely acting as J.'s agent in ordering the whisky for him. *Hightower v. State* (Cr. App.) 165 S. W. 184.

12. **Questions for jury.**—See notes under art. 786, C. C. P.

Evidence held sufficient to go to the jury. *Johnson v. State* (Cr. App.) 150 S. W. 1175; *Cole v. State* (Cr. App.) 162 S. W. 880.

Evidence held to make it a jury question as to whether a certain person was an accomplice. *Hightower v. State* (Cr. App.) 165 S. W. 184.

13. **Instructions.**—See notes under arts. 735-743, C. C. P.

The court should charge that, though the jury might find that accused was following the business and occupation of selling intoxicating liquors, they could not convict him unless the state should prove to their satisfaction, beyond a reasonable doubt, that accused while pursuing such occupation and business had made at least two or more sales within three years. *Mizell v. State*, 59 App. 226, 128 S. W. 125.

A charge held not argumentative nor on the weight of the evidence. *Clark v. State*, 61 App. 597, 136 S. W. 260.

A charge that in order to constitute engaging in or pursuing the occupation of selling intoxicating liquor it is necessary for the state to prove beyond a reasonable doubt that the defendant unlawfully followed that business, places a greater burden on the state than the law requires, and was not prejudicial to defendant. *Clark v. State*, 61 App. 597, 136 S. W. 260.

A charge that if the jury believed that accused unlawfully engaged in, and pursued, the occupation or business of selling intoxicating liquors, as alleged in the indictment, and at or about the date mentioned in the indictment made at least two different sales of intoxicating liquors to the parties named in the indictment, they should find the defendant guilty, is proper, not authorizing a conviction for two sales unless accused was also engaged in the business of selling, and not being a charge on the weight of evidence. *Dickson v. State* (Cr. App.) 146 S. W. 914.

Where accused claimed that he merely ordered the liquor for others, a charge that if he ordered the liquor for the accommodation and as the agent of the purchasers, and not as the seller's agent, such transactions would not be sales, was proper in connection with the further charge that the jury must find beyond a reasonable doubt that accused was pursuing such business, and had made at least two sales. *Dickson v. State* (Cr. App.) 146 S. W. 914.

An instruction that it was not necessary that a party should make a profit in his business in order to be guilty of pursuing the occupation of selling intoxicating liquors was not an improper limitation on the meaning of the words, "occupation" or "business," as used in the statute, and was proper where the evidence showed that accused would order whisky for his store customers, and charge it in their store account at cost to be paid when the rest of the account was paid, since each of these transactions constituted a sale. *Dickson v. State* (Cr. App.) 146 S. W. 914.

An instruction that it was necessary to show that defendant made at least two sales of intoxicating liquor within three years preceding the indictment was erroneous for failure to define what constitutes engaging in or pursuing the business of selling intoxicating liquors. *Floyd v. State* (Cr. App.) 147 S. W. 264.

An instruction that the state must prove beyond a reasonable doubt that defendant unlawfully engaged in or pursued the occupation or business of selling intoxicating liquors in J. county at the time alleged in the indictment, and that the sales, if any, were made to G. as alleged prior to January 5, 1912, when the indictment was filed, and that defendant pursued such business as a business or calling and for profit or gain, and that at least two sales were made by him, and unless the jury so believed beyond a reasonable doubt they should acquit, properly defined the offense. *Atkinson v. State* (Cr. App.) 149 S. W. 114.

Where the state's witnesses testified that they bought intoxicating wine from accused, while she claimed that the beverage was grape juice made by boiling the juice of the grape, and was not intoxicating, she was entitled to an affirmative instruction that if the jury believed from the evidence that the beverage was grape juice, and would not intoxicate, or if they had a reasonable doubt of that fact, they must acquit. *Mollenkopf v. State* (Cr. App.) 151 S. W. 799.

An instruction that it was necessary to prove that accused made at least two sales, and that by the term "business and occupation" was meant a calling, trade, or vocation which one engages in to make a living or obtain wealth was misleading, in that it authorized an inference that proof of two sales in and of itself would constitute a business or occupation, and that the latter part of the charge was a definition more burdensome on the state and more favorable to accused than required by the statute creating the offense, it being only essential, to establish engaging in the business or pursuing the occupation of selling whisky, that the state prove that accused kept in her possession whisky for sale, and that she actually made two sales within the time specified in the statute. *Mollenkopf v. State* (Cr. App.) 151 S. W. 799.

Where the indictment alleged that accused pursued the occupation and on or about a designated date made different sales of liquor to third persons, and the evidence only established a sale to one of them not made directly by accused, and there was nothing to show that accused was a partner of any of the parties actually making a sale, or that he had any connection with them, a charge that if accused by agent, employé, or partner, while pursuing the business, made as many as two different sales to persons, he should be convicted, was erroneous. *Lester v. State* (Cr. App.) 153 S. W. 861.

Charges that in order to constitute "engaging in the business of selling intoxicants," the state must prove that accused had made at least two sales of intoxicating liquors within the period of limitation; and that in order to constitute engaging in said occupation or business, the state must prove that accused unlaw-

fully engaged in and followed said occupation between the dates stated, that he unlawfully made at least as many as two sales of intoxicants between said dates, were not on the weight of the evidence. *Wilson v. State* (Cr. App.) 154 S. W. 571.

An instruction that the terms "occupation" and "business" meant trade, calling, or vocation in which one engages to procure a living or obtain wealth, was a sufficient definition of the term "occupation." *Anderson v. State*, 70 App. 250, 157 S. W. 150.

Since the mere making of two or more sales in itself does not constitute the offense of pursuing the business of selling intoxicating liquors, an instruction by which the court made that the test of whether accused was pursuing the business or occupation of selling intoxicating liquors, and which did not clearly charge that the jury must believe from all the evidence that he pursued that business or occupation, and in addition thereto made at least two sales, was erroneous. *Bird v. State*, 70 App. 515, 157 S. W. 479.

Where the sheriff testified to finding whisky under the floor of accused's house, while she testified that she had rented that room to J., that he was occupying it, and that she did not know the whisky was there, an instruction that the jury could consider the testimony relative to the finding of the whisky in determining whether or not she was prosecuting such business was erroneous; and the court should have charged that if the whisky was owned by J., or by some person other than accused, and was placed there without her knowledge or consent, it could not be considered against her for any purpose, but that if the jury believed it belonged to and was placed there by her or with her knowledge it might be considered. *Creed v. State*, 71 App. 509, 160 S. W. 468.

The court charged that if the jury believed that accused acted only as agent in procuring certain whisky for J., she would not be guilty of making a sale thereof, but refused a charge that if she acted only as agent, such act could not be considered as evidence that she was engaged in the business. Held, that the refusal of such instruction was error. *Creed v. State*, 71 App. 509, 160 S. W. 468.

The charge does not authorize a conviction for making two sales; it instructing that the jury must believe beyond a reasonable doubt that defendant was pursuing the occupation and made two sales to the person named in the indictment, or they would acquit, and then defining occupation in an unobjectionable way. *Miller v. State*, 72 App. 151, 161 S. W. 128.

Failure to define the meaning of "engaging in or pursuing the occupation or business" of selling intoxicants would be favorable to accused, so that he could not complain thereof; since, without definition, the jury would naturally understand that the term meant the pursuit of the business as a vocation to procure a living or obtain wealth. *Hightower v. State* (Cr. App.) 165 S. W. 184.

The requested charge that by the term "pursuing the occupation" of selling intoxicants in prohibition territory was meant that accused was engaged in selling intoxicants as her chief business and occupation, and was engaged therein for the purpose of making a living or obtaining wealth, was properly refused as inaccurate. *Hightower v. State* (Cr. App.) 165 S. W. 184.

An instruction held not objectionable on the ground that it did not sufficiently define the offense charged. *Hightower v. State* (Cr. App.) 165 S. W. 184.

An instruction held not objectionable upon the ground that it permitted a conviction on proof of two separate and distinct sales. *Hightower v. State* (Cr. App.) 165 S. W. 184.

The court should define "engaging in or pursuing the occupation or business of selling intoxicating liquors." *Hightower v. State* (Cr. App.) 165 S. W. 184.

The instructions should have been to convict, if defendant pursued the business at any time prior to the indictment and subsequent to the date of the publication of the order following the prohibition election, where that date was within three years before the filing of the indictment, and the court should instruct the jury to convict defendant if he pursued the business within three years prior to the indictment. *Rhodes v. State* (Cr. App.) 172 S. W. 252.

Defendant is entitled to an instruction that the state must prove at least two sales to persons named in the indictment. *Rhodes v. State* (Cr. App.) 172 S. W. 252.

Requested charge that the term "occupation" or "business" means vocation, trade, calling, the business in which one engages to procure a living or wealth, is properly refused. *Jackson v. State* (Cr. App.) 178 S. W. 521.

In a prosecution for violating the local option law, an instruction that if the jury believed beyond a reasonable doubt that accused sold intoxicating liquor, honestly believing that it was not intoxicating when drunk in reasonable quantities, he would not be guilty, sufficiently presented the question of good faith and mistake of fact by accused. *Deadweyler v. State*, 121 S. W. 863.

In a prosecution for engaging in the occupation of retail liquor dealer as a business in local option territory, the court should charge that, though the jury might find that accused was following the business and occupation of selling intoxicating liquors, they could not convict him unless the state should prove to their satisfaction, beyond a reasonable doubt, that accused while pursuing such occupation and business had made at least two or more sales within three years. *Mizell v. State*, 128 S. W. 125.

Art. 590. United States revenue license prima facie proof of.—

In prosecutions under this law, where it is proven that there is posted up at the place where such intoxicating liquor is being sold, United States internal revenue liquor or malt license, to any one, it shall be prima facie proof that the person to whom such license

is issued is engaged in and is pursuing the business and occupation of selling intoxicating liquors within the meaning of this law. [Id., p. 284.]

See notes under art. 597, post.

Cited, *Slack v. State*, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112.

Art. 591. What constitutes pursuing occupation of.—In order to constitute the engaging in or pursuing the occupation of business of selling intoxicating liquors, within the meaning of this law, it shall be necessary for the state to prove in all prosecutions hereunder, that the defendant made at least two sales of intoxicating liquor within three years next preceding the filing of the indictment. [Id., p. 284.]

See notes under article 589, ante.

Indictment and proof thereunder.—Where an indictment for selling liquor in local option territory charged that defendant was engaged in the business and in pursuit thereof made two sales to one D., as well as to other persons unknown, the admission of testimony of R. that he bought whisky from the defendant was proper; there being two elements of the offense—that accused was engaged in the business of selling intoxicants in prohibited territory, and that he made at least two sales. *Mills v. State* (Cr. App.) 178 S. W. 367.

Art. 592. [398] Selling liquor to wild Indians.—If any person shall sell, give or barter, or cause to be sold, given or bartered, any ardent spirits, or any spirituous or intoxicating liquors, or fire-arms, or ammunition, to any Indian of the wild or unfriendly tribes, he shall be fined not less than ten nor more than one hundred dollars. [Act Oct. 31, 1866, p. 71.]

Indictment.—Willson's Cr. Forms, 306.

Art. 593. [400] Giving or delivering to minors.—Any person who shall give or deliver, or cause to be given or delivered, or be in any way concerned in the gift or delivery of any spirituous, vinous, malt or intoxicating liquors to any person under the age of twenty-one years, whether consigned to such person or to some other person, without the written consent of the parent or guardian of such person who is under the age of twenty-one years, shall be guilty of a misdemeanor, and, upon conviction therefor, shall be fined not less than twenty-five nor more than one hundred dollars; and any person who, as agent for or employed by an express company or other common carrier, or who, as agent for or employé of any other person, firm or corporation, delivers, or causes to be delivered, any spirituous, vinous, malt or intoxicating liquors to any person under the age of twenty-one years, whether consigned to such person or to some other person, without the written consent of the parent or guardian of such minor, shall be guilty of a misdemeanor, and shall be punished, upon conviction therefor, by a fine of not less than twenty-five nor more than one hundred dollars. [Act 1897, ch. 32; Act 1907, ch. 116. Amended, Act 1909, p. 119.]

See, also, post, arts. 622 and 1054.

Cited, *Bell v. State*, 62 App. 242, 137 S. W. 670, 36 L. R. A. (N. S.) 98, Ann. Cas. 1913C, 617; *Forester v. State*, 72 App. 298, 162 S. W. 507.

Explanatory.—This article is in the language of the original session laws. The same act was changed in language somewhat and inserted in the revised Penal Code as art. 1054. The act from which arts. 593 and 1054 were constructed seems to have been superseded by Acts 1909, 1st S. S. p. 307. See note under art. 1054, post.

In general.—*Reed v. State* (Cr. App.) 29 S. W. 1074.

The ante-bellum offense of selling liquor to a slave without a permit assimilates to this. Under *Hartley's Digest*, art. 454, punishing selling to a slave, proof of giving away would not sustain a conviction, *Allen v. State*, 14 Tex. 633; and (under O. & W., art. 688) if the sale or gift was with the consent or upon the order of another, it was the duty of the person making the sale or gift to know that the other was the "master, overseer, or employer." A white man could, however, buy the liquor in good faith and without collusion, and give it to a slave in the presence of the seller, without criminating the latter. *Smith v. State*, 24 Tex. 547. The particular transaction must have been identified in the indictment,

and if the name of the slave was unknown, the name of the master, etc., should be stated, or other facts sufficient to fix the identity. *State v. Shwartz*, 25 Tex. 764.

As to selling and permitting to be drunk on premises, see *Ezzell v. State*, 29 App. 521, 16 S. W. 782.

This article construed in connection with arts. 622 and 1054. *Talley v. State* (Cr. App.) 147 S. W. 255.

The offense mentioned in this article and that of selling to a minor are distinct. *Dickerson v. State*, 72 App. 293, 162 S. W. 871.

A loan of whisky to a minor, which is subsequently repaid, is a "sale," especially in local option territory. *Jenkins v. State*, 70 App. 138, 155 S. W. 531.

Knowledge of minority.—Knowledge on the part of the defendant that the person to whom he sold the liquor was, at the time of the sale, a minor, is an essential element of this offense. *Hunter v. State*, 18 App. 444, 51 Am. Rep. 319; *Pressler v. State*, 13 App. 95; *Henderson v. State*, 37 App. 79, 38 S. W. 617; *Williams v. State*, 23 App. 70, 3 S. W. 661; *Sears v. State*, 35 App. 442, 34 S. W. 124; *Gray v. State*, 44 App. 470, 72 S. W. 169; *Ferguson v. State*, 50 App. 155, 95 S. W. 111.

Consent of parent or guardian.—Consent is defensive matter. *Kuhn v. State*, 34 App. 85, 29 S. W. 272.

The sale must be backed by a written consent of some person authorized to give such permission. The fact that the minor had neither parents nor guardian, will not relieve the seller. *Herchenbach v. State*, 34 App. 122, 29 S. W. 470.

A stepfather can give written consent to sale of liquor to minor stepson, so as to exempt seller from punishment, even though the mother protests against such sale. *Welch v. State*, 46 App. 528, 81 S. W. 50.

Principals and accomplices.—Where defendant, a saloon keeper, was actually present and knew that one purchasing liquor was making the purchase for a minor who there paid the money to the intermediary, who in turn paid it to defendant, defendant was liable as principal for a sale to a minor. *Starling v. State*, 34 App. 295, 30 S. W. 445.

A purchaser of liquors sold in violation of law is not an accomplice of the seller. *Sears v. State*, 35 App. 442, 34 S. W. 124.

A sale by an agent, acting within the scope of his agency, makes a prima facie case against the dealer. *Ollre v. State*, 57 App. 520, 123 S. W. 1116.

But a dealer is not liable for a sale at his place of business by one who assumes to be, but is not his agent, or by agent who sells in violation of his orders. *Id.*

Indictment.—*Willson's Cr. Forms*, 312.

It must be alleged that defendant knowingly sold the liquor to a minor. *Pressler v. State*, 13 App. 95; *Henderson v. State*, 37 App. 79, 38 S. W. 617.

Indictment held sufficient. *Hunter v. State*, 18 App. 444, 51 Am. Rep. 319.

It must be alleged that defendant made the sale without the written consent of the parent or guardian of such minor, or some one standing in their place or stead. If the word "father" be used in the indictment in place of the word "parent," such indictment will be bad. *Lantzmaster v. State*, 19 App. 320.

A person can be convicted of giving intoxicating liquors to a minor on a complaint charging the selling and giving of such liquors to a minor, regardless of whether or not the local option law was in force in the county. *Ex parte Casens*, 57 App. 377, 122 S. W. 888.

Where defendant was indicted under art. 1054, a finding of guilty under this article was reversible error. *Williams v. State* (Cr. App.) 145 S. W. 612.

Where the evidence, under an indictment for giving intoxicating liquors to a minor without the consent of his parent or guardian, showed only a loan or sale, which the court instructed came within the statute, there was a variance, requiring the reversal of a conviction. *Jenkins v. State*, 70 App. 138, 155 S. W. 531.

Evidence.—Evidence held insufficient to sustain a conviction. *Simpson v. State* (Cr. App.) 151 S. W. 303.

Evidence held not to support a conviction. *Turley v. State*, 59 App. 156, 127 S. W. 835.

Evidence in a prosecution for knowingly giving and delivering intoxicating liquor to a minor held insufficient to support a conviction. *Ethridge v. State*, 63 App. 662, 141 S. W. 89.

Defendant's knowledge at the time that the purchaser was a minor may be proved by circumstances. *Hunter v. State*, 18 App. 444, 51 Am. Rep. 319; *Sears v. State*, 35 App. 442, 34 S. W. 124; *Williams v. State*, 23 App. 70, 3 S. W. 661; *Ferguson v. State*, 50 App. 155, 95 S. W. 111.

Knowledge of the purchaser's minority must be proved, and merely proving that the buyer was sixteen years old is not sufficient. *Henderson v. State*, 37 App. 79, 38 S. W. 617.

A witness may testify to the physical marks of age of the alleged minor, but not as to how, in his opinion, such physical marks would impress others. *Walker v. State*, 25 App. 448, 8 S. W. 644; *Garner v. State*, 28 App. 561, 13 S. W. 1004; *Waldstein v. State*, 29 App. 82, 14 S. W. 394; *Yakel v. State*, 30 App. 391, 17 S. W. 943, 20 S. W. 205.

Sufficiency of evidence. See *Wakefield v. State* (Cr. App.) 28 S. W. 470.

Defendant must show proper written consent of parents. *Kuhn v. State*, 34 App. 85, 29 S. W. 272.

Evidence held sufficient to show sale to a minor. *Horsky v. State* (Cr. App.) 36 S. W. 443; *Sears v. State*, 35 App. 442, 34 S. W. 124.

When the evidence shows a sale by an employé it must further show that defendant acquiesced in the sale. *Freedman v. State*, 37 App. 115, 38 S. W. 993.

Evidence of sales to other minors is inadmissible. *Freedman v. State*, 37 App. 115, 38 S. W. 993.

Instructions.—Charge of court authorizing conviction if defendant “was instrumental or in any way concerned in giving liquor to a minor” was erroneous. *Walker v. State*, 57 App. 172, 122 S. W. 395.

Art. 593a. Sale or other disposition of liquors in bawdy houses.—That if any person, whether the owner, lessee, manager, house-keeper, proprietor, servant, agent, employé, inmate, visitor or any other person shall sell, give away or drink, or permit to be sold, given away or drunk, any spirituous or vinous or malt liquors, whether capable of producing intoxication or not, in any bawdy house, disorderly house or assignation house, shall be guilty of a misdemeanor, and upon conviction such person or persons shall be punished by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days, and by a fine of not less than fifty nor more than five hundred dollars. [Act 1911, p. 23, ch. 15, § 1.]

Keeping disorderly house, see art. 496 et seq.

Instructions.—An instruction was not affirmatively erroneous for authorizing a conviction whether accused knew the intoxicants were given away or not, where all the evidence showed that she did know such fact, and had herself often drunk on the premises. *Forester v. State*, 72 App. 298, 162 S. W. 507.

Art. 593b. Same; definition of terms.—For the purposes of this Act a bawdy house is one kept for prostitution, or where prostitutes are permitted to resort for the purpose of plying their vocation.

A disorderly house is an assignation house or any theater or any play house or house or place where prostitutes or lewd women or women of bad reputation for chastity are employed, kept in service, or permitted to resort or permitted to display or conduct themselves in a lewd or lascivious or indecent manner.

An assignation house is a house or room or place where men and women meet by appointment made by themselves or by another for the purpose of sexual intercourse. [Id., § 2.]

Art. 593c. Same; incriminating testimony.—No person shall be exempt from giving testimony in any proceeding for the enforcement of this Act, but the testimony given by a witness shall not be used against him or her, in any criminal action or proceeding, nor shall any criminal action or proceeding be brought against such witness on account of any testimony so given by him or her. [Id., § 3.]

Art. 594. [401] Selling and permitting the same drunk on premises.—If any person or firm shall sell, or be in any way concerned in selling, spirituous, vinous or other intoxicating liquors in quantities of a quart or more, and shall permit the same to be drunk at the place or establishment where sold, or at any other place provided by said person or firm for that purpose, he or they shall be punished by fine not less than fifty nor more than two hundred and fifty dollars. [Act Feb. 12, 1858, p. 168.]

In general.—*Burch v. Republic*, 1 Tex. 608; *Needham v. State*, 19 Tex. 332; *Cain v. State*, 20 Tex. 355; *Tardiff v. State*, 23 Tex. 169; *Cochran v. State*, 26 Tex. 678; *Hewitt v. State*, 25 Tex. 722; *State v. Wilburn*, 25 Tex. 738; *Brown v. State*, 27 Tex. 335; *Alexander v. State*, 29 Tex. 495; *Lacy v. State*, 32 Tex. 227; *New v. State*, 34 Tex. 100; *Curry v. State*, 35 Tex. 364; *State v. Terry*, 35 Tex. 366; *Manning v. State*, 36 Tex. 670; *Gorman v. State*, 38 Tex. 165; *Countz v. State*, 41 Tex. 50; *State v. Heldt*, 41 Tex. 220.

This article has survived all the mutations of legislation since the war (*State v. Smith*, 35 Tex. 132; *May v. State*, 35 Tex. 650; *State v. Perry*, 44 Tex. 100), but until July 24, 1879, was inoperative for want of a penalty. *Smith v. State*, 7 App. 286.

Offense.—The gist of this offense is selling liquor in quantities of a quart or more and allowing it to be drunk on the premises where sold. If the parties regarded the quantity sold as a quart, it is immaterial if it was not an exact quart, if it approximated it. *Scott v. State*, 25 Tex. Supp. 168. When an act is done on a man's premises, and in his presence, without any effort on his part to prevent it, it must be inferred that it was with his consent. *Cochran v. State*, 26 Tex. 678. A hotel keeper is amenable to this law for selling liquor to his guest and per-

mitting the same to be drunk on the premises, unless, perhaps, where the liquor is drunk in a room leased by such guest. *Scott v. State*, 25 Tex. Supp. 168.

Indictment.—Willson's Cr. Forms, 311.

Requisites in general, see arts. 447-487, C. C. P.

A party cannot be convicted for this offense under an indictment charging him with retailing without a license. *May v. State*, 35 Tex. 650.

Instructions.—See notes under arts. 735-743, C. C. P.; *May v. State*, 35 Tex. 650.

Art. 595. Selling to habitual drunkards.—Any person who shall knowingly sell or give, or cause to be sold or given, or who shall be instrumental in selling, giving or procuring of any spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, to any person who is an habitual drunkard, shall be fined not less than twenty-five nor more than one hundred dollars. [Act 1903, p. 69.]

See art. 623, post; *Scott v. State*, 25 Tex. Supp. 169.

Art. 596. "Habitual drunkard" defined.—An habitual drunkard, within the meaning of this law, is one who makes it a habit to get drunk, or who habitually becomes intoxicated by the voluntary use of intoxicating liquors. [Id., p. 69.]

Art. 597. [402] Selling in prohibited districts.—If any person shall sell any intoxicating liquor in any county, justice precinct, city or town in which the sale of intoxicating liquor has been prohibited under the laws of this state, or if any person shall give away any intoxicating liquor in any such county, justice precinct, city or town, with the purpose of evading the provisions of said laws, he shall be punished by fine of not less than twenty-five nor more than one hundred dollars, and by imprisonment in the county jail for not less than twenty nor more than sixty days. Or, if any person shall sell any intoxicating liquor in any county, justice precinct, school district, city or town, or subdivision of a county, in which the sale of intoxicating liquors shall hereafter be prohibited under the laws of this state, or if any person shall give away any intoxicating liquor in any such county, justice precinct, school district, city or town, or subdivision of a county, with the purpose of evading the provisions of said law, he shall be punished by confinement in the penitentiary not less than one nor more than three years. Upon complaint being filed with any county judge, or justice of the peace, describing the place where it is believed by the person making the complaint that intoxicating liquor is being sold or given away in violation of law, such county judge or justice of the peace shall issue his warrant directing and commanding the sheriff or any constable of his county to search such place, and, if the law is being violated, to arrest the person so violating it; and it shall be the duty of the officer to whom such warrant is delivered to search the place described in the warrant, to seize all intoxicating liquors found therein, and arrest and bring before the county judge or justice who issued the writ, all persons connected with such business either as proprietor, manager, clerk or other employé; and, if admission into said place is refused, the officer executing said warrant is hereby authorized to force open the same. In prosecutions under this article, where it is proven that there is posted up at the place where such intoxicating liquor is being sold or given away with the purpose of evading the provisions of the law, United States internal revenue liquor or malt license, to any one, it shall be prima facie proof that the person to whom such license is issued is engaged in the sale of intoxicating liquor. [Amended by Act March 30, 1887, p. 70; Act 1903, ch. 40; amended Act 1909, p. 356.]

See arts. 589-591, ante.

See also notes under C. C. P. art. 464.

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| 1. In general. | 11. — Judicial notice. |
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1. **In general.**—Old art. 378 reads as follows: "If any person shall sell, exchange, or give away any intoxicating liquor whatever, in any county, justice's precinct, city, or town in this state, after the qualified voters of such county, justice's precinct, city, or town have determined at an election held in accordance with the laws of this state, that the sale or exchange of intoxicating liquors shall be prohibited in such county, justice's precinct, city, or town, and the commissioners' court has passed an order to that effect, which order has been duly published in accordance with law, he shall be fined in a sum not less than twenty-five nor more than two hundred dollars." [Act June 24, 1876, p. 26.]

The act of July 24, 1879, amending section 5 of the act of June 24, 1876, the original option act from which this article was framed, was held to be nugatory and inoperative, because the act which it amended had been repealed by the adoption of the Revised Code. *Robertson v. State*, 12 App. 541; *Pinckard v. State*, 13 App. 373; *Van Noy v. State*, 14 App. 69; *Akin v. State*, Id. 142.

For an exhaustive review of the civil statutes upon which the preceding article is based, see *Dawson v. State*, 25 App. 670, 8 S. W. 820; *Ex parte Burrage*, 26 App. 35, 9 S. W. 72; *Robinson v. State*, 26 App. 82, 9 S. W. 61; *Lawhon v. State*, 26 App. 101, 9 S. W. 355; *Curry v. State*, 28 App. 475, 13 S. W. 752; *Id.*, 28 App. 477, 13 S. W. 773; *Ex parte Cox*, 28 App. 537, 13 S. W. 493.

On trial for violation of the local option law, three distinct sales were testified to by the prosecuting witness. Defendant pleaded former conviction, but there was no evidence that defendant had ever been convicted for the sale involved in this case, and the judgment will not be disturbed. *Bruce v. State*, 39 App. 26, 44 S. W. 852.

One cannot be prosecuted for the sale of intoxicants until after 28 days from the first publication. *Byrd v. State*, 53 App. 597, 111 S. W. 149.

The accused can not defend on the ground of the invalidity of the election after the time prescribed for contesting such election has passed. *Jerue v. State*, 57 App. 213, 123 S. W. 414. And see *Ex parte McGuire*, 57 App. 38, 123 S. W. 425; *Gober v. State*, 57 App. 66, 123 S. W. 427.

Where the local option law had been adopted in a county at two elections, the second of which was held after the adoption of the statute making it a felony to sell intoxicating liquors, one subsequently selling intoxicating liquors was properly prosecuted under the second election. *Mayo v. State*, 62 App. 110, 136 S. W. 790.

A conviction in the county court for illegally selling intoxicants in a dry county would not bar a subsequent prosecution, for unlawfully pursuing the occupation of selling intoxicants in prohibition territory. *Wilson v. State* (Cr. App.) 154 S. W. 571.

Where a subdivision which had adopted the prohibition law holds a new election, and adopts the new law making a sale of intoxicants a felony, instead of a misdemeanor, the state cannot elect to proceed under the original election, and the county court has no jurisdiction of the prosecution. *Sandaval v. State*, 72 App. 368, 162 S. W. 1148.

2. **Constitutionality.**—This law is constitutional. *Rippey v. State* (Cr. App.) 73 S. W. 15 (affirmed by U. S. Supreme Court, Id., 193 U. S. 504, 24 Sup. Ct. 516, 48 L. Ed. 767); *Ex parte Lynn*, 19 App. 293; *Steele v. State*, 19 App. 425; *Ex parte Kennedy*, 23 App. 77, 3 S. W. 114; *Wilson v. State* (Cr. App.) 154 S. W. 571.

The legislature had no constitutional power to prohibit the gift of intoxicating liquors nor to empower localities to do so by means of the local option law, and under the former statute it was not an offense to give intoxicating liquors to another in a local option district, and to the extent that the local option law prohibited a gift, it was unconstitutional. *Stallworth v. State*, 16 App. 345; *Holley v. State*, 14 App. 505; *McMillan v. State*, 18 App. 375; *Steele v. State*, 19 App. 425.

See a discussion of the rules in relation to constitutional provisions as to the passage of laws, wherein it is held that in passing upon the constitutionality of a law the court will not go behind the enrollment of the act. *Ex parte Tipton*, 28 App. 428, 13 S. W. 610, 8 L. R. A. 326, citing *Central Ry. Co. v. Hearne*, 32 Tex. 547; *Blessing v. City of Galveston*, 42 Tex. 642; *Houston & T. C. R. Co. v. Odum*, 53 Tex. 343; *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 865; *Gaddy v. State*, 8 App. 127; *Wood v. State*, 27 App. 396, 11 S. W. 449; approved by *Williams v. Taylor*, 83 Tex. 667, 19 S. W. 156.

This article as amended by the act of the Twenty-eighth Legislature (Gen. Laws 1903, p. 55, chap. 40), in so far as it authorizes a seizure of intoxicating liquors transcends the bounds of constitutional authority and is void. *Beavers v. Goodwin* (Civ. App.) 90 S. W. 932.

It is immaterial whether an amendment to an act is unconstitutional or not, and whether, if so, it vitiates the whole article as amended, as, if such be the case, the prosecution can be sustained under the article as it stood before amendment. *Ultoh v. State*, 48 App. 295, 87 S. W. 823.

3. **Relation to other statutes.**—Statute making the violation of local option law a felony held not to apply to counties adopting local option before its passage.

Crawford v. State (Cr. App.) 128 S. W. 1122; *Lewis v. State*, 58 App. 351, 127 S. W. 808, 21 Ann. Cas. 656; *Doyle v. State*, 59 App. 60, 127 S. W. 815; *Thompson v. State*, 59 App. 277, 128 S. W. 382; *Rice v. State*, 59 App. 293, 128 S. W. 613; *Payne v. State*, 60 App. 322, 131 S. W. 1101; *Head v. State* (Cr. App.) 141 S. W. 536; *McKinney v. State* (Cr. App.) 128 S. W. 1122; *Hamilton v. State* (Cr. App.) 145 S. W. 348.

The act of March 30, 1887, amendatory of the general local option law, is operative only in those communities wherein the local option law has been adopted since it went into effect and cannot affect those communities wherein the general local option law was previously in operation. *Robinson's Case*, 26 App. 82, 9 S. W. 61; *Lawhon v. State*, 26 App. 101, 9 S. W. 355; *Dawson v. State*, 25 App. 670, 8 S. W. 829.

Where the local option law has been adopted and put in force, it operates a repeal within the particular locality of all laws and parts of laws in conflict with it, and exempts from punishment all previous offenders against the repealed laws. *Robertson v. State*, 5 App. 155; *Ex parte Lynn*, 19 App. 293; *Boone v. State*, 12 App. 181; *Donaldson v. State*, 15 App. 25.

When by a subsequent election, prohibition has been repealed, prosecutions for violations of the law while it was in force cannot be maintained, and convictions had prior to such repeal cannot be enforced. *Halfin v. State*, 5 App. 212; *Monroe v. State*, 8 App. 343; *Fitze v. State*, 13 App. 372; *Pinckard v. State*, Id. 373; *Freese v. State*, 14 App. 31; *Prather v. State*, Id. 453; *Mulkey v. State*, 16 App. 53. But such is not now the law. Post, art. 602.

The penalty prescribed by the act of 1887, was not repealed by the act of 1893. *Aaron v. State*, 34 App. 103, 29 S. W. 267.

The legislature cannot by amendment impose new burdens upon the people of a precinct pending the operation of the local option law therein. *Ex parte Bains*, 39 App. 62, 45 S. W. 24.

Conviction on a count for violating the law in a precinct in erroneous where since the adoption of the law in the precinct the law has been adopted in the county before the finding of the indictment; the law in the precinct was merged in that of the county. *Raby v. State*, 42 App. 56, 57 S. W. 651.

The legislature in amending the provisions of the local option law cannot affect territory in which the law is already in force. *Ex parte Elliott*, 44 App. 575, 72 S. W. 837.

Where local option is in force the law prohibiting sales to minors is superseded. *Tompkins v. State*, 49 App. 154, 90 S. W. 1019.

A sale to a minor in local option territory cannot be prosecuted under the statute prohibiting sales to minors. *Dean v. State*, 49 App. 249, 92 S. W. 38.

There is no irreconcilable conflict between this and article 5060j, *Sayles' Civil Statutes*. There is no double penalty about the matter since the violation of the bond would be one thing and selling illegally the whisky is another one. *Oliver v. State* (Cr. App.) 105 S. W. 811, 812.

A rule of construction is that when the legislature revises or re-enacts a statute after it has been judicially construed without changing it, the presumption obtains that the legislature intended that the same construction should continue to be applied to that statute. *Lewis v. State*, 58 App. 351, 127 S. W. 808, 21 Ann. Cas. 656, and cases cited.

The holding of a local option election in December, 1909, in which local option carried, after the passage of the local option law making its violation a felony, operated to repeal the misdemeanor punishment imposed by the former local option statute, and to put in force the felony punishment as to offenses committed after such election was held. *Enriquez v. State*, 60 App. 580, 132 S. W. 782.

The adoption by a county, at an election held throughout the county, of Act April 24, 1909 (Laws 1909 [1st Called Sess. 31st Leg.] c. 35), amending Pen. Code 1895, art. 402 (art. 597, above), fixing the penalty for violating the local option law at confinement in the penitentiary for not less than one nor more than three years, superseded the prior local option law adopted in any of the precincts in the county, so that such penalty was operative throughout the county, including such precincts. *Garrett v. State*, 61 App. 254, 134 S. W. 696.

This article was not repealed by the vagrancy act (Acts 31st Leg. c. 59), defining and punishing vagrants. *Hamilton v. State* (Cr. App.) 145 S. W. 348.

This article construed in connection with articles 150 and 589. *Barnes v. State* (Cr. App.) 170 S. W. 548, L. R. A. 1915C, 101.

4. **Local option elections.**—See *Vernon's Sayles' Civ. St.* 1914, arts. 5715-5730, and notes.

5. **License.**—Whether local option is adopted before or after the passage of the law of 1897, license must be procured before one can sell liquor under the provisions of the law. *Snearley v. State*, 40 App. 507, 52 S. W. 547, 53 S. W. 696.

A local option election suspends the occupation tax, as it was under the act of 1893. *Gibson v. State*, 34 App. 219, 29 S. W. 1085.

Act of 25th Legislature providing for license for liquor dealers in local option precincts does not apply to precincts where local option is already in force. *Ex parte Baines*, 39 App. 62, 45 S. W. 24.

Party cannot sell intoxicating liquors in local option territory with or without prescription, until he has paid the license tax. *Watson v. State*, 42 App. 13, 57 S. W. 102; *Williamson v. State*, 41 App. 461, 55 S. W. 570.

6. **Offense.**—Intoxicating liquor is a liquor intended for use as a beverage, or capable of being so used, which contains alcohol, obtained by fermentation or by distillation, in such proportion that it will produce intoxication, when taken in such quantities as may practically be drunk. *Sandoloski v. State* (Cr. App.) 143 S. W. 151.

This article and article 589 create two distinct offenses. *Oliver v. State* (Cr. App.) 152 S. W. 1066; *Mizell v. State*, 59 App. 226, 128 S. W. 125.

When prohibition has been declared, it operates a revocation of all licenses for the sale of intoxicating liquors within the locality adopting it, and a subsequent sale of such liquor within such locality, made under an unexpired license granted before the prohibition, is a violation of law. *Robertson v. State*, 12 App. 541; *Ex parte Lynn*, 19 App. 293.

It is immaterial with what intent one sells liquor in a local option district. *Pike v. State*, 40 App. 615, 51 S. W. 395; *Howard v. State*, 72 App. 624, 163 S. W. 429.

Blackberry cordial is an intoxicant and its sale is forbidden in local option districts. *Pike v. State*, 40 App. 617, 51 S. W. 395.

A liquor dealer outside of a local option county is guilty when he sends liquor to a certain person at a certain place in the county to be delivered. *Northcutt v. State*, 35 App. 584, 34 S. W. 946.

Stipulation held to render contract an executory sale. *Bruce v. State*, 36 App. 53, 35 S. W. 383.

A contract to sell, made in a local option precinct, is no violation, if the sale be made outside the precinct. *Weldon v. State*, 36 App. 34, 35 S. W. 176.

A club organized for the purpose of furnishing members with liquor held an evasion of the local option law. *Sutton v. State* (Cr. App.) 49 S. W. 501.

The sale of intoxicating liquor by the agent of a social club to one of its members in a local option district is a violation of the law. Such club is not authorized to sell liquors in a local option precinct. *Finn v. State*, 38 App. 75, 41 S. W. 1102. See, also, *Krnavek v. State*, 38 App. 44, 41 S. W. 612.

The evidence showed that defendant was employed to look after and keep a check on sales made by the bartenders, who were all negroes, that on the occasion in question he met several parties at the door and objected to one of them coming in because he had "been giving people away," and stepped outside and watched such person while the others bought the liquors; held, that he was a joint principal in the sales. *Wolfe v. State*, 38 App. 537, 43 S. W. 997.

Order to one outside local option district for whisky to be sent by express C. O. D. held not a sale consummated within the inhibited district, and hence a prosecution for the illegal sale of liquors there will not lie. *Weathered v. State* (Cr. App.) 60 S. W. 876.

In order to violate the local option law the liquid must be intoxicating. It is not a violation of such law otherwise to sell beer or any other liquid. *Tyler v. State* (Cr. App.) 86 S. W. 763.

Where accused owned whisky, and transferred it for a consideration, either in hand or to be paid subsequently, there was a sale of whisky; but where the whisky was transferred as a gift, without any expectation of receiving pay for it, accused was not guilty of a sale. *Hamilton v. State*, 58 App. 173, 127 S. W. 212.

Where accused was interested in whisky that a witness received under a sale by a third person, and accused assisted in the sale knowing that the third person was transferring the whisky, so as to constitute a sale, accused was guilty of making a sale, whether he received any money or not. *Hamilton v. State*, 58 App. 173, 127 S. W. 212.

The local option law is not violated by giving away whisky. *Ellis v. State*, 59 App. 419, 128 S. W. 1125.

Where defendant delivers whisky to another he violates the local option law where remuneration of any kind was expected or intended, and it is immaterial whether payment was to be made in money, other whisky, or other merchandise of any character. *Morris v. State*, 64 App. 498, 142 S. W. 876.

Where accused selling whisky received the money from prosecutor, and delivered the whisky to him, the fact that a third person furnished to prosecutor a half of the price before meeting accused did not make the sale a joint one to prosecutor and the third person. *Crawford v. State* (Cr. App.) 147 S. W. 229.

An indictment drawn in a local option county, charging a violation of Pen. Code 1911, art. 622, which denounces such a sale as a misdemeanor, was improper; the proper proceeding being by an action under article 597 for a violation of the local option law. *Talley v. State* (Cr. App.) 147 S. W. 255.

Where the state's witness gave defendant 50 cents to get some whisky, and when defendant returned with alcohol refused to take it, but afterwards followed defendant and took the alcohol from him without his consent, there was no sale; but if he took it in payment of the 50 cents, with defendant's consent, it would be a sale. *Scott v. State* (Cr. App.) 151 S. W. 550.

A violation of the local option law adopted at an election held prior to the amendment of the law making it a felony to sell liquors in prohibition territory is a misdemeanor. *Boyd v. State*, 72 App. 452, 162 S. W. 850.

If accused sold whisky in violation of the prohibition law, and received money for it, he would be guilty irrespective of who owned the whisky. *Clay v. State* (Cr. App.) 164 S. W. 1.

Defendant, who, at the request of one who had ordered whisky, made affidavit that it was his and was not intended for any illegal purpose, paying the notary with money furnished by the party ordering the whisky, took the affidavit to the express office, signed for and received the liquor and delivered it to the party who had ordered it, was guilty of a sale in violation of the misdemeanor prohibition law. *Coleman v. State* (Cr. App.) 166 S. W. 164.

In a prosecution for wrongful selling of liquor to H. in violation of the prohibition law, evidence that defendant had been bound over to await the action of the grand jury on a complaint charging him with pursuing the occupation of selling intoxicating liquors, and that the state in such proceeding relied on the sale to H. as one of the sales by which it was intended to show that defendant was guilty of pursuing the occupation, furnished no defense. *Sinclair v. State* (Cr. App.) 168 S. W. 530.

A prospective purchaser told accused that he desired some whisky, and accused replied that he had some in his trunk. Thereupon the purchaser paid him money and went to accused's home, where another member of accused's family showed him the trunk containing the whisky from which he took his purchase. Held, that accused was guilty of unlawful sale. *Whitten v. State* (Cr. App.) 170 S. W. 718.

A loan of whisky to be returned in whisky is a sale. *Howard v. State*, 72 App. 624, 163 S. W. 429.

7. — **Agents.**—One acting as agent of the buyer cannot be convicted of illegally selling. *Bowman v. State* (Cr. App.) 35 S. W. 382; *Lafrentz v. State*, 57 App. 464, 125 S. W. 32, 29 L. R. A. (N. S.) 743; *Clay v. State* (Cr. App.) 144 S. W. 280; *Scott v. State*, 70 App. 57, 153 S. W. 871; *Cowley v. State*, 72 App. 173, 161 S. W. 471.

One is guilty of selling whisky who keeps it in his place of business for sale, though it is sold by an employé. *Clark v. State*, 40 App. 127, 49 S. W. 85.

A sale by a clerk against the express orders of defendant, and in his absence, will not support a conviction. *Wadsworth v. State*, 35 App. 581, 34 S. W. 934.

One buying whisky for another with money furnished him by such other person, is not guilty. *Hood v. State*, 35 App. 585, 34 S. W. 935.

One procuring liquor in his own name for another is not a seller. *Wright v. State*, 35 App. 581, 34 S. W. 935.

A sale in a local option district by an agent of a foreign firm is a violation. *Lafferty v. State* (Cr. App.) 35 S. W. 374.

An agent, whose principal is outside local option territory, is guilty when he takes orders and the liquor is shipped by his principal and paid for at latter's office. *Pogle v. State*, 42 App. 380, 55 S. W. 830.

Where defendant received \$2 from prosecuting witness and said he thought he could "rustle" him a quart of whisky, and obtained the whisky from a third person on payment of the \$2 as an accommodation to and as agent of the prosecuting witness, he was not guilty of a sale. *Latham v. State*, 71 App. 552, 160 S. W. 455.

Where accused and two others contributed money to buy a bottle of whisky, and accused with the money so contributed purchased whisky, which he and the others then drank, there was no sale of whisky by accused. *McLain v. State*, 72 App. 107, 161 S. W. 117.

Where a father ordered his son to get some whisky which belonged to the father and sell it to the purchaser, the father participated in the sale and was a principal in the transaction. *Albright v. State* (Cr. App.) 164 S. W. 1001.

8. — **Loan or exchange.**—Where accused let another have some whisky to be repaid in whisky, it was a sale. *Black v. State* (Cr. App.) 151 S. W. 1053; *Johnson v. State* (Cr. App.) 150 S. W. 1175.

B., desiring some whisky, went to defendant, who stated that he was going to order a gallon for himself and another, and that he would put B.'s order in with theirs. B. gave him the money, and the same day he delivered to B. a bottle of whisky, claiming he had borrowed it from K., and would pay it back when B.'s whisky came; held, that defendant was not guilty of making a sale unless the exchange was only a ruse to hide a real transaction, and the court should have so instructed the jury. *Vanarsdale v. State*, 35 App. 587, 34 S. W. 931.

The defendant is guilty of an evasion only when he becomes a seller or exchanger; he is not guilty of violation of the local option law when he only borrows whisky for another. *Id.*

An exchange of liquor is a sale within the meaning of the statute. *Bruce v. State* (Cr. App.) 39 S. W. 633.

Where a physician informed a patient that a certain prescription would have to be taken in whisky, and the patient gave the physician a sum of money for whisky, and the physician delivered whisky in his possession, which he stated belonged to another patient, on an understanding that the bottle ordered by the patient should replace the one delivered, the transaction amounted to a sale of liquor in a local option district, in violation of this article. *Daniel v. State*, 57 App. 467, 125 S. W. 37.

Where the possessor of intoxicating liquors allowed another to take a quantity in consideration of his promise to subsequently return the same quantity of liquor, there was a sale within the purview of the local option acts. *Veach v. State*, 71 App. 181, 159 S. W. 1069.

9. **Indictment, information, or complaint.**—Willson's Cr. Forms, 314.

An indictment which charges that the accused sold intoxicating liquors "after the qualified voters of said county had determined at an election held in accordance with the laws of said state that the sale or exchange of intoxicating liquors should be prohibited," etc., is fatally defective. *Ninenger v. State*, 25 App. 449, 8 S. W. 480; *Croom v. State*, 25 App. 556, 8 S. W. 661. Indictment for selling liquor in violation of the local option law must allege name of purchaser. *Drechsel v. State*, 35 App. 580, 34 S. W. 934. *Contra*, *Ryan v. State*, 32 Tex. 280; *State v. Heldt*, 41 Tex. 280.

An indictment charging that defendant sold and gave away liquors sufficiently charges a sale. *Jordan v. State*, 37 App. 224, 38 S. W. 780, 39 S. W. 111; *Ellis v. State*, 59 App. 419, 128 S. W. 1125.

Indictment held sufficient. *Williams v. State*, 37 App. 238, 39 S. W. 664; *Sedberry v. State*, 14 App. 233.

There is a variance between an indictment or information charging that the accused sold intoxicating liquors to a certain person and proof that the sale was made to that person's agent. *Miles v. State*, 62 App. 530, 138 S. W. 398; *Clay v. State* (Cr. App.) 150 S. W. 430.

An indictment for selling liquor within some locality where its sale is specially prohibited need only follow the statute. It need not designate the house where

sold, or the person to whom sold, and it need not set out the special statute. *Ryan v. State*, 32 Tex. 280; *State v. Heldt*, 41 Tex. 220.

When a sham gift, but a real sale, is the offense, the indictment should charge that the gift was made "with the purpose of evading the law." *Stallworth v. State*, 16 App. 345; *Holley v. State*, 14 App. 505.

A prohibited sale of liquors is per se a violation of law and not an evasion of law. It is not necessary, therefore, that indictment should allege a sale with the purpose of evading law. *McMillan v. State*, 18 App. 375.

Information for violating local option law must allege adoption and promulgation of the law. *Hall v. State*, 37 App. 219, 39 S. W. 117.

Information need not allege that election was ordered by commissioners' court. *Brown v. State* (Cr. App.) 39 S. W. 578.

An indictment which alleges that the election had been held in the precinct, city or town, or a subdivision, describing it; that the commissioners' court had passed an order declaring the result, and that said order had been duly published as required by law, is sufficient in regard to the adoption of the law. *Williams v. State*, 37 App. 238, 39 S. W. 664.

The indictment must allege that the sale took place in the prohibited territory. To allege that the sale took place in "the precinct of Justice of the Peace No. 1," is not sufficient. *Williams v. State*, 38 App. 377, 43 S. W. 115.

Where indictment describes territory by metes and bounds and evidence shows that lines do not close, defendant should be acquitted. *Matkins v. State* (Cr. App.) 58 S. W. 109.

Indictment must allege that the liquor was sold in the local option territory. *Maddox v. State*, 42 App. 509, 60 S. W. 960.

An information which alleges that the commissioners' court of the county had duly made, passed, and entered an order declaring the result of the local option election and prohibiting the sale of intoxicating liquor within the county, as required by law, and had caused the order to be published in the manner and form and for the length of time, required by law, is sufficient, without alleging in terms that the county judge published the order declaring the result of the election. *Wesley v. State*, 57 App. 277, 122 S. W. 550.

An information which states the date of the offense within the period of limitation, and which avers that the law prohibiting the sale of intoxicating liquors was in force, is good, without alleging the date of the local option election, where at the date of the offense and of the filing of the information, and at the time of trial, the statute imposed a penalty by fine and imprisonment in the county jail, notwithstanding a subsequent act making the unlawful sale of intoxicating liquors a felony. *Coy v. State*, 59 App. 379, 128 S. W. 414.

An indictment need not allege the date upon which the local option election was held in the county. *Enriquez v. State*, 60 App. 580, 132 S. W. 782.

An indictment which alleges a sale in a certain named county, is sufficient in its designation of the place of offense. *Green v. State*, 62 App. 345, 137 S. W. 126.

It is no ground for the quashing of an indictment that it charged that the order of commissioners' court absolutely prohibited the sale of intoxicating liquors in the designated county without negating the exceptions under which such liquors might be sold, since the law itself makes the exceptions. *Green v. State*, 62 App. 345, 137 S. W. 126.

Though two indictments were pending against defendant, one for sale on the 6th of a month, and the other for a sale on the 11th of the month, it was not error to allow the state on a trial under the former indictment to elect, after the close of the evidence to rely for a conviction on the sale on the 11th; it not having been suggested that defendant was surprised by the election or had a valid defense to the transaction of that date. *James v. State*, 63 App. 75, 138 S. W. 612.

The state, though required to show the local option law was in force, may prove the facts necessary therefor without pleading them. *James v. State*, 63 App. 75, 138 S. W. 612.

Where an indictment alleged that the election was properly held "on or about March 12, 1910," it was not objectionable for indefiniteness as to the date of the election. *Wright v. State*, 63 App. 429, 140 S. W. 1105.

An information filed in county court, charging that accused sold intoxicating liquors on September 29, 1909, which was after Act April 24, 1909 (Acts 31st Leg. [1st Ex. Sess.] c. 35), went into effect, and that the sale was made after an election had been held in the territory, was insufficient in failing to show that the county court had jurisdiction of the offense, for the county court has jurisdiction only of misdemeanors, and, if the election was held after act of April 24, 1909, went into existence, the sale was a felony. *Head v. State*, 64 App. 112, 141 S. W. 536.

Evidence held to indicate a sale of liquor to B., if a sale was made to any one, and not to P., as alleged in the indictment. *Whitstone v. State*, 64 App. 168, 141 S. W. 951.

In an affidavit for violating the local option law, it was alleged that at an election held it was determined that the sale of intoxicating liquors should be prohibited in justice precinct No. 4, and the necessary orders made and publication had, and that thereafter, on a date specified, a person named "did then and there sell intoxicating liquor" to a person named. The information followed the complaint, except that, instead of the words "then and there," the words "thereafter in said justice precinct" were used. Held, that the affidavit sufficiently charges that the sale took place in justice precinct No. 4, and that there was no variance between the affidavit and the information in that respect; both affidavit and information charging the offense to have been committed in prohibited territory (citing *Words & Phrases*, vol. 8, p. 6946). *Moreno v. State*, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863.

An objection that an information does not show that the election putting prohibition into effect was held before the passage of the Act of April 24, 1909, c.

35, making such sale a felony, is an objection to the form of the information, and to be available an exception must be taken before announcement for trial. *Hamilton v. State* (Cr. App.) 145 S. W. 348.

An indictment charging the commission of such an offense on August 1, 1909, held to charge only a misdemeanor. *Mealer v. State* (Cr. App.) 145 S. W. 353.

An indictment presented in the district court, and alleging that defendant on January 20, 1911, violated the local option law, which election was held on March 5, 1910, properly alleges the date of the election, conferring jurisdiction upon the district court. *Moore v. State* (Cr. App.) 145 S. W. 588.

Though an information for violating the local option law is required, by Code Cr. Proc. 1911, art. 478, subd. 2, to allege the date of the local option election by which the law was put in force, such allegation being no part of the offense, failure of an information to include it did not render it fatally defective, under article 476, providing that formal defects in indictments shall be disregarded, which is made applicable to informations by article 480. *Meyer v. State* (Cr. App.) 145 S. W. 919.

An objection made for the first time in the motion for rehearing that an information for selling liquor in prohibition territory is defective for failing to allege the date of the election by which prohibition was put in force comes too late. *Crawford v. State* (Cr. App.) 147 S. W. 229.

An objection to an indictment charging a violation of the local option law, on the ground that it does not allege the date of the adoption of prohibition, cannot be raised for the first time on appeal. *Ferguson v. State* (Cr. App.) 147 S. W. 239.

The complaint and information were not fatally defective for not alleging the date of the prohibition election, or when the law was put in force. *Snell v. State* (Cr. App.) 150 S. W. 615.

An information in the county court for a violation of the prohibitory law, which alleges that such law was then in force, but does not allege the date when such law was adopted or put in force, should be quashed as not showing jurisdiction of the court. *Parker v. State* (Cr. App.) 150 S. W. 1184.

A person indicted for pursuing the business of selling intoxicating liquors cannot be convicted for making a single sale. *Leonard v. State* (Cr. App.) 152 S. W. 632.

An indictment which alleges, without giving the date, that the prohibition law was put in force by election orders, etc., prior to the time the act making it a felony was passed, was sufficient. *Robinson v. State* (Cr. App.) 154 S. W. 997.

That a complainant swore positively to a sale, instead of alleging that he had reason to believe and did believe that a sale was made, was not ground for quashing a complaint and information. *Eason v. State* (Cr. App.) 154 S. W. 1196.

That a complaint and information did not negative the fact that the sale was on a prescription was not ground for quashing it. *Eason v. State* (Cr. App.) 154 S. W. 1196.

An indictment which alleges that the local option election was held on June 6, 1903, and that on August 17, 1912, accused made a sale of liquor, sufficiently shows that the county court has jurisdiction of the offense. *Jones v. State*, 70 App. 343, 156 S. W. 1191.

An affidavit charging a violation of the local option law need not allege that the sale of liquor was unlawful. *Giles v. State*, 70 App. 550, 157 S. W. 943.

An indictment charging an illegal sale of intoxicating liquor after the adoption of prohibition, which does not allege when prohibition was adopted, charges prima facie a felony when the offense was committed after the felony statute went into effect. *Johnson v. State*, 70 App. 582, 157 S. W. 1196.

An indictment is not subject to motion to quash, because not specifically stating the date of the election when prohibition was carried, and whether the law was put in force prior or subsequent to Acts 31st Leg. (1st Ex. Sess.) c. 35, which makes subsequent violations felonies instead of misdemeanors. *Nobles v. State*, 71 App. 121, 158 S. W. 1133.

An indictment alleging that a prohibition election was held anterior to July 1, 1909, and in accordance with the laws of the state, sufficiently showed that the local option law was in force at and prior to July 1, 1909, and was therefore sufficient as to the date. *Cobb v. State* (Cr. App.) 163 S. W. 73.

The information or indictment should allege the date of the adoption of the local option law, for, if the election was held subsequent to the passage of the felony statute, the county court would not have jurisdiction, and, if held before, it would have jurisdiction. *Lewis v. State* (Cr. App.) 163 S. W. 705.

10. Evidence.—Adoption of prohibition, see *Vernon's Sayles' Civ. St.* 1914, arts. 5721, 5722, 5727 and notes.

11. — Judicial notice.—Courts do not know judicially that beer is an intoxicating liquor. Where the account sued on was for beer, and defendant pleaded that the sale was for intoxicating liquor sold him in local option territory, the evidence must show that beer is an intoxicating liquor. *Dallas Brewery v. Holmes Bros.*, 51 Civ. App. 514, 112 S. W. 124.

The local option law is a local or special law, and is in force only in those counties where the people have adopted it, and the court on appeal does not judicially know in what territory it has been adopted. *Dorman v. State*, 64 App. 104, 141 S. W. 526.

12. — Presumptions and burden of proof.—See notes under art. 52, ante and art. 785, C. C. P.

To sustain a conviction of violating the local option law, the law must be shown to be operative in the territory where the offense occurred. *Ellis v. State*, 59 App. 419, 128 S. W. 1125; *Curry v. State*, 28 App. 475, 13 S. W. 773; *Ex parte Sublett*, 23 App. 309, 4 S. W. 894; *Wells v. State*, 24 App. 230, 5 S. W. 830; *Woodward v. State*, 58 App. 411, 126 S. W. 270; *Ellis v. State*, 59 App. 630, 130 S. W. 171; *Poudrill v. State*, 61 App. 431, 135 S. W. 126; *Dorman v. State*, 64 App. 104, 141 S. W. 526;

Ferguson v. State (Cr. App.) 147 S. W. 239; Galloway v. State (Cr. App.) 153 S. W. 857; Lester v. State (Cr. App.) 153 S. W. 861; Robinson v. State (Cr. App.) 154 S. W. 997; Johnson v. State, 70 App. 582, 157 S. W. 1196. And see, also, Ninenger v. State, 25 App. 449, 8 S. W. 480; Croom v. State, 25 App. 556, 8 S. W. 661; Ex parte Burrage, 26 App. 35, 9 S. W. 72.

When the State made out a prima facie case by introducing the orders of the court the burden then shifts to the defendant to show such orders illegal. Frickie v. State, 39 App. 254, 45 S. W. 810.

The burden is upon the State to prove that the order of prohibition was duly published. This may be proven by a certified copy of the order required to be entered by the judge, or by the newspaper containing the publication. Jones v. State, 38 App. 533, 43 S. W. 981.

The burden is on the state to prove beyond a reasonable doubt that the beverage sold was intoxicating. Cannan v. State, 71 App. 416, 159 S. W. 1186.

13. — Admissibility in general.—See notes under art. 783 et seq., C. C. P.

Evidence that drunken men were seen about the drug store of defendant during the time he had blackberry cordial for sale, is admissible to prove that it was intoxicating. Pike v. State, 40 App. 614, 51 App. 395.

Evidence of other sales of the same beverage is not admissible to show intent. Dane v. State, 36 App. 84, 35 S. W. 661.

Where defense was that defendant was steward for a social club, and was merely dispensing liquor as such; held competent for the State to prove the amount of intoxicating liquors shipped to such club between given dates. Arnold v. State, 38 App. 1, 40 S. W. 734.

Other sales than that alleged may be proved to show character of business in which defendant was engaged. Matkins v. State (Cr. App.) 58 S. W. 109.

Return and poll list of election held competent in evidence. Nelson v. State (Cr. App.) 75 S. W. 502.

When one is arrested under this act he cannot be compelled to be sworn to testify in the case. He is virtually a defendant in the case and cannot be compelled to incriminate himself, and there is no object in swearing him except to get his testimony. He is guilty of no contempt if he refuses to be sworn. Ex parte Sauls, 46 App. 209, 78 S. W. 1073.

The original minutes of the commissioners' court, containing the orders going to make a valid local option law, are admissible to prove the existence of the law. Holley v. State, 46 App. 324, 81 S. W. 957.

It was proper to permit minutes of commissioners' court to be corrected and read. Cantwell v. State, 47 App. 521, 85 S. W. 18.

Evidence describing the buildings, fixtures, and surroundings where the liquor was sold was admissible. Todd v. State, 57 App. 26, 121 S. W. 506.

Where the complaint was made by the sheriff, who saw the sale made, and who brought the buyer to the courthouse before a justice of the peace, evidence as to why the buyer did not make the complaint was inadmissible. Wooten v. State, 57 App. 89, 121 S. W. 703.

Evidence that the proprietor of the drug store where the alleged sale of liquors was made had employed the accused, a day or two before, to haul away empty beer and whisky bottles, is inadmissible, as not tending to show a sale by the accused. Hankins v. State, 57 App. 152, 122 S. W. 21.

Where defendant was convicted upon the testimony of but one witness, evidence that defendant, while upon the way to trial, upon being overtaken by a buggy in which the witness was riding, halted it, and pulled the witness out, and fought with him, was inadmissible. Haney v. State, 57 App. 158, 122 S. W. 34.

Evidence that seven weeks before the alleged sale liquors were found in defendant's possession is inadmissible if objected to by defendant. Goss v. State, 57 App. 557, 124 S. W. 107.

Where the state sought to show that accused was a partner of a third person who was believed to be selling whisky, and that under the arrangement accused undertook to sell whisky stored on his premises, evidence of the declarations of accused, his presence at the third person's place, and familiarity with the business, was admissible as a circumstance to show the relation. Holt v. State, 57 App. 432, 125 S. W. 43.

Where the state sought to show that accused was a partner of a third person, who was selling whisky, and that under the arrangement accused sold whisky, and accused denied the firm arrangement, evidence that accused had told another that he did not want his wife to know that he was in the liquor business, because he had been in that business before and had gotten into trouble, was admissible as showing accused's reason for not disclosing his connection with the third person. Holt v. State, 57 App. 432, 125 S. W. 43.

It is competent to show that one charged with selling intoxicating liquors on a designated date in violation of the local option law had on that date received whisky by express. Ellis v. State, 59 App. 626, 130 S. W. 170.

The state may show that accused received liquor during several months prior to and up to the date of the offense. Ellis v. State, 59 App. 630, 130 S. W. 171.

The prosecuting witness testified on cross-examination that he was an ex-saloon keeper and bartender, and ran a saloon in another state, and that he knew what whisky was, whereupon defendant asked him if the whisky he claimed to have purchased from him was the same character of whisky he had sold while he was in that business, for the purpose of showing that the liquor sold was not pure whisky, and that the witness could not say that it was an intoxicant. Held, that the evidence sought was objectionable, since the question was whether the liquor sold was whisky, and not whether it was the kind that prosecuting witness had himself sold. Green v. State, 62 App. 345, 137 S. W. 126.

A violation of the local option law may be proved by a copy of the entries in the books of the internal revenue collector showing the issuance of an internal rev-

enue license, as expressly permitted by art. 603. *Columbo v. State* (Cr. App.) 145 S. W. 910.

Evidence that accused had received eight barrels of whisky was admissible to show the character of his business; and it was not error to fail to limit the effect of the testimony. *Patton v. State* (Cr. App.) 145 S. W. 1189.

The theory of defendant on a prosecution for sale of liquor to H. being that he acted only as agent of H., testimony of a witness that he saw defendant call M. and give him the money which H. had furnished, and saw M. go away and after some time return with the liquor and give it to defendant, who in turn gave it to H., is admissible. *Jones v. State* (Cr. App.) 147 S. W. 251.

Prosecution for the unlawful sale of intoxicating liquors, testimony as to whether the assistant county attorney, at the time he induced witnesses to purchase liquor from the accused, had announced himself as a candidate for county attorney, was wholly immaterial. *Lawson v. State* (Cr. App.) 148 S. W. 587.

Evidence to show that defendant had access to a quantity of whisky at the time of the alleged sales was admissible. *Black v. State* (Cr. App.) 151 S. W. 1053.

Evidence that liquors other than those involved were found on premises controlled by accused, and were claimed by him, was inadmissible to show intent to commit the particular offense. *Stewart v. State* (Cr. App.) 153 S. W. 1150.

Evidence that accused resisted arrest, drew a dirk, and cut the officers who were arresting her, was admissible. *Moreno v. State*, 71 App. 460, 160 S. W. 361.

Evidence held to authorize the admission in evidence of a bottle of diluted alcohol claimed to be the liquor purchased by prosecutrix from accused. *Thompson v. State*, 72 App. 6, 160 S. W. 685.

Evidence as to the receipt by accused of shipments of liquor about and prior to the time of the alleged sale was admissible to show his possession of the article alleged to have been sold. *Cowley v. State*, 72 App. 173, 161 S. W. 471.

Where the state showed the receipt by accused of shipments of whisky about and prior to the time of the alleged sale, the waybills for which described the shipments as a specified number of quarts and pints, the testimony of the express agent that he had examined shipments so marked, addressed to other parties, and found them to contain half pint bottles should have been excluded, though, if he had examined any of the shipments addressed to accused and found such condition to exist, he could so testify. *Cowley v. State*, 72 App. 173, 161 S. W. 471.

Where accused testified that he was asked by the prosecuting witness to get him some whisky from D. and that he did so, it was error to exclude evidence of a witness that accused, just prior to the alleged sale, asked him if he knew where D. was, telling him that he wished to get some whisky from D. for a sick person, that he directed accused to D., and that accused left in that direction, and immediately thereafter delivered a half pint of whisky to the prosecuting witness, since this would have strongly supported accused's theory. *Cowley v. State*, 72 App. 173, 161 S. W. 471.

It is error to permit a witness to state that he had heard people say that they believed accused was selling whisky. *Sasser v. State* (Cr. App.) 166 S. W. 1160.

A witness, knowing the reputation of accused as a bootlegger of whisky in prohibition territory, may testify as to whether his reputation is good or bad. *Sasser v. State* (Cr. App.) 166 S. W. 1160.

Evidence that officers under a search warrant found in accused's trunk about 76 pint bottles of whisky was admissible. *Martoni v. State* (Cr. App.) 167 S. W. 349.

The state may, on the cross-examination of accused, show that he had at the time of the alleged offense a United States internal revenue license to sell whisky. *Martoni v. State* (Cr. App.) 167 S. W. 349.

It was not error to permit the prosecuting witness, who had testified that he bought the liquor for two other persons, to testify that after making the purchase he gave it to one of those persons, who shared it with the other. *Clark v. State* (Cr. App.) 169 S. W. 895.

The state may cross-examine the defendant as to the number of times within the last six months or a year he had gone away and brought back with him intoxicating liquors, for the purpose of proving that he had, from time to time, procured and had on hand such liquor. *Clark v. State* (Cr. App.) 169 S. W. 895.

Evidence that when arrested on the second day after the sale defendant had an unopened pint of whisky on his person was admissible as a circumstance to show that he made the sale as charged. *McCuen v. State* (Cr. App.) 170 S. W. 738.

14. — **Internal revenue license.**—An examined copy from the books of the internal revenue collector is admissible in evidence in trial of case of violating the local option law. *Biddy v. State* (Cr. App.) 108 S. W. 692; *Gerstenkorn v. State*, 38 App. 621, 44 S. W. 503; *Broadnax v. State* (Cr. App.) 150 S. W. 1168.

It is not permissible for a witness to testify from memory or copy made by him of the internal revenue or collector's books as to an entry in said books. *Biddy v. State* (Cr. App.) 107 S. W. 814; *Broadnax v. State* (Cr. App.) 150 S. W. 1168.

Certified copies of revenue officer's books made by him or his deputy are admissible to show issuance of license, but the contents of the book cannot be proved by a party making a memorandum from such books, and testifying from it or from memory. *Goble v. State*, 42 App. 501, 60 S. W. 969.

The sheet showing the paying of an internal revenue liquor tax by defendant was not admissible, unless properly proven by an examined copy or otherwise. *Rhodes v. State* (Cr. App.) 172 S. W. 252.

If a sheet, showing an internal revenue liquor tax to have been paid by defendant, was properly proven, testimony of witnesses that they had seen an internal revenue license posted in defendant's place of business was admissible though they were unable to state the wording of the license. *Rhodes v. State* (Cr. App.) 172 S. W. 252.

15. — **Weight and sufficiency.**—See *Dickerson v. State*, 72 App. 539, 162 S. W. 1155; *Wolfe v. State*, 38 App. 537, 43 S. W. 997; *Goff v. State*, 57 App.

28, 121 S. W. 503; *Wooten v. State*, 57 App. 89, 121 S. W. 703; *Gee v. State*, 57 App. 151, 122 S. W. 23; *Matthews v. State*, 57 App. 337, 123 S. W. 127; *Trinkle v. State*, 57 App. 567, 123 S. W. 1114; *Davis v. State*, 57 App. 638, 124 S. W. 635; *Doyle v. State*, 59 App. 60, 127 S. W. 815; *Fussell v. State*, 60 App. 193, 131 S. W. 562; *Kirksey v. State*, 61 App. 641, 135 S. W. 577; *Clark v. State*, 61 App. 597, 136 S. W. 260; *Banks v. State*, 62 App. 552, 138 S. W. 406; *Beck v. State*, 63 App. 615, 141 S. W. 111; *Perry v. State*, 63 App. 637, 141 S. W. 209; *Smith v. State* (Cr. App.) 145 S. W. 918; *Patton v. State* (Cr. App.) 145 S. W. 1189; *Molthrop v. State* (Cr. App.) 147 S. W. 1158; *Wren v. State* (Cr. App.) 150 S. W. 440; *Hightower v. State*, 70 App. 48, 155 S. W. 533; *Smith v. State*, 71 App. 661, 160 S. W. 1184; *Boyd v. State*, 72 App. 452, 162 S. W. 850; *Whittlesey v. State*, 72 App. 614, 163 S. W. 78; *Smclair v. State* (Cr. App.) 168 S. W. 530; *Brown v. State* (Cr. App.) 170 S. W. 716; *Tidwell v. State*, 58 App. 577, 126 S. W. 1128; *McLendon v. State*, 57 App. 617, 124 S. W. 637; *Whittlesey v. State*, 60 App. 291, 131 S. W. 1093; *Paris v. State*, 62 App. 354, 137 S. W. 698; *Kennard v. State*, 64 App. 7, 141 S. W. 88; *Whitstone v. State*, 64 App. 168, 141 S. W. 951; *Rigsby v. State*, 64 App. 504, 142 S. W. 901, 38 L. R. A. (N. S.) 1116; *Hamilton v. State* (Cr. App.) 145 S. W. 922; *Decker v. State* (Cr. App.) 147 S. W. 259; *Thomas v. State* (Cr. App.) 147 S. W. 578; *Molthrop v. State* (Cr. App.) 147 S. W. 1159; *Oliver v. State* (Cr. App.) 152 S. W. 1066; *Pierce v. State* (Cr. App.) 154 S. W. 559; *Chumley v. State*, 70 App. 50, 155 S. W. 534; *Ross v. State*, 71 App. 493, 159 S. W. 1063; *Veach v. State*, 71 App. 181, 159 S. W. 1069; *Pickle v. State*, 71 App. 493, 160 S. W. 379; *Ford v. State* (Cr. App.) 164 S. W. 826; *Clay v. State* (Cr. App.) 164 S. W. 846; *McElwhee v. State* (Cr. App.) 165 S. W. 927; *Barnhill v. State* (Cr. App.) 167 S. W. 348.

An order of the commissioners' court and their publication of the result of a local option election held sufficient to establish its legality. *Cooper v. State* (Cr. App.) 65 S. W. 916.

The order for a local option election, the order declaring the result, and the certificate of the county judge, held sufficient evidence that local option was in force in the territory specified. *Cantwell v. State*, 47 App. 521, 85 S. W. 18.

Issuance of internal revenue license to one is prima facie evidence that he is engaged in selling intoxicating liquors. *Fox v. State*, 53 App. 150, 109 S. W. 372.

A statement by a witness that there was a local option law in the county held insufficient to show that fact so as to sustain a conviction for its violation. *Bills v. State*, 55 App. 541, 117 S. W. 835.

While, under the statute, contests of local option elections must be taken in due time, the court should in every prosecution for violating the local option law require the introduction of formal orders of the commissioner's court adopting local option in the county. *Id.*

A sale in violation of the local option law may be made by implication as well as by direct contract, so that no words are necessary to constitute a transaction a "sale," but passage of the property with intent to sell is enough. *Jackson v. State*, 57 App. 341, 123 S. W. 142.

A county court record, purporting to show the proceedings taken for the adoption of local option, but failing to state for what purpose the local option election was held, and the minutes failing to show whether the result of the election was favorable or unfavorable, was not sufficient to show that local option had been adopted in the county. *Roberts v. State* (Cr. App.) 144 S. W. 940.

Evidence held to show that the law was in force before the sales were made. *Nobles v. State*, 71 App. 121, 158 S. W. 1133.

Evidence held insufficient to establish the publication, which was a condition precedent to the going into effect of the law. *Walker v. State*, 72 App. 536, 163 S. W. 71.

On a trial in 1915 for unlawfully selling intoxicating liquors on or about January 1, 1915, the state proved that prohibition was in force in the county under an election held in 1904. A witness testified positively to the sale to him by accused of whisky in 1915, and that "I bought said whisky this year. This year is 1904." Held, that the evidence supported a verdict of guilty, as it was clear that the witness intended 1915, and not 1904, and no one could have understood otherwise. *Hart v. State* (Cr. App.) 177 S. W. 1175.

16. **Questions for jury.**—See notes under art. 786, C. C. P.

Question whether local option law is in force in a county is for jury. *Strickland v. State* (Cr. App.) 47 S. W. 470.

Evidence held to raise the issue as to whether the purchases were made by accused as agent so as to require the submission of the question. *Scott v. State*, 70 App. 57, 153 S. W. 871.

Evidence as to whether accused made unlawful sales held for the jury. *Nobles v. State*, 71 App. 121, 158 S. W. 1133.

It is usually a question for the jury to decide whether an accused sold intoxicating liquors or not, but the facts must show a sale. *Latham v. State*, 71 App. 552, 160 S. W. 455.

Where accused was charged with illegally selling certain alcohol to prosecutrix in prohibition territory, and the bottle containing the alcohol was admitted in evidence, it was proper for the court to permit it to go to the jury for them to "smell its contents"; it not appearing that they drank any of it. *Thompson v. State*, 72 App. 6, 160 S. W. 685.

Where, on a trial for violating the prohibition law, a witness swore positively that he purchased a bottle of whisky from accused and paid him therefor, while accused denied making the sale, there was a question for the jury. *Hart v. State* (Cr. App.) 177 S. W. 1175.

17. **Instructions.**—See notes under art. 735 et seq. C. C. P.

If the court charge upon simulation he must give the character of the simulation. *Vanarsdale v. State*, 35 App. 588, 84 S. W. 931.

It is unnecessary to define in the charge intoxicating liquor because it is commonly understood what it is. *Pike v. State*, 40 App. 615, 51 S. W. 395.

Under an indictment charging a sale to a particular person an instruction allowing a conviction for a sale to any person is erroneous. *Drechsel v. State*, 35 App. 580, 34 S. W. 934.

On trial for sale in a particular precinct an instruction on a sale in "a" local option precinct is erroneous. *Hood v. State*, 35 App. 585, 34 S. W. 935.

For a correct instruction as to the meaning of the word traffic, see *Levine v. State*, 35 App. 647, 34 S. W. 969.

On trial for selling to a certain person, an instruction permitting a conviction for a sale to any person is erroneous. *Lafferty v. State* (Cr. App.) 35 S. W. 373.

When the orders required by statute have been properly made, and have been introduced in evidence, it is not error for the court to instruct the jury that local option is in force, unless defendant has proven, or introduced testimony tending to prove, that some of the requisites of the statute were not complied with. *Shields v. State*, 38 App. 252, 42 S. W. 398.

The court can instruct the jury that local option has gone into effect at the time specified in the order, there being no controversy as to this. *Webb v. State* (Cr. App.) 58 S. W. 83.

When order declaring result has been made by commissioners' court, it is presumed that all antecedent necessary steps to validity of law have been taken and defendant must show that orders have not been entered, and in absence of such proof court can assume in charge to jury that local option is in force. *Allen v. State* (Cr. App.) 59 S. W. 265.

A charge that the law was in force held justified. *Sebastian v. State*, 44 App. 508, 72 S. W. 849.

Where the accusation is for the sale of malt liquors and an internal revenue license or an examined copy of the same is introduced in evidence against the defendant, the court is not authorized to instruct the jury that the same is prima facie evidence that appellant is engaged in the sale of intoxicating liquors. The malt liquors may or may not be intoxicating. *Uloth v. State*, 48 App. 295, 87 S. W. 823.

It is not correct to charge that the issuance of an internal revenue license to defendant is evidence of his guilt of the particular offense charged. *Gorman v. State*, 52 App. 327, 106 S. W. 385.

A charge that it was agreed between the state and accused that during the year within which accused could be found guilty of selling intoxicating liquors the local option law was in effect and the sale of intoxicating liquors prohibited, sufficiently charged that the local option law was in force. *Matthews v. State*, 57 App. 328, 122 S. W. 544.

Where the evidence showed that the sale occurred after the publication of the result of the election and before the filing of the pleading charging accused with the offense, a charge that if accused, within two years from the filing of the pleading in the case, sold intoxicants in violation of the local option law, he was guilty, was correct, though the election adopting local option was being contested. *Gober v. State*, 57 App. 66, 123 S. W. 427.

On prosecution for an illegal sale of liquor to witness, the evidence showed that witness and B. and others jointly contributed \$1.50 with which to buy a quart of whisky, and gave the money to B.; that all went to the hotel where defendant was working, and asked him if he had any whisky, and he replied that he did not, but might get some, and took the money and departed, returning with whisky, which he gave to B., or one of the others. Witness testified that he had never purchased whisky from defendant, had nothing to do with buying it, but merely put in 50 cents. Held, that an instruction that if defendant did not himself, or through an agent, sell to witness, he should be acquitted, was an insufficient presentation of defendant's case, and it was error to refuse to instruct that if no whisky was delivered to witness, but was delivered to B., and that B. gave defendant money with which to buy liquor, and not witness, they should acquit. *Burrell v. State*, 58 App. 293, 125 S. W. 575.

Where the evidence of the state was limited to the date alleged in the information, and there was no evidence that accused was engaged in the sale of intoxicating liquors on the day of the trial, a charge that the issuance of an internal revenue license is prima facie proof that accused has paid the special tax as a seller of liquors, and is prima facie proof that he is engaged in the business of selling intoxicating liquors, was not objectionable as charging that the internal revenue license made a prima facie case that accused was, at the date of the trial, engaged in the liquor business. *Coy v. State*, 59 App. 379, 128 S. W. 414.

An instruction that no particular formality is required to constitute a sale, and that the essential ingredients are a meeting of the parties' minds on a sale and purchase for an agreed price and the purchaser's obtention of possession by the act or agency of the seller, was not erroneous as failing to instruct that to constitute a completed sale the purchaser must pay or agree to pay the price when he obtains possession, where the court had instructed that a sale is a parting with title and possession for an agreed consideration by one party and the acceptance of the property and payment of the price or consideration by the other. *Kirksey v. State*, 61 App. 641, 135 S. W. 577.

Where the evidence shows the proper orders of election, carrying prohibition, the putting of the law in force, publications, etc., the court should charge that the law is in force. *Looper v. State*, 62 App. 96, 136 S. W. 791.

Defendant's requested instruction that if he gave the liquor to the prosecuting witness, and if such witness had asked defendant if he had such liquor at that time, and that if such witness owed the defendants at that time, or if there was reasonable doubt as to those facts, they should find for defendant, held properly refused. *Green v. State*, 62 App. 345, 137 S. W. 126.

An instruction that, if the defendant merely gave the liquor to the prosecuting witness without pay, he should be acquitted, is proper; and a requested addition to this instruction that if defendant gave the liquor to the prosecuting witness, or intended to give and to sell it to him without pay therefor, defendant should be acquitted, is properly refused. *Green v. State*, 62 App. 345, 137 S. W. 126.

Where the orders made in the election adopting local option are put in evidence and no issue is raised as to the regularity of the election, the court should charge that local option is in force in the county. *Dozier v. State*, 62 App. 258, 137 S. W. 679.

Evidence held to require a requested charge that, if accused purchased the liquor merely as agent and did not himself sell it to the alleged purchaser, the jury should acquit. *Johnson v. State*, 63 App. 457, 140 S. W. 337.

An instruction that a delivery of intoxicating liquors may be by the person charged with the sale, or by him acting through some one else, and if the defendant in person sold the liquor to the witness, and delivered the liquor himself in person, or through some other person acting with the defendant, or under his instructions, such delivery would authorize a verdict of guilty, providing the other essential elements of the sale were found held proper. *Beck v. State*, 63 App. 615, 141 S. W. 111.

Where the evidence showed that accused bought whisky for prosecutor while acting as an accommodation agent of the prosecutor to secure whisky, a charge that if accused sold whisky to prosecutor, or acted as agent of a third person in selling whisky to prosecutor, he was guilty, was unauthorized by the evidence, which called for a charge, when requested by accused, that if he acted as the agent of prosecutor in purchasing the whisky he must be acquitted. *Brewster v. State* (Cr. App.) 145 S. W. 339.

Evidence held not to authorize an instruction that accused would be guilty of violating the local option law, if he acted as an agent for the person selling the whisky. *Thomas v. State* (Cr. App.) 147 S. W. 578.

Where the evidence was that the state's witness gave defendant 50 cents to buy whisky, and on defendant's return with alcohol refused it, and then followed defendant and took it from him, and was conflicting as to whether defendant consented to the taking, the failure to submit the question of defendant's consent was reversible error. *Scott v. State* (Cr. App.) 151 S. W. 550.

Where there was evidence of more than two sales about the same time that accused was charged with a commission of the offense, an instruction that, in order to convict, the jury must believe beyond a reasonable doubt that accused had made the two specific sales alleged in the complaint and information, and that one sale would not constitute a retail malt dealer, was proper and sufficient. *Ausbrook v. State*, 70 App. 289, 156 S. W. 1177.

Where, on a trial for selling beer in prohibition territory, witnesses testified that the beer would not intoxicate, the court must charge that, unless the jury found that the beer was intoxicating, or if they had a reasonable doubt of the fact, they must acquit accused. *Jones v. State*, 70 App. 343, 156 S. W. 1191.

A clerical error in an instruction as to the time of the sale held not misleading. *Giles v. State*, 70 App. 550, 157 S. W. 943.

The court can only charge that prohibition is in force where proof has been made of the orders for the election, of the commissioners' court declaring the result in favor of prohibition, and putting prohibition in force, and of the publication of the order putting prohibition in force. *Johnson v. State*, 70 App. 582, 157 S. W. 1196.

Charges that the burden was on the state to prove, beyond a reasonable doubt, that accused sold the liquor as charged, and that he was not acting as agent for the prosecuting witness, and if he was, there was no sale, sufficiently presents the defense that accused merely procured the liquor as the witness' agent. *Nobles v. State*, 71 App. 121, 158 S. W. 1133.

A charge that if accused, "with the purpose" and "for the purpose" of evading such law did sell intoxicating liquors, he should be found guilty is improper in the use of the quoted phrases; for there is no law punishing a man for selling intoxicating liquor in prohibition territory for such purpose. *Nobles v. State*, 71 App. 121, 158 S. W. 1133.

It was error to charge that the burden was on the state in the first instance to prove that beer was sold, whereupon the burden shifted to defendant to prove that the beer so sold was not intoxicating. *Cannan v. State*, 71 App. 416, 159 S. W. 1186.

Where the indictment was returned March 31, 1913, and the evidence showed that the sale in question took place, if at all, on March 25, 1913, it was not error for the court to charge that, if the jury believed beyond a reasonable doubt that defendant in A. county, Tex., at any time during the month of March, and before the 31st day thereof, did sell intoxicating liquors, etc., they should find him guilty. *Thompson v. State*, 72 App. 6, 160 S. W. 685.

18. **Appeal.**—Recognizance, see Code Crim. Proc. art. 919.

When the statement of facts fails to show that local option was in force the case will be reversed. *Wartelsky v. State*, 38 App. 629, 44 S. W. 510; *Whittlesey v. State*, 72 App. 614, 163 S. W. 78.

Where, on a trial for violating the local option law, the state introduced orders for a local option election, declaring the result of the election, and ordering publication thereof, but did not show the result of the election, nor a publication of the proclamation declaring the result, nor the date of the election, the appellate court could not presume that the local option law had been adopted at the time of an alleged sale. *Ellis v. State*, 59 App. 626, 130 S. W. 170.

19. **Punishment.**—Punishment of two years in the penitentiary on conviction for selling liquor in violation of the prohibition law is not excessive, where the

statute authorizes confinement in the penitentiary for not less than one nor more than three years. *Mitchell v. State*, 71 App. 241, 158 S. W. 815.

20. **Seizure.**—A petition for an injunction to restrain a seizure must allege facts showing that the prerequisites of a complaint and search warrant had not been complied with, and an allegation that defendant had, and, unless restrained, would continue, to search applicant's place of business, "without legal process or authority of law," is but the statement of a legal conclusion and insufficient. *Moss v. Whitson* (Civ. App.) 130 S. W. 1034.

Art. 598. [403] Not applicable, when.—The preceding article shall not apply to the sale of wines for sacramental purposes, nor to alcoholic stimulants as medicines in cases of actual sickness; but such stimulants shall only be sold upon the prescription of a regular practicing physician, dated and signed by him and certified on his honor that he (the physician) has personally examined the applicant (naming him), and that he finds him actually sick and in need of the stimulant prescribed as a medicine; provided, that a physician who does not follow the profession of medicine as his principal or usual calling, or who is in any way, directly or indirectly, engaged in the sale of such stimulants on his own account or as the agent, employé, or partner of others, shall not be authorized to give the prescription provided for in this article; and provided, further, that no person shall be permitted to sell more than once on the same prescription, nor upon a prescription which has been canceled, nor on a prescription which is not dated, signed and certified, as above required; provided, that every person selling such stimulants upon the prescription herein provided for shall cancel such prescription by indorsing on it the word "canceled," and file the same away, and on the first day of July, 1903, and every month thereafter, file the said prescription with the clerk of the district court, accompanied by an affidavit, stating that he has sold no intoxicating liquor other than that named in the prescriptions filed, which said prescriptions shall be preserved by the clerk of the district court for a period of three years from and after the date of filing, subject to the inspection of the grand jury, district, county and precinct officers. [Added by Act March 30, 1887, pp. 70-71; amended, Act 1903, p. 56.]

Cited, *Slack v. State*, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112; *Bell v. State*, 62 App. 242, 137 S. W. 670, 36 L. R. A. (N. S.) 98, Ann. Cas. 1913C, 617.

Former statute.—Old article 379 was as follows:

The preceding article shall not apply to the sale of wine for sacramental purposes, nor to the sale of alcoholic stimulants as medicine, in cases of actual sickness, upon the written prescription of a regular practicing physician, certifying upon honor that the same is actually necessary as a medicine. [Act June 24, 1876, p. 26.]

Offense.—When a party has a regular certified prescription, it is a good defense whether the prescription is canceled or not. *Snead v. State*, 40 App. 265, 49 S. W. 595.

Intoxicants for medical purposes can only be sold upon a prescription certifying that a regular physician signing the prescription has personally examined the party to whom the prescription is given, and that he is actually sick; and he must certify these matters upon his honor. The terms of the exception must be followed. *McLain v. State*, 42 App. 213, 64 S. W. 866.

One can be punished for failing to file the prescriptions accompanied by the affidavit mentioned in this article. *Holland v. State*, 51 App. 547, 103 S. W. 631, 632.

A physician gave a prescription and directed the patient to take it in whiskey. The patient gave the physician a sum of money who delivered him whiskey in his possession with the statement that it belonged to another patient, and with the understanding that the bottle ordered by the patient should replace the one delivered. Held, a sale under this article. *Daniel v. State*, 57 App. 467, 125 S. W. 37.

Indictment.—An indictment for violating the local option law need not negative that it was sold for sacramental or medicinal purposes. *Williams v. State*, 37 App. 238, 39 S. W. 664.

Complaint defective which fails to allege that sale of liquor was not made under prescription and does not contain other negative averments in article 7467, R. S. *Gamble v. State* (Cr. App.) 57 S. W. 95.

An indictment for selling liquor in violation of the local option law need not negative the exceptions in art. 598. *Mayo v. State*, 62 App. 110, 136 S. W. 790.

Disqualification of jurors.—*West v. State*, 35 App. 48, 30 S. W. 1069.

Art. 599. [404] Failure to cancel prescription; permitting liquor to be drunk on premises.—It shall be the duty of any person who sells any intoxicating liquor upon the prescription provided for in article 598 to write across the face of the prescription, with ink, the word "canceled," and file the same with the clerk of the district court, accompanied by an affidavit as hereinbefore provided; and for any failure to do so, he shall be punished by a fine of not less than twenty-five nor more than one hundred dollars; and if any person shall sell any intoxicating liquor upon the prescription provided for in article 598 and shall permit the same to be drunk at the place or establishment where sold, or at any other place provided for that purpose by such person, he shall be punished by fine of not less than twenty-five nor more than one hundred dollars. [Added by Act March 30, 1887, p. 71; amended Act 1903, p. 56.]

Cited, *Slack v. State*, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112; *Bell v. State*, 62 App. 242, 137 S. W. 670, 36 L. R. A. (N. S.) 98, Ann. Cas. 1913C, 617.

Indictment.—Willson's Cr. Forms, 317.

Injunction.—The district court has jurisdiction to issue an injunction to restrain a druggist, licensed to sell liquor on prescription, from selling liquor in violation of law. *Ex parte Roper*, 61 App. 68, 134 S. W. 334.

An injunction restraining a druggist licensed to sell liquor on prescription is not void because it restrains him from selling on prescriptions in accordance with law, as well as without prescriptions in violation of law; the remedy being by motion for its modification. *Ex parte Roper*, 61 App. 68, 134 S. W. 334.

Art. 600. [405] Giving prescription illegally.—If any person who is not a regular practicing physician shall give a prescription to be used in obtaining any intoxicating liquor in any county, school district, justice precinct, city or town, or subdivision of a county, in which the sale of intoxicating liquor has been prohibited under the laws of this state, or if any practicing physician who is directly or indirectly, either for himself or as the agent or employé of another, interested in the sale of liquor, shall give a prescription to be used in obtaining any intoxicating liquor in any such county, justice precinct, school district, city or town, or subdivision of a county, to any one who is not actually sick, and without a personal examination of such person, he shall be punished by a fine of not less than twenty-five nor more than one hundred dollars, and by imprisonment in the county jail not less than twenty nor more than sixty days. [Added by Act March 30, 1887, p. 71; amended, Act 1903, p. 56.]

Cited, *Slack v. State*, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112.

Offense.—This article makes it an offense to give a prescription to another party than the one writing the prescription. It is not unlawful for one to write a prescription for himself. *Hawk v. State*, 44 App. 560, 72 S. W. 842.

This article does not prohibit and punish giving prescriptions in local option territory other than those mentioned, to-wit: Counties, justices' precincts, cities and towns. School district not being mentioned in the statute, it is no offense to give a prescription in a school district territory where the local option law has been put in force. *Gordon v. State* (Cr. App.) 73 S. W. 398.

Indictment.—Willson's Cr. Forms, 318.

An indictment charging a practicing physician with illegally giving a prescription should allege that such prescription was given without a personal examination. *Stovall v. State*, 37 App. 337, 39 S. W. 934. See, also, *Stewart v. State*, 35 App. 392, 33 S. W. 1081; *Alford v. State*, 37 App. 386, 35 S. W. 657.

Indictment must allege directly that party giving a prescription was a regular practicing physician. *McQuerry v. State*, 40 App. 572, 51 S. W. 247; *West v. State*, 40 App. 575, 51 S. W. 247.

When indictment alleges that prescription was given without a personal examination, proof that defendant made a personal examination is a variance from the allegation. *McQuerry v. State*, 40 App. 572, 51 S. W. 247.

It must also allege that local option was in force. *Stewart v. State*, 35 App. 392, 33 S. W. 1081; *Alford v. State*, 37 App. 386, 35 S. W. 657.

Evidence.—The person to whom the prescription was given testified that he was sick, and that defendant did examine him; held, that the evidence did not support the conviction. *McQuerry v. State* (Cr. App.) 40 S. W. 990.

Art. 601. [406] "Blind tiger" defined; penalty for keeping; procedure against.—Any person who shall keep or run, or shall be in any manner interested in keeping or running, a blind tiger in any county, justice precinct, school district, city or town, or subdivision of a county, in which the sale of intoxicating liquor has been prohibited under the laws of this state, he shall be punished by confinement in the county jail not less than two nor more than twelve months, and by a fine of not less than one hundred nor more than five hundred dollars. Each and every day such blind tiger is run or kept shall be a separate offense. A "blind tiger," within the meaning of this article, is any place in which intoxicating liquors are sold by any device whereby the party selling or delivering the same is concealed from the person buying or to whom the same is delivered. Upon complaint being filed with any county judge or justice of the peace describing the place where any "blind tiger" is kept or run, such county judge or justice shall issue his warrant, directing and commanding the sheriff, or any constable, of his county, to search such place, and, if the law is being violated, to arrest the person so violating it; and it shall be the duty of the officer to whom such warrant is delivered to search the place described in the warrant, and to arrest and bring before the county judge, or the justice who issued the writ, all persons found by him therein; and if admission into said place is refused, the officer executing said warrant is hereby authorized to force open the same. In prosecutions under this article, where it is proven that there is posted up at the place where such blind tiger is kept or run, United States internal revenue liquor or malt license, to any one, it shall be prima facie proof that the person to whom such license is issued is keeping and running such blind tiger. [Added by Act March 30, 1887, pp. 71, 72; Act 1901, 1st S. S. ch. 18; amended, Act 1903, p. 57.]

Constitutionality.—This article is not unconstitutional because it prescribes a higher punishment for sale of intoxicants by means of a "blind tiger" than for others. *Schwulst v. State*, 52 App. 426, 108 S. W. 698.

Indictment.—Willson's Cr. Forms, 319.

Art. 602. [407] Repeal of law does not exempt offender; offender not an accomplice.—When the sale of intoxicating liquor has been prohibited in any county, justice precinct, school district, city or town, or subdivision of a county, the repeal of such prohibition shall not exempt from punishment any person who may have offended against any of the provisions of the law while it was in force; and the fact that a person purchases intoxicating liquor from one who sells it in violation of the provisions of this chapter shall not constitute such person an accomplice. [Added by Act March 30, 1887, p. 72; amended, Act 1903, p. 56.]

See notes under article 597, ante.

Transportation, delivery, etc., of liquors, see post, art. 606p.

Cited, *Slack v. State*, 61 App. 372, 136 S. W. 1073, Ann. Cas. 1913B, 112.

Principals.—*Wolfe v. State*, 38 App. 537, 43 S. W. 997; *Lott v. State*, 58 App. 604, 127 S. W. 191.

Accomplices.—The purchaser of intoxicating liquor illegally sold is not an accomplice of the seller so as to make his testimony subject to the rule governing testimony of accomplices. *Ray v. State*, 60 App. 138, 131 S. W. 542.

A purchaser of liquor illegally sold is not an accomplice of the seller. *Sears v. State*, 35 App. 442, 34 S. W. 124; *Robertson v. State* (Cr. App.) 178 S. W. 1191.

Witnesses who were purchasers of intoxicating liquors are not accomplices in violating the law with the seller thereof. *Trinkle v. State*, 59 App. 257, 127 S. W. 1060; *Id.*, 60 App. 187, 131 S. W. 583.

This article specifically provides that the purchaser of intoxicating liquors in a local option district is not an accomplice of the seller. *Morrow v. State*, 56 App. 519, 120 S. W. 491.

A purchaser of intoxicating liquor from one selling it in violation of the law and connected with the transaction in no other way is not an accomplice. *Creech v. State*, 70 App. 229, 158 S. W. 277.

The fact that one is employed to buy beer by the sheriff, from a party who sells it in violation of the law as amended by acts of 1903, does not make him an

accomplice of the seller and therefore his testimony need not be corroborated. *Terry v. State*, 46 App. 75, 79 S. W. 320.

Where the court stated in the presence of the jury that he understood the law to be that a detective, or the purchaser of intoxicating liquors need not be corroborated, but that he would not so charge, and upon objection of defendant's counsel he withdrew the remark and instructed the jury not to consider it, no error was committed. *Morrow v. State*, 56 App. 519, 120 S. W. 492.

One who is requested by an officer to purchase liquor of accused, and who makes such purchase with his own money knowing that accused would be prosecuted if he sold him the liquor, is not an accomplice of accused. *Moreno v. State*, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863.

It was not error for the court to refuse either to charge that a purchaser was an accomplice, or to submit that question to the jury. *Neal v. State*, 70 App. 584, 157 S. W. 1192.

A purchaser of intoxicating liquors in a local option district, though a detective or "spotter," is not an accomplice, either under this article or under the common law. *Albright v. State* (Cr. App.) 164 S. W. 1001.

Pursuing business in prohibition territory. *Hightower v. State* (Cr. App.) 165 S. W. 184.

Uncorroborated evidence of a detective who admitted that he induced accused to make the sale in order to detect him in a violation of law, though contradicted by accused, will support a conviction for violation of the local option law. *Looper v. State* (Cr. App.) 167 S. W. 342.

Repeal.—One charged with violating the local option law, prior to the statute making a sale of intoxicating liquor a felony, is properly tried and punished under the statute, making a sale of liquor a misdemeanor, in force at the time of the offense. *Sandoloski v. State* (Cr. App.) 143 S. W. 151.

Art. 603. Entries in books of internal revenue collector admissible in evidence.—In prosecutions under the provisions of this law, an examined copy of the entries on the books of the internal revenue collector, showing that the United States internal revenue liquor or malt license has been issued to the person or persons charged with violating the provisions hereof, shall be admissible in evidence, and shall be held to be prima facie evidence that such person or persons has paid the United States special tax as a seller of spirituous or malt liquors, and shall be held prima facie proof that the person or persons paying such tax are engaged in selling intoxicating liquors. [Act 1903, p. 56.]

See ante art. 597.

Cited, *Bell v. State*, 62 App. 242, 137 S. W. 670, 36 L. R. A. (N. S.) 98, Ann. Cas. 1913C, 617.

Evidence.—Where a person took out an internal revenue license as a retail liquor dealer, the fact that he was engaged in selling nonintoxicating malt liquors, and was advised to take out a license for that reason, would not prevent the issuance of such license from being prima facie proof under this article. *Columbo v. State* (Cr. App.) 145 S. W. 910.

A violation of the local option law may be proved as permitted by this article, though article 597 also permits it to be proved by showing that an internal revenue license is posted in the place where the violation is charged to have occurred. *Columbo v. State* (Cr. App.) 145 S. W. 910.

Instructions.—A charge that the license introduced in evidence is prima facie evidence that the licensee is engaged in selling intoxicating liquors is not reversible error, the error in referring to the paper introduced in evidence as a license being immaterial. *Columbo v. State* (Cr. App.) 145 S. W. 910.

Art. 604. Persons, firms or associations engaged in business of keeping and storing intoxicating liquor.—If any person, firm or association of persons, agent or employé of any person, firm or association of persons, who are engaged in the business or occupation of keeping or storing spirituous, vinous, or intoxicating liquors for others, within any county, justice precinct, subdivision of a county, city or town, in which the sale of spirituous, vinous and intoxicating liquors has been prohibited under the laws of this state, shall permit any one to drink any spirituous, vinous or intoxicating liquors within such place of business, such person, firm or association of persons, agent or employés, shall be deemed guilty of a misdemeanor. [Act 1905, p. 91.]

Cited, *Longmire v. State* (Cr. App.) 171 S. W. 1165.

Constitutionality.—This law is constitutional. *Ex parte Massey*, 49 App. 60, 92 S. W. 1084, 122 Am. St. Rep. 784.

Separate offenses.—No matter how many may drink at the same time, permitting any one to drink would be a separate offense. *Teague v. State*, 51 App. 523, 102 S. W. 1143.

Persons liable.—An owner who has no knowledge of the act of his clerk in permitting drinking is not guilty. *Teague v. State*, 51 App. 523, 102 S. W. 1143.

Indictment.—Willson's Cr. Forms, 320-322.

Instructions.—Where the defendant's evidence tended to show that he kept the liquors as an accommodation for others and not for hire a charge that by the terms "business" and "occupation" as used in this statute, is meant that which engages one's time and attention or labor, or that about which a person is engaged or employed, is too restrictive under the facts and erroneous. *Cohen v. State*, 53 App. 422, 110 S. W. 67, 68.

Art. 605. Penalty for.—Any person, firm or association of persons, or any agent or employé, found guilty of the above defined offense, shall be punished by a fine in any sum not less than twenty-five dollars nor more than two hundred dollars, and by confinement in the county jail for not less than twenty nor more than sixty days. [*Id.*, p. 91.]

Art. 606. Shipping intoxicating liquor; words to be placed on package; book to be kept.—Each and every person in this state, who shall place or have placed any package or parcel, of whatever nature, containing any intoxicating liquor, with any express company, railroad company or other common carrier, for shipment or transportation to any point in any county, justice precinct, school district, city or town, or subdivision of a county, within this state, where the sale of intoxicating liquors has been, or may hereafter be, prohibited under the laws of this state, shall first place in a conspicuous place, in plain letters, on such package or parcel the words: "Intoxicating liquor," the character and quantity of such intoxicating liquor, the place from where shipped, the place of destination and the names of the consignor and the consignee; and no express company, railroad company, or other common carrier, or any agent thereof, in this state, shall accept or receive from any person, firm or corporation, for shipment or transportation to any such point where the sale of intoxicating liquors has been, or may hereafter be, prohibited, under the laws of this state, any such package or parcel, unless the same shall have been labeled in the manner and form as hereinbefore in this article required; and no express company, railroad company, or other common carrier, or any agent thereof, in this state, shall deliver such package or parcel to any other than the consignee in person. Any agent of such express company, railroad company, or other common carrier, having the custody of any book or books required by this law of such express company, railroad company, or other common carrier, to be kept, shall, at the request of any person, at any reasonable time during office hours, produce such book or books for inspection by any officer of the law or any member of the grand jury.

When any express company, railroad company, or other common carrier, within this state, shall receive any package or parcel of whatsoever nature, whether from a point within or without this state, containing any intoxicating liquor, for transportation to any point within any county, justice precinct, school district, city or town, or subdivision of a county, where the sale of intoxicating liquors has been prohibited under the laws of this state, such express company, railroad company, or other common carrier, shall forthwith transport such intoxicating liquor to the place of its destination; and, upon the arrival of same at its place of destination, there shall be entered in a book to be kept for that purpose the names of the consignor and the consignee, the exact time of the arrival of such package or parcel at the place of its destination, the place from where shipped, the quantity and character of such intoxicating liquor, as shown on such package or parcel, the exact time delivered to the consignee, if delivered, and the signature of such consignee, who shall sign in person for same before delivery

thereof; and such book shall be open at all reasonable hours for inspection by any officer of the law or any member of the grand jury.

Any agent of any express company, railroad company, or other common carrier, or any other person, who shall violate any of the provisions of this section of this law shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and shall be punished by imprisonment in the county jail for any term not less than twenty nor more than sixty days. [Act 1905, ch. 160; S. S. 1910, p. 33.]

Explanatory.—This section is greatly reduced in its scope by arts. 606a-606p, post, but it probably still subsists as to the excepted instances and purposes in and for which liquor may be shipped.

Constitutionality.—This article is a valid exercise of the police power. *Hughes v. State* (Cr. App.) 149 S. W. 173.

This article does not violate Bill of Rights, § 9, which provides that the people shall be secure in their persons, houses, and papers from all unreasonable searches and seizures. *Hughes v. State* (Cr. App.) 149 S. W. 173.

Offenses.—This article covers and prohibits such a shipment of intoxicating liquor as baggage, without being properly labeled. *Phillips v. State* (Cr. App.) 167 S. W. 353.

Indictment.—An indictment which charged that defendant about 3 o'clock in the afternoon of a certain day, the same being within the office hours of his express company, refused to permit the sheriff to inspect books was sufficient, though it did not allege that the hour was "reasonable," especially where that ground was not given for the refusal. *Hughes v. State* (Cr. App.) 149 S. W. 173.

Evidence.—In a prosecution for refusing to permit inspection of books kept by defendant as an express agent, evidence by defendant that, if the officers entitled to examine the books had told him their rights under the law, he would have permitted their inspection, was inadmissible. *Hughes v. State* (Cr. App.) 149 S. W. 173.

A letter written by defendant to the county attorney the day after the refusal, offering to permit the examination of his books and stating that he did not intend to violate the law, was inadmissible. *Hughes v. State* (Cr. App.) 149 S. W. 173.

The entries on packages and in the books and papers of express companies are quasi public records and admissible in evidence in a prosecution for pursuing the occupation of selling intoxicating liquors in prohibition territory on proof that they were the records kept by the express company and identifying them, though they were not proved by the officer or agent of the express company making the entries; it also appearing that accused had signed such records as a receipt for the packages referred to therein. *Stephens v. State*, 63 App. 382, 139 S. W. 1141.

Evidence in a prosecution for pursuing the occupation of selling liquors in prohibition territory by a driver of an express wagon that he hauled for accused packages marked intoxicating liquors from the express office to the place where accused did business was not objectionable as opinion evidence because the witness had no personal knowledge of the contents of the packages. *Stephens v. State*, 63 App. 382, 139 S. W. 1141.

Where defendant was charged with violating the local option law, evidence that on various occasions he went at night with unidentified persons to a railway station some distance from the place where he resided, and each time identified the one who was with him as the consignee of liquor at such station, and that none of the alleged consignees were known to the agent, was admissible to show defendant's alleged system in carrying on the business in violation of the law. *Walker v. State* (Cr. App.) 145 S. W. 904.

Art. 606a. Delivery of liquor for shipment within state.—Except as otherwise provided in this Act it shall be unlawful for any person, firm or corporation, or any officer, agent or employé thereof in this state to deliver to any other person, firm or corporation, or any agent, officer or employé thereof, any intoxicating liquor for shipment, transportation, carriage or delivery within this state. [Act 1913, 1st S. S., p. 62, ch. 31, § 2, amending Act 1913, ch. 67, § 1.]

Historical.—Laws 1901, ch. 96, declaring that a C. O. D. shipment of liquor shall constitute a sale at the place of delivery, and that where orders are solicited in local option territory the transaction shall be considered a sale at the place of solicitation was held unconstitutional in *James v. State*, 45 App. 592, 78 S. W. 951, and was omitted from the revised Penal Code.

In general.—This applies to a county which, prior to its enactment, had adopted prohibition. *Longmire v. State* (Cr. App.) 171 S. W. 1165.

To secure a conviction under the Allison Bill, prohibiting the shipment of intoxicating liquors into local option territory, it is necessary that some of the provisions with regard to the illegal shipment, transportation, and reception of intoxicating liquor in such territory be violated. *Bain v. State* (Cr. App.) 176 S. W. 563.

Legislative power.—The Legislature may pass laws defining offenses for new conditions arising under the prohibition law, to aid in the prevention of illegal sales. *Johnson v. State* (Cr. App.) 171 S. W. 211.

Constitutionality.—This act is constitutional. *Johnson v. State* (Cr. App.) 171 S. W. 211; *Ex parte Muse* (Cr. App.) 168 S. W. 520.

Offense.—Petitioner, an express agent, delivered in local option territory, liquor shipped from without the state, which the consignee used and intended to use only for himself and his family. Held, that in view of section 9, (606i) authorizing any person to carry into local option territory liquor intended for his own use, petitioner was not guilty of any violation of law; section 5, (606d) authorizing deliveries of intoxicants when not intended to be used unlawfully. *Ex parte Peede* (Cr. App.) 170 S. W. 749.

Defendant's act as an agent in buying for another and carrying to him a bottle of whisky bought with such other's money for his individual use was not an offense. *Ex parte Hopkins* (Cr. App.) 171 S. W. 1163.

Transportation as agent for another for his own use is not an offense. *Longmire v. State* (Cr. App.) 171 S. W. 1165.

Indictment.—An indictment charging in two counts that the law prohibiting the sale of intoxicating liquors had been duly voted upon, carried, and was in force in the county at the time of the offense charged, and that accused unlawfully delivered to Y. intoxicating liquors for shipment, transportation, and carriage within the state, and that he unlawfully delivered to Y. intoxicating liquor in violation of such law, charged an offense. *Ex parte Muse* (Cr. App.) 168 S. W. 520.

An indictment need not allege whether the transportation was interstate or intrastate. *Longmire v. State* (Cr. App.) 171 S. W. 1165.

Art. 606b. Reception of liquor for shipment within state.—Except as otherwise provided in this Act, it shall be unlawful for any person, firm or corporation, or any agent, officer or employé thereof in this state to receive from any other person, firm, or corporation, or any agent, officer or employé thereof, any intoxicating liquor for shipment, transportation, carriage or delivery within this state. [Act 1913, 1st S. S., p. 63, ch. 31, § 3, amending Act 1913, ch. 67, § 2.]

See notes under art 606a, ante.

Art. 606c. Shipment of liquor within state.—Except as otherwise provided in this Act, it shall be unlawful for any person, firm or corporation, or any agent, officer or employé thereof to ship, transport, carry or deliver any intoxicating liquor to any other person, firm or corporation, or any agent, officer or employé thereof in this state. [Act 1913, 1st S. S., p. 63, ch. 31, § 4, amending Act 1913, ch. 67, § 3.]

See notes under art. 606a, ante.

Legislative power.—With the shipment and delivery of intoxicating liquor wholly within the state, the Legislature alone has authority to deal, and, in so far as it may be necessary to protect the public health, morals, and welfare, its will, as expressed in statutes, is final. *Longmire v. State* (Cr. App.) 171 S. W. 1165.

Interstate shipments.—This article is inapplicable to interstate shipments. *Ex parte Peede* (Cr. App.) 170 S. W. 749.

Indictment.—An indictment charging conjunctively a violation of this article, charges but one offense. *Johnson v. State* (Cr. App.) 171 S. W. 211.

An indictment charging the transportation and delivery of intoxicating liquor in prohibition territory, which alleges that on a designated date an election was held under proper authority and that prohibition was adopted, was sufficient, without naming the various voting precincts in the county. *Johnson v. State* (Cr. App.) 171 S. W. 211.

An indictment need not allege whether the transportation was interstate or intrastate. *Longmire v. State* (Cr. App.) 171 S. W. 1165.

An indictment charging that defendant did unlawfully bring, transport, and carry into the county intoxicating liquors for one E., and did then and there deliver intoxicating liquors to E., and did receive for transportation, carriage, and delivery to E. in said county, intoxicating liquors, said liquors being received by defendant in D. county, Tex., from person or persons unknown, was sufficient. *Perryman v. State* (Cr. App.) 173 S. W. 1195.

Evidence.—Evidence held to sustain a conviction. *Johnson v. State* (Cr. App.) 171 S. W. 211.

Testimony of an officer, seizing a valise of accused which he had carried into the prohibition territory, that the bottles in the valise contained whisky, was admissible. *Johnson v. State* (Cr. App.) 171 S. W. 211.

Where there was evidence that a valise containing whisky was the property of accused, and that he had transported the same into prohibition territory from a point in the state, the action of the court in allowing the district attorney to open the valise in the presence of the jury, and introduce it and the whisky contained therein in evidence, was proper. *Johnson v. State* (Cr. App.) 171 S. W. 211.

Where the evidence clearly showed that a valise containing bottles of whisky was carried into the territory by accused, the testimony of an officer that he saw a third person go to a negro coach, and saw a negro's arm handing the valise out to him, and that when the third person saw the officer he threw the valise under the coach, was admissible as against the objection that it was not shown that accused handed the valise to the third person; the evidence excluding every other reasonable hypothesis than the fact that accused was the one who handed the valise to the third person. *Johnson v. State* (Cr. App.) 171 S. W. 211.

Art. 606d. Shipment of liquor from without the state to place within the state where sale is prohibited.—It shall be unlawful for any person, firm or corporation, or any officer, agent or employé thereof to ship, or transport in any manner or by any means whatsoever any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind from a point within any other state or territory or district of the United States to any person, firm or corporation, or agent, officer, or employé thereof in this state residing or living within any territory within this state where the sale of intoxicating liquors has been prohibited under the laws of this state, which such spirituous, vinous or malted, fermented or other intoxicating liquor is intended by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of this state. [Act 1913, 1st S. S., p. 63, ch. 31, § 5.]

Explanatory.—The proviso in Act 1913, ch. 67, § 4, excluding interstate commerce from the operation of the act was repealed by the amendatory act (Act 1913, 1st S. S. ch. 31).

See notes under art. 606a, ante.

Constitutionality.—This article is not an invalid regulation of interstate commerce. Ex parte Peede (Cr. App.) 170 S. W. 749.

Laws applicable.—Interstate shipments are governed solely by this section which is a replica of the Webb-Kenyon Act. Ex parte Peede (Cr. App.) 170 S. W. 749.

Offense.—It is no offense for an express agent to deliver in local option territory, liquor shipped from without the state, which the consignee used and intended to use only for himself and his family. Ex parte Peede (Cr. App.) 170 S. W. 749.

Persons delivering intoxicants within local option territory are bound to exercise "proper care" which is the use of such diligence as the circumstances require to see that the liquor is not used contrary to law, and only a mistake of fact will excuse a delivery of liquors used or intended to be used contrary to law. Ex parte Peede (Cr. App.) 170 S. W. 749.

Defendant's act as an agent in buying for another and carrying to him a bottle of whisky bought with such other's money for his individual use was not an offense. Ex parte Hopkins (Cr. App.) 171 S. W. 1163.

Art. 606e. Soliciting orders for intoxicating liquors in local option territory.—It shall be unlawful for any person, firm or corporation in person, by letter, circular or other printed or written matter, or in any other manner to solicit or take orders for any intoxicating liquors in any county, justice precinct, town, city or other subdivision of a county where the qualified voters thereof have by a majority vote determined that the sale of intoxicating liquors shall be prohibited therein. [Id., § 6.]

Historical.—Laws 1905, ch. 159 prohibiting the soliciting of orders for the sale of liquor in local option territory was held unconstitutional in Ex parte Massey, 49 App. 60, 92 S. W. 1086, 122 Am. St. Rep. 784, and was omitted from the revised penal code.

Offense.—That a person, upon the solicitation of another, attempts to procure intoxicating liquors for him, but does not himself solicit the giving of an order therefor, is not a violation of this article. Bain v. State (Cr. App.) 176 S. W. 563.

Art. 606f. Medicinal, mechanical, and scientific purposes excepted.—Nothing in this Act shall prohibit any owner, proprietor, agent or employé of any drug store in which drugs are compounded and employing a registered pharmacist, whether incorporated or unincorporated, or any owner, proprietor, agent or employé of any educational or eleemosynary institution, whether incorporated or unincorporated, or any owner, proprietor, agent or employé of any public or private hospital, whether incorporated or unincorporated, or any agent, officer or employé of any manufacturer or the owner or proprietor of any manufacturing establishment, whether incorporated or unincorporated, from receiving alcohol for the uses of his, their or its business only; provided such business is not manufacturing of any intoxicating liquors capable of being used as a beverage; provided further that the order for the same shall be accompanied with an affidavit showing that the person ordering or receiving same is entitled to receive the same under the

provisions of this section; in which said affidavit the fact shall be stated as to the status of the person so ordering or receiving the same, and the quantity of alcohol so ordered and an original of such affidavit at the time of the making of such order shall be filed with the clerk of the district court of the county where such intoxicating liquor is to be delivered. [Id., § 7.]

See notes under art. 606a.

Art. 606g. Not applicable to licensed dealer.—Nothing in this Act shall make it unlawful for any person licensed or authorized under the laws of this state to sell spirituous, vinous or malt liquors, to ship, transport, carry or deliver such liquors to any person within the limits of the territory wherein the sale of intoxicating liquors is permitted under the laws of this state. [Act 1913, 1st S. S., p. 63, ch. 31, § 8, amending Act 1913, ch. 67, § 5.]

See notes under art. 606a.

Art. 606h. Proprietors of vineyards not prohibited from shipping grape juice and wine.—Nothing in this Act or the laws of this State shall make it unlawful for any person who is engaged in the planting or growing of a vineyard to ship, transport, carry or deliver, any grape juice or wine made by him from grapes so grown, to any person within the limits of any territory in this state in which the sale of intoxicating liquors is permitted under the laws of this state. [Act 1913, 1st S. S., p. 64, ch. 31, § 8a.]

Art. 606i. Liquors for private use excepted.—Nothing in this Act shall make it unlawful for any person for the use of himself or the members of his family residing with him, to personally carry such liquor to any point within this state. [Act 1913, 1st S. S., p. 64, ch. 31, § 9, amending Act 1913, ch. 67, § 6.]

See notes under art. 606a.

Personal transportation.—The transportation of intoxicating liquors from "wet" territory in the state into prohibition territory by a citizen of the latter territory, for his own use is not a violation of this act. *Longmire v. State* (Cr. App.) 171 S. W. 1165.

Art. 606j. Shipment to licensed dealers not prohibited.—Nothing in this Act shall make it unlawful for any person, firm or corporation, or any agent, officer, or employé thereof to ship, transport, carry or deliver intoxicating liquor to any person authorized or licensed under the laws of this state to sell spirituous, vinous or malt liquors (including dealers licensed and authorized under the laws of this state to sell such liquor for medicinal purposes on prescription in local option territory). [Act 1913, 1st S. S., p. 64, ch. 31, § 10, amending Act 1913, ch. 67, § 7.]

See notes under art. 606a.

Art. 606k. Wine for sacramental purposes excepted.—Nothing in this Act shall make it unlawful for any priest or minister of any religious denomination or sect, to order or receive wine for sacramental purposes, or for any common carrier to ship, transport, carry or deliver same to any priest or minister of any religious denomination or sect for sacramental purposes only, in quantities of one gallon or less. [Act 1913, 1st S. S., p. 64, ch. 31, § 11, amending Act 1913, ch. 67, § 8.]

Art. 606l. Negating exceptions.—It shall not be necessary in any prosecution under this Act to negative the exceptions herein made but the same shall be available to the defendant as purely defensive matters. [Act 1913, 1st S. S., p. 64, ch. 31, § 12.]

Negating exceptions.—*Ex parte Muse* (Cr. App.) 168 S. W. 520; *Longmire v. State* (Cr. App.) 171 S. W. 1165; *Perryman v. State* (Cr. App.) 173 S. W. 1195.

Art. 606m. Affidavit by persons using liquor for medical, etc., purposes.—Any owner, proprietor, agent or employé of any drug

store, or any owner, proprietor, agent or employé of any board of directors of any hospital, educational or eleemosynary institutions of this state, or any owner, agent or employé of any manufacturer or manufacturing establishment who shall order any alcohol without accompanying the order with an affidavit as required in Section 7 [art. 606f] of this Act, or who shall fail or refuse to file an original of such affidavit with the clerk of the county where such liquor is to be delivered, shall be guilty of violating the provisions of this Act. [Id., § 13.]

Art. 606n. Penalties and suits therefor.—Any corporation which shall violate any of the provisions of this Act, shall for each such violation forfeit and pay the sum of Five Hundred Dollars to the state of Texas. The county Attorney for the county or in case there is no county attorney for said county, then the district attorney for the district, including such county in which such violation may occur, shall, upon credible information furnished him, institute suit or suits in the name of the State of Texas against such corporation for the recovery of said penalties; and in case of a recovery of any penalties, the said attorney instituting and prosecuting said cases shall be entitled to one-fourth of the amount thereof as commission for his services, and the remainder thereof shall be paid into the Road and Bridge Fund of said county; provided that the State of Texas shall in no event be liable for any costs in any suit authorized by this law to enforce its provisions and the state shall not be required to give bond for costs in any suit instituted under the provisions of this Act.

And provided further, that should any county or district attorney refuse to bring such suit after credible information has been furnished him, then and in that event any private person, a citizen of the county in which the violation occurred, may institute suit in his own name for the use and benefit of the State of Texas as provided for herein for the recovery of such penalties provided for in this Act; and said person so instituting any suit may be required to give security for costs as provided for under the general laws of the State of Texas.

Provided further, that should any private citizen institute suit as herein provided for, and he be required to give bond, and thereafter any county or district attorney desiring to prosecute same, said attorney shall be permitted so to do, and his name shall be entered upon the Court docket where said case is pending, and thereafter said private citizen and his sureties shall be relieved of all costs in said case at that time remaining unpaid, which have accrued or which may thereafter accrue. [Act 1913, 1st S. S., p. 64, ch. 31, § 14, amending Act 1913, ch. 67, § 10.]

Art. 606o. Violation of act a felony.—Any person, or any officer, agent or employé of any firm or any corporation who shall violate any of the provisions of this Act, shall be deemed guilty of a felony and upon conviction thereof shall be confined in the state penitentiary for not less than one nor more than three years. [Act 1913, 1st S. S., p. 65, ch. 31, § 15, amending Act 1913, ch. 67, § 9.]

Art. 606p. Conviction on testimony of accomplice; exemption from prosecution.—A conviction for a violation of any of the provisions herein may be had on the unsupported evidence of an accomplice or participant, and such accomplice or participant shall be exempt from prosecution for any offense under this law about which he may be required to testify. [Act 1913, 1st S. S., p. 65, ch. 31, § 16.]

Purchaser and seller under local option laws, see ante, art. 602.

Art. 606q. Invalidity of part of act.—If for any reason any section or part of this Act shall be held to be unconstitutional or invalid, then that fact shall not invalidate any other part of this Act but the same shall be enforced without reference to the parts so held to be invalid. [Act 1913, 1st S. S., p. 65, ch. 31, § 17, amending Act 1913, ch. 67, § 12.]

Sec. 18, Acts 1913, 1st S. S. ch. 31, repeals all laws and parts of laws in conflict.

Art. 607. [408] Evidence when persons are jointly indicted.—Where persons are jointly indicted, or otherwise prosecuted for selling liquor in violation of law, it shall be sufficient to show, by general reputation, that they are understood to be members of the firm. [Act Feb. 12, 1858, p. 168.]

Indictment.—Willson's Cr. Forms, 315.

Art. 608. [409] Members of firm liable personally.—Any one member of a firm may be separately prosecuted for the offense of selling liquor in violation of law. [Act Feb. 12, 1858, p. 168.]

Indictment.—Willson's Cr. Forms, 315.

Art. 609. [410] If owner is unknown, persons selling liable.—Where any establishment for the sale of liquor is conducted without the name of the owner being known, any and all persons who may be found selling liquor in such establishment, in violation of law, shall be subject to prosecution as separate offenders. [Act Feb. 12, 1858, p. 168.]

Art. 610. [411] Procedure in case of firm.—When a firm is prosecuted for a violation of the law relating to the sale of liquor, the fine shall be assessed against the parties jointly, but each defendant shall be liable for the whole amount; and in cases of prosecution against a firm, if all the defendants be not arrested, a verdict and judgment for the full amount of the fine may be rendered against any one or more who may be tried. [Act Feb. 12, 1858, p. 168.]

Indictment.—Willson's Cr. Forms, 315.

COLD STORAGE ACT

Laws 1897, ch. 99, making it a misdemeanor to operate a cold storage plant for the keeping or cooling of intoxicating liquors for others was held unconstitutional in *Ex parte Brown*, 38 App. 295, 42 S. W. 554, 70 Am. St. Rep. 743, and was omitted from the revised penal code.

CHAPTER EIGHT

VIOLATIONS OF THE LAW REGULATING THE SALE OF INTOXICATING LIQUORS

Art.	Art.
611. Selling without license.	624. Spirituous or vinous liquors not to be sold under malt dealer's license.
612. Selling malt liquors without license.	625. Musical instruments or games prohibited in place of business.
613. Wine growers exempted, when.	626. Female employé other than member of family prohibited.
614. Business under license limited to one place.	627. Not to sell to persons after having been notified.
615. Time for opening and closing.	628. Law not to conflict with local option law.
616. Selling to be drunk on premises; bond required; false affidavit of verification; sale without giving bond; sale after cancellation of bond; sale after withdrawal of sureties; proviso in respect to sales to minors and habitual drunkards.	629. License to be posted in conspicuous place.
617-621. [Superseded.]	630. Prohibiting sale of liquor at places and on election day.
622. Selling or giving away to minors.	630a. Sale within prohibited districts in cities and towns.
623. Selling or giving away to habitual drunkards or on Sunday or on election day.	631. Duties of certain officers.
	632. Official dereliction, penalty.
	633. Tax collectors issuing illegal receipts.

Article 611. Selling without license.—No person shall, directly or indirectly, sell spirituous or vinous liquors, capable of producing intoxication, in quantities of one gallon or less, without taking out a license as a retail liquor dealer. Any person who shall violate the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail for a term not to exceed six months. [Act 1907, ch. 138; Act 1909, p. 294.]

See art. 130, ante.

Cited, *Ex parte Preston*, 72 App. 77, 161 S. W. 115; *Minter v. State*, 70 App. 634, 159 S. W. 286.

Relation to other statutes.—The purpose of this law is to punish one selling intoxicating liquors without license at any time, whether on Sunday or week day. The general Sunday law punishes infractions by sales on Sunday whether with or without license. *Ex parte Wright*, 56 App. 504, 120 S. W. 868.

Art. 302 is not affected nor is it in conflict with any of the provisions of this chapter. *Ex parte Wright*, 56 App. 504, 120 S. W. 868.

This article is not in conflict with articles 496 and 589. *Haynes v. State*, 63 App. 181, 139 S. W. 1155.

Legislative powers.—A sale of intoxicating liquor is subject to control under the police power of the state, and it may be either prohibited or permitted under such conditions as the Legislature shall impose. *State v. Country Club* (Civ. App.) 173 S. W. 570; *Ex parte Bell*, 24 App. 428, 6 S. W. 197; *Ex parte Peede* (Cr. App.) 170 S. W. 749.

Offense.—Tax for sale of liquors cannot affect a sale made prior to its levy. *Petteway v. State*, 36 App. 97, 35 S. W. 646.

Whether liquor sold comes within the prohibition depends on whether it was intoxicating. *Petteway v. State*, 36 App. 97, 35 S. W. 646.

One sale of liquor taken from a licensed saloon by an employé of the proprietor would not constitute the employé a "liquor dealer" within the meaning of this article. *Cassidy v. State*, 58 App. 454, 126 S. W. 600.

Before one can be convicted of unlawfully selling intoxicating liquors, the jury must believe beyond a reasonable doubt that the liquor sold was intoxicating. *Roberts v. State*, 59 App. 47, 126 S. W. 1129.

Where two licenses were issued authorizing relator to sell intoxicating liquors at two different places in the same county, the revocation of one license for a violation of the liquor law does not ipso facto revoke the other license, when no notice of a declaration of a forfeiture has been given, so as to render relator's sales made under the authority of the second license illegal. *Ex parte Hewgley* (Cr. App.) 150 S. W. 1174.

This article was intended to make unlawful a single sale by any one not licensed and not within the exception, even if not engaged in the business of selling. *State v. Country Club* (Civ. App.) 173 S. W. 570.

— **Intent.**—Intent is not an issue in selling liquor without license. *Allen v. State* (Cr. App.) 59 S. W. 265.

The only intent necessary is an intent to do the prohibited act, though the seller believes in good faith that the sale is not prohibited by the statute. *State v. Country Club* (Civ. App.) 173 S. W. 570.

— **Social Clubs.**—Keeping place for sale, see ante, art. 496 et seq.

A bona fide club dispensing liquors to its membership is not within the law requiring a license to follow the business of selling liquors. *Baker v. State* (Cr. App.) 167 S. W. 340; *Adams v. State* (Cr. App.) 145 S. W. 940; *Trezevant v. State* (Cr. App.) 145 S. W. 1191.

Where an incorporated club purchased liquors in bulk with money in the treasury, a sale of the same at the usual price, though made only to its members, constitutes a sale within the prohibition laws. *Adams v. State* (Cr. App.) 145 S. W. 940.

Where a club, formed for social and literary purposes, and having a membership and charging membership dues, has a bar and a stock of liquors kept for sale, the officer or person in charge who makes a sale of liquor to a person not a member is guilty. *Trezevant v. State* (Cr. App.) 145 S. W. 1191.

Facts held to show that a club was not bona fide, but a mere pretense for the sale of liquor. *Baker v. State* (Cr. App.) 167 S. W. 340.

A transfer of common property to one of the owners in consideration of payment of the price into the common fund is a "sale," but a distribution of it among the common owners is not. *State v. Country Club* (Civ. App.) 173 S. W. 570.

The enacting of this article and following articles exempting certain persons therefrom, is a more definite indication of the intent to include incorporated clubs within the prohibition than if there had been an attempt to enumerate the prohibited classes, since the word "persons" includes corporations, and the mention of exempted persons excludes others from the exemption. *State v. Country Club* (Civ. App.) 173 S. W. 570.

The re-enactment of this law after it had been decided that the statute of which it formed a part did not authorize the collection of a license tax from an incorporated club, indicated, under the rule that the Legislature, in re-enacting a statute which has been construed, adopts the construction placed thereon, rather than that the Legislature intended to prohibit all sales by such clubs than that

they were to be exempted from the prohibition. *State v. Country Club* (Civ. App.) 173 S. W. 570.

The dispensing of intoxicating liquors by an incorporated, bona fide social club to its members for a sum sufficient to pay the cost of the liquors and of maintaining the service is a "sale" of such liquors, and, if unlawful, cannot be held to be within the implied powers of the corporation. *State v. Country Club* (Civ. App.) 173 S. W. 570.

Indictment.—The indictment must allege a violation of the particular character of license required in that particular territory as a prerequisite to engage in the sale of such intoxicants. As a license to sell on prescription of regular practicing physicians, it must be alleged that this provision was violated. *Williamson v. State*, 41 App. 461, 55 S. W. 569.

Indictment alleging sale in quantities less than one gallon is not sustained by proof of sale in quantities of more than a gallon. *Williamson v. State*, 41 App. 461, 55 S. W. 570.

The indictment must allege the intoxicating quality of the malt liquors sold. *Hardwick v. State*, 55 App. 140, 114 S. W. 832.

An indictment alleged that accused sold intoxicants in quantities of less than one gallon without taking out a license as a retail dealer, he not being then a retail dealer, and not having taken out a license as such, and that he then and there sold intoxicants, to wit, one glass of beer to a certain person and a bottle of beer to another, etc. Held, that the indictment contained only one count, and a contention that it contained two, one alleging a sale of a glass and bottle of beer without alleging that they contained less than a gallon, so that accused could not be convicted, the indictment failing to allege whether he was a wholesale or retail dealer, was untenable, and the indictment was sufficient. *Hookman v. State*, 59 App. 183, 127 S. W. 825.

An indictment for the offense of selling intoxicating liquors in quantities of one gallon or less, without first obtaining license to do so, need not allege that defendant was pursuing the occupation of a retail liquor dealer. *Trezevant v. State* (Cr. App.) 145 S. W. 1191.

Evidence.—Evidence of the effect of brandy cherries, sold by a person other than defendant, is inadmissible. *Petteway v. State*, 36 App. 97, 35 S. W. 646.

When the only issue is whether defendant sold spirituous liquors, evidence of intent is inadmissible. *Id.*

An order of the commissioners' court levying a county tax on all occupations taxable by law, is sufficient and is admissible in evidence. *Witherspoon v. State*, 39 App. 65, 44 S. W. 164, 1096.

To warrant a conviction for an alleged sale of liquor through go-betweens, the state must show that the accused was connected with the sale, and received the price, and knew what it was for. *Lindley v. State*, 57 App. 480, 123 S. W. 1107.

Evidence held insufficient to sustain a conviction. *Cassidy v. State*, 58 App. 454, 126 S. W. 600.

In a prosecution for selling liquor without a license, evidence of violation of the law under license would not sustain a conviction, and evidence that defendant sold the liquor after getting it from a licensed saloon, where he worked as a bartender, need not be considered. *Cassidy v. State*, 58 App. 454, 126 S. W. 600.

Where, on the issue whether liquor sold was intoxicating, a witness testified that he had handled a car load of the beverage, and that the casks that were sold to prosecutor went out of the same car from which casks to a third person were sold, and there was nothing to show that the third person had bought liquor from any one else, evidence that the liquor sold by the third person was intoxicating was admissible. *Roberts v. State*, 59 App. 47, 126 S. W. 1129.

It is competent for the state to show the possession of the liquor by the prosecuting witness on the day of the sale and immediately following, and to introduce and identify the liquor so found in his possession. *McAdams v. State*, 59 App. 86, 126 S. W. 1156.

Declarations of the prosecuting witness are inadmissible to connect accused with the sale. *McAdam v. State*, 59 App. 86, 126 S. W. 1156.

In a prosecution for selling on April 24th, evidence that on April 22d accused applied for a retail license to sell at the place where the illegal sales were claimed to have been made, and was granted a license on May 6th, was admissible to show that accused had control and management of the place when the sales charged were made, and as evidence to identify such place. *Hookman v. State*, 59 App. 183, 127 S. W. 825.

Testimony was not admissible that the place in which accused was charged with selling intoxicants was reputed a place where beer was sold. *Hookman v. State*, 59 App. 183, 127 S. W. 825.

Error in admitting evidence that the house in which the sales were alleged to have been made was reputed a place where beer was sold, held reversible where accused claimed he had not sold any liquor, and did not control the place and that the beer privilege therein belonged to another who had a license, and the evidence sharply conflicted. *Hookman v. State*, 59 App. 183, 127 S. W. 825.

Evidence that defendant, after his attention was called by officers to the fact of an alleged unlawful sale, but while he was not under arrest, asked how much it would take to square the thing was admissible. *Trezevant v. State* (Cr. App.) 145 S. W. 1191.

The Court of Criminal Appeals will take judicial notice that beer is intoxicating. *Figueroa v. State*, 71 App. 371, 159 S. W. 1188.

Instructions.—Inasmuch as a party engaged in the sale of malt liquors, regardless of their intoxicating qualities, is required to obtain a license for the sale of such malt liquors, a charge on this statute, making the revenue license prima facie evidence and shifting the burden of proof, is not authorized in any case where the

accusation is for the sale of malt liquors and the intoxicating quality of the liquor is a matter in dispute. *Thompson v. State* (Cr. App.) 97 S. W. 318.

It is proper to charge the substance of this article in a prosecution under art. 612. *Figueroa v. State*, 71 App. 371, 159 S. W. 1188.

Art. 612. Selling malt liquors without license.—No person shall sell, directly or indirectly, malt liquor capable of producing intoxication, in quantities of one gallon or less, without taking out a license as a retail malt dealer; provided that this article shall not apply to a retail liquor dealer, and that a retail liquor dealer's license shall be construed to embrace a retail malt dealer's license. Any person, who shall violate the provisions of this article, shall, upon conviction thereof, be punished by a fine of not less than two hundred and fifty dollars nor more than five hundred dollars, and by imprisonment in the county jail for a term not exceeding ninety days. [Act 1907, ch. 138; Act 1909, p. 295.]

Offense.—It is an offense to sell intoxicating liquors at any other place than that set out in the license. *Saffroi v. Cobun*, 32 Civ. App. 79, 73 S. W. 829.

In a prosecution for selling intoxicating liquors without a license, proof that accused had a license to sell intoxicating liquors at another place on the same street is no defense; the statute prohibiting a dealer in intoxicants from carrying on his business under his license at more than one place at the same time, and providing for a change of the location of licenses. *Loicano v. State*, 72 App. 518, 163 S. W. 64.

Indictment.—A complaint was not fatally defective because it alleged that defendant sold "malt liquor or beer" instead of charging a sale of malt liquor and beer, since the terms "malt liquor" and "beer," as used in this article are in effect synonymous. *Figueroa v. State*, 71 App. 371, 159 S. W. 1188.

An information alleging that accused sold intoxicating malt, spirituous, and vinous liquors, to wit, one bottle of beer, is not duplicitous in charging the sale of different kinds of intoxicating liquors in the same count as it specifically alleges the kind of liquor sold, and the words "spirituous and vinous" should be disregarded as surplusage. *Loicano v. State*, 72 App. 518, 163 S. W. 64.

Evidence.—It was not necessary for the state to prove any county levy of taxes. *Figueroa v. State*, 71 App. 371, 159 S. W. 1188.

Instructions.—The court did not err in omitting to define the terms "occupation" or "business," neither of which were used in the statute under which defendant was prosecuted. *Figueroa v. State*, 71 App. 371, 159 S. W. 1188.

It was proper for the court in stating the case to the jury to charge the substance of article 611. *Figueroa v. State*, 71 App. 371, 159 S. W. 1188.

Art. 613. Wine growers exempted, when.—This law shall not be so construed as to deny the right of wine growers to sell wine of their own production in any quantity without license; provided, that such wine grower shall not permit nor suffer any wine so sold by him to be drunk on his premises; and provided, further, that this article shall not be so construed as to give any wine grower the right to sell any wine to any minor, without the permission of the parent, master or guardian of such minor first had and obtained, or any habitual drunkard, after being notified by any relative of such drunkard not to make such sale, gift or disposition. Every wine grower who shall violate any of the provisions of this article shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail during a term not to exceed three months, or by both such fine and imprisonment. [Act 1907, ch. 138; Act 1909, p. 295.]

Art. 614. Business under license limited to one place.—No retail liquor dealer nor retail malt dealer shall carry on said business at more than one place at the same time under the same license, nor shall any such license be voluntarily assigned more than once; but, before the assignee of such license can engage in business thereunder, he shall comply with the provisions required of the original licensee; and provided, further, that the sale of such license, whether in the name of the original licensee or assignee, may be made under execution or mortgage; and the purchaser of such license at such sale shall have the right to surrender such license to the state or county which issued the tax receipt which is

the basis therefor, and shall receive therefor the pro rata unearned portion of such license; provided, further, that should said original licensee or his assignee desire to change the place designated in said license he may do so by applying to the county judge as in case of original application for license, but it shall not be necessary to furnish another certificate from the comptroller of public accounts. [Id.]

Art. 615. Time for opening and closing.—Every person or firm having a license, who may be engaged in or who may hereafter engage in the sale of intoxicating liquors to be drunk on the premises (in any locality of this State other than where local option is in force) shall close and keep closed their houses and places of business and transact no business therein or therefrom from and after nine thirty o'clock P. M. until six o'clock A. M. of each week day, and shall close and keep closed their houses and places of business and transact no business therein or therefrom from and after nine thirty o'clock P. M. on Saturday until six o'clock A. M. of the following Monday of each week, and any such person or firm or his or their agent or employee who shall open or keep open, or permit to open or permit to be opened or kept open, any such house or place of business, for the purpose of traffic or who shall sell or barter any intoxicating liquor of any kind, or who shall transact or permit to be transacted therein or therefrom any such business between the hours aforesaid shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment. [Act 1907, p. 260; Act 1909, p. 304; Act 1913, p. 141, ch. 75, amending art. 615, Pen. Code 1911.]

See Act 1913, 1st S. S. ch. 30, § 1, amending the civil statutes relating to the time of closing (Vernon's Sayles' Civ. St. 1914, art. 7451).

Cited, in dissenting opinion, *Moreno v. State*, 64 App. 660, 143 S. W. 156, Ann. Cas. 1914C, 863.

Indictment.—An indictment charging that defendant "did then and there open and permit to be opened his place of business for the purpose of traffic, and did then and there barter and sell intoxicating liquor, to wit, whisky and beer in quantities of less than one quart, after twelve o'clock midnight on Saturday, February 2, 1909, and before five o'clock a. m. the following Monday, February 4, 1909," sufficiently alleged the date of the commission of the offense to be on a certain day; the absence of a date preceding the words "then and there" not being fatal in view of the other allegations. *Celli v. State*, 60 App. 311, 131 S. W. 597.

An affidavit, stating that a certain person had a retail license to sell liquor at a certain place on a certain date, and that on such date, at a prohibited time, he sold liquor, in violation of this article, was sufficient to authorize the county court to issue the notice provided for in section 8, informing him, in effect, that the matter of canceling his license would be heard at a certain time. *State v. De Silva*, 105 Tex. 95, 145 S. W. 330.

Evidence.—There is no presumption that local option laws are in effect in a given territory, and hence in a prosecution for sales of intoxicants on Sunday made by a licensed dealer, the state having introduced his application for a license in which he made affidavit that prohibition was not in effect in the place in which he carried on his business, is not bound to show that the local option law had not been adopted. *Woods v. State* (Cr. App.) 151 S. W. 296.

Art. 616. Selling to be drunk on premises; bond required; false affidavit of verification; sale without giving bond; sale after cancellation of bond; sale after withdrawal of sureties; proviso in respect to sales to minors and habitual drunkards.—Every person or firm desiring to engage in the sale of spirituous, vinous or malt liquors, or medicated bitters, capable of producing intoxication to be drunk on the premises, shall, before engaging in such sale, be required to enter into a bond in the sum of five thousand dollars; provided, however, that any person or firm dealing exclusively in malt liquors shall be required to give bond only in the sum of one thousand dollars, with at least two good, lawful and suffi-

cient sureties, and the sureties required by law on the bonds of liquor dealers shall make affidavit, before some officer authorized to administer oaths, that they, in their own right, over and above all exemptions, are each worth the full amount of the bond they sign as sureties; and no county judge shall approve any such bond unless the affidavit as provided for in this article shall have been duly made. The approval of any such bond by the county judge without such affidavit shall make said county judge liable for any penalty recovered on such liquor dealer's bond; and any person who shall make any false affidavit, as required by this law, shall be punished as provided for in the Penal Code of this State; provided, that nothing herein shall prevent the making of such bond by a surety, company as permitted by law, payable to the State of Texas, to be approved as to security by the county judge; which bond shall be conditioned that said person or firm so selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, shall not, either in person or knowingly by any agent, employé or representative, during the year for which such license shall run, keep open the house or place where liquors shall be sold under such license for the sale thereof, or transact such business in such house or place of business, after 9:30 o'clock p. m. on Saturday and between that hour and 6 o'clock a. m. on the following Monday of any week, or between the hours of 9:30 p. m. and 6 a. m. of the following morning of any week day, and that such person or firm shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, and that such person or firm, or his or their agent or employé, will not sell or permit to be sold in his or their house or place of business, nor give nor permit to be given any spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, to any person under the age of 21 years, or to a student of any institution of learning, or any habitual drunkard, after having been notified in writing through the sheriff or other peace officer, by the wife, father, mother, daughter or sister of such habitual drunkard, said notice shall be in force and effect for a period of two years, not to sell to any such person, and that he or they will not permit any person under the age of 21 years to enter and remain in such house or place of business; that he or they will not permit any games prohibited by the law of this State to be played, dealt or exhibited in or about such house or place of business, and that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this State, and that he or they will not adulterate the liquors sold by them in any manner, mixing the same with any drug, and that he or they will not knowingly sell or give away any impure or adulterated liquors of any kind, and that he or they will not violate any law of this State relating to the regulation, sale or transportation of intoxicating liquors, which said bond shall be filed in the office of the county clerk of the county where such business is conducted, and shall be recorded by such clerk in a book to be kept for such purpose; for which service said clerk shall be entitled to a fee of seventy-five cents; which said bond may be sued on at the instance of any person or persons aggrieved by the violations of its provisions, and such person shall be entitled to recover the sum of five hundred dollars as liquidated

damages for such infraction of the conditions of such bond; and the said bond shall not be void on the first recovery, but may be sued on until the full penal sum named therein shall have been recovered. In addition to civil proceedings for individual injuries brought on said bond, as above indicated, if any person or firm shall violate any of the conditions of the bond herein required, it shall be the duty of the county and district attorneys, or either of them, to institute suit thereupon; or any person owning real property in the county may institute suit thereupon in the name of the State of Texas, for the use and benefit of the county, but no compensation shall be allowed such citizen, and he may be required to give security for costs; and the amount of five hundred dollars as a penalty shall be recovered from the principals and sureties upon the liquor dealer's bond, upon the breach of any of the conditions thereof; and thereafter when any recovery is had by any person or by any county or district attorney, for the use and benefit of the county in any action in any court of competent jurisdiction, upon the bond of any person or firm engaged in the sale of spirituous, vinous, or malt liquors or medicated bitters capable of producing intoxication, or malt liquors exclusively, to be drunk on the premises, in any locality other than where local option is in force, upon the ground that such licensee sold, or permitted to be sold, or gave or permitted to be given, any such liquors to a minor in his place of business, or permitted a minor to enter or remain in his place of business, or sold such liquor to any habitual drunkard, after having been notified in writing not to sell to such habitual drunkard, or that such licensee permitted prostitutes or lewd women to enter and remain in his place of business, or permitted any games prohibited by the law to be played, dealt or exhibited in or about his place of business, or of renting or letting his place of business, or any part thereof, for such purpose or purposes, the license of such person or firm shall, by reason of such recovery, be forfeited, revoked and cancelled; and that court entering judgment of recovery shall also enter an order declaring forfeited, revoked and cancelled such license; and the unearned portion of the occupation tax paid therefor shall not be refunded, but shall be forfeited to the State and county, city or town to which the money for the same may have been paid. And any person or firm who shall sell any such liquors or medicated bitters in any quantity, to be drunk on the premises, without first giving bond, as required by law, or who shall sell the same after said license shall have been forfeited, revoked or cancelled, shall be deemed guilty of a misdemeanor, and, on conviction shall be fined in the same amount provided for sales where no license has been obtained. An open house in the meaning of his chapter, is one in which no screens or other device is used or placed inside or outside of such house or place of business for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where intoxicating liquors are sold to be drunk on the premises. A quiet house or place of business, in the meaning of this chapter, is one in which no music, loud or boisterous talking, yelling or indecent or vulgar language is allowed, used or practiced, or any other noise calculated to disturb or annoy any person residing or doing business in the vicinity of such house or place of business, or those passing along the streets or public highways. By an orderly house, is meant one in which no prostitutes or lewd women are allowed to enter or remain; and it is further provided that said house must not contain any vulgar or obscene pictures. Any surety on such bond may relieve himself from further liability

thereon by giving the principal in said bond notice in writing that he will no longer remain as surety thereon, and filing with the county judge an affidavit that such notice has been given; and, if within five days after such notice the principal fails to make a new bond, he shall cease to pursue said business until a new bond is given. Any person who shall continue to pursue said business after such notice is given and such affidavit is filed, shall be guilty of a misdemeanor and shall be punished as provided in cases where no license has been procured; provided, that where the sale was made in good faith, or the minor permitted to enter and remain in good faith, with the belief that the minor was of age, and there is good ground for such belief, that shall be a valid defense to any recovery on such bond; provided, further, that where the sale to any habitual drunkard is made in good faith, with the belief that he is not an habitual drunkard, and there are good grounds for such belief, that shall be a valid defense to any recovery on such bond; provided, the provisions of this law shall apply to suits by the State or of any individual. Provided, that no license shall be issued under this law to any person who has been convicted of a felony and served such term of conviction. [Act 1901, ch. 136; Act 1907, ch. 138; Act 1909, p. 304; Act 1913, 1st S. S., p. 58, ch. 30, § 1, amending art. 7452 Rev. St. 1911.]

Explanatory.—Arts. 616–621 revised Pen. Code, and art. 7452, Rev. Civ. St. 1911, were made up from the same act, and hence, the amendment of art. 7452 of the civil statutes worked a supercession of the corresponding articles in the Penal Code.

Decisions on civil features of article.—See notes under art. 7452, Vernon's Sayles' Civ. St. 1914.

Constitutionality.—A statute requiring the execution of a bond as a condition precedent to the granting of a license to conduct a saloon is constitutional. *Ex parte Bell*, 24 App. 428, 6 S. W. 197.

Arts. 617–621.—Superseded by Act 1913, S. S. ch. 30 amending art. 7452 Rev. St. 1911. See art. 616 Penal Code, and note thereunder.

Art. 622. Selling or giving away to minors.—Every retail liquor dealer, or malt liquor dealer, or other person, who shall knowingly sell, give away, deliver or otherwise dispose of, or suffer the same to be done, about his premises, any intoxicating liquor in any quantity to any minor, or who shall have in his employ about his place of business, or who shall permit any minor to enter and loaf or remain in his place of business, shall be guilty of a misdemeanor, and, upon conviction therefor, shall be punished by a fine of not less than ten dollars nor more than two hundred dollars, or by imprisonment in the county jail for not longer than sixty days, or by both such fine and imprisonment. [Act 1907, p. 266; Act 1909, p. 307.]

Explanatory.—See arts. 593 and 1054 and notes thereunder. This article is modified by a proviso to art. 616, ante, as amended by Acts 1913, S. S. ch. 30.

Application.—In order to effectuate all the provisions of the code this article was held to apply to retail dealers alone, to express companies and common carriers alone, and article 1054 to all persons other than licensed retail liquor dealers and express companies and common carriers. *Talley v. State* (Cr. App.) 147 S. W. 255.

Effect of local option.—Where the local option law is in force in a district, the law prohibiting the sale of liquor to minors held superseded. *Tompkins v. State*, 49 App. 154, 90 S. W. 1019.

A sale of liquor to a minor in local option territory cannot be prosecuted under the statute prohibiting sales to minors, as it is a violation of the local option law. *Dean v. State*, 49 App. 249, 92 S. W. 38.

A person can be convicted of giving intoxicating liquors to a minor on a complaint charging selling and giving regardless of whether the local option law was in force in the county. *Ex parte Cassens*, 57 App. 377, 122 S. W. 888, 891.

Offense.—An indictment drawn in a local option county, charging a violation of this article is improper; the proper proceeding being by an action under article 597 for a violation of the local option law. *Talley v. State* (Cr. App.) 147 S. W. 255.

Indictment.—Willson's Cr. Forms, 303, 310.

Art. 623. Selling or giving away to habitual drunkards, or on Sunday or election day.—Any sale, gift or other disposition of intoxicating liquors, knowingly made to any minor, or to any habitual drunkard, or on any Sunday or election day, by an agent, clerk or other person acting for any retail liquor dealer, or retail malt dealer, or other person, shall be deemed and taken to be, for all purposes of this law, as the act of such retail liquor dealer or retail malt dealer, or other person. [Act 1907, ch. 138; Act 1909, p. 307.]

See proviso to art. 616 as amended by Acts 1913, S. S. ch. 30.

Evidence.—In a prosecution for selling liquor on Sunday, evidence held insufficient to support a conviction. *Mittendorf v. State*, 59 App. 245, 128 S. W. 118.

In a prosecution of a defendant charged with giving intoxicating liquor to another while an election was being held in a certain town, precinct, and county of the state, evidence of the orders of the commissioners' court creating such precinct as well as the fact that the town was in such precinct was admissible. *Walker v. State* (Cr. App.) 151 S. W. 318.

Sales by agent.—Proof of a sale by an agent acting within the scope of his agency makes a prima facie case against the dealer. *Ollre v. State*, 57 App. 520, 123 S. W. 1116.

A liquor dealer is not criminally liable for a sale made at his place of business by one assuming to act as his agent, where he shows, either that such person was not his agent, or that the sale was made in violation of his orders. *Ollre v. State*, 57 App. 520, 123 S. W. 1117.

Art. 624. Spirituous or vinous liquors not to be sold under malt dealer's license.—Any person or firm doing business under a retail malt dealer's license in this state, who shall sell any spirituous or vinous liquors other than those defined by law as malt liquors, shall, upon conviction therefor, be punished by a fine of not less than one hundred dollars, nor more than three hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months, and shall, in addition to the punishment herein prescribed, forfeit his license as a retail malt dealer; and the court in which such conviction is had shall cause such forfeiture to be entered in the judgment of conviction; and such retail malt dealer shall thenceforth be deemed to have no license; and the clerk of said court shall certify such forfeiture to the comptroller of public accounts, as elsewhere herein provided. [Act 1907, ch. 138; Act 1909, p. 308.]

Art. 625. Musical instruments or games prohibited in place of business.—It shall be unlawful for any retail liquor dealer, or retail malt dealer, to use, exhibit, suffer to be kept, exhibited or used, in his place of business any piano, organ, or other musical instrument whatever, for the purpose of performing upon, or having the same performed upon, in such place, or to permit any sparring, boxing, wrestling, or any other exhibition or contest, or cock fight, in his place, or to set up, keep, use, or permit to be kept or used, in or about the said premises, or by any other person, or to run, or to be run, in connection with such place of business, in any manner or form whatever, any billiard table, pool-table or gaming table, bowling or ten pin alley, cards, dice, dominoes, or any other device for gaming or playing any game of chance, or to permit any person to play at, on or with such tables, alleys, cards, dice, dominoes, or other device of any kind. Any retail liquor dealer, or retail malt dealer, violating any of the provisions of this article, shall, upon conviction, be fined in a sum not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment in the county jail for not longer than thirty days, or both such fine and imprisonment. [Act 1907, p. 267; Act 1909, p. 308.]

Art. 626. Female employé other than member of family prohibited.—No retail liquor dealer, or retail malt dealer, shall employ, or suffer to be employed, other than a member of his family, any female as a servant, bartender or waitress in his place of business, nor permit on said premises any dancer, singer or lewd woman; and any person violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by imprisonment in the county jail for not more than twelve months, or by a fine not exceeding five hundred dollars, or both such fine and imprisonment. [Act 1907, p. 267; Act 1909, p. 309.]

Repeal.—Acts 30th Leg. c. 132, P. C. arts. 496 et seq. prohibiting disorderly houses, was not repealed by this article. *Morgan v. State*, 62 App. 39, 136 S. W. 445.

Information.—An information held not too general or indefinite because not giving the names of the lewd women. *Ferguson v. State*, 72 App. 494, 163 S. W. 65.

Art. 627. Not to sell to persons after having been notified.—It shall be unlawful for any retail liquor dealer, or retail malt dealer, to sell, give away, or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquors to any habitual drunkard, after he shall have been notified by the wife, father, mother, brother, sister, child or guardian of such person not to sell, give away or furnish to such person any intoxicating liquors; and any retail liquor dealer or retail malt dealer violating this article shall be fined not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or punished by both such fine and imprisonment. [Id.]

Art. 628. Law not to conflict with local option law.—This law, or any of the provisions thereof, shall not be construed to be in conflict with any local option law now or hereafter to be in force in this state; and no license to any retail liquor or retail malt dealer shall be issued or shall be effective at any place where local option law is in force and operation. [Act 1907, p. 268; Act 1909, p. 309.]

Art. 629. License to be posted in conspicuous place.—Any license required by this law shall be posted, in some conspicuous place, in the house where the business or occupation, for which such license is necessary, is carried on, before engaging in such business or occupation, and any person so licensed who fails to so post the same shall be fined not exceeding one hundred dollars. [Id.]

See § 130.

Art. 630. Prohibiting sale of liquor at places and on election day.—It shall be unlawful for any retail liquor dealer, or retail malt dealer, to sell, or offer for sale, any intoxicating liquors at any place where people have assembled for religious worship, or for educational or literary purposes, or in any election precinct on any election day; and any person violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment. [Id.]

See art. 245, and note thereunder.

Election day.—The party to whom whisky is given is not an accomplice. *Keith v. State*, 38 App. 680, 44 S. W. 847.

If the election was ordered by proper authority its legality or illegality cannot be questioned. *Anderson v. State*, 39 App. 34, 44 S. W. 824.

Evidence as to nonintoxicating qualities of liquor held improperly excluded. *Martin v. State*, 57 App. 149, 122 S. W. 24.

Evidence held to raise the issue of honest mistake of fact. *Martin v. State*, 57 App. 149, 122 S. W. 24.

Indictment.—Willson's Cr. Forms, 122.

Art. 630a. Sale within prohibited districts in cities and towns.—

If any person shall sell any intoxicating liquor in any city or town, after such city or town shall in any manner have fixed the limits in said city or town in which intoxicating liquors may be lawfully sold, outside of such limits, he shall be punished by confinement in the State penitentiary not less than one nor more than three years. In prosecutions under this law, where it is proven that there is posted up at the place where such intoxicating liquor is sold, United States internal revenue liquor or malt license, to any one, it shall be prima facie proof that the person to whom such license is issued is engaged in and is pursuing the business and occupation of selling intoxicating liquors, within the meaning of this law. [Act 1913, p. 32, ch. 18, § 1.]

Art. 631. [411g] Duties of certain officers.—Any tax collector, sheriff, deputy sheriff, constable, or other peace officer, having knowledge of the violation of this chapter, shall report the same to the county attorney, who shall forthwith prosecute any person or persons violating the provisions of this chapter; and any tax collector whose attention has been called to an instance in which the provisions of this chapter appear to have been violated, shall investigate the particular case, and, if it is found that this chapter has been violated, report the fact to the county attorney or district attorney. [Act Feb. 12, 1858, p. 168.]

Cited, *Bell v. State*, 62 App. 242, 137 S. W. 670, 36 L. R. A. (N. S.) 98, Ann. Cas. 1913C, 617; *Minter v. State*, 70 App. 634, 159 S. W. 286.

Art. 632. [411h] Official dereliction; penalty.—Any officer who shall wilfully refuse or neglect to perform the duties required of him by the provisions of this chapter shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum from one hundred to five hundred dollars, and may be dismissed from office. [Id.]

Cited, *Bell v. State*, 62 App. 242, 137 S. W. 670, 36 L. R. A. (N. S.) 98, Ann. Cas. 1913C, 617.

Art. 633. [411i] Tax collector issuing illegal receipts.—All receipts issued by tax collectors for taxes paid under this law shall be made on blanks prepared by the comptroller; and any tax collector who shall issue a manuscript receipt for taxes herein levied, or use any form of receipt other than that furnished him by the comptroller, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished as provided in the preceding article. [Id.]

CHAPTER EIGHT A

POOL HALLS

<p>Art. 633a. "Pool hall" defined. 633b. Operation of pool hall within prohibited territory.</p>	<p>Art. 633c. Same; evidence as to result of election; judicial notice; charge to juries.</p>
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Article 633a. "Pool hall" defined.—The term "pool hall" as used herein [arts. 6319a–6319n, Vernon's Sayles' Civ. St. 1914] shall mean and include the following: Any room, hall or building in which are exhibited any pool or billiard table or tables for the purpose of permitting games played thereon for hire, revenue, prize, fees, or gain of any kind. [Act 1913, p. 140, ch. 74, § 12.]

Constitutionality.—This act is unconstitutional as delegating legislative power, and authorizing the suspension by the voters of the general law for licensing pool rooms. Ex parte Mitchell (Sup.) 177 S. W. 953. The civil features of this law are to be found in Vernon's Sayles' Civ. St. 1914, arts. 6319a-(6319n).

The pool hall statute (Acts 33d Leg. c. 74), providing for prohibition of pool rooms, and making its provisions effective in any county, precinct, etc., dependent upon the result of an election therein, does not violate Const. art. 1, § 28, which restricts the power to suspend laws to the Legislature, and especially prohibits the exercise of such power by any other body. Ex parte Francis, 72 App. 304, 165 S. W. 147.

Such act, though without specific authority therefor in the Constitution, was not unconstitutional as a delegation of power to make a law, since the act was the law itself, and the fact that it went into effect in given territory as a result of an election therein, did not vitiate the law; but it remained the same, and could not be changed, altered, or amended in any way except by another act of the legislative body. Ex parte Francis, 72 App. 304, 165 S. W. 147.

Such act, applying within the territory where it is adopted, without discrimination in favor or against all persons therein, does not conflict with Const. U. S. Amend. 14, guaranteeing equal protection of the laws. Ex parte Francis, 72 App. 304, 165 S. W. 147.

Such act deprives no person of any property, and does not conflict with Const. U. S. amend. 14, or Texas Bill of Rights, § 19, providing that property shall not be taken without due process of law. Ex parte Francis, 72 App. 304, 165 S. W. 147.

Such act, providing for a local option vote thereon in any political subdivision of the state, prescribing the manner of holding such elections, and declaring the result thereof, defining the term "pool room" or "pool hall," providing a penalty for violation of its provisions, authorizing prosecuting attorneys to enjoin the running of such pool rooms or pool halls, and declaring an emergency, was not void as being vague, ambiguous, and indefinite. Ex parte Francis, 72 App. 304, 165 S. W. 147.

Rev. St. 1911, art. 7355, § 8, which levied an occupation tax of \$20 on every billiard or pool table used for profit, and the pool hall statute (Acts 33d Leg. c. 74), which permitted counties and justice precincts to accept its provisions whereby pool halls might be prohibited therein, were not in irreconcilable conflict, and the prior statute was modified by the later act to the extent that the occupation tax was applicable only in the territory in which pool halls were not prohibited by an acceptance of the later act, so that one did not suspend the other. Ex parte Francis, 72 App. 304, 165 S. W. 147.

This act is not unconstitutional as an attempted delegation of the legislative power to the electors of the subdivision named, contrary to Const. art. 3, § 1, vesting the legislative power in the Senate and House of Representatives, being a completed act as enacted by the Legislature. Roper & Gilley v. Lumpkins, 163 S. W. 110.

Nor does such act violate the provision of the Bill of Rights prohibiting any interference with property, etc., except by due course of the law of the land. Id.

The provision of section 11 of this act (Vernon's Sayles' Civ. St. 1914, art. 6319k) that, if the result of the election be in favor of prohibiting pool halls, a contest shall not suspend the enforcement of the law pending such contest, is constitutional, for, while it may work a hardship on those engaged in running poolrooms, yet if a contest suspended the enforcement of the law, the law, though validly adopted, might never go into effect, because the contest might be pending until a subsequent election when determination might be in favor of the licensing of pool halls. Winn v. Dyess, 167 S. W. 294.

Art. 633b. Operation of pool hall within prohibited territory.—When any such election [Art. 6319a Vernon's Sayles' Civ. St. 1914] has been held and has resulted in favor of the prohibition of the operation and maintenance of pool halls within the territory for which the election is held, any person who shall thereafter, within the prescribed bounds of said territory, operate or maintain a pool hall such as is defined herein shall be subject to prosecution, and on conviction shall be punished by a fine of not less than twenty-five and not to exceed one hundred dollars, or by confinement in the county jail not less than thirty days nor more than one year, and each day such pool hall or pool room is run shall be a separate offense. [Id., § 13.]

See note under art. 633a.

Art. 633c. Same; evidence as to result of election; judicial notice; charge to juries.—In any prosecution that may arise under this Act it shall not be necessary for the State to introduce in evidence, any records, order of court, or any copy thereof, in regard to the adoption of said law, but all courts of the county and all appellate courts reviewing any such prosecution shall take judicial

knowledge of the existence and validity of said law, and shall give the same in charge to the juries the same as if a part of the penal code of this State. [Id., § 15.]

See note under art. 633a.

CHAPTER NINE

VAGRANCY

Art.	Art.
634. "Vagrancy" defined.	638. Information charging vagrancy.
635. Person unlawfully soliciting orders for intoxicating liquor, vagrant.	639. Court having jurisdiction; penalty for.
636. Male person habitually associating with prostitutes, vagrant.	640. Failure of officer to perform duty; penalty for.
637. Duty of sheriff and other officers.	

Article 634. "Vagrancy" defined.—The following persons are and shall be punished as vagrants, viz.:

(a) Persons known as tramps, wandering or strolling about in idleness, who are able to work and have no property to support them.

(b) Persons leading an idle, immoral or profligate life, who have no property to support them, and who are able to work and do not work.

(c) All persons able to work, have no property to support them, and who have no visible or known means of a fair, honest and reputable livelihood. The term "visible or known means of a fair, honest and reputable livelihood," as used in this article, shall be construed to mean reasonably continuous employment at some lawful occupation for reasonable compensation, or a fixed and regular income from property or other investments, which income is sufficient for the support and maintenance of such person.

(d) All able-bodied persons who habitually loaf, loiter and idle in any city, town or village, or railroad station, or any other public place in this state for the larger portions of their time, without any regular employment and without any visible means of support. An offense under paragraph (d) of this article shall be made out whenever it is shown that any person has no visible means of support, and only occasionally has employment at odd jobs, being for the most of the time out of employment.

(e) Persons trading or bartering stolen property, or who unlawfully sell any vinous, alcoholic, malt, intoxicating or spirituous liquors.

(f) Every common gambler or person who for the most part maintains himself by gambling.

(g) All companies of gypsies, who, in whole or in part, maintain themselves by telling fortunes.

(h) Every able-bodied person who shall go begging for a livelihood.

(i) Every common prostitute.

(j) Every keeper of a house of prostitution.

(k) Every keeper of a house of gambling or gaming.

(l) Every person who shall abandon his wife, or child, or children, without just cause, leaving such wife, or child, or children, without support, or in danger of becoming a public charge.

(m) Every able-bodied person who lives without employment or labor, and who has no visible means of support.

(n) All persons who are able to work and do not work, but hire out their minor children, or allow them to be hired out, and live upon their wages, being without other means of support.

(o) All persons over sixteen years of age and under twenty-one,

able to work and do not work, and have no property to support them, and have not some known, visible means of a fair, honest and reputable livelihood, and whose parents, or those in loco parentis, are unable to support them, and who are not in attendance upon some educational institution.

(p) All persons who advertise and maintain themselves in whole or in part as clairvoyants or foretellers of future events, or as having supernatural knowledge with respect to present or future conditions, transactions, happenings or events. [Act 1909, p. 111.]

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| 1. In general. | 6. Keeper of house of gambling or gaming. |
| 2. Common law. | 7. Defenses. |
| 3. Repeal. | 8. Jurisdiction of offense. |
| 4. Able-bodied persons habitually loafing, etc. | 9. Complaint or indictment. |
| 5. Common prostitutes. | 10. Evidence. |

1. **In general.**—This article enumerates certain persons who come within the definition of vagrant. *Ex parte Strittmatter*, 58 App. 156, 124 S. W. 906, 137 Am. St. Rep. 937, 21 Ann. Cas. 477. A vagrant was originally understood to be an idle person, without visible means of support, who, though able to work for his maintenance, refused to do so, but the idea later included one whose business status or course of conduct was vicious or habitually unlawful; so the offense of being a vagrant, where it depends upon an habitual course of misconduct, is a separate offense from each specific act of misconduct. *Parshall v. State* (Cr. App.) 138 S. W. 759. "Vagrant" and "vagabond" are not equivalent. *Johnson v. State*, 28 App. 562, 13 S. W. 1005.

2. **Common law.**—The statutes of the United States and England having so frequently dealt with the subject of vagrancy, the common law on the subject has become largely superseded. *Ex parte Strittmatter*, 58 App. 156, 124 S. W. 906, 137 Am. St. Rep. 937, 21 Ann. Cas. 477.

3. **Repeal.**—The following articles were not repealed by this article. Articles 496 and 500, defining disorderly and bawdy houses, and prescribing the penalty for keeping such houses. *Wilson v. State*, 61 App. 628, 136 S. W. 447; *Haynes v. State*, 63 App. 181, 139 S. W. 1155; *Weir v. State*, 64 App. 164, 141 S. W. 948; *Hitchings v. State* (Cr. App.) 143 S. W. 1164. Article 559, making it a felony for any person to keep any premises, building, room, or place for the purpose of being used for a place to gamble with cards. *Austin v. State*, 61 App. 573, 135 S. W. 1167; *Parshall v. State*, 62 App. 177, 138 S. W. 759; *Goodwin v. State* (Cr. App.) 143 S. W. 939. Article 597 making the unlawful sale of intoxicating liquors in prohibited districts a misdemeanor. *Hamilton v. State* (Cr. App.) 145 S. W. 348; *Snell v. State* (Cr. App.) 150 S. W. 615.

4. **Able-bodied persons habitually loafing, etc.**—The term "larger portions of their time," when construed with the balance of the provision, is not so vague as to render the law invalid. The terms "loiter, loaf, and idle," when construed with the words "larger portions of their time," require proof, to sustain a conviction of vagrancy, that the person charged was able to work, and, being so able, habitually loafed, loitered, and idled in the city for the greater part of his time, without employment or visible means of support. *Ex parte Strittmatter*, 58 App. 156, 124 S. W. 906, 137 Am. St. Rep. 937, 21 Ann. Cas. 477. The word "visible" means noticeable, apparent, open, conspicuous, or perceptible by the eye. *Branch v. State* (Cr. App.) 165 S. W. 605.

The Legislature had ample power, under Const. art. 3, § 46, to enact this paragraph declaring that all able-bodied persons, who habitually loaf, loiter, and idle in any city, town, village, railroad station, or other public place within the state for the larger portion of their time, without any regular employment, and without any visible means of support, are vagrants, and the paragraph is constitutional. *Ex parte Strittmatter*, 58 App. 156, 124 S. W. 906, 137 Am. St. Rep. 937, 21 Ann. Cas. 477.

5. **Common prostitutes.**—It is the common prostitute that is declared a vagrant. All prostitutes are not common prostitutes. A common prostitute is one who makes a business of selling the use of her person to the male sex for the purpose of illicit intercourse. A woman may be a prostitute, and yet have illicit connection with but one man; but to be a common prostitute, her lewdness must be more general and indiscriminate. *Springer v. State*, 16 App. 591.

This article applies only to those persons who meet the description at the time that a charge is made under it, and one who has abandoned her vocation as a prostitute and has entered a place set apart for her reformation is not a vagrant. *City of San Antonio v. Salvation Army* (Civ. App.) 127 S. W. 860.

6. **Keeper of house of gambling or gaming.**—So much of this article as makes every keeper of a house of gambling or gaming a vagrant defines a different offense from that defined by article 559, making it a felony for any person to keep any premises, building, room, or place for the purpose of being used as a place to gamble with cards, there being a distinction between the offense of keeping a "room," denounced by article 559, and keeping a "house," denounced under the vagrancy act, for "room" and "house" are not synonymous or convertible terms. If it did not it would be unconstitutional, as violative of Const. art. 1, § 14, prohibiting double jeopardy. *Parshall v. State*, 62 App. 177, 138 S. W. 759. See, also, *Austin v. State*, 61 App. 573, 135 S. W. 1167.

One who permits many people to come and gamble in his residence, and who does not charge any fees or superintend the games, but plays as one of the visitors, and has none of the usual gambling house paraphernalia, is not a keeper of a gambling house within the purview of this article. *Austin v. State*, 61 App. 573, 135 S. W. 1167.

7. **Defenses.**—The purpose of this article is to punish persons whose status or course of conduct is that of vagrants as defined in the act, and it is no defense, when such status is shown to exist, that such person has money, etc., since he may have secured it by gambling, etc. *Branch v. State* (Cr. App.) 165 S. W. 605.

8. **Jurisdiction of offense.**—See note to article 639, post.

9. **Complaint or indictment.**—See Willson's Cr. Forms, 259, 325.

It is not sufficient to charge that the accused is "a vagrant within the meaning of the law." Some one or more of the statutory constituents of the offense must be alleged. *Walton v. State*, 12 App. 117. A complaint, charging in one count that on a certain day defendant was "a vagrant person in that on said date he was able to work and did not work, and has no property to support him," in another count he "was then and there a vagrant in that he habitually loafs and loiters around the streets and alleys and frequents places of ill fame in the city," and in another that he "was a vagrant person in that he is a professional thief and is engaged in unlawful pursuits," held insufficient to charge vagrancy under any of the definitions thereof. *Edwards v. State*, 71 App. 405, 160 S. W. 80.

10. **Evidence.**—Under an information, charging accused generally as a vagrant—a prostitute—evidence to prove her general reputation, or the bad character of her associates is inadmissible. *Arnold v. State*, 28 App. 480, 13 S. W. 774. See, also, *Holsey v. State*, 24 App. 35, 5 S. W. 523; *Johnson v. State*, 28 App. 562, 13 S. W. 1005.

The admission of evidence that the keeper of the place about which defendant loafed and another had no license to sell intoxicating liquors there is erroneous. So also is the admission of evidence that the keeper of a place, about which defendant loafed, had attempted to bribe peace officers to permit gambling in such place, and was being prosecuted for bribery. *Davis v. State* (Cr. App.) 153 S. W. 319.

In a prosecution for vagrancy under paragraph d evidence that the defendant, at the time charged, had some money on his person, and that he paid cash for groceries is not relevant. *Branch v. State* (Cr. App.) 165 S. W. 605.

Art. 635. Person unlawfully soliciting orders for intoxicating liquors, vagrant.—Any person who unlawfully solicits orders for intoxicating liquors. [*Id.*, p. 112.]

Art. 636. Male person habitually associating with prostitutes, vagrant.—All male persons who habitually associate with prostitutes, or habitually loiter in or around houses of prostitution, or who, without having visible means of support, receive financial aid or assistance from prostitutes. [*Id.*, p. 112.]

Occasional visits.—This article was intended to reach persons who associated with prostitutes as their equals or associated with them in public and was not intended to make a vagrant of one who merely visited such a person occasionally at her rooms. *Ellis v. State* (Cr. App.) 145 S. W. 339; *Lingenfelter v. State* (Cr. App.) 163 S. W. 981.

Information.—An information alleging that defendant, referred to as "Jim," but not otherwise alleged to be a "male person," did habitually associate with a prostitute, etc., does not state an offense, under this article. *Ellis v. State* (Cr. App.) 145 S. W. 339.

Evidence.—Evidence, in a prosecution for habitually associating with prostitutes, held to sustain a conviction. *Lingenfelter v. State* (Cr. App.) 163 S. W. 981. Evidence in a prosecution for vagrancy for loitering in disorderly houses held insufficient to support a conviction. *Martoni v. State* (Cr. App.) 166 S. W. 1169.

Under an indictment, charging vagrancy for loitering in a disorderly house from a certain date until the date of the filing of the complaint, evidence that accused was seen in disorderly houses more than a year before is inadmissible, where there was no showing that he was at such places between that time and the time specified in the complaint. (Evidence insufficient to support a conviction.) *Martoni v. State* (Cr. App.) 166 S. W. 1168.

Art. 637. Duty of sheriff and other officers.—It shall be the duty of every sheriff, deputy sheriff and constable in every county, and of the police, town marshal, deputy marshal, and other like officials, in every county, city, town or village in the state, to give information under oath to any officer empowered to issue criminal warrants, of all vagrants within their knowledge, or upon information in their respective counties, cities, towns and villages; thereupon the said officer shall issue a warrant for the apprehension of the person alleged to be a vagrant. [*Id.*, p. 112.]

Art. 638. Information charging vagrancy.—All information charging vagrancy shall be under oath; and, while it is made the special duty of the officers named in article 637 hereof to file the said information whenever they shall have knowledge or good reason to suspect that any person is a vagrant, as defined by any clause or article of this law, yet any information charging vagrancy may be filed under oath by any resident of the state. [Id., p. 112.]

Art. 639. Court having jurisdiction; penalty for.—Whenever any person shall have been arrested on a charge of vagrancy, he shall immediately be carried before any court having jurisdiction of the offense herein named, and, upon conviction thereof, shall be fined in any sum not to exceed two hundred dollars. [Id., p. 112.]

Courts invested with jurisdiction.—Corporation courts, under the express provisions of Rev. St. 1914, art. 904, are given jurisdiction of a prosecution on complaint charging that defendant, on or about a certain day and on each successive day thereafter to a certain date, was a vagrant, in that she was unlawfully and willfully the keeper of a house of prostitution, where prostitutes were permitted to resort and reside for the purposes of plying their vocation, etc. *State ex rel. Bergeron v. Travis County Court* (Cr. App.) 174 S. W. 365.

Art. 640. Failure of officer to perform duty, penalty for.—If any of the officers named in article 637 shall fail, refuse, or neglect to perform the duties therein required, he shall be guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars, nor more than one hundred dollars. [Id., p. 112.]

CHAPTER NINE A

ABANDONMENT OF WIFE OR CHILDREN

Art.	Art.
640a. Desertion and failure to support wife or children; penalty.	640d. Venue.
640b. Order for support pendente lite; contempt.	640e. Expenses of extradition and prosecution.
640c. Proof of marriage and paternity; confidential communications; evidence as to willfulness of desertion.	640f. Liberal construction; partial invalidity.

Article 640a. Desertion and failure to support wife or children; penalty.—That any husband who shall wilfully or without justification, desert, neglect or refuse to provide for the support and maintenance of his wife, who may be in destitute or necessitous circumstances, or any parent who shall wilfully or without justification, desert, neglect or refuse to provide for the support and maintenance of his or her child or children under the age of sixteen years in destitute or necessitous circumstances, shall be deemed guilty of a misdemeanor and on conviction thereof shall punished by a fine of not less than twenty-five dollars and not more than five hundred dollars or by imprisonment in the county jail not more than one year, or by both such fine and imprisonment. [Act 1907, p. 133, ch. 62; Act 1913, p. 188, ch. 101, § 1.]

Explanatory.—This act supersedes Laws 1907, ch. 62, which was declared unconstitutional in *Ex parte Smythe*, 56 App. 375, 120 S. W. 200, 23 L. R. A. (N. S.) 854, 133 Am. St. Rep. 976, and was not carried into the revised penal code.

Intent.—This act does not impose a penalty for mere temporary separation due to inability to furnish support, but implies a purpose on the part of the husband and father not to support his family, where there is no justification or excuse for his failure to do so. And where the evidence shows that accused had merely left his family temporarily in order to secure work, and to make a new home for them, there can be no conviction. *Irving v. State* (Cr. App.) 166 S. W. 1166.

Place of abandonment.—Where accused had, before the passage of this act, abandoned his wife and children in another state, and the wife and children thereafter came within the state for over six months, and accused knew of their destitute condition, and wilfully refused to support them, he was guilty of the offense denounced by the act. *Noodleman v. State* (Cr. App.) 170 S. W. 710.

Complaint, indictment or information.—A complaint and information for wife and child desertion without justification, leaving them in destitute and necessitous circumstances following the language of the statute is sufficient, although not alleging that the wife and child were without the necessities of life, or the means of obtaining them or were in want and in extremely needy and distressing circumstances. *Hatch v. State* (Cr. App.) 174 S. W. 1062. An indictment charging that the defendant deserted and abandoned his wife, but not directly alleging that he had a wife or giving her name, is insufficient. So also is an indictment for the abandonment of defendant's minor child, which does not allege the name of the child. *Irving v. State* (Cr. App.) 166 S. W. 1166.

In a prosecution for wife desertion, where the information alleged that the county attorney presented to the court that on a certain date, before the filing of such information, the defendant deserted his wife, etc., not referring to the complaint, which alleged that theretofore defendant deserted his wife without justification and refused to provide for her support, and that she was in destitute and necessitous circumstances, such complaint and information sufficiently charged the offense as against general demurrer; it not being necessary that the information should make mention of the complaint. *Herrera v. State* (Cr. App.) 175 S. W. 696.

Evidence.—In a prosecution for the abandonment of defendant's minor son, evidence which does not establish the name of the son as charged in the indictment is insufficient to sustain a conviction. *Irving v. State* (Cr. App.) 166 S. W. 1166.

Evidence showing when accused abandoned his wife and family is also admissible, although it cannot be considered, except as tending to show the condition of the wife and children. And evidence that his children were in a destitute condition for a long time before the law went into effect, and that such condition continued up to the time of the prosecution, is admissible. *Noodleman v. State* (Cr. App.) 170 S. W. 710.

In a prosecution of accused for abandonment of his wife, evidence held sufficient to show abandonment when he refused to send her money to return to him from a visit to her mother in F. county, which he had induced her to make, or in any case when he wrote her two months later that she need not come back, that he would never treat her as a wife, and that she should do the best she could, for he did not want her. *Hatch v. State* (Cr. App.) 174 S. W. 1062.

Art. 640b. Order for support pendente lite; contempt.—At any time before the trial, upon petition of the complainant and upon notice to the defendant, the court or judge thereof in vacation, may enter such temporary orders as may seem just, providing for the support of the deserted wife or children, or both, pendente lite, and may punish for the violation of or refusal to obey such order or orders as for contempt. [Act 1913, p. 189, ch. 101, § 2.]

Art. 640c. Proof of marriage and paternity; confidential communications; evidence as to wilfulness of desertion.—No other or greater evidence to prove the marriage of such husband and wife, or that the defendant is the father or mother of such child or children, shall be required than is or shall be required to prove such facts as in a civil action. In no prosecution under this Act shall any existing statute prohibiting disclosures of confidential communications between husband and wife apply, to strictly relevant facts and both husband and wife shall be competent and compellable witnesses to testify against each other to any and all relevant matters, including the fact of such marriage, and the parentage of such child or children. Proof of the desertion of such wife, child or children in destitute or necessitous circumstances or of neglect or refusal to provide for the support and maintenance of such wife, child or children shall be prima facie evidence that such desertion, neglect or refusal is wilful. [Id., § 3.]

Art. 640d. Venue.—An offense under this Act shall be held to have been committed in the county in which such wife, child or children may have been at the time such abandonment occurred, or in the county in which such wife, child or children shall have resided for six months next preceding the filing of the complaint, information or indictment. [Id., § 4.]

Jurisdiction.—Where accused had deserted his wife and children in another state before the passage of this act, and they afterwards came into this state and resided for over six months in the county in which prosecution was instituted, and accused, though knowing of the destitute condition of his children, wilfully refused to support them, the courts of the county where the children resided had jurisdiction. *Noodleman v. State* (Cr. App.) 170 S. W. 710.

The jurisdiction given by this section is not defeated by the fact that, during

the six months, the wife was temporarily absent from the county for two months earning money for her support. *Hatch v. State* (Cr. App.) 174 S. W. 1062.

Art. 640e. Expenses of extradition and prosecution.—It shall be the duty of the commissioners' court of the county in which a complaint, information or indictment under this Act is filed to furnish the funds necessary for extraditing or arresting and returning to such county any defendant under this Act who is not at the time in such county or who has gone to another State. [Id., § 5.]

Art. 640f. Liberal construction; partial invalidity.—This Act shall be liberally construed and if any section thereof be declared invalid, the remaining parts of the law shall not be affected thereby, as it is the intent of the Legislature to preserve all, any and every portion of said Act, if possible. [Id., § 6.]

CHAPTER TEN

MISCELLANEOUS OFFENSES UNDER THIS TITLE

Art.		Art.	
641.	Pawnbroker failing to comply with the law.	646.	Consolidation of railroad corporations rendered unlawful.
642.	Insurance agent doing business without authority.	647.	Penalty; officer, etc., not liable when.
643.	Any violation of insurance laws.	648.	"Railroad corporation" defined.
644.	Who are insurance agents.	649.	Venue of offense; duty of judge to give law in charge to grand jury.
645.	Penalty for acting as agent unlawfully.		

Article 641. [414] Pawnbroker failing to comply with the law.—If any pawnbroker, or person doing any business as such, shall receive any article in pledge, or sell the same without complying with the laws regulating pawnbrokers in this state, he shall be punished by fine not less than twenty-five dollars nor more than one hundred dollars. [Act April 28, 1879, p. 154.]

Effect of article in general.—This article does not fix the liability of a pawnbroker pursuing the occupation without first obtaining a license. His liability is determined by article 130 of this Code and Rev. Civ. St. 1911, arts. 7355, 7357. *Schapiro v. State* (Cr. App.) 169 S. W. 683.

Indictment.—Willson's Cr. Forms, 326.

Art. 642. [415] Insurance agent doing business without authority.—If any person shall transact the business of life, fire or marine insurance in this state, either as agent, solicitor or broker, without his, or the company or association he represents, first obtaining a certificate of authority therefor from the commissioner of insurance and banking, he shall be punished by fine not less than five hundred nor more than one thousand dollars, and by imprisonment in the county jail not less than three nor more than six months. [Act Feb. 17, 1875, p. 44.]

Certificate from company as to authority of agent, see art. 639.

Who are agents.—It is the intent and purpose of this article to make every person an "agent" who shall commit any of the inculpatory acts, whether or not he was an agent in fact. *Smith v. State*, 18 App. 69.

Indictment.—The indictment must allege that the company for which the accused acted as agent was an insurance company. *Brown v. State*, 26 App. 540, 10 S. W. 112. And see *Smith v. State*, 18 App. 69.

Evidence.—That the insurance company had complied with the laws of the state is defensive and not inculpatory matter, and the burden of proof rests on the defense. *Smith v. State*, 18 App. 69.

Art. 643. [416] Any violation of insurance laws.—If any person shall violate any provision of the laws of this state regulating the business of life, fire or marine insurance, he shall be punished by fine not less than five hundred nor more than one thousand dollars. [Act May 2, 1874, p. 200; Feb. 17, 1875, p. 44.]

Art. 644. [417] Who are insurance agents.—Any person who solicits insurance on behalf of any insurance company, whether in-

corporated under the laws of this or any other state, or foreign government, or who takes or transmits other than for himself, any application for insurance, or any policy of insurance, to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive or collect or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into, or adjust or aid in adjusting, any laws for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request, or by the employment of such insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done, or the risk is taken, as far as relates to all the liabilities, duties, requirements and penalties set forth in this act; provided, that the provisions of this act shall not apply to citizens of this state who arbitrate in the adjustment of losses between the insurers and assured, nor to the adjustment of particular or general average losses of vessels or cargoes, by marine adjusters; provided, further, that the provisions of this act shall not apply to practicing attorneys at law in the state of Texas acting in the regular transaction of their business as such attorneys at law, and who are not local agents nor acting as adjusters for any insurance company. [Act July 9, 1879, extra session, ch. 36, § 1.]

Art. 645. [418] Penalty for acting as agent unlawfully.—Any person who shall do or perform any of the acts or things mentioned in the preceding article for any insurance company hereinbefore referred to, without such company having first complied with the requirements of the laws of this state, or having received the certificate of authority from the commissioner of insurance and banking of the state of Texas, as required by law, shall be guilty of a misdemeanor, and, on conviction by any court of competent jurisdiction, for the first offense be fined five hundred dollars, and also a sum equal to the state, county and municipal licenses required to be paid by such insurance company for doing business in this state, and shall be imprisoned in the county jail, where the offense is committed, for the period of three months, unless the fine assessed against him and the sum of licenses herein mentioned and the cost of the court be sooner paid; and for any second or other offense, such person shall be fined in the sum of one thousand dollars, and shall be imprisoned in the county jail for the period of six months, unless the fine assessed against him and the costs of the court be sooner paid. [Id., § 2.]

See notes to art. 642, ante.

Art. 646. [419] Consolidation of railroad corporations declared unlawful.—It shall be unlawful for any railroad corporation, or other corporation, or the lessees, purchasers or managers of any railroad corporation, to consolidate the stocks, property, works or franchises of such corporation with, or lease or purchase the stocks, property, works or franchises of any other railroad corporation owning or having under its control or management a competing or parallel line; nor shall any officer, agent, manager, lessee or purchaser of such railroad corporation act, or become an officer, agent, manager, lessee or purchaser of any other corporation in leasing or purchasing any parallel or competing line. [Act April 4, 1887, p. 137, § 1.]

Art. 647. [420] Penalty; officer, etc., not liable, when.—Any officer, director, manager, superintendent, agent, purchaser or lessee of any such railroad corporation, or other corporation, who shall violate, or aid in violating, any of the provisions of this act, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one thousand dollars nor more than four thousand dollars; provided, that no person shall be liable to punishment under this act who has not, by virtue of his office, agency or position, a voice in the management of the railway company, or who has not, by virtue of his office, agency or position, some power to prevent a violation of this act. [Id., § 2.]

Art. 648. [421] "Railroad corporation" defined.—Railroad corporation, or other corporation, as used in this act, is declared to mean any corporation, company, person or association of persons, who own or control, manage or operate any line of railroad in this state. [Id., § 3.]

Art. 649. [422] Venue of offenses; duty of judges to give law in charge to grand juries.—Indictments and prosecutions under the provisions of this act may be found and made in any county through or into which the line of railroad may run, and it shall be the duty of district judges to charge the grand juries upon this law the same as in other cases. [Id., § 4.]

CHAPTER ELEVEN

INSURANCE COMPANIES

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FIRE INSURANCE

Article 649a. Maximum rates to be fixed by State Fire Insurance Commission; other compensation prohibited; lesser rates.—After this Act shall take effect, a maximum rate of premiums to be charged or collected by all companies transacting in this State the business of fire insurance, as herein defined, shall be exclusively fixed and determined and promulgated by the State Fire Insurance Commission created by this Act, and no such fire insurance company shall, after this Act takes effect, charge or collect any premium or other compensation for or on account of any policy or contract of fire insurance as herein defined in excess of the maximum rate as herein provided for, but may write insurance at a less rate than the maximum rate as herein provided for; provided, that when insurance is written for less than the maximum rate, such lesser rate shall be applicable to all risks of the same character situated in the same community. [Act 1910 S. S. p. 125 repealed; Act 1913, p. 195, ch. 106, § 2.]

Art. 650. Companies deemed to have accepted provisions of law.—Every fire insurance company, every marine insurance com-

pany, every fire and marine insurance company, every fire and tornado insurance company, and each and every insurance company of every kind and name issuing a contract or policy of insurance, or contracts or policies of insurance against loss by fire on property within this State, whether such property be fixed or movable, stationary or in transit, or whether such property is consigned or billed for shipment within or beyond the boundary of this State or to some foreign country, whether such company is organized under the laws of this State or under the laws of any other State, territory or possession of the United States, or foreign country, or by authority of the Federal government, now holding a certificate of authority to transact business in this State, shall be deemed to have accepted such certificate and to transact business thereunder, upon condition that it consents to the terms and provisions of this Act and that it agrees to transact business in this State, subject thereto; it being intended that every contract or policy of insurance against the hazard of fire shall be issued in accordance with the terms and provisions of this Act, and the company issuing the same governed thereby, regardless of the kind and character of such property and whether the same is fixed or movable, stationary or in transit, including the shore end of all marine risks insured against loss by fire. [Act 1909, p. 311; Act 1910 S. S. p. 125, repealed; Act 1913, p. 196, ch. 106, § 3, superseding art. 650, Rev. Pen. Code.]

Art. 651. State Insurance Commission; appointment, etc.—

That there may be reasonable and just insurance rates in Texas, there is hereby created a commission to be known as the "State Insurance Commission," which shall be composed of the Commissioner of Insurance and Banking, who shall be chairman thereof, and two commissioners who shall be appointed by the Governor by and with the consent of the Senate, subject to removal as provided for removal of State officers by Article 3528 of the Revised Statutes of Texas; the members of said Commission other than the Commissioner of Insurance and Banking shall be appointed as herein provided within ten days after this Act takes effect; one of said members to be so appointed shall be appointed for a term ending February 1, 1914, and biennially thereafter; the other of said members of said commission shall be appointed for a term ending February 1st, 1915, and biennially thereafter, and the Governor in making his first appointments to fill these respective offices shall designate which of said officers shall fill the term expiring February 1st, 1914, and which of said officers shall fill the term expiring February 1st, 1915. The Commissioner of Insurance and Banking, for the purpose of this Act, may be referred to as the Commissioner of Insurance. [Act 1910 S. S. p. 125, repealed; Act 1913, p. 196, ch. 106, § 4, superseding art. 651, Pen. Code.]

Art. 652. Insurance Commission to fix rates, etc.—The State Fire Insurance Commission shall have the sole and exclusive power and authority, and it shall be its duty to prescribe, fix, determine and promulgate the rates of premiums to be charged and collected by fire insurance companies transacting business in this State. As soon as practicable after this Act shall take effect, the State Fire Insurance Commission shall begin the work of fixing and determining and promulgating the rates of premiums to be charged and collected by fire insurance companies throughout the State, and the making and adoption of its schedules of such rates, and then until such time as this work shall have been completed, said Commission shall have full power and authority to adopt and continue in force the rates of premiums which may be lawfully charged and

collected when this Act shall take effect, or any portion thereof, for such time as it may prescribe or until the work of making such schedules for the entire State shall be completed. Said Commission shall also have authority to alter and amend any and all such rates of premiums so fixed and determined and adopted by it, and to raise or lower the same, or any part thereof, as herein provided. Said Commission shall also have authority to employ clerical help, inspectors, expert and other assistants, and to incur such other expenses as may be necessary in carrying out the provisions of this Act; provided that such expenses, including the salaries of the members of the Commission shall not exceed in the aggregate the sum of one hundred thousand dollars (\$100,000.00) per annum.

It shall be the duty of said Commission to ascertain as soon as practicable, the annual fire loss in this State; to obtain, to make and maintain a record thereof and collect such data and information with respect thereto as will enable said Commission to classify the fire losses of this State, the causes thereof, and the amount of premiums collected therefor for each class of risks and the amount paid thereon, in such manner as will be of assistance in determining equitable insurance rates, methods of reducing such fire losses, and reducing the insurance rates of the State, or subdivisions of the State. [Act 1910 S. S. p. 125, repealed; Act 1913, p. 197, ch. 106, § 6, superseding art. 652 revised Pen. Code.]

Art. 653. Statements to be made to insurance commission; powers of commission.—That said Commission is authorized and empowered to require sworn statements from any insurance company affected by this Act, and from any of its directors, officers, representatives, general agents State agents, special agents and local agents of the rates and premiums collected for fire insurance on each class of risks, on all property in this State during any or all years for the five years next preceding the first day of January, 1913, and of the causes of fire, if such be known, if they are in possession of such data, and information, or can obtain it at a reasonable expense; and said commission is empowered to require such statements for any period of time after the first day of January, 1913, and said Commission is empowered to require such statements showing all necessary facts and information to enable said Commission to make, amend and maintain the general basis schedules provided for in this Act, and the rules and regulations for applying same and to determine reasonable and proper maximum specific rates and to determine and assist in the enforcement of the provisions of this Act. The said Commission shall also have the right, at its discretion, either personally, or by some one duly authorized by it to visit the office whether general, local or otherwise, of any insurance company doing business in this State, and the home office of said company outside of this State, if there be such, and the office of any officers, directors, general agents, state agents, local agents or representatives of such company, and there require such company, its officers, agents or representatives to produce for inspection by said Commission or any of its duly authorized representatives all books, records and papers of such company or such agents and representatives; and the said Commission or its duly authorized agents or representatives shall have the right to examine such books and papers and make or cause to be made copies thereof; and shall have the right to take testimony under oath with reference thereto, and to compel the attendance of witnesses for such purpose; and any company, its officers, agents or representatives failing to make such statements and reports herein referred to and failing or refusing to per-

mit the examination of books, papers and records as herein required, when so called upon or declining or failing to comply with any provisions of this Section shall be subject to the penalties provided for in Section 26 of this Act [art. 661, post]. Said Commission shall be further authorized and empowered to require the fire insurance companies transacting business in this State or any of them, to furnish said Commission with any and all data which may be in their possession, either jointly or severally, including maps, tariffs, inspection reports and any and all data affecting fire insurance risks in this State, or in any portion thereof and said Commission shall be authorized and empowered to require any two or more of said companies, or any joint agent or representative of them, to turn over any and all such data in their possession, or any part thereof, to said Commission for its use in carrying out the provisions of this Act. [Act 1910 S. S. p. 128, repealed; Act 1913, p. 199, ch. 106, § 12, superseding art. 653 revised Pen. Code.]

Art. 654. Secretary of fire marshal.—For the purpose of facilitating the work of said Commission, one of the appointed members thereof shall be selected by the Commission as its secretary, who shall perform the duties which shall appertain to that position, and whose official title shall be “Secretary of the State Insurance Commission”; the other of said appointed members thereof shall be selected by said Commission as Fire Marshal of the State Insurance Commission, and his official title shall be “Fire Marshal of the State Insurance Commission;” but the said members so selected as Secretary and Fire Marshal as aforesaid, shall receive no compensation for filling their respective positions, other than their salaries as members of the State Insurance Commission, and shall perform the duties of those respective positions at the will of the Commission, but their expenses incurred in performing the duties of these positions shall be paid as provided in this Act. [Act 1910 S. S. p. 127, repealed; Act 1913, p. 197, ch. 106, § 7, superseding art. 654 (1) revised Pen. Code.]

Art. 654a. Duties of fire marshal.—It shall be the duty of the Fire Marshal of the State Insurance Commission, who, for the purpose of this Act, may be referred to as the State Fire Marshal, at the discretion of the Board, and upon the request of the mayor of any city or village, or the chief of a fire department of any city or village or any fire marshal where a fire occurs within such city or village, or of a county or district judge, or of the sheriff or county attorney of any county, where a fire occurs within the district or county of the officer making such request, or of any fire insurance company, or its general, state or special agent, interested in a loss, or of a policyholder sustaining a loss, or upon the direction of the State Insurance Commission to forthwith investigate at the place of such fire before loss can be paid, the origin, cause and circumstances of any fire occurring within this State, whereby property has been destroyed or damaged, and shall ascertain if possible whether the same was the result of any accident, carelessness or design, and shall make a written report thereof to the State Insurance Commission, and shall also furnish in writing, to the county or district attorney of the county in which such fire occurred, all the information and evidence obtained by him including a copy of all the pertinent testimony taken in the case. [Act 1910 S. S. p. 127, 128, repealed; Act 1913, p. 198, ch. 106, § 8, superseding art. 654 (2) Pen. Code.]

Art. 654b. Powers of fire marshal.—The State Fire Marshal shall have the power to administer oaths, take testimony, compel

the attendance of witnesses and the production of documents and to enter at any reasonable time, any buildings or premises where a fire has occurred or is in progress, or any place contiguous thereto for the purpose of investigating the cause, origin and circumstances of such fire. And he may enter and examine at any reasonable time any building, structure or place for the purpose of ascertaining the fire hazard and may remove or require the owner or occupant to remove or safely store combustible material, dangerously exposed or improperly placed therein, and to remove any unnecessary exposure to fire hazard found therein; the said State Fire Marshal is hereby authorized when necessary to apply to a court of competent jurisdiction for the necessary writs or orders to enforce the provisions of this Section, and in such case he shall not be required to give bond. [Act 1910 S. S. p. 128, repealed; Act 1913, p. 198, ch. 106, § 9, superseding art. 654(3) revised Pen. Code.]

Art. 654c. When State Fire Marshal is unable to act.—If for any reason the State Fire Marshal is unable to make any required investigation in person, he may designate the fire marshal of such city or town or some other suitable person to act for him; and such person so designated shall have the same authority as is herein given the State Fire Marshal with reference to the particular matter to be investigated by him, and shall receive such compensation for his services as may be allowed by the State Insurance Commission. If the investigation of a fire is made at the request of an insurance company, or at the request of a policyholder sustaining loss, or at the request of the mayor, town clerk or chief of the fire department of any city, village or town in which the fire occurred, then the expenses of the Fire Marshal, clerical expenses, witnesses and officers fees incident and necessary to such investigation shall be paid by such insurance company, or such policyholder of such city or town as the case may be, otherwise the expenses of such investigation are to be paid as part of the expenses of the State Insurance Commission. Provided, the party or parties, company or companies, requesting such investigation, shall before such investigation is commenced deposit with the State Insurance Commission, an amount of money in the judgment of said Commission sufficient to defray the expenses of said Fire Marshal in conducting such investigation. [Act 1910 S. S. p. 128, repealed; Act 1913, p. 198, ch. 106, § 10, superseding art. 654(4) revised Pen. Code.]

Art. 654d. Action of fire marshal not to affect policies, etc.—No action taken by the State Fire Marshal shall effect the rights of any policyholder or any company in respect to a loss by reason of any fire so investigated; nor shall the result of any such investigation be given in evidence upon the trial of any civil action upon such policy, nor shall any statement made by any insurance company, its officers, agents or adjusters, nor by any policyholder, or any one representing him, made with reference to the origin, cause or supposed origin or cause of a fire to the Fire Marshal or to any one acting for him, or under his direction, be admitted in evidence or made the basis for any civil action for damages. [Act 1910 S. S. p. 128, repealed; Act 1913, p. 199, ch. 106, § 11, superseding art. 654(5) revised Pen. Code.]

Art. 655. Rates to be reasonable; schedules of rates; powers and duties of commission; when rates take effect, etc.—The rates of premium fixed by said Commission under and in pursuance of the provision of this Act shall be at all times reasonable and the

schedules thereof made and promulgated by said Commission as herein provided, shall be in such form as will in the judgment of the Commission, most clearly and definitely and in detail disclose the rate so fixed and determined by said Commission to be charged and collected for policies of fire insurance. Said Commission may employ and use any facts and information now in the possession of the present State Insurance Board, as well as all facts obtainable from and concerning fire insurance companies transacting business in this State, showing their expense and charges for fire insurance premiums, for any period or periods, said commission may deem advisable, which in their opinion will enable them to devise and fix and determine reasonable rates of premium for fire insurance. The said Commission in making and publishing schedules of the rates fixed and determined by it shall show all charges, credits, terms privileges and conditions which in any wise affect such rates, and copies of all such schedules shall be furnished by said Commission to any and all companies affected by this Act applying therefor, and the same shall be furnished to any citizens of this State applying therefor, upon the payment of the actual cost thereof. No rate or rates fixed or determined by the Commission shall take effect until it shall have entered an order or orders fixing and determining same, and shall give notice thereof to all fire insurance companies affected by this Act, authorized to transact business in the State. It shall be the duty of the State Fire Insurance Commission, and of any inspector or other agent or employé thereof, who shall inspect any risk for the purpose of enabling the Commission to fix and determine the reasonable rate to be charged thereon, to furnish to the owner of such risk at the date of such inspection, a copy of the inspection report, showing all defects that may operate as charges to increase the insurance rate.

Said commission shall have full power and authority to alter, amend, modify or change any rate fixed and determined by it on thirty days' notice, or to prescribe that any such rate or rates shall be in effect for a limited time, and said Commission shall also have full power and authority to prescribe reasonable rules whereby in cases where no rate of premium shall have been fixed and determined by the Commission, for certain risks or classes of risks, policies may be written thereon at rates to be determined by the company, provided, however, that such company or companies shall immediately report to said Commission such risk so written, and the rates collected therefor, and such rates shall always be subject to review by the Commission. [Act 1910 S. S. pp. 129, 132, repealed; Act 1913, p. 200, ch. 106, § 13, superseding art. 655(1) revised Pen. Code.]

Art. 655a. Authority to revise schedules of rates.—The Commission shall have full power and authority after having given reasonable notice, not exceeding thirty days, of its intention to do so, to alter, amend or revise any rates of premium fixed and determined by it in any schedules of such rates promulgated by it as herein provided, and to give reasonable notice of such alteration, amendment or revision to the public, or to any company or companies affected thereby. Such altered, amended or revised rates shall be the rates thereafter to be charged and collected by all fire insurance companies affected by this Act; provided, that no policy in force prior to the taking effect of such changes or amendments shall be affected thereby, unless there shall be a change in the hazard of the risk, necessitating a change in the rate applicable to such risk, in which event such policy shall be subject to the new rates. [Act

1910 S. S. p. 132, repealed; Act 1913, p. 201, ch. 106, § 16, superseding art. 655 (2) revised Pen. Code.]

Art. 656. Companies may petition for change of rates, etc.; credits for reduced hazards, etc.—Any fire insurance company or companies affected by this Act shall have the right at any time to petition the Commission for an order changing or modifying any rate or rates fixed and determined by the Commission, and the Commission shall consider such petition in the manner provided in this Act and enter such order thereon as it may deem just and equitable. The Commission shall have full authority and power to give each city, town, village or locality credit for each and every hazard they may reduce or entirely remove, and also for all added fire fighting equipment, increased police protection, or any other equipment or improvement that has a tendency to reduce the fire hazard of any such city, town, village or locality, and also to give credit for a good fire record made by any city, town, village or locality. Said Commission shall also have the power and authority to compel any company to give any or all policyholders credit for any and all hazards that said policyholder or holders may reduce or remove. Said credit shall be in proportion to such reduction or removal of such hazard and said company or companies shall return to such policy holder or holders such proportional part of the unearned premium charged for such hazard that may be reduced or removed. [Act 1910 S. S. p. 130, repealed; Act 1913, p. 201, ch. 106, § 14, superseding art. 656 revised Pen. Code.]

Art. 657. Company to furnish policyholder with analysis of rate; schedules open to public.—When a policy of fire insurance shall be issued by any company transacting the business of fire insurance in this State, such company shall furnish the policyholder with a written or printed analysis of the rate or premium charged for such policy, showing the items of charge and credit which determine the rate, unless such policyholder has theretofore been furnished with such analysis of such rate. All schedules of rates promulgated by said Commission shall be open to the public at all times, and every local agent of a fire insurance company transacting business in this State shall have and exhibit to the public copies of such schedules covering all risks upon which he is authorized to write insurance. [Act 1910 S. S. p. 132, repealed; Act 1913, p. 201, ch. 106, § 15, superseding art. 657 revised Pen. Code.]

Art. 658. Commission to establish uniform policies, etc.—It shall be the duty of the State Insurance Commission to make, promulgate and establish uniform policies of insurance applicable to the various risks of this State, copies of which uniform policies shall be furnished each company doing business in this State, or which may hereafter do business in this State. That after such uniform policies shall have been established and promulgated and furnished the respective compies [companies] doing business in this State, such companies shall, within sixty days after the receipt of such forms of policies, adopt and use said form or forms and no other; also all companies which may commence business in this State after the adoption and promulgation of such forms of policies, shall adopt and use the same and no other forms of policies.

The said State Fire Insurance Commission shall also prescribe all standard forms, clauses and endorsements used on or in connection with insurance policies. All other forms, clauses and endorsements placed upon insurance policies shall be placed thereon subject to the approval of the Commission. The Commission shall also have authority in its discretion to change, alter or amend such

form or forms of policy or policies, and such clauses and endorsements used in connection therewith, upon giving notice and proceedings in accordance with Section 21 of this Act. [Act 1910, S. S., p. 132, repealed; Act 1913, p. 201, ch. 106, § 17, superseding art. 658 (1) revised Pen. Code.]

Art. 658a. Certain provisions in policies void.—Any provision in any policy of insurance issued by any company subject to the provisions of this Act to the effect that if said property is encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character, that such encumbrance shall render such policy void, shall be of no force and effect, and any such provision within or placed upon any such policy shall be absolutely null and void. [Act 1910, S. S., p. 132, repealed; Act 1913, p. 202, ch. 106, § 18, superseding art. 658 (2) revised Pen. Code.]

Art. 658b. Co-insurance clauses.—No company subject to the provisions of this Act may issue any policy or contract of insurance covering property in this State, which shall contain any clause or provision requiring the assured to take out or maintain a larger amount of insurance than that expressed in such policy, nor in any way providing that the assured shall be liable as co-insurer with the company issuing the policy for any part of the loss or damage which may be caused by fire to the property described in such policy, and any such clause or provision shall be null and void, and of no effect; provided that the co-insurance clauses and provisions may be inserted in policies written upon cotton, grain or other products in process of marketing, shipping, storing or manufacture. [Act 1910, S. S., p. 133, repealed; Act 1913, p. 202, ch. 106, § 19, superseding art. 658 (3) revised Pen. Code.]

Art. 659. Right of persons to petition insurance commission.—Any citizen or number of citizens of this State or any policyholder or policyholders, or any insurance company affected by this Act, or any Board of Trade, Chamber of Commerce, or other civic organization, or the civil authorities of any town, city, or village, shall have the right to file a petition with the State Fire Insurance Commission, setting forth any cause of complaint that they may have as to any order made by this Commission, or any rate fixed and determined by the Commission, and they shall have the right to offer evidence in support of the allegations of such petition by witnesses, or by depositions, or by affidavits; upon the filing of such petition, the party complained of, if other than the Commission shall be notified by the Commission of the filing of such petition and a copy thereof furnished the party or parties, company or companies, of whom complaint is made, and the said petition shall be set down for a hearing at a time not exceeding thirty days after the filing of such petition and the Commission shall hear and determine said petition; but it shall not be necessary for the petitioners or any one of them to be present to present the cause to the Commission, but they shall consider the testimony of all witnesses, whether such witnesses testify in person or by depositions, or by affidavits, and if it be found that the complaint made in such petition is a just one, then the matter complained of shall be corrected or required to be corrected by said Commission. [Act 1910, S. S., p. 133, repealed; Act 1913, p. 202, ch. 106, § 20, superseding art. 659 (1) revised Pen. Code.]

Art. 659a. Hearings by commission; actions to vacate or modify; injunction; appeal, etc.—The State Fire Insurance Commission shall give the public and all insurance companies to be affected

by its orders or decisions, reasonable notice thereof, not exceeding thirty days, and an opportunity to appear and be heard with respect to the same; which notice to the public shall be published in one or more daily papers of the State, and such notice to the insurance company or companies to be affected thereby shall be by letter deposited in the postoffice, addressed to the State or general agent of such company or companies, if the address of such State or general agent be known to the Commission, or if not known, then such letter shall be addressed to some local agent of such company or companies, or if the address of a local agent be unknown to the Commission, then by publication in one or more of the daily papers of the State, and the Commission shall hear all protests or complaints from any insurance company or any citizen or any city, or town, or village or any commercial or civic organization as to the inadequacy or unreasonableness of any rates fixed by it or approved by it, or as to the inadequacy or unreasonableness of any general basis schedules promulgated by it or the injustice of any order or decision by it, and if any insurance company, or other person, or commercial or civic organization, or any city, town or village, which shall be interested in any such order or decision, shall be dissatisfied with any regulation, schedule or rate adopted by such Commission, such company or person, commercial or civic organization, city, town or village shall have the right, within thirty days after the making of such regulation or order, or rate, or schedule or within thirty days after the hearing above provided for, to bring an action against said Commission in the district court of Travis county to have such regulation or order or schedule or rate vacated or modified; and shall set forth in a petition therefor the principal ground or grounds of objection to any or all of such regulations, schedules, rates or orders; in any such suit, the issue shall be formed and the controversy tried and determined as in other civil cases, and the court may set aside and vacate or annul any one or more or any part of any of the regulations, schedules, orders or rates promulgated or adopted by said Commission, which shall be found by the court to be unreasonable, unjust, excessive or inadequate, without disturbing others. No injunction, interlocutory order or decree suspending or restraining [restraining] directly or indirectly the enforcement of any schedule, rate, order or regulation of said Commission shall be granted; provided, that in such suit, the court, by interlocutory order, may authorize the writing and acceptance of fire insurance policies at any rate which in the judgment of the court is fair and reasonable, during the pending of such suit, upon condition that the party to such suit in whose favor the said interlocutory order of said court may be, shall execute and file with the Commissioner of Insurance and Banking a good and sufficient bond to be first approved by said court, conditioned that the party giving said bond will abide the final judgment of said court and will pay to the Commissioner of Insurance and Banking whatever difference in the rate of insurance, it may be finally determined to exist between the rates as fixed by said State Fire Insurance Commission complained of in such suit, and the rate finally determined to be fair and reasonable by the court in said suit, and the said Commissioner of Insurance and Banking, when he receives such difference in money, shall transmit the same to the parties entitled thereto.

Whenever any action shall be brought by any company under the provisions of this Section within said period of thirty days, no penalties nor forfeitures shall attach or accrue on account of the failure of the plaintiff to comply with the orders, schedules, rates or regulations sought to be vacated in such action until the final determination of the same.

Either party to any such action, if dissatisfied with the judgment or decree of said court, may appeal therefrom as in other civil cases. No action shall be brought in any court of the United States to set aside any orders, rates, schedules or regulations made by said Commission under the provisions of this Act until all of the remedies provided herein, shall have been exhausted by the party complaining.

If any insurance company affected by the provisions of this Act shall violate any of the provisions of this Act, the Commissioner of Insurance shall, by and with the consent of the Attorney General, cancel its certificate of authority to transact business in this State. [Act 1910, S. S., p. 133, repealed; Act 1913, p. 203, ch. 106, § 21, superseding art. 659 (2) revised Pen. Code.]

Art. 660. Insurance companies not to do certain things.—No company shall engage or participate in the insuring or re-insuring of any property in this State against loss or damage by fire except in compliance with the terms and provisions of this Act; nor shall any such company knowingly write insurance at any lesser rate than the rates herein provided for, and it shall be unlawful for any company so to do, unless it shall thereafter file an analysis of same with the Commission, and it shall be unlawful for any company, or its officers, directors, general agents, State agents, special agents, local agents, or its representatives, to grant or contract for any special favor or advantages in the dividends or other profits to come thereon, or in commissions in the dividends or other profits to accrue thereon, or in commissions or division of commission, or any position or any valuable consideration or any inducement not specified in the policy contract of insurance; nor shall such company give, sell or purchase, offer to give, sell or purchase, directly or indirectly as an inducement to insure or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, partnership or individual, or any dividends or profits accrued or to accrue thereon, or anything of value whatsoever, not specified in the policy; but nothing in this Section or in this Act shall be construed to prohibit a company from sharing its profits with its policyholders, provided that such agreement as to profit-sharing shall be placed on or in the face of the policy, and such profit-sharing shall be uniform and shall not discriminate between individuals or between classes; provided, however, that no part of the profit shall be paid until the expiration of the policy. Any company, or any of its officers, directors, general agents, state agents, special agents, local agents or its representatives, doing any of the acts in this Section prohibited, shall be deemed guilty of unjust discrimination; provided, however, that if any agent of [or] company shall issue a policy without authority, and any policyholder holding such policy shall sustain a loss or damage thereunder, said company or companies shall be liable to the policyholder thereunder, in the same manner and to the same extent as if said company had been authorized to issue said policies, although the company issued said policy in violation of the provisions of this Act. But this shall not be construed to give any company the right to issue any contract or policy of insurance other than as provided in this Act. [Act 1910, S. S., p. 135, repealed; Act 1913, p. 204, ch. 106, § 22, superseding art. 660 revised Pen. Code.]

Art. 661. Violation of act; penalty.—Any insurance company affected by this Act, or any officer or director thereof, or any agent or person acting for or employed by any insurance company, who, alone, or in conjunction with any corporation, company or person, who shall wilfully do or cause to be done, or shall wilfully suffer or

permit to be done any act, matter or thing prohibited or declared to be unlawful by this Act, or who shall wilfully omit or fail to do any act, matter or thing required to be done by this Act or shall cause or wilfully suffer or permit any act, matter or thing directed not to be done, or who shall be guilty of any wilful infraction of this Act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than three hundred dollars (\$300.00), nor more than one thousand dollars (\$1,000.) for each offense. [Act 1910, S. S., p. 136, repealed; Act 1913, p. 205, ch. 106, § 26, superseding art. 661 revised Pen. Code.]

Art. 662. Unlawful to accept rebate.—No person shall knowingly receive or accept from any insurance company or from any of its agents, sub-agents, brokers, solicitors, employes, intermediaries or representatives, or any other person, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other financial profits accrued or to accrue thereon, or any valuable consideration, position or inducement not specified in the policy of insurance, and any person so doing shall be guilty of a violation of the provisions of this Section, and shall be punished by a fine of not exceeding one hundred dollars (\$100.00) or by imprisonment in the county jail for not exceeding ninety days, or by both such fine and imprisonment. [Act 1910, S. S., p. 136, repealed; Act 1913, p. 205, ch. 106, § 23, superseding art. 662, revised Pen. Code.]

Art. 662a. Law not applicable to collection of premiums; certain policies to be in force.—The provisions of this law shall not deal with the collection of premiums, but each company shall be permitted to make such rules and regulations as it may deem just between the company, its agents, and its policyholders; and no bona fide extension of credit shall be construed as a discrimination, or in violation of the provisions of this Act.

All policies heretofore issued or which shall hereafter be issued by any insurance company prior to the taking effect of this Act which provide that said policies shall be void for non-payment of premiums at a certain specified time, shall be and the same are in full force and effect, provided, that the company or any of its agents have accepted the premium on said policies after the expiration of the dates named in said provisions fixing the date of payment. [Act 1913, p. 205, ch. 106, § 24.]

Art. 663. Incriminating testimony.—No person shall be excused from giving testimony or producing evidence when legally called upon to do so at the trial of any other person or company charged with violating any of the provisions of this Act on the ground that it may incriminate him under the laws of this State; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence under this Act, except for perjury in so testifying. [Act 1910, S. S., p. 137, repealed; Act 1913, p. 206, ch. 106, § 27, superseding art. 663 revised Pen. Code.]

Art. 664. Law not applicable to certain companies.—This Act shall not apply to purely mutual or to purely profit-sharing fire insurance companies incorporated or unincorporated under the laws of this State, and carried on by the members thereof solely for the protection of their property and not for profit; nor to purely co-operative inter-insurance and reciprocal exchange carried on by the members thereof solely for the protection of their property and not for profit. [Act 1910, S. S., p. 137, repealed; Act 1913, p. 206, ch. 106, § 28, superseding art. 664 revised Pen. Code.]

Art. 664a. Partial invalidity.—If any part of this Act be for any reason held unconstitutional, it shall not affect any other portion or part of this Act. [Act 1913, p. 206, ch. 106, § 30.]

Art. 664b. Shall file bond.—Every fire insurance company, not organized under the laws of this state applying for a certificate of authority to transact any kind of insurance in this state shall, before obtaining such certificate, file with the commissioner of insurance and banking, a bond, with good and sufficient surety or sureties to be approved by the commissioner of insurance and banking, payable to the commissioner of insurance and banking, and his successors in office, in a sum equal to twenty-five per cent of its premiums collected from citizens or upon property in this state during the preceding calendar year, as shown by its annual report for such year; provided, however, the bond in no case shall exceed fifty thousand dollars, nor be less than ten thousand dollars, conditioned that said company will pay all its lawful obligations to citizens of this state. Such bonds shall be subject to successive suits by citizens of this state so long as any part of the same shall not be exhausted, and the same shall be kept in force unimpaired until all claims of citizens of this state arising out of obligations of said company have been fully satisfied. Such bonds shall provide that in the event the company shall become insolvent or cease to transact business in this state at any time when it has outstanding policies of insurance in favor of citizens of this state or upon property in this state the commissioner of insurance and banking shall have the power, after having given ten days notice to the officers of such company or any receiver in charge of its property and affairs, to contract with any other insurance company transacting business in this state for the assumption and reinsurance by it of all the insurance risks outstanding in this state of such company which is insolvent, or which has ceased to transact business in this state, which contract shall also provide for the assumption by such reinsuring company of all outstanding and unsatisfied lawful claims then outstanding against such company which has become insolvent, or ceased to transact business in this state, and in the event of the commissioner making any such contract and if the same shall be approved as reasonable by the attorney general and the governor of this state the reinsuring company shall be entitled to recover from the makers of such bond the amount of the premium or compensation so agreed upon for such reinsurance. Any company desiring to do so may at its option in lieu of giving the bond required by this section deposit securities of any kind in which it may lawfully invest its funds with the state treasurer of this state upon such terms and conditions as will in all respects afford the same protection and indemnity as is herein provided for to be afforded by said bond. [Acts 1909, p. 182, ch. 102, § 1.]

Cited *Southwestern Surety Ins. Co. v. Anderson* (Civ. App.) 152 S. W. 816; *Id.* (Sup.) 155 S. W. 1176.

Explanatory.—The above act, comprising arts. 664b-664d, was omitted from the revised Penal Code, and is included in this compilation in view of the decision in *Berry v. State* (Cr. App.) 156 S. W. 626.

When bond required.—Under this article and art. 664d, requiring that before any company shall issue any policy it shall first have filed during the calendar year in which such policy may issue a bond in a sum not less than \$10,000, conditioned for the payment of all lawful obligations to citizens of this state arising out of any policies or contracts issued by such company, and makes it a penal offense for any company to issue policies without having given bond, held that, when construed with the senate journal, which showed that this article as it originally stood made no provision for a minimum or maximum penalty, which provision was entered by amendment without any other change in the bill, the two articles were but complements of each other, and hence required the giving of only one bond. *Ætna Ins. Co. v. Hawkins*, 103 Tex. 195, 125 S. W. 313.

Under this article and art. 664d, which requires that before any company shall issue any policy it shall first have filed, "during the calendar year in which such

policy may issue, a bond," etc., and the practice and statutory provision, under which the state department did not issue the certificates to insurance companies until March, the words "calendar year," as used in art. 664d, would be read in connection with this article, and construed to mean the year in which the certificate is to run, since it was obvious that the legislature considered that the certificate was to run a calendar year, and since any other construction would leave an interval between January and March, during which time a policy issued by the company would not be preceded by a bond "filed during the calendar year." *Id.*

Under the statutory provision that certificate of authority for an insurance company to do business in the state must be obtained annually, and this article, the filing of a bond is required whenever a certificate to do business was applied for. *Id.*

Obligation of bond.—Under this article and art. 664d, which requires that, before any company shall issue any policy, it shall first have filed a bond conditioned for the payment of all lawful obligations to citizens of the state arising out of any policies or contracts issued by such company, a bond filed must contain all the conditions imposed by either section, except that the bond mentioned in this article would be limited by the language of art. 664d to include only lawful obligations arising out of insurance policies or contracts. *Ætna Ins. Co. v. Hawkins*, 103 Tex. 195, 125 S. W. 313.

Bond for benefit of policy holders.—A bond executed by defendant to indemnify a surety on the bond of a foreign insurance company to enable it to obtain a license to do business in Texas held to inure to the benefit of policy holders of the insurance company. *Southwestern Surety Ins. Co. v. Anderson* (Sup.) 155 S. W. 1176.

Art. 664c. Same; time for compliance with act.—Every fire insurance company not organized under the laws of this State which shall hold a certificate of authority to transact any kind of insurance business in this State, when this Act takes effect, shall within ninety days thereafter comply with the requirements of Section 1 of this Act [Art. 664b], as to companies hereafter obtaining certificates of authority and it shall be the duty of the Commissioner of Insurance and Banking to revoke the certificate of authority failing to so comply within such period. [*Id.*, § 2.]

See notes under art. 664b.

Art. 664d. Same; penalty for violation.—Every fire insurance company not organized under the laws of this state, hereafter issuing or causing or authorizing to be issued any policy of insurance other than life insurance shall first have filed with the Commissioner of Insurance and Banking during the calendar year in which such policy may issue or authorize or cause to be issued a bond of good and sufficient sureties to be approved by such commissioner in a sum of not less than ten thousand dollars, conditioned for the payment of all lawful obligations to citizens of this State arising out of any policies or contracts issued by such fire insurance company, which such bond shall be subject to successive suits by citizens of this State so long as any part of the same shall not be adjusted and so long as there remains outstanding any such obligations or contracts of such fire insurance company. Any person violating the provisions of this Section shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment in the county jail for not less than three nor more than twelve months, or by both such fine and imprisonment. This Act shall not apply to any person, firm or corporation or association doing an interinsurance, co-operative or reciprocal business. [*Id.*, § 3.]

FRATERNAL BENEFICIARY ASSOCIATIONS

Art. 665. Fraternal benefit societies defined.—Any corporation, society, order or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of

benefits in accordance with Section 5 [Art. 665d] hereof, is hereby declared to be a fraternal benefit society. [Act 1899, p. 195; Act 1909, p. 359, repealed; Act 1913, p. 220, ch. 113, § 1, superseding art. 665 revised Pen. Code.]

Explanatory.—Acts 1913, p. 220, § 23, repeals chapter 36 of 1st S. S. and chapter 22 of 2nd S. S., 1909, and chapter 92, Acts 1911, and all other laws in conflict, and thus supercedes arts. 665-672, Revised Pen. Code.

Art. 665a. Lodge system defined.—Any society having a supreme governing or legislative body and subordinate lodges or branches by whatever name known, into which members shall be elected, initiated and admitted in accordance with its Constitution, laws, rules, regulations and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such society to hold regular or stated meetings at least once in each month, shall be deemed to be operating on the lodge system. [Act 1909, p. 357, § 2, repealed; Act 1913, p. 220, ch. 113, § 2.]

Explanatory.—Sections 2-8, 11-18, 20, 22-24, 26, 29, of Act 1913, ch. 113, amendatory of similar provisions in the repealed act of 1909, which were omitted from the revised Penal Code, are inserted in this compilation for convenience and because they seem to enumerate or illustrate the acts denounced in the penal provisions.

Art. 665b. Representative form of government defined.—Any such society shall be deemed to have a representative form of government when it shall provide in its Constitution and laws for a supreme legislative or governing body, composed of representatives, elected either by the members or by delegates elected, directly or indirectly by the members, together with such other members as may be prescribed by its Constitution and laws; provided, that the elective members shall constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its Constitution and laws; provided, further, that the meetings of the supreme or governing body, and the election of officers, representatives or delegates, shall be held as often as once in four years. The members, officers, representatives or delegates of a fraternal benefit society shall not vote by proxy. [Act 1909, p. 357, § 3, repealed; Act 1913, p. 220, ch. 113, § 3.]

Art. 665c. Exemptions.—Except as herein provided, such societies shall be governed by this Act, and shall be exempt from all provisions of the insurance laws of this State, not only in governmental relations with the State, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein. [Act 1909, p. 358, § 4, repealed; Act 1913, p. 221, ch. 113, § 4.]

See notes under art. 4830, Vernon's Sayles' Civ. St. 1914.

Art. 665d. Benefits.—Every society transacting business under this Act shall provide for the payment of death benefits and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident or old age; provided the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under seventy years and may provide for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all or such portion of the face value of his certificate as the laws of the society may provide; provided, that nothing in this Act contained shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life which are payable upon the death or disability of the member occurring within the term for which the benefit cer-

tificates may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate, with interest payable or compounded annually at a rate not lower than four per cent per annum; provided, that this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contribution, and to contracts affected by such readjustment.

Any society which shall show by the annual valuation herein-after provided for that it is accumulating and maintaining the reserve not lower than the usual reserve computed by the American Experience Table and five per cent. interest may grant to its members extended and paid-up protection, or such withdrawal equities as its Constitution and laws may provide; provided, that such grants shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made. [Act 1909, p. 358, § 5, repealed; Act 1913, p. 221, ch. 113, § 5.]

Art. 665e. Beneficiaries.—The payment of death benefits shall be confined to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption, or to a person or persons dependent upon the member; provided, that if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary. Within the above restrictions each member shall have the right to designate his beneficiary, and from time to time have the same changed in accordance with the laws, rules or regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member; provided, that any society may, by its laws, limit the scope of beneficiaries within the above classes. [Act 1909, p. 358, § 6, repealed; Act 1913, p. 221, ch. 113, § 6.]

See notes under art. 4832, Vernon's Sayles' Civ. St. 1914.

Art. 665f. Qualifications for membership.—Any society may admit to beneficial membership any person not less than sixteen and not more than sixty years of age, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society; provided, that any beneficiary member of such society who shall apply for a certificate providing for disability benefits need not be required to pass an additional medical examination therefore. Nothing herein contained shall prevent such society from accepting general or social members. [Act 1909, p. 358, § 7, repealed; Act 1913, p. 222, ch. 113, § 7.]

See notes under art. 4833, Vernon's Sayles' Civ. St. 1914.

Art. 665g. Certificate.—Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation (or, if a voluntary association, the articles of association), the Constitution and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same, certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to said charter or ar-

ticles of incorporation, or articles of association, if a voluntary association, a constitution or laws duly made or enacted subsequent to the issuance of the benefit certificates shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership. [Act 1909, 1st S. S., p. 358, § 8, and Act 1909, 2nd S. S., p. 443, repealed; Act 1913, p. 222, ch. 113, § 8.]

See notes under art. 4834, Vernon's Sayles' Civ. St. 1914.

Art. 666. Funds.—Any society may create, maintain, invest, disburse and apply an emergency surplus or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in Section 5 of this Act [Art. 665d]. The funds from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed shall be derived from periodical or other payments by the members of the society and accretions of said funds; provided, that no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this State which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the National Fraternal Congress Table of Mortality as adopted by the National Fraternal Congress, August 23, 1899, or any higher standard, with interest assumption not more than four per cent. per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent. per annum.

Deferred payments or installments of claims shall be considered as fixed liabilities on the happenings of the contingency upon which such payments or installments are thereafter to be paid. Such liability shall be the present value of such future payments or installments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability regardless of proposed future collections to meet any such liabilities. [Act 1909, 1st S. S., p. 359, § 9, repealed; Act 1913, p. 222, ch. 113, § 9, superseding Art. 666 revised Pen. Code.]

See notes under art. 4835, Vernon's Sayles' Civ. St. 1914.

Art. 667. Investments.—Every society shall invest its funds only in securities permitted by the laws of this State for the investment of the assets of life insurance companies; provided, that any foreign society permitted or seeking to do business in this State which invests funds in accordance with the laws of the State in which it is incorporated shall be held to meet the requirements of this Act for the investment of funds; provided, that in case the Constitution and by-laws of the Grand Lodge or governing body of any such association provides that all or any part of the beneficiary or mortuary or insurance fund of such association that is paid in by or collected from the members of such subordinate or local lodge may be retained in the custody of and controlled and managed by such subordinate or local lodge, and designate what officers of such subordinate or local lodge shall have the custody and control of such fund and authorize such local officers to loan

or invest the same, and such local officer shall have executed and filed, and shall from time to time when required by the Commissioner of Insurance and Banking, file with the Commissioner of Insurance and Banking such bond or other written instrument to be prescribed and approved in terms and amount by the Commissioner of Insurance and Banking as will indemnify such fund against waste, depletion or loss through loans, investment or otherwise, then such fund so secured shall be exempt from the provisions of this Act. [Act 1909, 1st S. S., p. 359, § 10 and Act 1911, ch. 92, repealed; Act 1913, p. 223, ch. 113, § 10, superseding art. 667 revised Pen. Code.]

Art. 668. [Repealed by Act 1913, ch. 113, § 33. See note under art. 665 ante.]

Art. 668a. Distribution of funds.—Every provision of the laws of the Society for payment by members of such Society, in whatever form made, shall distinctly state the purpose of the same and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses. [Act 1909, 1st S. S., p. 360, § 13, repealed; Act 1913, p. 223, ch. 113, § 11.]

See note under art. 665a.

Art. 668b. Organization.—Seven or more persons, citizens of the United States, and a majority of whom are citizens of this State, who desire to form a fraternal benefit society, as defined by this Act, may make and sign (giving their addresses) and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation, in which shall be stated:

First. The proposed corporate name of the society, which shall so closely resemble the name of any society or insurance company already transacting business in this State as to mislead the public or to lead to confusion.

Second. The purpose for which it is formed, which shall not include more liberal powers than are granted by this Act; provided, that any lawful, social, intellectual, educational, charitable, benevolent, moral or religious advantages may be set forth among the purposes of the Society, and the mode in which its corporate powers are to be exercised.

Third. The names, residences and official titles of all the officers, trustees, directors or other persons who are to have and exercise the general control and management of the affairs and funds of the Society for the first year or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

Fourth. Such articles of incorporation and duly certified copies of the Constitution and laws, rules and regulations, and copies of all proposed forms of benefit certificates, applications therefor and circulars to be issued by such society, and a bond in the sum of five thousand dollars, with sureties approved by the Commissioner of Insurance and Banking, conditioned upon the return of the advance payments, as provided in this Section, to applicants, if the organization is not completed within one year, shall be filed with the Commissioner of Insurance and Banking, who may require such further information as he deems necessary, and if the purposes of the society conform to the requirements of this Act, and all provisions of law have been complied with, the Commissioner of Insurance and Banking shall so certify and retain and record (or

file) the articles of incorporation, and furnish the incorporators a preliminary certificate authorizing said society to solicit members as hereinafter provided.

Upon receipt of said certificate from the Commissioner of Insurance and Banking, said society may solicit members for the purpose of completing its organization and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its Table of Rates as provided by its Constitution and laws, and shall issue to each such applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any benefit certificate nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least one thousand dollars each, and all such applications for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examination have been duly filed and approved by the chief medical examiner of such society; nor until there shall be established ten subordinate lodges or branches into which said five hundred applicants have been initiated; nor until there has been submitted to the Commissioner of Insurance and Banking, under oath of the president and secretary or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date, approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation, contracted, when valued for death benefits upon the basis of the National Fraternal Congress Table of Mortality, as adopted by the National Fraternal Congress, August 23, 1899, or any higher standard, at the option of the society, and for disability benefits by tables based upon reliable experience and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four per cent. per annum; nor until it shall be shown to the Commissioner of Insurance and Banking by the sworn statement of the treasurer or corresponding officer of such society, that at least five hundred applicants have each paid in cash at least one regular monthly payment as herein provided per one thousand dollars of indemnity to be effected, which payments in the aggregate shall amount to at least twenty-five hundred dollars; all of which shall be credited to the mortuary or disability fund on account of such applicants and no part of which may be used for expenses.

Said advanced payments shall, during the period of organization, be held in trust, and if the organization is not completed within one year as hereinafter provided, returned to said applicants.

The Commissioner of Insurance and Banking may make such examination and require such further information as he deems advisable; and upon presentation of satisfactory evidence that the society has compiled [complied] with all the provisions of law, he shall issue to such society a certificate to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate. The Commissioner of Insurance and Banking shall cause a record of such certificate to be made and a certified copy of such record may be given in evidence with like effect as the original certificate.

No preliminary certificate granted under the provisions of this Section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the

Commissioner of Banking and Insurance upon cause shown; unless the five hundred applicants herein required have been secured and the organization has been completed as herein provided; and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of said preliminary certificate, or at the expiration of said extended period, unless such society shall have completed its organization and commenced business as herein provided. When any domestic society shall have discontinued business for the period of one year, or has less than four hundred members, its charter shall become null and void. Every such society shall have the power to make a Constitution and by-laws for the government of the society, the admission of its members, the management of its affairs and the fixing and readjusting of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to, or amend such Constitution and by-laws and shall have such other powers as are necessary and incidental to carrying into effect the object and purposes of the society. [Act 1899, p. 200, § 14; Act 1909, 1st S. S., p. 360, § 14, repealed; Act 1913, p. 223, ch. 113, § 12.]

See note under art. 665a, ante, and notes under art. 4839, Vernon's Sayles' Civ. St. 1914.

Art. 668c. Powers retained; reincorporation; amendments.—Any society now engaged in transacting business in this State may exercise, after the passage of this Act, all of the rights conferred thereby, and all of the rights, powers and privileges now exercised or possessed by it under its charter or articles of incorporation not inconsistent with this Act, if incorporated; or if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided therein or in its Constitution and laws, and all such amendments shall be filed with the Commissioner of Insurance and Banking and shall become operative upon such filing, unless a later time be provided in such amendments or in its articles of incorporation, Constitution or laws. [Act 1909, 1st S. S., p. 362, § 15, repealed; Act 1913, p. 225, ch. 113, § 13.]

See note under art. 665a.

Art. 668d. Mergers and transfers.—No domestic society shall merge with or accept the transfer of the membership or funds of any other society unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer, and filed with the Commissioner of Insurance and Banking of this State, together with a sworn statement of the financial condition of each of said societies by its president and secretary, or corresponding officers, and a certificate of such officers, duly verified under oath of said officers of each of the contracting societies, that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each of said societies.

Upon the submission of said contract financial statements and certificates, the Commissioner of Insurance and Banking shall examine the same, and if he shall find such financial statements to be correct and the said contract to be in conformity with the provisions of this Section, and that such merger or transfer is just and equitable to the members of each of said societies, he shall approve said merger or transfer, issue his certificate to that effect, and thereupon the said contract or merger or transfer shall be of full force and effect. In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the

Commissioner of Insurance and Banking. [Act 1909, 1st S. S., p. 363, § 16, repealed; Act 1913, p. 226, ch. 113, § 14.]

See note under art. 665a, ante, and note under art. 4841, Vernon's Sayles' Civ. St. 1914.

Art. 668e. Annual license.—Societies which are now authorized to transact business in this State may continue such business until the first day of April next succeeding the passage of this Act, and the authority of such societies may thereafter be renewed annually, but in all cases to terminate on the first day of the succeeding April; provided, however, the license shall continue in full force and effect until the new license be issued or specifically refused. For each such license or renewal the society shall pay the Commissioner of Insurance and Banking ten dollars. A duly certified copy or duplicate of such license shall be prima facie evidence that the licensee is a fraternal benefit society within the meaning of this Act. [Act 1909, 1st S. S., p. 363, § 17, repealed; Act 1913, p. 226, ch. 113, § 15.]

See note under art. 665a.

Art. 668f. Admission of foreign society.—No foreign society now transacting business, organized prior to the passage of this Act, which is not now authorized to transact business in this State, shall transact any business herein without a license from the Commissioner of Insurance and Banking. Any such society shall be entitled to a license to transact business within this State upon filing with the Commissioner of Insurance and Banking a duly certified copy of its charter or articles of association; a copy of its Constitution and laws, certified by its secretary or corresponding officer; a power of attorney to the Commissioner of Insurance and Banking as hereinafter provided; a statement of its business under oath of its president and secretary or corresponding officers in the form required by the Commissioner of Insurance and Banking, duly verified by an examination made by the supervising insurance official of its home State or other State satisfactory to the Commissioner of Insurance and Banking of this State; a certificate from the proper official in its home State, province or country that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical or other payments by persons holding similar contracts; and upon furnishing the Commissioner of Insurance and Banking such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the State, territory, district, province or country where it is organized, he shall issue a license to such society to do business in this State until the first day of the succeeding April, and such license shall, upon compliance with the provisions of this Act, be renewed annually, but in all cases to terminate on the first day of the succeeding April; provided, however, that license shall continue in full force and effect until the new license be issued or specifically refused. Any foreign society desiring admission to this State shall have the qualifications required of domestic societies organized under this Act and have its assets invested as required by the laws of the State, territory, district, country or province where it is organized. For each such license or renewal the society shall pay the Commissioner of Insurance and Banking ten dollars. When the Commissioner of Insurance and Banking refuses to license any society or revokes its authority to do business in this State, he shall reduce his ruling, order or decision to writing and file the same in his office, and shall furnish a copy thereof, together with a statement of his reasons, to

the officers of the society, upon request, and the action of the Commissioner of Insurance and Banking shall be reviewable by proper proceedings in any court of competent jurisdiction within the State; provided, however, that nothing contained in this or the preceding section shall be taken or construed as preventing any such society from continuing in good faith all contracts made in this State during the time such society was legally authorized to transact business herein. [Act 1899, p. 196, § 3; Act 1909, 1st S. S., p. 363, § 18, repealed; Act 1913, p. 226, ch. 113, § 16.]

See note under art. 665a, ante, and note under art. 4843, Vernon's Sayles' Civ. St. 1914.

Art. 668g. Power of attorney and service of process.—Every society, whether domestic or foreign, now transacting business in this State shall, within thirty days after the passage of this Act, any [and] every such society hereafter applying for admission, shall before being licensed, appoint in writing the Commissioner of Insurance and Banking, and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society and that the authority shall continue in force so long as any liability remains outstanding in this State.

Copies of such appointment certified by said Commissioner of Insurance and Banking shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall only be made upon such attorney, must be made in duplicate upon the Commissioner of Insurance and Banking, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such society; provided, however, that no such service shall be valid or binding against any such society when it is required thereunder to file its answer, pleading [pleading] or defense in less than thirty days from the date of mailing the copy of such service to such society. When legal process against any such society is served upon said Commissioner of Insurance and Banking he shall forthwith forward by registered mail, one of the duplicate copies prepaid and directed to its secretary or corresponding officer. Legal process shall not be served upon any such society except in the manner provided herein. [Act 1899, p. 197, § 4; Act 1909, 1st S. S., p. 364, § 19, repealed; Act 1913, p. 227, ch. 113, § 17.]

See note under art. 665a, ante, and notes under art. 4844, Vernon's Sayles' Civ. St. 1914.

Art. 668h. Place of meeting; location of office.—Any domestic society may provide that the meetings of its legislative or governing body may be held in any State, district, province or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this State; but its principal office shall be located in this State. [Act 1899, p. 199, § 12; Act 1909, 1st S. S., p. 364, § 20, repealed; Act 1913, p. 228, ch. 113, § 18.]

See note under art. 665a, ante, and notes under art. 4845, Vernon's Sayles' Civ. St. 1914.

Art. 668i. Grand lodges regarded as single state organization; reports.—All grand lodges, by whatever name known, whether incorporated or not, holding charters from any supreme governing body, which were conducting business in this State upon the passage of this Act as a fraternal beneficiary association, upon what is known as the separate jurisdiction plan, shall be treated as single

State organizations, and all reports required by the provisions of this Act shall be made and furnished by the officers of such supreme State governing body and shall embrace and contain the transactions, liabilities and assets of such State organization. [Act 1909, 1st S. S., p. 365, § 23, repealed; Act 1913, p. 228, ch. 113, § 20.]

See note under art. 665a, ante, and notes under art. 4847, Vernon's Sayles' Civ. St. 1914.

Art. 668j. Constitution and laws; amendments.—Every society transacting business under this Act shall file with the Commissioner of Insurance and Banking a duly certified copy of all amendments of, or additions to its Constitution and laws within ninety days after the enactment of the same. Printed copies of the Constitution and laws, as amended, changed, or added to, certified by the secretary or corresponding officer of the society, shall be prima facie evidence of the legal adoption thereof. [Act 1909, 1st S. S., p. 365, § 24, repealed; Act 1913, p. 228, ch. 113, § 22.]

See note under art. 665a, ante, and notes under art. 4849, Vernon's Sayles' Civ. St. 1914.

Art. 668k. Annual reports.—Every society transacting business in this State shall annually, on or before the day of March, file with the Commissioner of Insurance and Banking in such form as he may require, a statement under oath of its president and secretary or corresponding officers, of its condition and standing on the thirty-first day of December next preceding, and of its transactions for the year ending on that date, and also shall furnish such other information as the Commissioner of Insurance and Banking may deem necessary to a proper exhibit of its business and plan of working. The Commissioner of Insurance and Banking may at other times require any further statement he may deem necessary to be made relating to such society.

In addition to the annual report herein required, each society shall annually report to the Commissioner of Insurance and Banking a valuation of its certificates in force on December 31st last preceding, excluding those issued within the year for which the report is filed, in cases where the contribution for the first year in whole or in part are used for current mortality and expenses; provided, the first report of valuation shall be made as of December 31st, 1913, such report of valuation shall show, as contingent, liabilities the present mid-year value of the promised benefits provided in the constitution and laws of such society, under certificates the subject to valuation; and, as contingent assets, the present mid-year value of the future net contributions provided in the Constitution and laws as the same are in practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and said net value, when computed in case of monthly contributions, may be the mean of the terminal values for the end of the preceding and of the current insurance years.

Such valuation shall be certified by a competent accountant or actuary, or, at the request and expense of the society, verified by the actuary of the Department of Insurance of the home State of the society, and shall be filed with the Commissioner of Insurance and Banking within ninety days after the submission of the last preceding annual [annual] report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the National Fraternal Congress Table of Mortality as adopted by the National Congress, August 23rd, 1899; or, at the option of the society, any higher table; or, at its option, it may use a table based upon the society's own experience of at least twenty years, and covering not less than one hundred thousand lives with interest

assumption not more than four per centum per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds and the valuation of all other business of the society; provided, that where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experiences, and in such cases a separation of the funds shall not be required.

The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent [solvent] so long as the funds [funds] in its possession are equal to or in excess of its matured liabilities.

Beginning with the year, 1914, a report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed, shall be printed and mailed to each beneficiary member of the society not later than June 1st, of each year; or, in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper and the issue containing the same mailed to each beneficiary member of the society. The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full, and to provide for the creation and maintenance of the funds required by its laws additional, increased or extra rates of contribution shall be collected from the members to meet such deficiency; and such laws may provide that, upon the written application or consent of the member, his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per centum per annum. [Act 1899, p. 197, § 5; Act 1909, 1st S. S., p. 365, § 25, repealed; Act 1913, p. 229, ch. 113, § 23.]

See note under art. 665a.

Art. 668l. Provisions to insure future security.—If the valuation of the certificates, as hereinbefore provided, on December 31st, 1917, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefits and accrued liabilities, such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of deficiency as shown in the valuation as of December 31, 1917. If at any succeeding triennial valuation such society does not show at least the same condition, the Commissioner of Insurance and Banking shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the condition required herein, the Commissioner of Insurance and Banking may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of Section 24 of this Act [art. 668n], or in the case of a foreign society, its license may be cancelled in the manner provided in this Act.

Any such society, shown by any triennial valuation, subsequent to December 31, 1917, not to have maintained the condition herein required, shall, within two years thereafter, make such improvement as to show a percentage of deficiency not greater than as of December 31, 1917, or thereafter, as to all new members admitted, be subject, so far as stated rates of contributions are concerned, to

the provisions of Section 12 of this Act [Art. 668b], applicable in the organization of new societies; provided, that the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the said new members may be placed in a separate class and their certificates valued as an independent society in respect of contributions and funds. [Act 1913, p. 230, ch. 113, § 23a.]

Art. 668m. Same; valuation of certificates; transfers; tabular basis; accumulation basis; filing table showing credits; proviso.— In lieu of the requirements of Section 23 [Art. 668k] and 23a, [Art. 668l] any society accepting in its laws the provisions of this Section, may value its certificates on a basis herein designated, “accumulation basis,” by crediting each member with the net amount contributed for each year and with interest at approximately the next rate earned and by charging him with his share of the losses for each year, herein designated “cost of insurance,” and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this State, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death less the credit to the member, except as specifically provided in its articles of laws or contracts no charge shall be carried forward from the first valuation hereunder against any member for any past share of losses exceeding the contributions and credit. If, after the first valuation, any member’s share of losses for any year exceeds his credit, including the contribution for the year, the contribution shall be increased to cover his share of the losses. Any such excess share of losses chargeable to any member may be paid out of a fund or contribution especially created or required for such purpose.

Any member may transfer to any plan adopted by the society with net rates on which tabular reserves are maintained and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society.

Certificates issued, rerated or readjusted on a basis provided for adequate rates with adequate reserves to mature such certificates upon assumption for mortality and interest recognized by the law of this State shall be valued on such basis, herein designated the “Tabular Basis”; provided, that if on the first valuation under this Section a deficiency in reserve shall be shown for any such certificate, the same shall be valued on the accumulation basis.

Whenever in any society having members upon the tabular basis and upon the accumulation basis, the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year, the deficiency shall be met for the year from the available funds after setting aside all credits in the reserve or from increased contributions or by an increase in the number of assessments applied to the society, as a whole or to classes of members as may be specified in its laws, savings from a lower amount of death losses may be returned in like manner as may be specified in its laws. If the laws of the society so provide, the assets representing the reserves of any separate class of members may be carried separately for such class as if in an independent society, and the required reserve accumulation of such class, so set apart shall not thereafter be mingled with the assets of other classes of the society.

A table showing the credits to individual members for each age and year of entry and showing opposite each credit the tabular reserve required on the whole life or other plan of insurance specified in the contract, according to assumptions for mortality and interest recognized by the law of this State and adopted by the society, shall be filed by the society with each annual report and also be furnished to each member before July 1st of each year.

In lieu of the aforesaid statement there may be furnished to each member within the same time a statement giving the credit for such member and giving the tabular reserve and level rate required for a transfer carrying out the plan of insurance specified in the contract. No table or statement need be made or furnished where the reserves are maintained on the tabular basis. For this purpose individual bookkeeping accounts for each member shall not be required and all calculations may be made by actuarial methods.

Nothing herein contained shall prevent the maintenance of such surplus over and above the credits on the accumulation basis, and the reserves on the tabular basis pursuant to its laws; nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its laws; nor as making any such reserve or credits a liability in determining the legal solvency of the society. [Id., § 23b.]

Art. 668n. Examination of domestic societies.—The Commissioner of Insurance and Banking, or any person he may appoint, shall have the power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have, free access to all the books, papers and documents that relate to the business of the society, and may summon and qualify as witnesses under oath and examine its officers, agents and employes or other person in relation to the affairs, transactions and conditions of the society.

The expense of such examination shall be paid by the society examined, upon statement furnished by the Commissioner of Insurance and Banking and the examination shall be made at least once in three years. [Act 1909, 1st S. S., p. 366, § 26, repealed; Act 1913, p. 232, ch. 113, § 24.]

See note under art. 665a.

Art. 668o. Examination of foreign societies.—The Commissioner of Insurance and Banking, or any person whom he may appoint, may examine any foreign society transacting or applying for admission to transact business in this State. The said Commissioner of Insurance and Banking may employ assistants, and he, or any person he may appoint, shall have free access to all the books, papers and documents that relate to the business of the society, and may summon and qualify as witnesses under oath and examine its officers, agents and employes and other persons in relation to the affairs, transactions and conditions of the society. He may, in his discretion, accept in lieu of such examination of the Insurance Department of the State, territory, district, province or country where such society is organized. The actual expense of examiners making any such examination shall be paid by the society, upon statements furnished by the Commissioner of Insurance and Banking. If any such society or its officers refuse to submit such examination or to comply with the provisions of the Section relative thereto, the authority of such society to write new business in this State shall be suspended, or license refused until satisfactory evidence is furnished the Commissioner of Insurance and Banking relating to the condition and

affairs of the society, and during such suspension the society shall not write any new business in this State. [Act 1909, 1st S. S., p. 367, § 28, repealed; Act 1913, p. 233, ch. 113, § 26.]

See note under art. 665a.

Art. 668p. Certain societies excluded; accident societies.—Nothing contained in this Act shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows or Knights of Pythias (exclusive of the insurance department of the supreme lodge Knights of Pythias) and the Junior Order of the United American Mechanics (exclusive of the beneficiary degree or insurance branch of the National Council Junior Order United States American Mechanics) or societies which limit their membership to any one hazardous occupation nor to similar societies which do not issue insurance certificates nor to an association of local lodges of a society now doing business in this State which provides death benefits not exceeding five hundred dollars to any one person or disability benefits not exceeding three hundred dollars in any one year to pay one person or both, nor to any contracts of reinsurance business on such plan in this State nor to domestic societies which limit their membership to the employés of a particular city or town, designated firm, business house or corporation, nor to domestic lodges, orders or associations of a purely religious, charitable and benevolent description which do not provide for a death benefit of more than one hundred dollars or for disability benefits of more than one hundred and fifty dollars to any person in one year.

The Commissioner of Insurance and Banking may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this Act.

Any fraternal benefit society heretofore organized and incorporated and operating within the definition set forth in Sections 1, 2 and 3 of this Act [arts. 665, 665a, 665b], providing for the benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this Act and shall have all the privileges and shall be subject to all the provisions and regulations of this Act, except that the provisions of this Act requiring medical examinations, valuations of benefit certificates and that the certificates shall specify the amount of benefits, shall not apply to such society. [Act 1909, 1st S. S., p. 368, § 30, repealed; Act 1913, p. 233, ch. 113, § 29.]

Art. 668q. Labor organizations excluded.—The provisions of this Act shall not apply to nor include the Brotherhood of Locomotive Firemen, Brotherhood of Locomotive Engineers, Brotherhood of Railroad Trainmen, Order of Railway Conductors, Order of Railway Telegraphers, Switchmen's Union of North America, and Railway Mail Association. [Act 1899, p. 200, § 16; Act 1903, p. 179; Act 1905, p. 206, ch. 106, § 1.]

Explanatory.—The above provision (art. 668q) was omitted from the revised Penal Code. The legislature, by Act 1909, p. 370, § 37, apparently attempted to repeal it, but designated it as "chapter 108." The later act (Act 1913, p. 236, § 33) in turn repeals the act of 1909, and thus repeals the repealing clause. Inasmuch as the exclusion of labor unions from the act is not obviously inconsistent with the new act, the act of 1905 is included in this compilation in view of the decision in *Berry v. State* (Cr. App.) 156 S. W. 626.

Art. 669. Provisions not to apply to local mutual aid associations; annual statement by such associations, etc.—The provisions of this Act shall not apply to incorporated or unincorporated mutual relief or benefit or burial associations operating upon the assessment plan, whose business is confined to not more than one county in the State, or to a territory in two or more adjacent coun-

ties included within a radius of not more than twenty-five miles surrounding the city or town in which its principal office is to be located, which is designated in its charter, which are hereby denominated local mutual aid associations; providing that such associations are in no manner directly or indirectly connected, federated or associated with any such association, and do not directly or indirectly contribute to the expense or support of any other such association or to the officers, promoters or managers thereof. And, provided, that no person or officer shall receive from said association any payment on account of organization or other expenses or salaries not a bona fide resident of such county, in which such association is domiciled. The association above mentioned shall annually on or before March 1st, file a statement with the Commissioner of Insurance and Banking, which shall be signed and sworn to by the president, secretary and treasurer or the officers holding positions corresponding thereto. Such statement shall show whether the association has during the preceding year done any business outside of the county in which it is domiciled, and shall state whether or not said association is associated, federated or directly or indirectly connected with any other, and shall show what, if anything, has been contributed during the preceding year by said association, or the members to any person or officer or director thereof for salaries, commissions or promotion expenses and the name and residence of the party or parties receiving the same. Should any person in such affidavit herein provided for make any false statement he shall be deemed guilty of false swearing, and punished as provided by law. The Commissioner of Insurance and Banking may, at his option, and it shall be his duty, if not satisfied with said statement, to demand other and additional statements, and examine the books, papers and records of said association, either himself or by some other suitable person, authorized by him. Should it appear to the Commissioner of Insurance and Banking that any such local mutual aid association is not carrying on business as set forth in this Section, and is not entitled to the exemption therein set forth, such association shall be subject to and comply with all provisions of this Act as a fraternal beneficiary association. Every such local association claiming to be entitled to the benefit of the exemption created by this Section shall plainly state upon its certificates, applications and all advertising matter, in a conspicuous manner, that said association is a local mutual aid association, or same shall be deemed subject to all provisions of this Act. [Act 1909, p. 369, § 34, repealed; Act 1913, p. 234, ch. 113, § 31, superseding arts. 669, 672 revised Pen. Code.]

Art. 670. Penalties.—Any person, officer, member or examining physician of any society authorized to do business under this Act who shall knowingly or willfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this Act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days, nor more than one year, or both in the discretion of the court; any person who shall willfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a certificate holder in any such society for the purpose of procuring payment of a benefit named in the certificate of such holder, and any person who shall willfully make

any false statement in any verified report or delaration [declaration] under oath required or authorized by this Act, shall be guilty of perjury, and shall be proceeded against and punished as provided by the statutes of this State in relation to the crime of perjury.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this State, or who shall solicit membership for, or in any manner assist in procuring membership in such society not authorized as herein provided to do business as herein defined in this State, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Any person who solicits for or organizes lodges of such association as are described in the first section of this Act [Art. 665] without first obtaining from the Commissioner of Insurance and Banking a certificate of authority showing that the association has complied with the provisions of this Act, and is entitled to do business in this State, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars, nor more than two hundred and fifty dollars, or by imprisonment in the county jail for not less than three nor more than six months, or by both such fine and imprisonment; provided, the provisions of this Section shall not be so construed as to prohibit any member or members of a local or subordinate lodge from soliciting any person or persons to become a member of any local or subordinate lodge already in existence; and providing, further, the provisions of this Section shall not apply to any member or members of any local or subordinate lodge who participate in, supervise or directs or conducts the organization or establishment of any local or subordinate lodge within the limits of the county of his or their residence or lodge district. All certificates of authority for agents or solicitors shall be issued by the Commissioner upon application made therefor by any of the general officers of the association, or by any agent whom the properly authorized governing body of the association has, by resolution, filed with the Commissioner of Insurance and Banking, duly empowered to make such application, and all such certificates shall be revoked by the Commissioner upon the request of the association and may be revoked for cause upon like ground and in like manner as the as the certificates of authority of agents for life insurance companies under the laws of this State. All such certificates shall be renewed annually and shall expire on the first day of April of each year, and a fee of \$1.00 shall be paid for the use of the State for the issuance of said such certificate.

Any society or any officer, agent or employé thereof neglecting or refusing to comply with or violating any of the provisions of this Act, the penalty for which neglect, refusal or violation is not specified in this Section, shall be fined not exceeding two hundred dollars upon conviction thereof. [Act 1899, p. 198, § 8; Act 1909, p. 369, § 33; Act 1913, p. 235, ch. 113, § 32, superseding arts. 670, 671 revised Pen. Code.]

Arts. 671, 672. [Superseded. See arts. 669, 670.]

ACCIDENT INSURANCE COMPANIES

Art. 673. Providing for organization of.—That any number of persons, not less than five, may organize a corporation for the purpose of transacting the business of accident insurance, upon the cooperate or mutual assessment plan, without capital stock, by com-

plying with the provisions of this law; provided, that all such persons shall be bona fide citizens and residents of the state of Texas. [Act 1903, p. 174.]

Art. 674. Obtaining and filing charter.—When said charter has been filed with the commissioner, with the approval of the attorney general, accompanied by a filing fee of twenty dollars, the commissioner shall record the said charter and certificate of the attorney general in a book kept for that purpose, and shall, upon the receipt of fee for certified copy of charter, of one dollar, furnish a certified copy of such charter and certificate of the attorney general to the incorporators, and shall return to said incorporators all such applications for membership, also a certificate that such charter has been filed and recorded in his office, and that said company is duly incorporated under the laws of the state of Texas, and authorized to transact the business set forth in its charter, stating same; upon the filing and recording of which charter, said association shall become a body politic and corporate, with the right to transact its said business in this state and elsewhere, according to the provisions of this law, to hold property and to alienate same, to contract, sue and be sued under its corporate name, and by that name shall have succession, and may by its board of directors make by-laws not inconsistent with law, and shall carry on its business subject to the provisions of this law. [Id., p. 174.]

Art. 675. "Mutual assessment accident insurance" defined.—Any corporation which issues any certificate, policy or other evidence of interest to its members, whereby upon his death or total disability, any money is to be paid by such corporation to such member, or beneficiary designated by him, which money is derived from voluntary contributions or from admission fees, dues and assessments, or any of them, collected or to be collected from the members thereof, and interest and accretions upon, and wherein the paying of such money is conditioned upon the same being realized in the manner aforesaid, and wherein the money so realized is applied to the uses and purposes of said corporation, and the expense of the management and prosecution of its business, and which has no subordinate lodges or similar bodies, shall be deemed to be engaged in the business of mutual assessment accident insurance as contemplated by this law, and shall be subject only to the provisions of this law. [Id., p. 175.]

Art. 676. Not to issue stock or declare dividend.—Such corporations shall issue no certificate of stock, shall declare no dividends, shall pay no profits; and the salaries of all officers shall be designated in its by-laws, and such by-laws shall provide for annual members' meetings, in which each member shall be entitled to vote, only in person, to the amount of insurance held. [Id., p. 175.]

Art. 677. Before adoption or amendment of by-laws must give notice to all members.—Every such corporation must, before the adoption of any by-laws or amendments thereto, cause the same to be mailed to all the members and directors of such association, together with the notice of the time and place when the same will be considered, and same shall be so mailed at least ten days before the time for such meeting; provided, that the provisions of this article shall not apply to by-laws adopted within sixty days after the incorporation of such company. [Id., p. 175.]

Art. 678. Certificate of membership, etc., what it shall contain.—Each certificate of membership, policy or other contract of insurance, issued by such company, shall bear on its face, in red letters, the following words: "The payment of the benefit herein pro-

vided for is conditioned upon its being collected by this company from assessments and other sources, as provided in its by-laws." Provided, that nothing in this law shall be construed to prevent the creation of a reserve fund by any such corporation, which funds or accretions, or both, are to be used only for the payment of assessments or death losses, or benefits in case of physical disability, as provided in the by-laws of said corporation; provided, that at least sixty per cent of all amounts realized from assessments and otherwise shall be used for the payment only of losses as they occur. [Id., p. 176, ch. 111, § 9.]

Explanatory.—The above provision, at the time it was carried into the revised Penal Code, had been amended by Acts 1905, ch. 125, § 1. The amendatory provision reads as follows:

Certificate of membership; reserve funds.—Each certificate of membership, policy or other contract of insurance issued by such company shall bear on its face in red letters the following words: "The payment of the benefit herein provided for is conditioned upon its being collected by this company from assessments and other sources, as provided in its by-laws;" provided, that nothing in this act shall be construed to prevent the creation of a reserve fund by any such organization, which fund, or its accretions, or both, are to be used only for the payment of assessments or death losses, or benefits in case of physical disability, as provided in the by-laws of such corporation; provided, further, that at least sixty per cent of all amounts realized from assessments shall be used only for the payment of losses as they occur, or the balance thereof remaining after paying such losses transferred to such reserve fund; provided, further, that no part of such reserve fund shall be invested, except by order of the board of directors, in property or securities approved by such board. [Act 1905, p. 311, ch. 125, § 1.]

Art. 679. Notice of assessment shall state what.—Each notice of assessments made by such corporation upon its members, or any of them, shall truly state the cause and purpose of such assessment, amount paid on the last claim paid, the cause of disability or death, the name of the member for whose death or disability such payment was made, the maximum face value of the certificate or policy, and, in case of disability, the maximum amount provided for in such policy or certificate for such disability, and if not paid in full, the reason therefor. [Act 1903, p. 177, § 10.]

Art. 680. Officers or employes violating this law, penalty.—Any officer or other employe of the mutual insurance company, who shall use or appropriate, or knowingly permit to be used or appropriated by another, any money belonging to such mutual insurance company, in any manner other than is herein provided, shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the state penitentiary for any length of time for not less than two nor more than ten years. [Id., p. 177, § 14.]

MUTUAL FIRE, LIGHTNING, HAIL, AND STORM INSURANCE COMPANIES

Art. 681. Fees; taxes.—Every mutual company operating under this Act shall pay to the commissioner of insurance and banking of the state of Texas, for obtaining a charter, a fee of twenty dollars, and for each license granted, or renewal thereof, a fee of one dollar, and for filing each annual statement a fee of ten dollars annually on the 31st day of each December, and when the insurance commissioner has certified to the treasurer of the state of Texas, the correct amount to be paid, every mutual company operating under this Act shall pay to the treasurer of the state of Texas one-half of

one per cent of all of the net premiums, or assessments, received by it during the year, and no other tax shall be required of such mutual company, or companies, their officers and agents, except such fees as shall be paid to the commissioner of insurance as required by law. [Act 1899, p. 200, § 15; Act 1903, p. 166, § 10; Act 1913, p. 58, sec. 18, superseding art. 681, revised Pen. Code.]

Explanatory.—Act 1913, ch. 29, § 20, repeals ch. 10, title 71, of Rev. St. 1911. Ch. 10, title 71, Rev. St. 1911 and arts. 681–683 revised Pen. Code were made up from Act 1903, p. 166, and, hence, the repeal of latter act superseded arts. 681–683 of the revised Pen. Code.

Art. 681a. Annual statement of company.—Every mutual insurance company [Arts. 4905–4907p, Vernon's Sayles' Civ. St. 1914] transacting business in the state shall, before the month of March in each year, file in the office of the commissioner of insurance a statement showing the exact condition of affairs of the company upon the 31st day of December preceding, such statement being in conformity with such forms as the insurance commissioner may furnish. [Act 1903, p. 166; Act 1913, p. 54, sec. 5.]

Art. 681b. By-laws; premiums or assessments; surplus fund, etc.—The by-laws of such companies shall specifically provide for the rules and regulations of the government, providing for the collection of adequate premiums or assessments, either all in cash or part cash and part by note, such premiums being based upon the greater or less risk attached to the property insured, and they shall state clearly and plainly the extent of each member's liability to other members, shall provide for the accumulation of a surplus fund to which shall be added not less than 10 per cent of the annual saving, being made by the company, shall require [provide] for the bonding of the company's officers and shall name such other provisions and safeguards as may be deemed proper and not contrary to the laws of the state, and a notice in heavy type shall be printed on all policies calling to the attention of the insured that the by-laws are a part of his contract with the company. [Act 1903, p. 166; Act 1913, p. 54, sec. 8.]

Art. 681c. Funds, how invested.—Funds of mutual companies may be invested in United States bonds, Texas state bonds, county or city bonds of the state of Texas, provided that such bonds are issued by authority of law and that interest upon them has never been defaulted, or in first mortgages on improved real estate within the state where the first mortgage does not exceed 50 per cent of the value of the land and improvements thereon. [Act 1903, p. 166; Act 1913, p. 54, sec. 9.]

Art. 681d. Limitation of expenses.—The expenses of all companies incorporated under this Act must not exceed an amount equal to 35 per cent of the annual premiums, and a statement must be made annually to the commissioner of insurance and banking by the president or secretary of the company that they are being so limited. [Act 1903, p. 166; Act 1913, p. 54, sec. 10.]

Art. 682. Solvency and profit, how determined; reserve.—In determining the solvency of any mutual company organized for any purpose mentioned in this Act, and in determining the profit or saving to be distributed among members, 40 per cent of the actual cash premiums paid on policies in force for one year and a pro rata of all premiums received on risks that have more than one year to run shall be deemed to be a sufficient reserve under the said policies and no dividends to members shall be paid out of this reserve. [Act 1903, p. 166; Act 1913, p. 54, sec. 11, superseding Art. 682 revised Pen. Code.]

Art. 682a. When assets insufficient; notice to commissioner and examination.—If any time the admitted assets of any mutual company, operating under this Act shall come to be less than the largest single risk for which the company is liable, then the president and the secretary of the company shall at once notify the Commissioner of Insurance and Banking, and he may make an examination into the company's affairs if he deems it best. [Act 1913, p. 57, ch. 29, § 12.]

Art. 683. Failure to report condition; false statements; misappropriation of funds.—Failure to report the company's condition as required in Section 12 of this Act [Art. 682a], shall be considered a misdemeanor, punishable by a fine of not less than one hundred dollars, nor more than five hundred dollars for such offense.

The intentional submitting of a false statement, or the intentional misappropriation of the funds of mutual companies, shall be considered a felony, punishable by confinement in the penitentiary for a term of years not less than five, nor more than ten years for such offense. [Act 1903, p. 166; Act 1913, p. 57, ch. 29, § 14, superseding art. 683 revised Pen. Code.]

LIFE INSURANCE COMPANIES

Art. 684. Shall invest funds how, penalty for violation.—Co-operative life insurance companies shall invest their funds only in bonds of the state of Texas, or of some county, city, town, school district, or other subdivision organized, or which may hereafter be organized and authorized, or which may hereafter be authorized, to issue bonds under the constitution and laws of this state, or in mortgages upon improved, unincumbered real estate, the title to which is valid, situate within the state of Texas, worth double the amount of the loan thereon, exclusive of buildings, unless such buildings are insured in some fire insurance company authorized to transact business under the laws of this state, and the policy or policies transferred to the company, or in not more than one office building located in some city or town of this state in which the home office of such company is located, the actual value of which is not less than the amount invested therein. All moneys of any such company, coming into the hands of any officer thereof or subject to his control, when not invested as prescribed in this article, shall be deposited in the name of such company in some bank or banks in this state, which are subject to either state or national regulation and supervision, and which have been approved by the commissioner of insurance and banking as depositories therefor. No co-operative life insurance company shall purchase or hold real estate, except the building in which it has its home office and the land upon which it stands, or such as it shall acquire in good faith through foreclosure sale or otherwise in satisfaction of debts contracted or loans made in the course of its dealings. Any officer or director of any such company, who shall knowingly and wilfully violate or assent to the violation of the provisions of this article, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary for a term of not less than one nor more than five years. [Act 1909, p. 287.]

Art. 685. Commissioner annually to make valuation of all policies; net premiums to pay death losses; penalty for officers diverting funds.—The commissioner of insurance and banking shall annually make valuations of all outstanding policies of co-operative life insurance companies as of December 31 of each year in accordance with the one year preliminary term method based upon the

American Experience Table of Mortality and three and one-half per cent interest per annum.

The net premiums upon all policies issued by any such company shall be computed in accordance with the provisions of this article, and no portion of such net premium collected upon any policy, and no portion of the gross premium collected upon any policy, except the expense loading, shall ever be used or applied for the payment of any expenses of the company of any kind or character, or for any other purpose than the payment of death losses, surrender values, or lawful dividends to policy holders, loans to policy holders, or for the purposes of such investments of the company as are prescribed in this law. Any officer, director or employé of any co-operative life insurance company, who shall knowingly and wilfully violate the provisions of this article, shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for a term of not less than one nor more than five years. [Id., p. 287.]

Art. 686. Detailed medical examination of persons before entering into contract of insurance, penalty.—No co-operative life insurance company shall enter into any contract of insurance upon the life of any person without having previously made, or caused to be made, a detailed medical examination, prescribed by its medical director and approved by its board of directors, of the insured, by a duly qualified and licensed medical practitioner, and without his certificate that the insured was in sound health at the date of examination. Any officer or agent or employé of such company violating the provisions of this article, or effecting, or attempting to effect, a contract of insurance contrary to the provisions hereof, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment in the county jail for not less than six months, or by both such fine and imprisonment. [Id., p. 289.]

Art. 687. Director or officer not to receive anything or be pecuniarily interested in, when.—No director or officer of any insurance company, transacting business in this state, or organized under the laws of this state, shall receive any money or valuable thing for negotiating, procuring, recommending or aiding in any purchase or sale by such company of any property or any loan from such company, nor be pecuniarily interested, either as principal, co-principal, agent or beneficiary, in any such purchase, sale or loan; provided, that nothing contained in this article shall prevent a life insurance corporation from making a loan upon a policy held therein, by the borrower, not in excess of the reserve value thereof. Any person violating any provisions of this article shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than three hundred dollars nor more than one thousand dollars. [Id., p. 197.]

Art. 688. Insurance companies not to discriminate.—No insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insureds (the insured), of the same class and of equal expectation of life, in the amount of, or payment of, premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon; nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as expressed in the policy issued thereon, nor shall any such company or any officer, agent, solicitor or representative thereof, pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as an inducement to insurance, any re-

bate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon or any paid employment or contract for service of any kind, or any valuable consideration or inducement whatever, not specified in the policy contract of insurance; or give, sell or purchase, or offer to give, sell or purchase, as an inducement to insurance or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits to accrue thereon, or any thing of value whatsoever not specified in the policy, or issue any policy containing any special or board contract or similar provision, by the terms of which said policy will share or participate in any special fund derived from a tax or a charge against any portion of the premium on any other policy. Any company or agent violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and the said company shall, as an additional penalty, forfeit its certificate of authority to do business in this state; and the said agent shall, as an additional penalty, forfeit his license to do business in this state for one year; provided, the company shall not be held liable under this article for any act of its agent, unless such act was authorized by its president, one of its vice presidents, its secretary or an assistant secretary, or by its board of directors. [Id., p. 198.]

Art. 689. Person soliciting insurance without certificate of authority, penalty.—Any person who, for direct or indirect compensation, solicits insurance, in behalf of any company, or transmits for a person other than himself, an application for a policy of insurance to or from such company, or assumes to act in negotiation of insurance without a certificate of authority to act as agent or solicitor for such company, or after such certificate of authority shall have been canceled or revoked, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars. [Id., p. 208.]

Certificate of authority of company to do business in state, see art. 642.

Who are agents, see art. 644.

Indictment or information.—An information, failing to allege that the solicitor was to receive compensation, either directly or indirectly, charges no offense. And a conviction under such information cannot be sustained, though no motion was made to quash it before trial, as the defect was of substance, and not of form, and might be raised at any time. *Jasper v. State* (Cr. App.) 164 S. W. 851.

See, also, notes to art. 642, ante.

Art. 690. Agent procuring by fraudulent representation.—Any such agent or solicitor who knowingly procures, by fraudulent representations, payment of an obligation for the payment of a premium of insurance shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars. [Id., p. 208.]

Art. 691. Agent embezzling or misappropriating money, etc.—Any insurance agent or solicitor who collects premiums for an insurance company lawfully doing business in this state and who embezzles or fraudulently converts or appropriates to his own use, or with intent to embezzle, takes, secretes or otherwise disposes of or fraudulently withholds, appropriates, lends, invests or otherwise uses or applies, any money or substitutes for money received by him as such agent or broker, contrary to the instructions or without the consent of the company, for or on account of which the same was received by him, shall be deemed guilty of theft of

property of the value of the amount involved in either case and shall be punished accordingly. [Id., p. 208.]

Indictment.—Willson's Cr. Forms, 690.

Art. 692. Agent or examining physician making false statement, penalty.—Any solicitor, agent, or examining physician who shall knowingly or wilfully make any false or fraudulent statement or representation, in or with reference to any application for insurance, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars. [Id., p. 208.]

Art. 693. Officers of foreign insurance company filing false statement, penalty.—Any officer of any insurance company not organized under the laws of this state, who shall file with the commissioner of insurance and banking any statement, report or other paper required or provided for by law to be so filed, which shall contain any material statement or fact known to be false by the person filing the same, or any person who shall execute or cause to be executed any such false statement, report or other paper to be so filed, shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for a term of not less than one year. [Id., p. 211.]

INDEMNITY CONTRACTS

Art. 693a. Right to exchange reciprocal indemnity contracts.—That individuals, partnerships and corporations of this State hereby designated subscribers are hereby authorized to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships and corporations of other States and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance. [Act 1915, p. 269, ch. 156, § 1, repealing Act 1913, ch. 109, § 1.]

Explanatory.—Act 1915, ch. 156, § 13, repeals Ch. 109, General Laws of the 33rd Legislature, and all other laws in conflict.

Art. 693b. Execution by attorney in fact; office.—That such contracts may be executed by a duly appointed attorney in fact duly authorized and acting for such subscribers. The office or offices of such attorney may be maintained at such place or places as may be designated by the subscribers in the power of attorney. [Act 1915, p. 269, ch. 156, § 2.]

Art. 693c. Attorney shall file declaration with Insurance Commissioner; contents.—That such subscribers, so contracting among themselves, shall, through their attorney, file with the Insurance Commissioner of this State a declaration verified by the oath of such attorney setting forth:

(a) The name or the title of the office at which such subscribers propose to exchange such indemnity contracts. Said name or title shall not be so similar to any other name or title previously adopted by a similar organization, or by any insurance corporation or association, as in the opinion of the Insurance Commissioner is calculated to result in confusion or deception. The office or offices through which such indemnity contracts shall be exchanged shall be classified as reciprocal or inter-insurance exchanges.

(b) The kind or kinds of insurance to be effected or exchanged.

(c) A copy of the form of policy, contract or agreement under or by which such insurance is to be effected or exchanged.

(d) A copy of the form of power of attorney or authority of such attorney under which such insurance is to be effected or exchanged.

(e) The location of the office or offices from which such contracts or agreements are to be issued.

(f) That applications have been made for indemnity upon at least seventy-five separate risks, aggregating not less than one-half million dollars as represented by executed contracts or bona fide applications to become concurrently effective, or in case of liability or compensation insurance, covering a total pay roll of not less than two thousand employes.

(g) That there is on deposit with some State or National bank as a depository for the payment of losses not less than the sum of ten thousand dollars. [Act 1915, p. 269, ch. 156, § 3, repealing Act 1913, ch. 109, § 2.]

Art. 693d. Service of process on Insurance Commissioner.—That concurrently with the filing of the declaration provided for by the terms of Section 3 [Art. 693c] hereof, the attorney shall file with the Insurance Commissioner an instrument in writing, executed by him for said subscribers, conditioned that, upon the issuance of certificates of authority provided for in Section 10 [Art. 693j] hereof, service of process may be had upon the Insurance Commissioner in all suits in this State arising out of such policies, contracts or agreements, which service shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorney. Three copies of such process shall be served, and the Insurance Commissioner shall file one copy, forward one copy to said attorney, and return one copy with his admission of service. [Act 1915, p. 270, ch. 156, § 4.]

Art. 693e. Statements as to maximum amount of indemnity and commercial rating of subscribers.—That there shall be filed with the Insurance Commissioner of this State by such attorney a statement under the oath of such attorney showing the maximum amount of indemnity upon any single risk, and such attorney shall, whenever and as often as the same shall be required, file with the Insurance Commissioner a statement verified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least one hundred thousand subscribers, and that from such examination or from other information in his possession it appears that no subscriber has assumed on any single risk an amount greater than 10 per cent of the net worth of such subscriber. [Id., § 5.]

Art. 693f. Reserve; computation and amount.—That there shall at all times be maintained as a reserve a sum in cash or convertible securities equal to 50 per cent of the aggregate net annual deposits collected and credited to the accounts of the subscribers on policies having one year or less to run and pro rata on those for longer periods. For the purpose of said reserve, net annual deposits shall be construed to mean the advance payments of subscribers after deducting therefrom the amounts specifically provided in the subscribers' agreements for expenses and reinsurance. Said sum shall at no time be less than ten thousand dollars, and if at any time 50 per cent of the aggregate deposits so collected and credited shall not equal that amount, then the subscribers, or their attorney for them, shall make up any deficiency. [Id., § 6.]

Art. 693g. Annual report; proviso; examination.—That such attorney shall make an annual report to the Insurance Commissioner for each calendar year, which report shall be made on or before March the first for the previous calendar year ending December 31, showing that the financial condition of affairs at the office where such contracts are issued is in accordance with the

standard of solvency provided for herein, and shall furnish such additional information and reports as may be required to show the total premiums or deposits collected, the total losses paid, the total amounts returned to subscribers, and the amounts retained for expenses; provided, however, that such attorney shall not be required to furnish the names and addresses of any subscribers. The business affairs and assets of said reciprocal or inter-insurance exchanges, as shown at the office of the attorney thereof, shall be subject to examination by the Insurance Commissioner. [Act 1915, p. 271, ch. 156, § 7, repealing Act 1913, ch. 109, § 3.]

Art. 693h. Power to exchange insurance contracts.—That any corporation now or hereafter organized under the laws of this State shall, in addition to the rights, powers and franchises specified in its articles of incorporation, have full power and authority to exchange insurance contracts of the kind and character herein mentioned. The right to exchange such contracts is hereby declared to be incidental to the purposes for which such corporations are organized and as much granted as the rights and powers expressly conferred. [Act 1915, p. 271, ch. 156, § 8, repealing Act 1913, ch. 109, § 5.]

Art. 693i. Penalty for violation of act.—That any attorney who shall, except for the purpose of applying for certificate of authority as herein provided, exchange any contract of indemnity of the kind and character specified in this Act, or directly or indirectly solicit or negotiate any application for same, without first complying with the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subjected to a fine of not less than one hundred dollars nor more than one thousand dollars. [Act 1915, p. 271, ch. 156, § 9, repealing Act 1913, ch. 109, § 6.]

Art. 693j. Procurement of annual certificate of authority; revocation of certificate.—That each attorney by whom or through whom are issued any policies of or contracts for indemnity of the character referred to in this Act shall procure from the Insurance Commissioner annually a certificate of authority, stating that all of the requirements of this Act have been complied with, and upon such compliance and the payment of the fees required by this Act, the Insurance Commissioner shall issue such certificate of authority. The Insurance Commissioner may revoke or suspend any certificate of authority issued hereunder in case of breach of any of the conditions imposed by this Act after reasonable notice has been given said attorney, in writing, so that he may appear and show cause why action should not be taken. Any attorney who may have procured a certificate of authority hereunder shall renew same annually thereafter; provided, however, that any certificate of authority shall continue in full force and effect until the new certificate of authority be issued or specifically refused. [Act 1915, p. 271, ch. 156, § 10, repealing Act 1913, ch. 109, § 4.]

Art. 693k. Fees.—That such attorney shall pay as a fee for the issuance of the certificate of authority herein provided for the sum of twenty dollars, which shall be in lieu of all license fees and taxes of whatsoever character in this State. [Act 1915, p. 272, ch. 156, § 11.]

Art. 693l. Insurance laws not applicable.—That except as herein provided, no insurance law of this State shall apply to the exchange of such indemnity contracts unless they are specifically mentioned. [Act 1915, p. 272, ch. 156, § 12.]

CHAPTER TWELVE

BUILDING AND LOAN ASSOCIATIONS

Art. 693m.	Embezzlement or misapplication of funds or property; false entries in books, and false reports and statements; failure to make reports.	Art. 693n.	Unlawful to act as agent for association not authorized to do business in state.
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Article 693m. Embezzlement or misapplication of funds or property; false entries in books, and false reports and statements; failure to make reports.—Every officer, director, member of any committee, clerk or agent of any building and loan association doing business in this State, who embezzles, abstracts or misapplies any of the moneys, funds or credits of such corporation, who issues or puts into circulation any warrant or other orders, who assigns, transfers, cancels or delivers up any note, bond, draft, mortgage, judgment, decree, or any other written instrument belonging to such association, who certifies to or makes a false entry in any book, report or statement of or to such association, with intent in either case to deceive, injure or defraud such association, or any member thereof, or to deceive any one appointed to examine the affairs of such association, shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the State penitentiary for a period of not less than one year nor more than ten years. Any officer whose duty it is, failing to make the reports required by this Act, [arts. 1313a–1313y, Vernon's Sayles' Civ. St. 1914] shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than twenty-five dollars nor more than two hundred dollars, or shall be imprisoned not less than one month nor more than six months. [Act 1913, 1st S. S., p. 79, ch. 33, § 23.]

Art. 693n. Unlawful to act as agent for association not authorized to do business in state.—It shall be unlawful for any person to act as agent for any building and loan association not authorized to do business in this State, [arts. 1313a–1313y, Vernon's Sayles' Civ. St. 1914] or to solicit, sell, or dispose of any shares of any such unauthorized association; and any person or persons acting for any such unauthorized association, or in any manner aiding in the transaction of the business of such association in this State, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars, nor more than five hundred dollars for each offense, and in default of payment of such fine shall be imprisoned in the county jail, for a period not to exceed one year. All fines collected under the provisions of this section shall be paid into the State Treasury. [Id., § 35.]

TITLE 12

OF OFFENSES AFFECTING PUBLIC HEALTH

<p>Chap.</p> <p>1. Occupation and acts injurious to health.</p> <p>1a. Sanitary regulations for hotels, restaurants, etc.</p> <p>2. Sale of unwholesome food, drink or medicine.</p> <p>3. Nursery and farm products.</p> <p>4. Feed stuffs.</p> <p>4a. Infectious diseases among animals and bees.</p>	<p>Chap.</p> <p>5. Cocaine and morphine.</p> <p>6. Unlawful practice of medicine.</p> <p>7. Dentistry.</p> <p>8. Pharmacy—practice of.</p> <p>9. Nursing and embalming.</p> <p>10. Violations of quarantine.</p> <p>10a. Veterinarians.</p> <p>11. Texas state board of health.</p>
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CHAPTER ONE

OCCUPATION AND ACTS INJURIOUS TO HEALTH

<p>Art.</p> <p>694. Offensive trades and nuisances.</p> <p>695. Pollution or obstruction of water courses.</p> <p>695a. Unlawful to pollute water courses and other bodies of water; penalty; persons liable; proviso.</p> <p>695b. Same; restraining order on conviction.</p> <p>695c. Same; time for compliance with act by cities and persons.</p>	<p>Art.</p> <p>695d. Duties of State Board of Health; inspector.</p> <p>695e. Harboring or concealing leper.</p> <p>696. Leaving dead body of animal in highway or near private residence.</p> <p>697. Public buildings, railways, persons, etc.; subject to rules of health officer.</p>
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Article 694. [423] Offensive trades and nuisances.—If any person shall carry on any trade, business or occupation injurious to the health of those who reside in the vicinity, or shall suffer any substance which has that effect to remain on premises in his possession, he shall be punished by fine not less than ten nor more than one hundred dollars; and each separate day of carrying on such business, trade or occupation, or of permitting such substance to remain on the premises, shall be considered a separate offense.

Abatement of nuisances.—Authority to abate nuisances does not include the power to declare that to be a nuisance which in its situation, nature or use is not such. *Ex parte Robinson*, 30 App. 493, 17 S. W. 1057; *Pye v. Peterson*, 45 Tex. 312, 23 Am. Rep. 608.

What constitutes public nuisance.—To constitute a public nuisance there must be a substantial injury to the public at large. The keeping of stallion in a town or elsewhere is not per se a nuisance. *Ex parte Robinson*, 30 App. 493, 17 S. W. 1057.

Indictment.—Willson's Cr. Forms, 327, 328.

Art. 695. [424] Pollution or obstruction of water courses.—If any person shall in any wise pollute or obstruct any water course, lake, pond, marsh or common sewer, or continue such obstruction or pollution, so as to render the same unwholesome or offensive to the inhabitants of the county, city, town or neighborhood thereabout, he shall be fined in a sum not exceeding five hundred dollars. [Act Feb. 11, 1869, p. 97.]

Explanatory.—This article is to some extent superseded by arts. 695a–695d, post, but as this article has a broader scope, especially as to "obstruction" of water, it is still an operative statute.

Construction of former provision.—This article originally provided a penalty for any person "who shall do any other act or thing that would be deemed and held to be a nuisance at common law," and the provision was held valid, *Allen v. State*, 34 Tex. 230; and applicable to bawdy-houses, *State v. Flynn*, 35 Tex. 354; but these cases were overruled before the provision was expunged. *Johnson v. State*, 4 App. 63.

Prosecution—Absence of intent.—Where defendant built dams across a bayou on his land for irrigation purposes, and after the water had risen and receded, a disagreeable smell arose, though no intent to produce same was shown, no criminal prosecution would lie. *Stacey v. State*, 54 Cr. App. 610, 114 S. W. 807, 22 L. R. A. (N. S.) 1259.

Indictment.—Willson's Cr. Forms, 329.

Art. 695a. Unlawful to pollute water courses and other bodies of water; penalty; persons liable; provisos.—That it shall be unlawful for any person, firm or corporation, private or municipal, to pollute any water course, or other public body of water, from which water is taken for the uses of farm, live stock, drinking and domestic purposes, in the State of Texas, by the discharge, directly or indirectly, of any sewage or unclean water or unclean or polluting matter or thing therein, or in such proximity thereto as that it will probably reach and pollute the waters of such water course or other public body of water from which water is taken, for the uses of farm live stock, drinking and domestic purposes; provided, however, that the provisions of this bill shall not affect any municipal corporation situated on tide water; that is to say, where the tide ebbs and flows in such water course. A violation of this provision shall be punished by a fine of not less than one hundred dollars and not more than one thousand dollars. When the offense shall have been committed by a firm, partnership or association, each member thereof who has knowledge of the commission of such offense, shall be held guilty. When committed by a private corporation, the officers and members of the board of directors, having knowledge of the commission of such offense, shall each be deemed guilty; and when by a municipal corporation, the mayor and each member of the board of aldermen or commission, having knowledge of the commission of such offense, as the case may be, shall be held guilty as representatives of the municipality; and each person so indicated as above shall be subject to the punishment provided hereinbefore; provided, however, that the payment of the fine by one of the persons so named shall be a satisfaction of the penalty as against his associates for the offenses for which he may have been convicted; provided, the provisions of this Act shall not apply to any place or premises located without the limits of an incorporated town or city, nor to manufacturing plants whose affluents contain no organic matter that will putrify, or any poisonous compounds, or any bacteria dangerous to public health or destructive of the fish life of streams or other public bodies of water. [Act 1913, ch. 47, § 1, amended; Act 1915, p. 38, ch. 23, § 1.]

Explanatory.—Act 1915, ch. 23 provides that ch. 47 of Acts of Regular Session of 33rd Legislature, page 90, be amended so as to read as shown by arts. 695a-695d.

Septic tank as nuisance.—A city incorporated under the general laws, with authority under its charter to provide a sewer system, must exercise its authority in a proper manner, and it may not create or maintain a nuisance, and in the construction of a septic tank for the purifying of sewage it must exercise care to build one of such character and dimensions as to prevent the escape therefrom of foul odors in such volume as to create a nuisance to any of its citizens. *Cardwell v. Austin* (Civ. App.) 168 S. W. 385.

Injunction—Jurisdiction of District Court.—This article does not deprive the district court of jurisdiction to prevent and suppress nuisances by injunction, and at most the remedy by injunction conferred on county courts is only cumulative of the remedy resting in the district courts. *Cardwell v. Austin* (Civ. App.) 168 S. W. 385.

Adequate remedy at law.—Where a method can be adopted by which sewage of a city may be purified and discharged practically free from odor, or where the odor will not interfere with the comfortable use and enjoyment by an individual of his home, and where the effluent will not so contaminate a stream as to render it unfit for drinking water for stock, the mere fact that the proximity of a septic tank to the residence of an individual will produce a degree of mental annoyance or tend to lessen the value of his property does not justify an injunction to restrain the establishment and operation of the tank, for the individual may be compensated in money for the damages sustained. *Cardwell v. Austin* (Civ. App.) 168 S. W. 385.

Sufficiency of evidence.—In a suit against a city and the owner of a franchise to construct and maintain a septic tank in connection with the sewer system in the city, evidence held to support a finding that the construction and operation of a proposed septic tank would create a nuisance, but not to support a finding that the construction and operation of a tank of proper dimensions and character would create a nuisance. *Cardwell v. Austin* (Civ. App.) 168 S. W. 385.

Art. 695b. Same; Restraining order on conviction.—Upon the conviction of any person under Section 1 of this Act [Art. 695a], it shall be the duty of the court, or judge of the court, in which such conviction is had, to issue a writ of injunction, enjoining and restraining the person or persons or corporation responsible for such pollution, from a further continuance of such pollution; and for a violation of such injunction, the said court and the judge thereof shall have the power of fine and imprisonment, as for contempt of court, within the limits prescribed by law in other cases; provided, that this remedy by injunction and punishment for violation thereof shall be cumulative of the penalty fixed by Section 1 of this Act; and the assessment of a fine for contempt shall be no bar to a prosecution under Section 1; neither shall a conviction and payment of fine under Section 1 be a bar to contempt proceedings under this section. [Act 1913, ch. 47, § 2, amended; Act 1915, p. 39, ch. 23, § 1.]

Art. 695c. Same; time for compliance with act by cities and persons.—Any city or town of this State, with a population of more than fifty thousand inhabitants, which has already an established sewerage system dependent upon any water course or other public body of water, from which water is taken for the uses of farm, live stock, drinking and domestic purposes, or which discharges into any water course or public body of water, from which water is taken for the uses of farm, live stock, drinking and domestic purposes, shall have until January 1, 1917, within which to make other provisions for such sewage. Cities and towns of less population than fifty thousand inhabitants shall have until January 1, 1917, within which to make other arrangements for the disposal of such sewage. Any person, firm or corporation, private or municipal, coming under or affected by the terms of this bill, or any independent contractor having the disposal of the sewage of any city or town, shall have until January 1, 1917, within which to make other arrangements for the disposal of such sewage, or other matter which may pollute the water, as defined in this bill. [Act 1913, ch. 47, § 3, amended; Act 1915, p. 39, ch. 23, § 1.]

Art. 695d. Duties of State Board of Health; inspector.—The Texas State Board of Health is authorized, and it is hereby made its duty, to enforce the provisions of this Act; and to this end the Governor shall appoint, by and with the consent of the Senate, an inspector to act under the direction of the said Board of Health and the State Health Officer making such investigations, inspections and reports, and performing such other duties in respect to the enforcement of this Act as the said Board of Health officer may require. [Act 1913, ch. 47, § 4, amended; Act 1915, p. 39, ch. 23, § 1.]

Art. 695e. Harboring or concealing leper.—Any person within this State who shall knowingly harbor or conceal any leper shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars and not more than five hundred dollars for every day of such concealment. [Act 1909, 1st S. S., p. 336, ch. 26, § 7.]

Explanatory.—The above provision (art. 695e) was omitted from the revised Pen. Code, and as it appears to be a subsisting law, in view of the decision in *Berry v. State* (Cr. App.) 156 S. W. 626, it is inserted in this compilation.

Art. 696. Leaving dead body of animal in highway or near private residence.—If any person shall leave the carcass, or body of any horse, mule, ox, steer, cow or other animal which died in the actual possession of such person in any public road or highway, or in any street or alley of any village, town or city in this State, or

within fifty yards of such public road, highway, street or alley, or shall leave any such carcass, or body within five hundred yards of any private residence, he shall be fined in any sum not less than five dollars, nor more than one hundred dollars. [Act Apr. 7, 1874, p. 69; Act 1913, p. 155, ch. 83, § 1, amending Art. 696 revised Pen. Code.]

Explanatory.—The amendment is of "article 696, chapter 1 of title 12 of the Revised Criminal Statutes of the State of Texas, as adopted by the Thirty-Second Legislature."

Actual possession.—Where one owns a pasture the fence of which runs along a public road or highway, and he turns his horse in such pasture and it dies, and the carcass is permitted to lie within 50 yards of such public road or highway he is not guilty under this article since the animal is not shown to have been in the actual (manual) possession of accused. *Ogg v. State*, 48 App. 231, 87 S. W. 348.

Indictment.—Willson's Cr. Forms, 330.

Art. 697. Public buildings, railways, persons, etc., subject to rules of health officer.—If any person having control of any public building, or any agent, manager, operator, employé or receiver of any railway company, sleeping car company, or any individual, shall fail to comply with the provisions of this chapter, and the rules and regulations promulgated by the state health officer, under the provisions thereof, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than fifty nor more than two hundred dollars. [Act 1903, p. 180.]

CHAPTER ONE A

SANITARY REGULATIONS FOR HOTELS, RESTAURANTS, ETC.

Art. 697a. Sterilizing dishes, etc.; napkins.	Art. 697b. Same; penalty.
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[Fire protection, see Title 13, ch. 5.]

Article 697a. Sterilizing dishes, etc.; napkins.—Any person or persons conducting or managing or their agents of any hotel, cafe, restaurant and any other public place where meals are served, must after the taking effect of this Act, sterilize in hot boiling water, all plates, cups, saucers, knives, forks, spoons and such other utensils as may be used in serving meals and drinks, after being used and before permitting them to be used again; provided that the water in which said eating utensils are sterilized, shall be changed every two hours; provided further that no napkins shall be furnished for use after being used once until laundered. [Act 1915, p. 10, ch. 7, § 1.]

Art. 697b. Same; penalty.—Any person or person[s] conducting or managing or their agents of any public eating house mentioned in section 1 of this Act [Art. 697a], who violates the provisions thereof, shall be fined not less than five (\$5.00) dollars nor more than one hundred (\$100.00) dollars for each separate offense. [Id., § 2.]

CHAPTER TWO

SALE OF UNWHOLESOME FOOD, DRINK OR MEDICINE, OR MILK PRODUCTS

Art. 698. [Superseded.]	Art. 704. Manufacture and sale of certain foods, discolored and adulterated.
699. Manufacture and sale of adulterated and misbranded foods.	705. Baking powder to be labeled, how.
700. Drugs, confectionery, and foods, when deemed adulterated.	706. Sale of impure milk.
701. "Misbranded" defined.	707. [Repealed.]
702, 703. [Repealed.]	708. Exemptions from provisions of act.

- Art. 709. Unlawful for officers to issue certificates of purity.
- 710. Obstruction of officers.
- 711. Penalty for violation of act.

MILL PRODUCTS

- 712. Standard weight, etc.
- 713. Name and weight to be marked or

- Art. branded on hogshead, sack, package, etc.
- 714. Penalty for offering same for sale not so marked or branded.
- 715. Penalty for violating any of the three preceding articles.
- 716. Manufactured wheat or corn products, packages how marked or branded.

Article 698. [426] Superseded by Art. 700 (c) (6), post.

Historical.—(This chapter is a substitution for chapter two of title XII, of the Penal Code of 1895, held in some respects inoperative. See *Dorsey v. State*, 38 App. 527, 44 S. W. 514, 40 L. R. A. 201, 70 Am. St. Rep. 762.)

Elements of offense.—To constitute the offense of selling diseased meat, the seller must have known at the time he sold it that the meat was diseased; and to warrant a conviction, the evidence must affirmatively establish such knowledge. See the statement of the case for evidence held insufficient to support a conviction for selling diseased meat. *Teague v. State*, 25 App. 577, 8 S. W. 667.

Offering for sale adulterated food.—See the statement of the case for an information held sufficient to charge the offense of offering adulterated food for sale. To support a conviction for offering adulterated food for sale it devolves upon the state to prove not only that the accused offered such food for sale, but that, when he did so, he knew that the said food was adulterated. See the statement of the case for evidence held insufficient to support a conviction for offering adulterated food for sale. *Sanchez v. State*, 27 App. 14, 10 S. W. 756.

Indictment.—Willson's Cr. Forms, 334.

Art. 699. Manufacture and sale of adulterated and misbranded foods.—That no person, firm or corporation, shall within this State manufacture for sale, have in his possession with the intent to sell, offer or expose for sale, or sell or exchange any article of food, or drug which is adulterated or misbranded within the meaning of this Act. The term "food" as used herein shall include all articles used for food, drink, flavoring, confectionery or condiment, by man, whether simple, mixed or compounded. That the term "drug" as used in this Act shall include all medicines and preparations for internal or external use recognized in the United States Pharmacopoeia or National Formulary, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or animal. [Act 1907, ch. 39; Act 1909, p. 167, repealed; Act 1911, p. 76, ch. 47, § 1, superseding Art. 699, revised Pen. Code.]

Explanatory.—Act 1911, ch. 47, § 26 repeals ch. 94, Acts 31st Leg. and all other laws in conflict.

Constitutionality of act.—The pure food law is not unconstitutional as to one charged with violating the act because the title does not specifically refer to and describe the offense, which is done in the body of the act. *Focke v. State* (Cr. App.) 144 S. W. 267.

The pure food law is not unconstitutional as to one charged with selling fruit not protected from flies, dust, and dirt, because the offense charged is not contained or disclosed in the caption, but in the body of the act. *Green v. State* (Cr. App.) 148 S. W. 311.

Indictment.—Willson's Cr. Forms, 335-338.

Art. 700. Drugs, confectionery, and foods, when deemed adulterated.—That for the purposes of this Act an Article shall be deemed to be adulterated: (a) In the case of drugs; (1) if, when sold under or by a name, recognized in the eighth decennial revision of the United States Pharmacopoeia or in such United States Pharmacopoeia as was official at the time of labeling it, or in the National Formulary, it differs from the standard strength, quality or purity laid down therein; (2) if, when sold under or by a name not recognized in the eight decennial revision of the United States Pharmacopoeia, but which is found in some other Pharmacopoeia or other standard work on materia medica, it differs materially from the standard of strength, quality or purity laid down in such work; (3) if its strength, quality or purity falls below the professed standard under which it is sold. (b) In the case of confectionery: If it contain terra alba, barytes, talc, chrome

yellow, or other mineral substance or poisonous color or flavor, or other ingredients deleterious or detrimental to health or any vinous, malt or spirituous liquor or compound, or narcotic drug. (c) In the case of food; (1) if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength; (2) if any substance has been substituted wholly or in part for the article; (3) if any valuable constituent of the article has been wholly or in part abstracted, or if the product be below that standard of quality, quantity, strength or purity represented to the purchaser or consumer; (4) if it be mixed, colored or powdered, coated or stained in a manner whereby damage or inferiority is concealed; (5) if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health, provided, that when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption; (6) if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal or vegetable unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. For the purpose of this Act, the term "filthy" shall be deemed to apply to food not securely protected from flies, dust, dirt, and as far as may be necessary by all reasonable means from all foreign or injurious contaminations. [Act 1907, ch. 39; Act 1909, p. 167, repealed; Act 1911, p. 77, ch. 47, § 2, superseding art. 700, revised Pen. Code.]

Indictment.—Willson's Cr. Forms, 337, 338.

Art. 701. "Misbranded" defined.—That the term "misbranded," as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular. That for the purposes of this Act an article shall also be deemed to be misbranded: (a) In the case of drugs; (1) if it be an imitation of or offered for sale under the name of another article; (2) if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any morphine, phenacetine, opium, cocaine, heroin alpha, or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilid or any derivative or preparation of any such substances contained therein. (b) In the case of food: (1) if it be an imitation of or offered for sale under the distinctive name of another article; (2) if it be labeled or branded so as to deceive or mislead the purchaser or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin alpha, or beta eucaine, phenacetin chloroform, cannabis indica, chloral hydrate or acetanilid, or any derivative or preparation of any of such substances contained therein; (3) if in package form and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the pack-

age; (4) if the package containing it or its labels bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular, provided that that an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated or misbranded in the following cases: First in case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced; second, in the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends; that the term "blend," as used herein, shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose or coloring and flavoring only; and provided, further, that nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredients to disclose their trade formulas except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding. [Act 1907, ch. 39; Act 1909, p. 167, repealed; Act 1911, p. 78, ch. 47, § 3, superseding art. 701, revised Pen. Code.]

Arts. 702, 703.—[Repealed by Act 1911, ch. 47, § 26.]

Art. 704. Manufacture and sale of certain foods, discolored and adulterated.—It shall be unlawful for any person to manufacture, sell, offer or expose for sale or exchange any article of food to which has been added formaldehyde, boric acid or borates, benzoic acid or benzoate sulphurous acids or sulphites, salacyclic acid or salacylates, abralstal, beta naphthal, fluorine compounds, dulcin, glucin cocaine, sulphuric acid or other mineral acid except phosphoric acid, any preparation of lead or copper or other ingredient injurious to health; provided, that nothing in this Act shall be construed as prohibiting the sale of catsups, sauces, concentrated fruits, fruit juices, and like substances preserved with one-tenth of one per cent of benzoate of soda, or the equivalent benzoic acid, when a statement of such fact is plainly indicated upon the label; provided, further, that the oxides of sulphur may be used for bleaching, clarifying and refining food products. [Act 1907, ch. 39; Act 1909, p. 169, repealed; Act 1911, p. 79, ch. 47, § 4, superseding art. 704, revised Pen. Code.]

Indictment.—Willson's Cr. Forms, 335, 336.

Art. 705. Baking powder to be labeled, how.—Whoever manufactures for sale within this State, or offers or exposes for sale or exchange or sells any baking powder or compound intended for use as a baking powder under any name or title whatsoever shall securely affix or cause to be securely affixed to the outside of every box, can or package containing such baking powder or like mixture or compound a label distinctly printed in plain capital letters in the English language, containing the name and residence of the manufacturer or dealer, and the ingredients of the baking powder. Baking powder containing less than 10 per cent of available carbon dioxide shall be deemed to be adulterated. [Act 1907, ch. 39; Act 1909, p. 169, repealed; Act 1911, p. 79, ch. 47, § 5, superseding art. 705, revised Pen. Code.]

Art. 706. Sale of impure milk.—That it shall be unlawful for any person either by himself or agent to sell or expose for sale or

exchange any unwholesome, watered, adulterated or impure milk or swill milk or colostrum, or milk from cows kept upon garbage, swill or any other substance in a state of putrefaction or other deleterious substances, or from cows kept in connection with any family in which there are infectious diseases, or from sick or diseased cows; provided, "skim milk" may be sold if on the can, or package from which such milk is sold, the words "skim milk" are distinctly painted in letters not less than one inch in length. [Act 1907, ch. 39; Act 1909, p. 169, repealed; Act 1911, p. 79, ch. 47, § 6, superseding art. 706, revised Pen. Code.]

Construction with reference to city ordinance.—This article is enforceable, and there is no conflict in the penalties prescribed by the state law; besides the act of the legislature cannot be held invalid because the city ordinance may be out of harmony with it; and, when a conflict arises between the act of the legislature and the city ordinance, the latter must give way and be held invalid. *Mantel v. State*, 55 App. 456, 117 S. W. 855, 131 Am. St. Rep. 818.

Art. 707. [Repealed by Act 1911, ch. 47, § 26.]

Art. 708. Exemptions from provisions of act.—That no dealer shall be prosecuted under the provisions of this Act, when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing within this State or in the United States from whom he purchases such article, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties, which would attach, in due course to the dealer under the provisions of this Act. [Act 1907, ch. 39; Act 1909, p. 169, repealed; Act 1911, p. 79, ch. 47, § 7, superseding art. 708, revised Pen. Code.]

Art. 709. Unlawful for officers to issue certificates of purity.—It shall be unlawful for the Dairy and Food Commissioner or his deputy or assistants while they hold office to furnish to any individual, firm or corporation any certificate as to the purity or excellence of any article manufactured or sold to or by them to be used as food or drug or in the preparation of foods or drugs. [Act 1907, ch. 39; Act 1909, p. 171, repealed; Act 1911, p. 81, ch. 47, § 17, superseding art. 709, revised Pen. Code.]

Dairy and Food Commissioners.—Provisions as to appointment, removal, powers and duties of Dairy and Food Commissioner are placed in the civil statutes. See *Vernon's Sayles' Civ. St. 1914*, arts. 4575-4585d.

Art. 710. Obstruction of officers.—Any person who shall wilfully hinder or obstruct the Dairy and Food Commissioner, or his inspector, or other persons by him duly authorized in the exercise of the powers conferred upon him by this Act, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$25.00 nor more than \$200.00. [Act 1907, ch. 39; Act 1909, p. 172, repealed; Act 1911, p. 81, ch. 47, § 19, superseding art. 710, revised Pen. Code.]

Dairy and Food Commissioners.—See notes under art. 709.

Art. 711. Penalty for violations of act.—Whoever shall do any of the acts or things prohibited, or willfully neglect or refuse to do any of the Acts or the things enjoined by this Act, or in any way violate any of its provisions, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than \$25.00 nor more than \$200.00. [Act 1907, ch. 39; Act 1909, p. 169, repealed; Act 1911, p. 79, ch. 47, § 8, superseding art. 711, revised Pen. Code.]

MILL PRODUCTS

Art. 712. Standard weights, etc.—Mill products, hereinafter mentioned, shall have the following standard weights, viz: Flour,

one hundred and ninety-six pounds per barrel, or forty-eight pounds per sack; corn meal, bolted or unbolted, thirty-five pounds per sack, and feed made from cereals of any kind, whether pure, mixed or adulterated, one hundred pounds per sack. Fractional barrels and sacks shall weigh in the same proportion; and these weights shall be net and exclusive of the barrel or sack in which such product is packed. [Act 1905, p. 227, § 1.]

Explanatory.—Attention is called to art. 730, post. The subject matter of art. 730 was first enacted in 1905 (Acts 1905, p. 207, § 1). The latter act took effect at the same time as Act 1905, p. 227, constituting art. 712. It should be noticed that Acts 1905, p. 207, § 1 contains the same language as is embraced in art. 712, except that it includes "cotton seed meal." Acts 1905, p. 207, § 1 was amended in 1907 (Acts 1907, p. 243), and "cotton seed meal" was dropped out and "rice bran" and "rice polish" added. This would seem to present a question as to whether the amendatory act of 1907 superseded Acts 1905, p. 227, § 1 (art. 712, above).

Art. 713. Correct name and true net weight to be marked or branded on hogshead, sack, package, etc.—The correct name and the true net weight of the contents of each and every hogshead, barrel, box, cask, bale, sack or package of any of the foregoing products, whether sold in single packages or lots, shall be plainly marked, branded or stenciled in large, legible letters and figures, not less than two inches in size, upon the exterior of such hogshead, barrel, box, cask, bale, sack or package, in a conspicuous place, as the head in case of hogsheads or barrels, and the front or branded side in case of sacks, bales or packages; and it shall be unlawful for any person, firm or corporation, or the agent, employé or representative of any person, firm or corporation, to sell or exchange, or offer for sale or exchange, any of such products so packed or contained, until the provisions hereof have been complied with. [Id., p. 227, § 2.]

Indictment.—Willson's Cr. Forms, 457.

Art. 714. Penalty for offering same for sale not so marked or branded.—It shall be unlawful for any person, firm or corporation, or the agent, employé or representative of any person, firm or corporation, to sell or exchange, or offer for sale or exchange, whether in single packages or lots, any product composed of mixed cereals of any kind, or any cereal adulterated in any manner, unless the word "adulterated" is plainly marked, printed or stenciled diagonally across the other marks or brands, if any, on the hogshead, barrel, box, bale, cask, sack or package containing the same, or in case there are no other marks thereon, then across such hogshead, barrel, box, cask, bale, sack or package, in a conspicuous place in large legible letters and figures not less than two inches in size. [Id., p. 227, § 3.]

Indictment.—Willson's Cr. Forms, 458.

Art. 715. Penalty for violating any provision of this law.—If any person shall knowingly violate the provisions of this law, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not less than twenty-five dollars nor more than one thousand dollars, and each transaction shall be deemed a separate offense. [Id., p. 227, § 4.]

Art. 716. Manufactured wheat or corn products, packages how marked or branded.—Any person, firm, corporation or agent, employé or representative of any person, firm, corporation, manufacturer or dealer in said manufactured wheat or corn products in original packages, and offering the same for sale in this state, whether said packages are sold singly or in lots, and all manufacturers or dealers of flour, meal or feed from the above enumerated grain products in this state, when offering the same for sale in original packages, whether sold in single packages or lots, shall place in large, legible letters and figures, not less than two inches in size, on the package or packages so offered for sale, the name of the contents

and the actual net weight of the contents of said package or packages; and it shall be unlawful for any such person to sell, or offer to sell, any of the articles mentioned in this act which have been falsely labeled, knowing the same to be falsely labeled. All adulterated wheat or corn products shall have stamped upon the sacks or barrels, "adulterated." [Act 1899, p. 304.]

Indictment and Information.—Willson's Cr. Forms, 339-341.

An information or indictment based upon this article to be sufficient, must allege the article with which the flour was adulterated. *Dorsey v. State*, 38 App. 527, 44 S. W. 514, 40 L. R. A. 201, 70 Am. St. Rep. 762.

CHAPTER THREE

NURSERY AND FARM PRODUCTS

Art.		Art.	
717.	Keeping of trees, shrubs, plants, etc., affected with contagious disease prohibited.	722.	Commissioner of agriculture, power to revoke certificate.
718.	Commissioner of agriculture cause examination of.	723.	Shall enforce this law, and make and enforce regulations.
719.	Nursery stock consigned for transportation shall be accompanied by certificate.	724.	Giving false certificate.
720.	Shipment of into the state shall be accompanied by certificate of inspection.	725.	"Nursery stock" defined.
721.	Transportation company or common carrier not to receive, when.	726.	"Nursery" defined.
		727.	"Dealer" defined.
		728.	Making false representations.
		729.	Statute of limitation shall run, when.

Article 717. Keeping of trees, shrubs, plants, etc., affected with contagious diseases prohibited.—No person in this state shall knowingly or wilfully keep any peach, almond, apricot, nectarine or other trees affected with the contagious disease known as yellows. Nor shall any person keep for sale any apple, peach, plum or other tree affected with nematode galls, crown galls, or root rot. Nor shall any person knowingly or wilfully keep any plum, cherry or other trees affected with the contagious disease or fungus known as black knot; nor any tree, shrub or plant infested with or by the San Jose scale or other insect pest dangerously injurious to, or destructive of, trees, shrubs or other plants; nor any orange or lemon trees, citrus stocks, cape jasmines or other trees, plants or shrubs infested with "white fly" or other injurious insect pests or contagious diseases of citrus fruits; nor subtropical plants, shrubs, evergreens or ornamentals; nor any china, forest or other trees, shrubs or plants, infested with injurious insect pests or contagious diseases. Every such tree, shrub or plant shall be a public nuisance, and as such, it shall be the duty of the commissioner of agriculture or his representatives to abate it; and no damage shall be awarded for entering upon the premises upon which there are trees, shrubs or plants infested with yellows, black knot, crown gall or other infectious or dangerous disease, or infested with San Jose scale or other dangerous insect pest, for the purpose of legally inspecting the same; nor shall any damages be awarded for the treatment by the commissioner of agriculture, or his duly authorized agents or representatives, of such trees, shrubs or plants, or for altogether destroying such trees, if necessary to suppress such insect, pest or disease, if done in accordance with the provisions of this article. But the owner of the trees, shrubs or plants shall be notified immediately upon its being determined that such trees, shrubs or plants should be destroyed, by a notice in writing signed by the commissioner or the person or persons representing him, which said notice in writing shall be delivered in person to the owner of such trees, shrubs or plants, or left at the usual place of residence of such owner, or, if such owner be not a resident of the locality, to notify by leaving

such notice with the person in charge of the premises, trees, shrubs, or plants, or in whose possession they may be. Such notice shall contain a brief statement of the facts found to exist, whereby it is necessary to destroy such trees, shrubs or plants, and shall call attention to the law under which it is proposed to destroy them; and the owner shall, within ten days from the date upon which such notice shall have been received, remove and burn all such diseased or infected trees, shrubs or plants. If, however, in the judgment of said commissioner, or person representing him, any tree, shrub or plant infected with any disease, or infested with dangerously injurious insects, can be treated with sufficient remedies, he may direct such treatment to be carried out by the owner under the direction of the commissioner, agent, employé or representatives. In case of objections to the findings of the chief inspector, employés or representatives of the commissioner, an appeal may be made to the commissioner, whose decision shall be final. An appeal must be taken within five days from service of said notice, and shall act as a stay of proceedings until it is heard and decided. When the commissioner, or chief inspector, or employé, or representative, appointed by him, shall determine that any tree or trees, shrubs or other plants must be treated or destroyed forthwith, he may employ all necessary assistance for that purpose; and such representative or representatives, agent or agents, employé or employés may enter upon any or all premises necessary for the purpose of such treatment, removal or destruction. But such commissioner or the person representing him shall, before such treatment or destruction, first require the owner or person in charge of the trees, shrubs or plants, to treat or destroy same, as the case may be; and, upon the refusal or neglect upon the part of said owner or person in charge to so treat or destroy such trees, plants or shrubs, then such commissioner, chief inspector, or person or persons representing him shall treat or destroy such trees, shrubs or plants; and all charges and expenses thereof shall be paid by such owner or person in charge of said trees, shrubs or plants, and shall constitute a legal claim against such owner or person in charge, which may be recovered in any court having jurisdiction upon the suit of such commissioner or chief inspector, or the county attorney of the county where the premises are situated, together with all costs, including an attorney fee of ten dollars, to be taxed as other costs. [Act 1905, ch. 121; Act 1909, p. 316.]

Indictment.—Willson's Cr. Forms, 732o, 732p.

Art. 718. Commissioner of agriculture cause examination of.—The commissioner of agriculture shall cause an examination to be made at least once each year, of each and every nursery or other place where trees, shrubs or plants, commonly known as nursery stock, are grown or exposed for sale, for the purpose of ascertaining whether the trees, shrubs or plants therein kept, or propagated for sale, are infected with contagious disease or diseases, or infested with insect pests. If, after such examination, it is found that the said trees, shrubs or other plants so examined are apparently free in all respects from any contagious or infectious disease or diseases, dangerously injurious insect pest or pests, the said commissioners shall issue to the owner or proprietor of the stock so examined a certificate, setting forth the fact that the stock so examined was at the time of such examination apparently free from any and all such disease or diseases, insect pest or pests. No such certificate shall be negotiable or transferable, and shall be void if sold or transferred. Any such act or sale or transference shall be punishable as provided by this article. [Act 1909, p. 318.]

Indictment.—Willson's Cr. Forms, 732p.

Art. 719. Nursery stock consigned for transportation shall be accompanied by certificate.—All nursery stock, consigned for shipment, or shipped by freight, express or other means of transportation shall be accompanied by a copy of said certificate attached to each car, box, bale, bundle or package. It is specifically provided that when such box, bale, bundle or package, contains nursery stock to be delivered to more than one individual, partnership or corporation, that each portion of such nursery stock to be delivered to such individual, partnership or corporation shall also bear a copy of the certificate of inspection issued as provided in this article. Should any individual, partnership or corporation, nursery agent, or dealer or broker, send out or deliver, within the state, trees, vines, shrubs, plants, buds or cuttings, commonly known as nursery stock, and which are subject to the attacks of insects and diseases above provided for, unless he has in his possession a copy of said certificate, dated within a year thereof, deface or destroy such certificate, or wrongfully be in possession of such certificate, or fail to attach proper tags on each and every shipment, such tags bearing a copy of the said certificate, he shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than two hundred dollars. [Id., p. 318.]

Indictment.—Willson's Cr. Forms, 732p.

Art. 720. Shipment of into the state shall be accompanied by certificate of inspection.—No individual, partnership or corporation, outside the state, shall be permitted to ship nursery stock into this state, without first filing with the commissioner of agriculture a certified copy of his or their certificate of inspection, issued by the proper authorities in the state, in which the proposed shipment originates. This certificate must show that the stock to be shipped has been examined by the proper officer of inspection in that state or province, and that the stock is apparently free from all dangerous insect pests or contagious diseases; and that when fumigation is required by the commissioner of agriculture, that the stock has been properly fumigated. Immediately upon receipt of the filing with the commissioner of agriculture of this certificate, he shall, in addition, make further investigation as to the moral standing and integrity of the applicant as will satisfy him that the applicant is entitled to receive a certificate. A fee of five dollars shall be required from the applicant, upon receipt of which, the commissioner of agriculture may issue a certificate permitting the applicant to ship into the state. Each box, bale or package of nursery stock from outside the state shall bear a tag, on which is printed a copy of the certificate of this state, and also a copy of the certificate of the state in which it originates. [Id., p. 318.]

Indictment.—Willson's Cr. Forms, 732p.

Art. 721. Transportation company or common carrier not to receive, when.—No transportation company or common carrier shall receive, transport or deliver shipments of nursery stock originating either within or without the state which do not bear shipping tags or labels, showing the certificate of inspection of the state in which it originates, together with the permit from this state, if it be a shipment from without the state. Any individual, partnership or corporation from without the state, or any agent of any transportation company, common carrier, or any person or persons, who shall violate the provisions of this article, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than two hundred dollars, together with all costs for each offense.

Provided, that no transportation company or common carrier shall be liable for damages to the consignee or consignor for refusing to receive for transportation or delivery such trees, packages, bales, bundles or boxes, when not accompanied by copies of the certificates provided for in this article. The agent of such companies or common carriers shall report any such shipment to the commissioner of agriculture immediately. Shipments of nursery stock into this state, or originating within the state, without tags or proper certificates, as provided for in this article, shall be fined as provided herein. [Id., p. 319.]

Indictment.—Willson's Cr. Forms, 732p.

Art. 722. Commissioner of agriculture, power to revoke certificate.—The commissioner shall have the power to revoke any certificate which has been issued, when he shall find that false representations have been made by the party or parties to whom certificates have been issued, or who have refused to comply with the law, instructions, rules and regulations given by the commissioner of agriculture in reference to the provisions of this law and its enforcement. Any individual, partnership, or corporation, who shall be guilty of interfering with, refusing or preventing, the commissioner of agriculture, or his representatives, in the execution of their official duties, to enter upon any premises owned, used or leased by them; and any person who shall make false representations for the purpose of obtaining a certificate from the commissioner of agriculture, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty-five dollars nor more than two hundred dollars, together with all costs for each offense. [Id., p. 319.]

Indictment.—Willson's Cr. Forms, 732p.

Art. 723. Shall enforce this law and make and enforce regulations.—The commissioner of agriculture shall enforce the provisions of this law, and make and enforce such rules and regulations as may be deemed necessary for carrying the same into effect, not inconsistent with the same, and for the inspection of nurseries, orchards, forest trees, greenhouses and any other premises, deemed necessary to carry out the provisions of this law, together with all products originating from same within the meaning of this law. He shall also appoint one person who shall be designated as chief inspector, whose duty it shall be to inspect, or cause to be inspected, under the directions of the commissioner of agriculture, all trees, plants and shrubs, of every kind whatsoever, grown, produced or offered for sale by any nursery, dealer, individual or corporation in this state, and also to inspect, or cause to be inspected, all orchards provided for in this law, and may employ such other person or persons, expert or experts, as may be necessary from time to time for administering and carrying into operation and enforcing the provisions of this law; provided, that the chief inspector employed under the provisions of this law shall not, during the time of such service, be interested in, or connected with, any nursery business whatsoever. The said commissioner shall fix and collect reasonable fees for the inspection, as provided for in this law; provided, that not less than two dollars and fifty cents nor more than fifteen dollars shall be charged for each inspection under the provisions of this law. All fees, collected under the provisions of this article, shall be paid to the department of agriculture, and credited to the fund provided for administering this law. [Id. p. 319.]

Indictment.—Willson's Cr. Forms, 732p.

Art. 724. Giving false certificate.—If the said commissioner, or any of his agents or employes, give a false certificate, or a certificate

without an actual examination of the nursery stock for which such certificate is given, to any owner, proprietor or lessee of any nursery, or owner of nursery stock, or to any other person, for use under the provisions of this law, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars for each offense. [Id., p. 320.]

Indictment.—Willson's Cr. Forms, 732p.

Art. 725. "Nursery stock" defined.—The term, "nursery stock," within the meaning of this law, shall include all fruit trees and vines, shade trees and forest trees, whether such shade or forest trees be especially grown for sale in a nursery or taken from the forests and offered for sale, all scions, seedlings, roses, evergreens, shrubbery or ornamentals, also such greenhouse plants or propagation stock, all classes of berry plants, cut flowers taken from plants, bushes, shrubs or other trees growing in this state, which may be a medium for disseminating injurious insect pests and contagious diseases. [Id., p. 320.]

Indictment.—Willson's Cr. Forms, 732p.

Art. 726. "Nursery" defined.—The term, "nursery," shall be construed to mean any grounds or premises on which nursery stock is grown, or exposed for sale. "Being in the nursery business" applies to any individual, partnership or corporation which may either sell or grow, or both grow and sell, nursery stock, regardless of the variety or quantity of nursery stock sold or grown. [Id., p. 320.]

Indictment.—Willson's Cr. Forms, 732p.

Art. 727. "Dealer" defined.—The term, "dealer," shall be construed to apply to any individual, partnership or corporation not growers of nursery stock, but who buy and sell nursery stock for the purpose of reselling and reshipping under their own name or title, independently of any control of those from whom they purchase. An "agent of a nursery or dealer" shall be construed to apply to any individual, partnership or corporation selling nursery stock, either as being entirely under the control of the nursery or dealer with whom the nursery stock offered for barter and traffic originates, or some co-operative basis for handling nursery stock with the grower or dealer, as specified in this article. That any such agent shall have proper credentials from the dealer he represents or co-operates with, and failing in that, any such agent shall be classed as a dealer, and subject to such rules and regulations as may be adopted relative to them, and shall be amenable to the same penalties for violations of any provisions of this law, or the rules and regulations of the commissioner. Provided, that any agent of any dealer or nurseryman, as specified in this article, who shall knowingly deliver to any individual, partnership or corporation, any tree, shrub, or plant infested or diseased, as specified in the provisions of this law, even though such trees, shrubs or plants are received in a box, bale or package, bearing a certificate of inspection, as provided in this law, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty-five dollars nor more than five hundred dollars for each such delivery to each individual, partnership or corporation. [Id., p. 321.]

Indictment.—Willson's Cr. Forms, 732p.

Art. 728. Making false representations.—That any person, persons, company, of persons, co-partnership, any member of a company or co-partnership, any corporation or any stockholder or officer thereof, any agent, servant or employé of any such person,

persons, company of persons, co-partnership, member or stockholder of any company, co-partnership or corporation or officer aforesaid, who shall hereafter, knowingly, make any false representation or representations of the name, quality or nature of any nursery product for the purpose of inducing any vendee to buy the same, or who shall deliver to any vendee, knowingly, any such product other than that contracted for, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned in the county jail not less than thirty days nor more than six months, or both so fined and imprisoned. [Act 1907, p. 304.]

Indictment.—Willson's Cr. Forms, 732n, 732p.

Art. 729. Statute of limitation shall run, when.—The statute of limitation shall not begin to run against a prosecution under the foregoing article until such product shall have developed and disclosed the fraud. [Id., p. 304.]

Indictment.—Willson's Cr. Forms, 732p.

CHAPTER FOUR

FEED STUFFS

<p>Art. 730. Printed on tags, certificate of name, number of pounds and analysis, penalty for failure.</p> <p>731. "Concentrated commercial feeding stuff" defined.</p> <p>732. "Concentrated feed stuff" defined.</p> <p>733. Manufacturer or party selling to file what, and deposit samples.</p> <p>734. To pay inspection tax and affix tag.</p> <p>735. Penalty for failure to affix tag or label.</p>	<p>Art. 736. Penalty for counterfeiting tag.</p> <p>737. Shall furnish list of names or trade marks.</p> <p>738. Analysis of to be made and published annually.</p> <p>739. "Importer" defined.</p> <p>740. Manufacturing or selling adulterated feeding stuffs, penalty for.</p> <p style="text-align: center;">BOLL WORM POISON</p> <p>741-746. [Superseded.]</p>
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Article 730. Printed on tag, certificate of name, number of pounds and analysis; penalty for failure.—Every lot or parcel of concentrated feeding stuffs, as defined in article 732, used for feeding farm live stock, sold, offered or exposed for sale in the state of Texas, for use within this state, shall have printed on a tag, described in article 734, a plainly printed statement clearly and truly certifying the number of net pounds of feeding stuff in the package, stating the name or names of material of which such weight is composed, where the contents are of a mixed nature, the name, brand or trade mark under which the article is sold, the name and address of the manufacturer or importer, the place of manufacture, such information as is required by article 740, if any, and a chemical analysis stating the minimum percentages it contains of crude protein, allowing one per cent of nitrogen to equal six and one-quarter per cent of protein, of crude fat, of nitrogen-free extract, and the maximum percentage it contains of crude fiber; these constituents to be determined by the methods adopted at the time by the association of official agricultural chemists of the United States. Mill products, hereinafter mentioned, shall have the following standard weight, viz: Flour, one hundred and ninety-six pounds per barrel, or forty-eight pounds per sack; corn meal, bolted or unbolted, thirty-five pounds per sack; rice bran, one hundred and forty-three pounds per sack; rice polish, two hundred pounds per sack; and other feeds made from cereals of any kind, whether pure, mixed or adulterated, one hundred pounds per sack. Fractional barrels and sacks shall weigh in the same proportion, and those

weights shall be net and exclusive of the barrel or sack in which said product is packed. And any person, firm or association of persons, engaged in the manufacture of mill products of any character whatsoever, who shall use any bag, box, barrel or any other receptacle, into which to put such product other than the one bearing the name of such mill manufacturing the same, shall be guilty of a misdemeanor, and, upon conviction therefor, shall be fined in any sum from one hundred dollars to one thousand dollars, or, in addition thereto, be confined in the county jail for a term of thirty days, or both such fine and imprisonment. [Act 1905, p. 207, § 1, amended; Act 1907, p. 243.]

See art. 712 and note thereunder.

Art. 731. "Concentrated commercial feeding stuff" defined.—The term, "concentrated commercial feeding stuffs," as herein used, shall not include hay or straw, the whole seed or grains of wheat, rye, barley, oats, Indian corn, rice, buckwheat or broom corn, or any other whole or unground grains or seeds. [Act 1905, p. 207.]

Art. 732. "Concentrated feed stuff" defined.—The term, "concentrated feed stuffs," as herein used, shall include wheat bran, wheat shorts, linseed meals, cotton seed meals, pea meals, cocoanut meals, gluten meals, gluten feeds, maize feeds, starch feeds, sugar feeds, dried brewer's grains, malt sprouts, hominy feeds, cerealine feeds, rice meals, rice bean, rice polish, rice hulls, oat feeds, corn and oat chops, corn chops, ground beef or mixed fish feeds, and all other materials of similar nature not included in this article. [Id., p. 207.]

Art. 733. Manufacturer or party selling to file what, and deposit samples.—Before any concentrated feeding stuff, as defined in article 732, is so offered or exposed for sale, the importer, manufacturer and party who causes it to be sold, or offered for sale, within the state of Texas, for use within this state, shall, for each and every feed stuff, bearing a distinguishing name and trade mark, file with the director of the Texas agricultural and experiment station a certified copy of the statement named in article 730, and shall also deposit with said director a sealed glass jar or bottle containing not less than one pound of the feeding stuff to be sold or offered for sale, accompanied by an affidavit that it is a fair average sample thereof, and corresponds within reasonable limits to the feeding stuff which it represents in the percentage of protein, fat and crude fiber, and nitrogen-free extract which it contains. This shall not be construed to apply to farmers who grind their own feed stuff, and who do not adulterate same. [Act 1905, p. 208, § 4, amended; Act 1907, p. 244.]

Art. 734. To pay inspection tax and affix tag.—The manufacturer, importer, agent or seller of each concentrated commercial feeding stuff, as defined in article 731, shall, before the article is offered for sale, pay to the director of the Texas agricultural experiment station an inspection tax of ten cents per ton for each ton of such concentrated feeding stuff sold or offered for sale in the state of Texas, for use within this state, and shall affix to each lot shipped in bulk, and to each bag, barrel or other package of such concentrated feeding stuffs a tag to be furnished by said director, stating that all charges specified in said section have been paid. The director of said Texas agricultural experiment station is hereby empowered to prescribe the form of such tags, and adopt such regulations as may be necessary for the enforcement of this law. Whenever the manufacturer or importer or shipper of a concentrated feeding stuff shall have filed a statement made in article

730, and have paid the inspection tax, no agent or seller of said manufacturer, inspector or shipper shall be required to file such statement or pay such tax. The amount of the inspection tax and penalties received by said director shall be paid into the state treasury. So much of the inspection tax and penalties collected under this act shall be paid by the state treasurer to the treasurer of the Texas agricultural and mechanical college as the director of the Texas agricultural experiment station may show by his bills has been expended in performing the duties required by this act, but, in no case, to exceed the amount of the inspection tax and penalties received by the state treasurer under this act. Provided, the excess, if any, for the next two years may be used as it accrues, by the board of directors of the agricultural and mechanical college for the purpose of putting up a station administration building, to provide the necessary offices and laboratory space, in order that the purposes of this act may be carried out. [Act 1905, p. 208, § 5, amended; Act 1907, p. 244.]

Art. 735. Penalty for failure to affix tag or label.—Any manufacturer, importer or agent, selling, offering or exposing for sale, any concentrated commercial feeding stuff, as defined in article 731 without the statement required by article 730, and the tax tag required by article 734, or with a label, stating that said feeding stuff contains substantially a larger percentage of protein, fat or nitrogen-free extract, or a smaller quantity of crude fiber than is contained therein; and any person violating any other provision of this law, shall, on conviction in a court of competent jurisdiction, be fined not less than one hundred dollars nor more than five hundred dollars for the first conviction, and not less than five hundred nor more than one thousand dollars for each subsequent conviction. [Act 1905, p. 207, § 6; Act 1907, p. 245.]

Indictment.—Willson's Cr. Forms, 452.

Art. 736. Penalty for counterfeiting tag.—Any person who shall counterfeit, or use a counterfeit, of the tag or tags prescribed by this law, knowing the same to be counterfeited, or who shall use them a second time, after the said tags shall have been once attached, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined in a sum not exceeding five hundred dollars, one-half of which fine shall be paid to the informer; which fine may be doubled or tripled at each second or third conviction, and so on progressively for subsequent convictions. [Act 1905, p. 207.]

Indictment.—Willson's Cr. Forms, 453.

Art. 737. Shall furnish list of names or trade marks.—All manufacturers and importers of concentrated commercial feeding stuffs, or dealers in same, shall, when requested, furnish the director of the Texas experiment station with a complete list of names or trade marks of such feeding stuffs. [Id., p. 207.]

Art. 738. Analysis of to be made and published annually.—The director of the Texas agricultural experiment station shall cause one analysis or more to be made annually of each concentrated commercial feeding stuff sold, or offered for sale, under the provisions of this act. Said director is hereby authorized in person, or by deputy, to take a sample not exceeding two pounds in weight for analysis from any lot or package of concentrated commercial feeding stuff which may be in the possession of any manufacturer, importer, agent, dealer or buyer in this state; but said sample shall be drawn or taken in the presence of said party or parties in interest or their representatives, and shall be taken from a parcel, lot or number of parcels, which shall not be less than five per cent of

the whole lot inspected, and shall be thoroughly mixed and divided into two samples and placed in glass or metal vessels, carefully sealed, and a label placed on each, stating the name or brand of the feeding stuff or material sampled, the name of the party from whose stock the sample is drawn and the date and place of taking such sample; and said label shall be signed by the director or his deputy and the party or parties at interest, or their representative present at the taking and sealing of said sample; provided, that where the party or parties at interest refuse to be present and take part in the sampling of the said feed stuffs, the director or his deputy may take said samples in the presence of two disinterested witnesses; one of said duplicate samples shall be retained by the director, and the other shall be left with the party whose stock was sampled; and the sample or samples retained by the director shall be for comparison with the certified statements made in articles 730 and 733. The result of the analysis of the sample or samples so prescribed, together with such additional information as circumstances advise, shall be published in reports or bulletins by the Texas agricultural and mechanical college from time to time. [Id., p. 207.]

Art. 739. "Importer" defined.—The term, "importer," for all the purposes of this law, shall be taken to mean all such persons as shall bring into or offer for sale, within this state, concentrated commercial feeding stuffs manufactured without this state. [Id., p. 207.]

Art. 740. Manufacturing or selling adulterated feeding stuffs, penalty for.—Any person manufacturing, selling, or offering for sale, any adulterated feeding stuff within this state, shall, upon conviction therefor, be punished by a fine of not less than twenty-five dollars and not more than two hundred dollars, or be imprisoned in the county jail for a term of not less than thirty days and not more than sixty days, or by both such fine and imprisonment. For the purpose of this act, a feeding stuff shall be deemed to be adulterated if it contains any sawdust, dirt, damaged feed, or any foreign matter whatever, or if it is in any respect not what it is represented to be; or if any rice hulls or chaff, peanut shells, corncobs, oat hulls, or other similar substances of little or no feeding value are admixed therewith; provided, that no wholesome mixture of feeding stuffs shall be deemed to be adulterated if the true percentage of constituents thereof is plainly and clearly stated on the package, and made known to the purchaser at the time of the sale. It shall be the duty of the director of the experiment station to examine, or have examined, for adulteration, all suspicious samples of feeding stuffs, and such other samples as may be desirable. [Act 1905, p. 210, § 11; Act 1907, p. 245.]

Indictment.—Willson's Cr. Forms, 454.

BOLL WORM POISON

Arts. 741-746. [Superseded by arts. 999a-999fff, post.]

CHAPTER FOUR A

INFECTIOUS DISEASES AMONG ANIMALS AND BEES

[See Title 17, ch. 4, Penal Code.]

CHAPTER FIVE

COCAINE AND MORPHINE

Art.

747. Unlawful to sell or give away except on prescription, with certain provisos.

Art.

748. Unlawful for any practitioner of medicine, dentistry or veterinary to prescribe to habitual users.

749. Penalty for violating this law.

Article 747. Unlawful to sell or give away except on prescription, with certain provisos.—It shall be unlawful for any person, firm or corporation to sell, furnish or give away cocaine, salts of cocaine or preparations containing cocaine, or salts of cocaine, or any morphine, or salts of morphine, or preparations containing morphine or salts of morphine, or any opium or preparations containing opium, or any chloral hydrate or preparations containing chloral hydrate, except upon the original written order or prescription of a lawfully authorized practitioner of medicine, dentistry or veterinary medicine, which order or prescription shall be dated and shall contain the name of the person for whom prescribed, or, if ordered by a practitioner of veterinary medicine, shall state the kind of animal for which ordered and shall be signed by the person giving the prescription or order. Such written order or prescription shall be permanently retained on file by the person, firm or corporation who shall compound or dispense the article ordered or prescribed; and it shall not be recomounded or dispensed a second time, except upon the written order of the original prescriber for each and every subsequent compounding or dispensing. No copy or duplicate of such written order or prescription shall be made or delivered to any person; but the original shall at all times be open to inspection by properly authorized officers of the law. Provided, however, that the above provisions shall not apply to preparations containing not more than two grains of opium, or not more than one-eighth grain of morphine, nor not more than two grains of chloral hydrate, or not more than one-sixteenth grain of cocaine, in one fluid ounce, or, if solid preparation, in one avoirdupois ounce; provided, also, that the above provisions shall not apply to preparations recommended in good faith for diarrhoea or cholera, each bottle or package of which is accompanied by specific directions for use, and the caution against habitual use; nor to linaments or ointments when plainly labeled, "for external use only." And provided, further, that the above provisions shall not apply to sales at wholesale jobbers, wholesalers and manufacturers to retail druggists, nor to sales at retail by retail druggists to regular practitioners of medicine, dentistry or veterinary medicine, nor to sales made to manufacturers of proprietary or pharmaceutical preparations for use in the manufacture of such preparations, nor the sales to hospitals, colleges, scientific or public institutions; nor to the sale of patent or proprietary medicines sold by druggists or others, containing any of the foregoing substances, the sale of which is prohibited by this law; provided, such preparations be not compounded or sold for the purpose of the evasion of this law. [Act 1903, ch. 115; Act 1905, p. 45.]

Indictment.—Willson's Cr. Forms, 342, 349.

An indictment for unlawfully selling, furnishing, and giving cocaine and morphine to one not having a written prescription of a physician was sufficient, without negating the exceptions as to sales in good faith for cholera, etc. *Brown v. State* (Cr. App.) 168 S. W. 861.

Art. 748. Unlawful for any practitioner of medicine, dentistry or veterinary to prescribe to habitual users.—It shall be unlawful for any practitioner of medicine, dentistry or veterinary medicine

to furnish to, or prescribe for the use of, any habitual user of the same, any cocaine or morphine, or any salts or compound of cocaine or morphine, or any preparation containing cocaine or morphine or their salts, or any opium or chloral hydrate, or any preparation containing opium or chloral hydrate; and it shall also be unlawful for any practitioner of dentistry to prescribe any of the foregoing substances for the use of any person not under his treatment in the regular practice of his profession, or for any practitioner of veterinary medicine to prescribe any of the foregoing substances for the use of any human being; provided, however, that the provisions of this section shall not be construed to prevent any lawfully authorized practitioner of medicine from prescribing in good faith for the use of any habitual user of narcotic drugs such substances as he may deem necessary for the treatment of such habit. [Act 1903, ch. 115; Act 1905, p. 46.]

Indictment.—Willson's Cr. Forms, 349-351.

An indictment which fails to allege that the prescription was not given for the treatment of the habit is insufficient. Blair v. State (Cr. App.) 97 S. W. 89; Blair v. State, 50 App. 225, 96 S. W. 23.

Art. 749. Penalty for violating this law.—Any person who shall knowingly violate any of the provisions of this law shall be deemed guilty of a misdemeanor, and, upon conviction for the first offense, shall be fined not less than twenty-five dollars nor more than fifty dollars, and, upon conviction for a second offense, shall be fined not less than fifty dollars nor more than one hundred dollars, and, upon a conviction for a third and all subsequent offenses, shall be fined not less than one hundred dollars nor more than two hundred dollars, and shall be imprisoned in the county jail for not less than six months. It shall be the duty of the grand jury to make presentments for violations of this law. [Id.]

Indictment.—Willson's Cr. Forms, 349.

CHAPTER SIX

UNLAWFUL PRACTICE OF MEDICINE

Art.	Art.
750. Authority to practice registered in district clerk's office; change of residence recorded, where.	756. Practicing in violation of law, penalty.
751. District clerk to keep medical register.	757. Not applicable to what cases.
752. Practitioners of medicine to receive verification license.	758. Physicians, etc., to report births and deaths.
753. Applicants other than those under previous article.	758a. Soliciting or drumming patients or patronage.
754. Not to discriminate against any particular school.	758b. Same; receiving compensation for soliciting patronage for physicians.
755. Shall be regarded as practicing medicine, when.	758c. Same; penalty.
	758d. Same; newspaper advertising excepted.
	758e. Incriminating testimony.

Article 750. Authority to practice registered in district clerk's office; change of residence recorded, where.—It shall be unlawful for any one to practice medicine, in any of its branches, upon human beings within the limits of this state who has not registered in the district clerk's office of the county in which he resides, his authority for so practicing, as herein prescribed, together with his age, postoffice address, place of birth, school of practice to which he professes to belong, subscribed and verified by oath; which, if wilfully false, shall subject the applicant to conviction and punishment for false swearing as provided by law. The fact of such oath and record shall be indorsed by the district clerk upon the certificate. The holder of the certificate must have the same recorded upon each change of residence to another county, and the

absence of such record shall be prima facie evidence of the want of possession of such certificate. [Act 1907, p. 225.]

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| 1. Historical. | 12. — Following language of statute. |
| 2. Validity of act. | 13. — Joinder of counts. |
| 3. Act of 1873. | 14. Instructions. |
| 4. Time of taking effect of act. | 15. Burden of proof. |
| 5. Construction of act. | 16. Admissibility of evidence. |
| 6. Compliance with article. | 17. — Newspaper advertisements. |
| 7. Persons liable. | 18. Sufficiency of evidence. |
| 8. Indictment and information. | 19. Unlicensed practitioner's right to recover fees. |
| 9. — Negating exceptions. | |
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| 11. — Disjunctive allegations. | |

1. **Historical.**—The Act of May 16, 1873, the original act upon this subject, was repealed by the act of August 21, 1876, which latter act is the one from which these articles were framed in revising. *Ellison v. State*, 6 App. 248.

2. **Validity of act.**—The act is valid, since no one has an inalienable right to practice medicine or treat diseases for pay. *Lewis v. State* (Cr. App.) 155 S. W. 523; *Herrington v. State* (Cr. App.) 166 S. W. 721.

Const. art. 16, § 31, provides that the legislature may pass laws prescribing the qualifications of practitioners of medicine and punish persons for malpractice, but that no preference shall ever be given by law to any school of medicine. Held, that the word "medicine," as used in the constitution, embraced the art of healing, by whatever scientific or supposedly scientific method; the art of preventing, curing, or alleviating diseases, and remedying as far as possible results of violence and accident, some thing or method supposed to possess curative power, and hence authorized the passage of this act, requiring physicians and surgeons, including osteopaths, to obtain a license before engaging in the public practice of their profession. *Ex parte Collins*, 57 App. 2, 121 S. W. 501, affirmed by Supreme Court of the United States, 1d., 32 S. Ct. 286, 223 U. S. 288, 56 L. Ed. 439.

This act is not unconstitutional in discriminating against the practice of the masseur treatment, in failing to provide any board or authority to whom one can apply for license to practice such treatment, for a license to practice that treatment can be obtained from the state medical board, and the condition that an applicant have certain medical knowledge is not a discrimination against the practice of the masseur treatment, but a valid exercise of police power. *Germany v. State*, 62 App. 276, 137 S. W. 130, Ann. Cas. 1913C, 477.

This act regulating the right to practice medicine, and defining who shall be regarded as medical practitioners, was a reasonable exercise of the state's police power. *Singh v. State* (Cr. App.) 146 S. W. 891.

The act is not invalid for indefiniteness because not specifically requiring a certificate to be registered in the office of the clerk of the district court. *Byrd v. State*, 72 App. 242, 162 S. W. 360.

3. **Act of 1873.**—See a discussion of the original act of May 16, 1873. *State v. Goldman*, 44 Tex. 104. These articles are not only expressly sanctioned by the constitution, but such legislation is competent under the general police power of the state. *Logan v. State*, 5 App. 306.

All medical practitioners, except those practicing regularly for five years prior to January 1, 1875, and those who qualified under the act of 1873, must have a certificate of qualification, and before engaging in practice must have it recorded; and one who had qualified under the act of 1873, but since removed to another county, must likewise have his certificate recorded. *Hilliard v. State*, 7 App. 69.

4. **Time of taking effect of act.**—Where, in a prosecution for practicing medicine without a license, accused testified that he never procured a license to practice medicine, and had not filed for registration a license to practice medicine in any county, it was no defense that the alleged offense was committed before he was required to register and file a certificate to practice medicine, if he desired so to do, under this act as a legal practitioner of medicine within the state under prior laws then in force, which required a physician to file a diploma or license, and have the same recorded in the office of the clerk of the district court of the district in which he practiced. *Dankworth v. State*, 61 App. 157, 136 S. W. 788.

5. **Construction of act.**—This act does not seek to regulate how any one shall treat diseases, but merely provides that, before any one shall treat, or offer to treat, diseases, he shall show his competency and obtain from the State Board of Medical Examiners authority to practice. *Lewis v. State* (Cr. App.) 155 S. W. 523.

6. **Compliance with article.**—Where a man presents a certificate from the examining board of another State to such board in this State, and it is indorsed by the latter and given to the clerk to be recorded, but the latter failed to properly record it, he complied with the law as far as he was concerned, and was not guilty of practicing medicine without a license. *Price v. State*, 40 App. 429, 50 S. W. 700.

If defendant when he practiced as charged labored under the mistake that his certificate had been filed for record in the county of the prosecution, and if said mistake did not arise from want of proper care on his part, he was entitled to acquittal. *Pettit v. State*, 28 App. 240, 14 S. W. 127.

A physician is liable to punishment if he practices medicine without having his certificate filed and recorded in the district clerk's office. *Wicks-Nease v. Watts*, 30 Civ. App. 515, 70 S. W. 1001.

Although one may have a diploma "issued by a bona fide medical college of respectable standing" still he must receive a certificate to practice medicine from

one of the duly constituted boards of medical examiners of the state of Texas, which shall be recorded before he would be authorized to practice. It is not necessary for him to be examined if he has complied with other provisions of the statute, but he must have the certificate. That a board refuses to examine him, or issue a certificate to him, is no defense. *Stone v. State*, 48 App. 114, 86 S. W. 1031.

7. **Persons liable.**—See notes under article 755.

8. **Indictment and information.**—Willson's Cr. Forms, 343.

The indictment (under act of 1873) must allege that accused practiced medicine without a diploma, or without a certificate of qualification, or without having practiced for five consecutive years, and that accused resided or sojourned in the county of the prosecution. *State v. Goldman*, 44 Tex. 104.

Under act of 1876 an indictment need not allege the particular branch or department of medicine in which the defendant practiced. *Antle v. State*, 6 App. 202.

An indictment under this act need not allege the particular branch or department of medicine in which the defendant practiced. *Antle v. State*, 6 App. 202.

An information that does not allege that the defendant resided in the county where he is prosecuted and had not filed his certificate or diploma there or which does not allege where he resided or that in the county of his residence he had not filed his certificate or diploma, states no offense. *Person v. State*, 53 App. 334, 109 S. W. 935.

Under this act an indictment which charges that accused did unlawfully engage in the practice of medicine in C. county without having first filed for record with the clerk of the district court of said county his authority for practicing medicine, is insufficient for failure to allege either that accused resided in C. county or that he did not register his authority to practice in the office of the district clerk of the county in which he resided. *Lockhart v. State*, 58 App. 80, 124 S. W. 923.

Under this article and art. 755 an indictment charging the defendant with unlawfully practicing medicine, without having properly registered his authority for so doing, and treating and offering to treat physical disease and disorder, and making a charge therefor, is sufficient. *Young v. State*, 61 App. 440, 134 S. W. 736.

Where an information for illegally practicing medicine stated that accused did practice medicine without having been licensed to do so, etc., it was not defective for failure to allege the particular school of medicine to which defendant was claimed to belong. *Singh v. State* (Cr. App.) 146 S. W. 891.

Under this article an information charging that accused did practice medicine, etc., was not objectionable for failure to allege that he professed to be a physician or surgeon; the act not being limited to persons so professing, but including any person treating or offering to treat any disease, etc. *Singh v. State* (Cr. App.) 146 S. W. 891.

An information, alleging that accused unlawfully engaged in the practice of medicine, for pay, as a regular practitioner, without a certificate from the Board of Medical Examiners, and without a diploma from any accredited medical college, charges a violation of arts. 751-756, providing for the granting of licenses to practice medicine, and punishing any person practicing medicine in violation of law, and does not charge the offense denounced by this article prohibiting any one from practicing medicine who has not registered, in the county in which he resides, his authority for practicing, and is not bad for failing to allege the county of the residence of accused, and that she had not registered her certificate, essential to charge an offense under this article. *Stiles v. State* (Cr. App.) 148 S. W. 326.

An indictment alleging that accused practicing medicine without a license practiced under a system of treatment, the name of which was unknown to the grand jury, but which treatment consisted in the performing of physical manipulations, does not require evidence to sustain a conviction that the name of the treatment was unknown to the grand jury. *Milling v. State* (Cr. App.) 150 S. W. 434.

An indictment which alleges that accused did unlawfully engage in the practice of medicine upon a human being without having registered in the district clerk's office of the county of his residence a certificate from some authorized board of medical examiners, or a diploma from some accredited medical college, contrary to the statute made and provided is sufficient. *Byrd v. State*, 72 App. 242, 162 S. W. 360.

An indictment charging the unlawful practice of medicine alleged that accused had not filed a certificate from the board of medical examiners "or a diploma from some accredited medical college." Held, that as the filing of a diploma did not authorize any one to practice medicine, the expression "or a diploma from some accredited medical college" will be disregarded as surplusage. *Byrd v. State*, 72 App. 242, 162 S. W. 360.

An indictment charging that accused was practicing medicine without having filed his certificate in the office of the district clerk of the county of his residence, as required, is not bad for uncertainty in failing to allege that the certificate was not filed in the office of the clerk of the district court. *Byrd v. State*, 72 App. 242, 162 S. W. 360.

Where a complaint and information distinctly charge the offense of treating or offering to treat any disease by any method in violation of subdivision 2 the allegations in the complaint and information attempting to charge accused with professing to be a physician or surgeon in violation of subdivision 1 will be treated as surplusage, and thereby render the complaint and information good as against the objection that separate and distinct offenses are charged. *Herrington v. State* (Cr. App.) 166 S. W. 721.

An information is fatally defective, where it fails to allege defendant's residence and that he had not registered his authority or license in the district clerk's

office of the county of his residence, though it alleges that he was not licensed and authorized under the laws of the state to practice medicine, was not practicing medicine under the provisions of the laws of the state, and was not a physician under a diploma of a reputable and legal college of medicine. *Young v. State* (Cr. App.) 167 S. W. 1112.

9. — **Negating exceptions.**—The exceptions contained in this article need not be negated in the indictment. They are matters of defense and provable under the plea of not guilty. *Blasdell v. State*, 5 App. 263; *Logan v. State*, Id. 306; *Newman v. State*, 58 App. 223, 124 S. W. 956; *Dankworth v. State*, 61 App. 157, 136 S. W. 788.

The provisos in the act of 1876 need not have been negated as exceptions in the enacting clause, *Blasdell v. State*, 5 App. 263; *Logan v. State*, 5 App. 306; as they were matters of defense, and provable under the general issue, *Antle v. State*, 6 App. 202; nor need the information (or indictment) allege the particular branch or department in which the defendant was engaged. Id.

An indictment alleging that accused practiced on human beings without authority of law, in that he unlawfully treated a physical disease of a person named and charged him indirectly therefor, said treatment being given in the capacity of a physician, under a system of treatment consisting in the performance of physical manipulations, sufficiently charges a practicing of medicine and the indictment need not allege that the treatment accused practiced was not within his particular sphere as a masseur, nor negative that he did not publicly represent himself as a masseur. *Milling v. State* (Cr. App.) 150 S. W. 434.

10. — **Variance.**—An indictment alleging that accused practicing medicine without a license treated a patient, and that the treatment consisted in physical manipulations with accused's hands "over" the patient, is sustained by proof that accused placed his hands "upon" the patient and rubbed and manipulated his hands "upon" his body; the words "upon" and "over" being synonymous. *Milling v. State* (Cr. App.) 150 S. W. 434.

The variance between the complaint and information alleging that accused practiced medicine by treating a person named for consumption, diagnosing her case and prescribing a treatment, and the proof that the person named applied to accused for treatment and told him that she had asthma and a choking-up sensation at night, and that accused did not diagnose the case as consumption, is fatal. *Norwood v. State*, 70 App. 605, 158 S. W. 270.

11. — **Disjunctive allegations.**—See C. C. P. art. 473.

12. — **Following language of statute.**—See C. C. P. art. 474.

13. — **Joinder of counts.**—See C. C. P. art. 481.

14. **Instructions.**—Harmless error in instructions. See C. C. P. article 743.

Where, on a trial for practicing medicine without a license, the state proved that accused treated diseases as a doctor, and charged indirectly therefor without having a license, and accused claimed that he practiced solely as a masseur and so advertised himself, the instructions which drew clearly the distinction between the practice of medicine and the practice solely as a masseur, and which submitted the issue to the jury, and which stated that, before accused could be convicted, the jury must be satisfied that he practiced medicine and charged for his services in the practice, etc., correctly presented the issues. *Milling v. State* (Cr. App.) 150 S. W. 434.

Where the information alleged that defendant charged \$2 of the current money of the United States of America for his services, an instruction, authorizing a conviction if he charged any money of any sort for medical treatment, was not within the issues, which should have been confined to finding the money charged to be the current money of the United States. *Collins v. State* (Cr. App.) 171 S. W. 729.

15. **Burden of proof.**—See notes under art. 52, ante, and art. 785, C. C. P.

16. **Admissibility of evidence.**—See notes under art. 783 et seq., C. C. P.

Under act of 1876 it was competent to prove the professional capacity in which defendant held himself out to the public. *Antle v. State*, 6 App. 202.

Evidence as to whether the treatment given by defendant to certain patients was harmful or beneficial was immaterial. *Germany v. State*, 62 App. 276, 137 S. W. 130, Ann. Cas. 1913C, 477.

Evidence as to whether the prosecuting witness had been treated by other physicians before she was treated by defendant was immaterial. *Germany v. State*, 62 App. 276, 137 S. W. 130, Ann. Cas. 1913C, 477.

A check executed by the patient's husband, payable to defendant or order, on which was defendant's indorsement, and on the face the words "one week's medical treatment for my wife," was admissible to show that the treatment was for compensation, and not gratuitous. *Singh v. State* (Cr. App.) 146 S. W. 891.

In a prosecution against defendant for practicing medicine without a license, evidence that, on request being made for receipts for money paid by a patient's husband, defendant stated that he did not give receipts because they were unnecessary as he could not collect by law, was admissible to show that defendant was aware of the provisions of the act and that the business he was pursuing was prohibited. *Singh v. State* (Cr. App.) 146 S. W. 891.

Evidence that defendant had prescribed for prosecuting witness for catarrh was admissible to show that he was practicing medicine. *Singh v. State* (Cr. App.) 146 S. W. 891.

Evidence of a third person that he called on defendant at the "Temple," which was the name given by accused to his place of business, asked him if he could cure the witness' wife of neuralgia, and that accused replied that he could, and that the charges would be \$10 per week if the witness brought his wife to the Temple and \$15 per week if accused was compelled to go to the home of the wit-

ness, was admissible to show that accused was treating, or offering to treat, disease for pay. *Singh v. State* (Cr. App.) 146 S. W. 891.

The state in a prosecution for the alleged treatment of a specified person for hire was not limited to proof of defendant's treatment of the person alleged, but was entitled to show that defendant had treated and offered to treat other persons as proof that he had been treating or offering to treat various diseases for compensation, especially in view of the defense that he only accepted free will offerings in return. *Singh v. State* (Cr. App.) 146 S. W. 891.

Where defendant was charged in one count with practicing medicine in that he treated certain named persons, and in another count with offering to treat diseases without a license, evidence that, at various times about the time charged in the indictment, defendant treated numerous witnesses, whose names were not mentioned in the indictment, for various ailments and diseases was admissible in support of either or both counts. *Mueller v. State* (Cr. App.) 153 S. W. 1142.

In the prosecution of an alleged optician for practicing without license, witnesses were properly permitted to testify that accused stated to them that the glasses he offered were "medicated" glasses. *Tipton v. State* (Cr. App.) 168 S. W. 97.

17. — **Newspaper advertisements.**—Evidence of advertisements issued by defendant for the purpose of obtaining practice was admissible. *Germany v. State*, 62 App. 276, 137 S. W. 130, Ann. Cas. 1913C, 477.

Defendant's newspaper advertisements were not objectionable because the state, at the time the advertisements were offered, had not shown that defendant had treated the particular persons named in the first count of the indictment. *Mueller v. State* (Cr. App.) 153 S. W. 1142.

Newspaper advertisements, in which defendant called himself a "professor" able to cure any and all diseases, and invited the afflicted public to come to him for treatment, were not inadmissible, because they did not show that he was practicing, or offering to practice, medicine, and did not claim to be a physician or practitioner of medicines belonging to any particular school, or because such advertisements stated that he made no charge. *Mueller v. State* (Cr. App.) 153 S. W. 1142.

The admission of an advertisement which on its face was that of another person, and copies of the newspaper containing advertisement of an osteopathic infirmary and hospital, followed by the name of defendant as its physician and surgeon without a showing that defendant authorized the publication and was connected with the infirmary, did not make him responsible, and was inadmissible. *Collins v. State* (Cr. App.) 171 S. W. 729.

In a prosecution for unlawfully practicing medicine, evidence of the auditor of a newspaper that defendant had a credit on his books of \$247, in the absence of any showing that it had been placed there to pay for advertisements therein, or any other connection, was inadmissible. *Collins v. State* (Cr. App.) 171 S. W. 729.

18. **Sufficiency of evidence.**—Under Act 1876 it was held sufficient to prove a single act of engaging in the practice in connection with proof that he held himself out to the public as a practicing physician. *Antle v. State*, 6 App. 202.

In a prosecution for the unlawful practicing of medicine without being registered in C. county, where accused was alleged to have then resided, a conviction was unauthorized in absence of proof that he resided in C. county; such proof being indispensable. *Young v. State*, 59 App. 358, 128 S. W. 1103.

On a prosecution for practicing medicine without having filed the required certificate, evidence held sufficient to sustain a finding that defendant was treating disease by some method and charging therefor. *Newman v. State*, 61 App. 338, 134 S. W. 688.

Proof that defendant did not charge for his services directly, but told all who applied for treatment that he would receive from them "free will offerings," and that he actually did receive pay from patients, was sufficient to show that he practiced medicine for compensation. *Singh v. State* (Cr. App.) 146 S. W. 891.

The state is not required to prove defendant practiced by some particular system or method, but simply that he treated a disease or disorder, mental or physical, and charged therefor. *Collins v. State* (Cr. App.) 152 S. W. 1047.

Evidence held to sustain a conviction of accused for unlawfully practicing medicine without a license. *Mueller v. State* (Cr. App.) 153 S. W. 1142.

In a prosecution for unlawfully practicing medicine, evidence showing defendant's treatment of disease by rubbing, manipulation, etc., held to justify conviction. *Newman v. State*, 72 App. 367, 163 S. W. 427.

19. **Unlicensed practitioner's right to recover fees.**—See notes under art. 5736, *Vernon's Sayles' Civ. St.* 1914.

Art. 751. District clerk to keep medical register.—It is hereby made the duty of the district clerk of each county in this state to purchase a book of suitable size, to be known as the "medical register" of such county, and set apart one full page for the registration of each physician, and to record in the same the name and record of each practitioner who presents a certificate from the state board of examiners, issued under this act. The clerk shall receive the sum of one dollar from each physician so registered, which shall be his full compensation for all duties required under this act. When any physician shall die or remove from the county, or have his license revoked, it shall be the duty of said clerk to make a note of facts at the bottom of the page as closing the

record. On the first day of January in each year, said clerk shall, on request of the board, certify to the office of the state board of medical examiners a correct list of the physicians then registered in the county, together with such other information as said board may require. Any district clerk, upon conviction of knowingly violating any of the provisions of this act, shall be fined not more than fifty dollars. A copy from the medical register pertaining to any person certified to by said clerk under the seal of said court, also a certificate issued by said officer certifying that any person named has or has not registered in said office as required by this act, shall be admitted as evidence in all trial courts. [Id., p. 225.]

See notes under art. 750; *Morse v. State Board of Medical Examiners*, 57 Civ. App. 93, 122 S. W. 446.

Art. 752. Practitioner of medicine to receive verification license.—All legal practitioners of medicine in this state who, practicing under the provisions of previous laws, or under diplomas of a reputable and legal college of medicine, have not already received license from a state medical examining board of this state, shall present to the board of medical examiners for the state of Texas, documents, or legally certified transcripts of documents, sufficient to establish the existence and validity of such diplomas or of the valid and existing license heretofore issued by previous examining boards of this state, or exemption existing under any law, and shall receive from said board verification license, which shall be recorded in the district clerk's office in the county in which the licentiates may reside. Such verification license shall be issued for a fee of fifty cents to all practitioners who have not already received a license from the state board of medical examiners of this state. It is especially provided that those whose claims to state licenses rest upon diplomas from medical colleges, recorded from January 1, 1891, to July 9, 1901, shall present to the state board of medical examiners satisfactory evidence that their diplomas were issued from bona fide medical colleges of reputable standing, which shall be decided by the board of medical examiners before they are entitled to a certificate from said board. This board may, at its discretion, arrange for reciprocity in license with the authorities of other states and territories having requirements equal to those established by this act. License may be granted applicants for license under such reciprocity on payment of twenty dollars. [Id., p. 225.]

See *Morse v. State Board of Medical Examiners*, 57 Civ. App. 93, 122 S. W. 446; *Lockhart v. State*, 58 App. 80, 124 S. W. 923.

Time of taking effect of act.—See note under article 750.

Verification certificate.—Where one has been granted a certificate to practice medicine in any county, and the certificate has been duly recorded, the board of examiners has no right to refuse a verification license to an applicant therefor, nor to limit the certificate of a female applicant to the practice of obstetrics. *Board of Medical Examiners v. Taylor*, 56 Civ. App. 291, 120 S. W. 575.

Under Rev. St. 1895, arts. 3784, 3785, requiring the board of medical examiners to examine applicants for certificates to practice medicine in any of its branches in enumerated subjects, and providing that the board, being satisfied as to the qualifications of an applicant, shall grant to him a certificate, which shall entitle the person to practice medicine, etc., a certificate reciting that the board has examined a person, and has found her qualified to practice the branches of obstetrics and diseases peculiar to women and children, is, in the absence of any evidence to the contrary, a valid license to such person to practice medicine as limited in the certificate, and such person is entitled to a verification certificate, under Acts 1907, c. 123. *State Board of Medical Examiners v. Taylor*, 103 Tex. 444, 129 S. W. 600.

Indictment and information.—Willson's Cr. Forms, 343.

See note under article 750.

Admissibility of evidence.—See art. 750.

It is error to admit opinion of witness that a college is not an accredited medical college, basing such opinion on a book purporting to contain a list of accredited medical colleges. *Aldenhoven v. State*, 42 App. 6, 56 S. W. 914.

Art. 753. Applicants other than those under previous article.—All applicants for license to practice medicine in this state, not otherwise licensed under the provisions of law, must successfully pass an examination before the Board of Medical Examiners established by this law. Applicants, to be eligible for examination, must present satisfactory evidence to the board that they are more than twenty-one years of age, of good moral character, and graduates of bon fide, reputable medical schools. Such schools shall be considered reputable within the meaning of this law, whose entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States, whose course of instruction shall embrace not less than four terms of five months each. Application for examination must be made in writing under affidavit to the secretary of the board, on forms prepared by the board, accompanied by a fee of twenty-five (\$25.00) dollars; except when an applicant desires to practice obstetrics alone, the fee shall be five (\$5.00) dollars. Such applicant shall be given due notice of the date and place of examination. Applicants to practice obstetrics in the State of Texas, upon proper application, shall be examined by the Board in obstetrics only, and upon satisfactory examination shall be licensed to practice that branch only; provided, this shall not apply to those who do not follow obstetrics as a profession, and who do not advertise themselves as obstetricians or midwives, or hold themselves out to the public as so practicing. In case any applicant, because of failure to pass examination, be refused a license, he or she shall, after one year, be permitted to take a second examination without an additional fee. [Act 1907, p. 225; Act 1915, p. 112, ch. 63, § 1, superseding art. 753, revised Pen. Code.]

See notes under art. 750.

Cited, *Morse v. State Board of Medical Examiners*, 57 Civ. App. 93, 122 S. W. 446.

Explanatory.—Art. 753, revised Pen. Code, and art. 5739, Revised St., 1911, were made up from section 7 of Act 1907, p. 226. Act 1915, ch. 63, amends art. 5739, Revised St., 1911, and thus supersedes art. 753, revised Pen. Code.

Verification certificate.—See notes under art. 752.

Temporary certificate.—One member of the board of examiners cannot issue a third temporary certificate to an applicant so as to entitle him to practice medicine and charge fees. *Peterson v. Seagraves*, 94 Tex. 390, 60 S. W. 752 (decision under prior act).

Unlicensed practitioner's right to recover fees.—See notes under art. 5736, *Vernon's Sayles' Civ. St.* 1914.

Art. 754. Not to discriminate against any particular school.—Nothing in this law shall be constructed as to discriminate against any particular school or system of medical practice. This act shall not apply to dentists, legally qualified and registered under the laws of this State, who confine their practice strictly to dentistry; nor to nurses who practice only nursing; nor to masseurs, in their particular sphere of labor, who publicly represent themselves as such; nor to commissioned or contract surgeons of the United States army, navy or public health and marine hospital service, in the performance of their duties, but such shall not engage in private practice without license from the board of medical examiners; nor to legally qualified physicians of other states called in consultation, but who do not open offices or appoint places in this state where patients may be met or called to see. This act shall be so construed as to apply to persons, other than licensed druggists of this state, not pretending to be physicians, who offer for sale on the streets or other public places, remedies which they recommend for the cure of disease. [Act 1907, p. 227.]

See notes under art. 750; *Morse v. State Board of Medical Examiners*, 57 Civ. App. 93, 122 S. W. 446.

When prior act took effect.—The act of February 22, 1901, which excludes from its operation all those who were practicing medicine in Texas prior to January 1, 1885, did not go into effect until ninety days after the adjournment of the twenty-seventh legislature, and adjournment occurred April 9, 1901. *Wickes-Nease v. Watts*, 30 Civ. App. 515, 70 S. W. 1002, 1003.

Masseur treatment.—See notes under arts. 750, 755.

Art. 755. Shall be regarded as practicing medicine, when.—Any person shall be regarded as practicing medicine within the meaning of this act:

(1) Who shall publicly profess to be a physician or surgeon and shall treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof.

(2) Or who shall treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation. [*Id.*, p. 227.]

See *Morse v. State Board of Medical Examiners*, 57 Civ. App. 93, 122 S. W. 446; *Young v. State*, 61 App. 440, 134 S. W. 736.

Cited, *Young v. State* (Cr. App.) 167 S. W. 1112.

Validity of act.—Discrimination against masseur treatment, see note under article 750.

Persons within act in general.—This act is not limited to persons professing to be physicians and surgeons but includes any person treating or offering to treat any disease, etc. *Singh v. State* (Cr. App.) 146 S. W. 891.

Proof that defendant did not charge for his services directly, but told all who applied for treatment that he would receive from them "free will offerings," and that he actually did receive pay from patients, was sufficient to show that he practiced medicine for compensation. *Singh v. State* (Cr. App.) 146 S. W. 891.

One treating or offering to treat without medicine various diseases for a specific compensation is within the act. *Lewis v. State* (Cr. App.) 155 S. W. 523.

An officer, agent, or employé of a corporation who practices medicine without a license commits an offense, though he purports to act for the corporation. *Norwood v. State*, 70 App. 605, 158 S. W. 270.

Masseur or massage doctor.—A masseur who publicly represents himself as a masseur, and who limits his practice to that of a masseur, is exempt from the law requiring a certificate for the practice of medicine; but where he represents himself as a masseur, but undertakes to cure diseases for pay and represents himself as able to cure diseases, he must obtain the proper certificate. *Milling v. State* (Cr. App.) 150 S. W. 434; *Newman v. State*, 61 App. 338, 134 S. W. 688; *Dankworth v. State*, 61 App. 157, 136 S. W. 788.

A party who advertised in a local newspaper that he was a masseur doctor located at a certain place, and that he could heal all diseases, and who treated many persons who came to him afflicted with various ailments, for which he received compensation, was "practicing medicine," within the meaning of this article, and hence was required to have a license, although he prescribed and used no drugs, but only massage treatment. *Newman v. State*, 58 App. 223, 124 S. W. 956.

Osteopathy.—One practicing osteopathy was not entitled to practice his profession without a license. *Ex parte Collins*, 57 App. 2, 121 S. W. 501.

Laying on of hands.—This act prohibited the attempted treatment of disease by an unlicensed person by means of prayer and the laying on of hands. *Singh v. State* (Cr. App.) 146 S. W. 891.

Indictment and information.—Willson's Cr. Forms, 343.

See notes under art. 750.

Admissibility of evidence.—See notes under article 750.

Sufficiency of evidence.—See notes under article 750.

Art. 756. Practicing in violation of law, penalty.—Any person practicing medicine in this state in violation of the provisions of this law shall, upon conviction thereof, be fined in any sum not less than fifty dollars nor more than five hundred dollars, and by imprisonment in the county jail for a term not exceeding six months; and each day of such violation shall constitute a separate offense, and in no such case shall the violator be entitled to recover anything for the services rendered. [*Id.*, p. 228.]

See notes under art. 750.

Distinct offenses.—A conviction of unlawfully practicing medicine in March is no bar to a prosecution for practicing medicine upon another person in May. *Byrd v. State*, 72 App. 265, 162 S. W. 363.

Indictment.—Willson's Cr. Forms, 343.

Art. 757. [441] Not applicable, to what cases.—The provisions of this chapter shall not apply to any person who has been

regularly engaged in the general practice of medicine, in any of its branches or departments, in this state, for five consecutive years prior to January 1, 1875; nor to any person who may have legally qualified himself to practice medicine under the provisions of an act, entitled, "An act to regulate the practice of medicine," passed May 16, 1873; nor to all those who were practicing medicine in Texas prior to January 1, 1885; nor to all those who began the practice of medicine in this state after the above date, who have complied with the laws of this state, regulating the practice of medicine, in force. [O. C., Act 1901, p. 14.]

Historical.—Added in revising.

The Act of August 21, 1876, did not take effect until ninety days after its passage, *Logan v. State*, 5 App. 306; and as it expressly repealed the act of May 16, 1873, an indictment under the last named act would not lie in 1877, after its repeal. *Ellison v. State*, 6 App. 248.

Place of recording certificate.—One who qualified under the Act of 1873, but afterward removed to another county, must have his certificate also recorded in the latter county. *Hilliard v. State*, 7 App. 69.

Art. 758. Physicians, etc., to report births and deaths.—All physicians, surgeons or accoucheurs who may attend at the birth of a child, or, in the absence of such attendance, either parent of the child, shall report the fact to the clerk of the county court, together with the name of the parent or parents, the sex of the child and the race to which the child belongs, and whether of foreign or native parents, whether still born or alive, within thirty days after said birth occurs, under a penalty of five dollars for each failure to do so; to be collected as other fines for misdemeanors are. All physicians, surgeons, accoucheurs and coroners, cognizant of death, shall report the same, together with the race, nativity, age, sex, residence, whether alien or citizen, and the cause of death, to the clerk of the county court within thirty days after the occurrence, under a penalty of not less than five dollars nor more than fifty dollars for each failure to do so; these data to be recorded as a part of the vital statistics of the county and state; and the clerk of the county court shall be paid by the county ten cents for each birth or death so recorded, and he shall report monthly all these data to the department of public health and vital statistics. In default of so reporting, he shall be fined not less than fifty dollars for each offense. [Act 1903, p. 220.]

Explanatory.—This article is, in the main, superseded by the new Sanitary Code (post, art. 801, Rules 34-50). The new act does not, however, specify the particulars that shall be stated in reports of births and deaths. Though the State Board of Health is given power (Rule 38) to prescribe the form of birth and death certificates, it is possible that the above article may still have some vitality in determining the statistical facts required as to births and deaths.

Indictment.—*Willson's Cr. Forms*, 726, 727.

Art. 758a. Soliciting or drumming patients or patronage.—If any physician, surgeon, osteopath, masseur, or any other person who practices medicine or the art of healing the sick or the afflicted, with or without the use of medicine, shall employ or agree to employ, pay or promise to pay, or reward or promise to reward, any person, persons, firm, association of persons, co-partnership, or corporation for securing, soliciting or drumming patients or patronage, such physician, surgeon, osteopath, masseur, or any other person who practices medicine or the art of healing the sick or afflicted, with or without the use of medicine, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished as hereinafter provided. [Act 1911, p. 97, ch. 55, § 1.]

Art. 758b. Same; receiving compensation for soliciting patronage for physicians.—If any person, firm, association of persons, co-partnership or corporation shall accept or agree to accept any payment, fee or reward, or anything of value, for securing, solicit-

ing or drumming for patients or patronage for any physician, surgeon, osteopath, masseur or any other person who practices medicine or the art of healing with or without medicine shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished as hereinafter provided. [Id., § 2.]

Art. 758c. Same; penalty.—That any person violating any of the provisions of this Act shall, upon conviction thereof, be fined in any sum not less than \$100.00 nor more than \$200.00 for each and every offense, and each and every payment or reward or fee or agreement to pay or accept a reward or fee shall constitute a separate offense. [Id., § 3.]

Art. 758d. Same; newspaper advertising excepted.—Provided, that nothing in this Act shall be construed to prohibit the inserting in a newspaper or newspapers of an advertisement of a person's business, profession and place of business, or from advertising by hand-bills and paying for services in distributing same. [Id., § 4.]

Art. 758e. Incriminating testimony.—No person shall be exempt from giving testimony in any proceedings for the enforcement of this Act, but the testimony given by a witness shall not be used against him or her in any criminal action or proceeding, nor shall any criminal action or proceeding be brought against such witness on account of any testimony so given by him or her. [Id., § 5.]

CHAPTER SEVEN

DENTISTRY

<p>Art. 759. Persons practicing dentistry or dental surgery to obtain certificate.</p> <p>760. Unlawful to extract teeth, when.</p> <p>761. Board of examiners created.</p> <p>762. Appointed by governor.</p> <p>763. Before entering upon duties shall make oath.</p> <p>764. Shall keep record of what.</p> <p>765. Persons desiring to commence practice of dentistry, what is required of.</p>	<p>Art. 766. Members of board when not in session may act, when.</p> <p>767. License issued by board to be filed with and recorded by county clerk.</p> <p>768. Penalty for violating any provision of this law.</p> <p>769. Penalty for extracting teeth in advertising, etc.</p> <p>770. Burden of proof upon whom.</p>
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Article 759. Persons practicing dentistry or dental surgery to obtain certificate.—It shall be unlawful for any person to practice, or attempt to practice, dentistry or dental surgery in the state of Texas, without first having obtained a certificate from the state board of dental examiners; provided that physicians and surgeons may, in the regular practice of their profession, extract teeth or make application for the relief of pain; and, provided, further, that nothing herein shall apply to any person legally engaged in the practice of dentistry or dental surgery in this state, at the time of the passage of this law. [Act 1897, ch. 97, § 1; Act 1905, p. 143.]

Indictment and information.—Willson's Cr. Forms, 344.

It was not necessary that an information allege that accused was not legally engaged in such practice at the passage of the act. *Doyle v. State* (Cr. App.) 143 S. W. 630.

Art. 760. Unlawful to extract teeth, when.—It shall be unlawful for any person or persons to extract teeth, or perform any other operation pertaining to dentistry, for pay, or for the purpose of advertising, exhibiting or selling any medicine or instrument or business of any kind or description whatsoever, unless such person or persons shall first have complied with the provisions of this title. [Act 1897, ch. 97, § 2; Act 1905, p. 143.]

Indictment.—Willson's Cr. Forms, 344.

Art. 761. Board of examiners created.—A board of examiners, consisting of six practicing dentists of acknowledged ability as such, is hereby created, who shall have authority to issue certificates to persons in the practice of dentistry or dental surgery in the state of Texas, who are legally practicing the same at the time of the passage of this law, and issue certificates to all applicants who may hereafter apply to said board, and pass a satisfactory examination. [Act 1897, ch. 97, § 3; Act 1905, p. 143.]

Indictment.—Willson's Cr. Forms, 344.

Art. 762. Appointed by governor.—The members of said board shall be appointed by the governor, and shall serve for two years, excepting that the members of the board first appointed shall be made as follows:

Three for one year, and three for two years, respectively, and until their successors are duly appointed.

In case of vacancy occurring in said board by resignation, removal from the state, or by death, such vacancy may be filled for its unexpired term by the governor. [Act 1897, ch. 97, § 4; Act 1905, p. 143.]

Indictment.—Willson's Cr. Forms, 344.

Art. 763. Before entering upon duties shall make oath.—Before entering upon the duties of his office, each and every member of this board shall make oath before any officer authorized to administer an obligation who shall be empowered to use a seal of office, that he will faithfully discharge the duties incumbent upon him to the best of his ability. The same shall be filed for record with the county clerk in which affiant resides. The county clerk shall receive for recording the same, fifty cents. [Act 1897, ch. 97, § 4a; Act 1905, p. 144.]

Indictment.—Willson's Cr. Forms, 344.

Art. 764. Shall keep record of what.—Said board shall keep a record in which shall be registered the names and residences or places of business of all persons authorized under this title to practice dentistry or dental surgery in this state. It shall elect one of its members president, and one secretary thereof; and it shall meet at least once in each year, and as much oftener, and at such times and places as it may deem necessary. A majority of the members of said board shall constitute a quorum, and the proceedings thereof shall be open to the public. [Act 1897, ch. 97, § 5; Act 1905, p. 144.]

Indictment.—Willson's Cr. Forms, 344.

Art. 765. Persons desiring to commence practice of dentistry, what is required of.—Any person, desiring to commence the practice of dentistry or dental surgery within this state, after the passage of this law, shall, before commencing such practice, make application to said board, and, upon undergoing a satisfactory examination before said board, shall be entitled to a certificate from said board, granting such person the right to practice dentistry or dental surgery within this state. [Act 1897, ch. 97, § 7; Act 1905, p. 144.]

Indictment.—Willson's Cr. Forms, 344.

Art. 766. Members of board when not in session may act, when.—Any member of said board may, when the board is not in session, grant a license to practice dentistry to any person whom such member finds, on examination, to be qualified, on the payment of two dollars by such person. A license so granted shall be valid until the next meeting of the board, but no longer. Each member shall make a report of license, so granted by him, at the meeting of the board following the granting of the license. A

member shall not grant a license under the provisions of this article to one who has been rejected by the board as disqualified. [Act 1897, ch. 97, § 8; Act 1905, p. 144.]

Indictment.—Willson's Cr. Forms, 344.

Art. 767. License issued by board to be filed with and recorded by county clerk.—Every person to whom license is issued by said board of examiners shall, within thirty days from the date thereof, present the same to the clerk of the county in which he or she resides or expects to practice, who shall officially record said license in his office book, provided for that purpose, and shall be entitled to a fee of fifty cents for his services. [Act 1897, ch. 97, § 9; Act 1905, p. 144.]

Indictment.—Willson's Cr. Forms, 344.

Art. 768. Penalty for violating any provision of this law.—Any person who shall violate this law by practicing, or attempting to practice, dentistry or dental surgery within this state, without first complying with the provisions of this law, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum of not less than twenty-five nor more than three hundred dollars for each and every offense, each day in the practice constituting an offense. All fines collected from prosecutions under this law shall be appropriated to the common school funds in the county where collected. [Act 1897, ch. 97, § 12; Act 1905, p. 145.]

Indictment.—Willson's Cr. Forms, 344, 347.

Art. 769. Penalty for extracting teeth in advertising, etc.—Any person or persons who shall violate this law by extracting teeth, or performing any other operation pertaining to dentistry for the purpose of advertising, exhibiting or selling any medicine, instrument or business of any kind or description, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum of not less than twenty-five nor more than three hundred dollars for each and every offense. [Act 1897, ch. 97, § 13; Act 1905, p. 145.]

Indictment.—Willson's Cr. Forms, 344, 348.

Art. 770. [454] Burden of proof upon whom.—On the trial of any person indicted under the provisions of this law, it shall be incumbent upon the defendant, in order to exempt him from the penalties of this law, to show that he has authority under the law to practice dentistry in this state. [O. C.]

Indictment.—Willson's Cr. Forms, 344.

CHAPTER EIGHT

PHARMACY—PRACTICE OF

Art.		Art.	
771.	Unlawful for any person not licensed to conduct pharmacy or drug store.	776.	License and renewal, conspicuously posted.
772.	Persons heretofore registered entitled to certificate.	777.	When board to examine applicants and make annual report to governor.
773.	In order to be licensed what is required of applicant.	778.	Board to hold meetings for examination of applicants.
774.	When board shall enroll name of applicant and issue license.	779.	Member of board may issue temporary certificate, when.
775.	When board may issue license without examination.	780.	Board may charge and collect fees.
		781.	Penalty for violating this law.

Article 771. Unlawful for any person not licensed to conduct pharmacy or drug store.—It shall be unlawful for any person, not licensed as a pharmacist, within the meaning of this law, to con-

duct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drug, chemical or poison, or for the compounding of physician's prescriptions, or to keep exposed for sale at retail, any drug, chemicals or poisons, except as hereinafter provided, or for any person, not licensed as a pharmacist or assistant pharmacist within the meaning of this law, to compound, dispense or sell at retail, any drug, chemical, poison, or pharmaceutical preparation, upon the prescription of a physician or otherwise, or to compound physicians' prescriptions, except as an aid to, or under the supervision of, a person licensed as a pharmacist under this law, And it shall be unlawful for any owner or manager of a pharmacy, or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense or sell at retail, any medicine or poison, except as an aid to, or under the supervision of, a person licensed as a pharmacist. Provided, however, that nothing in this section shall be construed to prevent any person from engaging in the business herein described, as proprietors and owners thereof; provided such proprietors or owners shall have employed in his business, to conduct same, some one qualified under this act; nor to interfere with any legally registered practitioner of medicine or dentistry in the compounding of his prescriptions, or to prevent him from supplying his patients such medicine as he may deem proper; nor with exclusively wholesale business of any dealer who shall be licensed as a pharmacist, or who shall keep in his employ at least one person who is licensed as a pharmacist; nor with the selling at retail of non-poisonous domestic remedies; nor with the sale of patent or proprietary preparations, when sold in unbroken packages; nor with the sale of poisonous substances, which are sold exclusively for use in the arts, or for use as insecticides, when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word "poison" and the names of at least two readily obtainable antidotes. [Act 1907, p. 349.]

Prescription of physician.—Law held inapplicable to sales of liquor on prescriptions of physicians under a license taken out for that purpose. *Watson v. State*, 45 App. 509, 78 S. W. 504.

Indictment.—Willson's Cr. Forms, 345.

Art. 772. Persons heretofore registered entitled to certificate.—All persons heretofore registered by district boards as pharmaceutical examiners shall, upon presenting proof of such registration in accordance with the law regulating the practice of pharmacy then in force, and the payment of one dollar, be entitled to a certificate of registration as licensed pharmacist, under the meaning of this law, from the state board of pharmacy, without examination. Such application shall be made to the state board of pharmacy within ninety days after the first meeting of said board. Proprietors and employes of such proprietors who are actively engaged in the preparation of physicians' prescriptions, and compounding and vending of medicines in towns of less than one thousand inhabitants in the State of Texas, and also proprietors and employes of such proprietors who shall become so engaged in such towns during the next five years after the passage of this law, shall be exempt from examination; provided, he or she will register as required in this law, and, upon paying said board of pharmacy one dollar, shall receive a certificate of registration which shall entitle such person to practice pharmacy in towns of one thousand inhabitants or under. Provided, that should such person fail to apply for registration within ninety days, from and

after the first meeting of said board, said party shall be required to pay the same fee as in original registration. Every person who shall hereafter desire to be licensed as a pharmacist shall file with the secretary of the board of pharmacy an application, upon blanks furnished by the board of pharmacy for that purpose, duly verified under oath, setting forth the name and age of the applicant, the place or places at which, and the time spent in the study of the science and art of pharmacy, the experience in the compounding of physicians' prescriptions which the applicant has had under the direction of a legally licensed pharmacist, and shall appear at a time and place designated by the board of pharmacy, and submit to an examination as to his or her qualifications for registration as a licensed pharmacist or assistant pharmacist; provided, however, if any applicant should fail to pass a satisfactory examination, he or she may, at any subsequent meeting of the board of pharmacy within six months, be permitted to be re-examined without cost. [Id., p. 350.]

Indictment.—Willson's Cr. Forms, 345.

Art. 773. In order to be licensed what is required of applicant.

—In order to be licensed as a pharmacist within the meaning of this act, an applicant shall be not less than twenty-one years of age, and shall have been licensed as an assistant pharmacist for not less than two years prior to his application for license as a pharmacist, or he shall present to the board satisfactory evidence that he is a graduate of a reputable school or college of pharmacy, or that he has had four years' practical experience in pharmacy under the instruction of a pharmacist; and he shall also pass a satisfactory examination by or under the direction of a board of pharmacy. In order to be licensed as an assistant pharmacist, within the meaning of this law, an applicant shall not be less than eighteen years of age, and shall have a sufficient preliminary general education, and shall have not less than two years' experience in pharmacy, and shall pass a satisfactory examination by, or under the direction of the board of pharmacy. Provided, however, that in the case of persons who have attended a reputable school or college of pharmacy, the actual time of attendance at school or college of pharmacy, may be deducted from the time of experience required of pharmacist and assistant pharmacist, but in no case shall less than two years' experience be required for registration as a licensed pharmacist. [Id., p. 350.]

Art. 774. When board shall enroll name of applicant and issue license.—If the applicant for license as a pharmacist or assistant pharmacist has complied with all the requirements of the two preceding articles, the board of pharmacy shall enroll his name upon the register of pharmacist or assistant pharmacist, and issue to him a license, which shall entitle him to practice as pharmacist or assistant pharmacist for a period of two years from the date of said license. The board of pharmacy may refuse to grant a license to any person guilty of felony or gross immorality, or who is addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him unfit to practice; and the board of pharmacy, after due notice and herein may revoke a license for like cause, or any license which has been procured by fraud. [Id., p. 351.]

Art. 775. When board may issue license without examination.—The board of pharmacy may issue license to practice as pharmacist or assistant pharmacist in this state, without examination, to such persons as have been legally registered or licensed as pharmacists or assistant pharmacists in other states or foreign coun-

tries; provided, that the applicant for such license shall present satisfactory evidence of qualifications equal to those required from licentiates in this state, and that he was registered or licensed by examination in such other state or foreign country, and that the standard of competency required in such other state or foreign country accords similar recognition to the licentiates of this state. Applicants for license under this article shall, with their application, forward to the secretary of the board of pharmacy the same fees as are required of other candidates for license. [Id., p. 351.]

Art. 776. License and renewal conspicuously posted.—Every certificate of license to practice as pharmacist or assistant pharmacist, and every license to any proprietor or employé to conduct a drug store in towns of not more than one thousand inhabitants, as above provided, and every renewal of such license, shall be conspicuously exposed in the pharmacy, or drug store or place of business of which the pharmacist, or assistant pharmacist, or other person to whom it is issued, is the owner or manager, or in which he is employed. Every licensed pharmacist or assistant pharmacist who desires to continue in the practice of his profession shall, within thirty days next preceding the expiration of his license or permit, file with the board an application for the renewal thereof, which application shall be accompanied by the fee hereinafter prescribed. If the board shall find that the applicant has been legally licensed in this state, and is entitled to renewal of license, or to a renewal of such permit, it shall issue to him a certificate attesting the fact. If any pharmacist or assistant pharmacist shall fail, for a period of sixty days after the expiration of his license, to make application to the board for its renewal, his name shall be erased from the register of licensed pharmacist or assistant pharmacist; and such person, in order to become registered as a licensed pharmacist or assistant pharmacist, shall be required to pay the same fee as in the case of original registration. The name of the responsible manager of every pharmacy, drug store or apothecary shop, shall be conspicuously displayed outside of such place of business. [Id., p. 351.]

Art. 777. When board to examine applicants and make annual report to governor.—It shall be the duty of the board to examine all applications for registration of such persons as may be entitled to the same under the provisions of this law, and to make an annual report to the governor, a copy of which shall be furnished to the Texas state pharmaceutical association, upon the condition of pharmacy in Texas, which report shall embrace all the proceedings of the board, and give an itemized account of all money received and disbursed by said board; and said itemized account of money paid out by said board shall show to whom paid and specifically for what purpose it was paid, and also the names of all pharmacists duly registered under this act. And it shall be the further duty of the board to deliver all money on hand at the end of the term of each board after all outstanding debts have been paid over to their successors in office. [Id., p. 353.]

Art. 778. Board to hold meetings for examination of applicants.—The Texas state board of pharmacy shall hold meetings for the examination of applicants for registration, and for the transaction of such other business as may legally come before it, at least once in four months, and such additional meetings as may be necessary; provided, that said regular meetings shall be held on the third Tuesdays of January, May and September of each year, in such cities or places as the said board may select, or such cities or places as shall be deemed most convenient for applicants. Due

notice of such meetings shall be given by publication in such papers as may be selected by the board, thirty days in advance of said meetings. Three members shall constitute a quorum for the transaction of any and all business. The president and secretary shall have the power to administer oaths in all matters pertaining to the examination and registration of pharmacist and assistant pharmacist. The board shall keep a record of its proceedings and a register of all persons to whom certificates or license as pharmacist or assistant pharmacist and permits have been issued, and all renewals thereof; and the books and register of the board or a copy of any part thereof, certified by the secretary, shall be accepted as competent evidence in all the courts. [Id., p. 353.]

Art. 779. Member of board may issue temporary certificate, when.—Any member of the board of pharmacy may issue a temporary certificate upon satisfactory proof that the applicant is competent; said temporary certificate shall be null and void after the first meeting of the board of pharmacy next after the granting said temporary certificate; provided, that not more than one temporary certificate shall ever be granted to any one person. [Id., p. 354.]

Art. 780. Board may charge and collect fees.—The board of pharmacy shall be entitled to charge and collect the following fees: For the examination of an applicant for license as a pharmacist, five dollars; for the examination of an applicant for license as an assistant pharmacist, two dollars and fifty cents; for renewing the license as a pharmacist, one dollar; for renewing the license as assistant pharmacist, one dollar; for issuing license to any proprietor or employé to conduct a drug store in towns of not more than one thousand inhabitants, one dollar; all fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists, or assistant pharmacists, or before any license or permit or any renewal thereof may be issued by the board. [Id., p. 354.]

Art. 781. Penalty for violating this law.—Whoever, not being licensed as a pharmacist, shall conduct or manage any drug store or other place of business for the compounding, dispensing or sale at retail of any drugs, medicine or poisons, or for the compounding of physicians' prescriptions contrary to the provisions of articles 771 and 772, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars, and each week such drug store or pharmacy or other place of business is so unlawfully conducted shall be held to constitute a separate and distinct offense. Whoever, not being licensed as a pharmacist or assistant pharmacist, shall compound, dispense or sell at retail, any drugs, medicine, poison or pharmaceutical preparation, even upon a physician's prescription or otherwise, and whoever, being the owner or manager of the drug store, pharmacy or other place of business, shall cause or permit any one not licensed as a pharmacist or assistant pharmacist, to dispense, sell at retail or compound any drug, medicine, poison or physician's prescription, contrary to the provisions of articles 771 and 772, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten dollars nor more than one hundred dollars. Any license or permit or renewal thereof, obtained through fraud, or by any false or fraudulent representations, shall be void and of no effect in law. Any person who shall make any false or fraudulent representations for the purpose of procuring a license or permit or renewal thereof, either for himself or for another, shall be deemed guilty of a mis-

demeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars; and any person who shall wilfully make a false affidavit for the purpose of procuring a license or permit or renewal thereof, either for himself or for another, shall be deemed guilty of perjury, and, upon conviction thereof, shall be subject to like penalties as in other cases of perjury. Whoever, being the holder of any license or permit granted under this act, shall fail to expose such license or permit, or any renewal thereof, in a conspicuous position in the place of business to which such license or permit relates, or in which the holder thereof is employed, contrary to the provisions of article 776, shall, upon conviction thereof, be fined not less than five dollars nor more than twenty-five dollars; and each week that such license, permit or renewal shall not be exposed, shall be held to constitute a separate and distinct offense; and whoever, being the holder of any license or permit granted under this act, shall, after the expiration of such license or permit, and without renewing the same, continue to carry on the business for which such license or permit was granted, contrary to the provisions of article 776, shall, upon conviction thereof, be fined not less than five dollars nor more than twenty-five dollars. [Id., p. 354.]

Indictment.—Willson's Cr. Forms, 346.

CHAPTER NINE

NURSING AND EMBALMING

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| <p>Art.
782. Nursing; persons entitled to registration; certificate of registration; practice without certificate.</p> <p>783. Penalty for.</p> <p>784. Embalming; persons engaged or desiring to engage in practice, what required of.</p> | <p>Art.
785. Shall annually obtain renewal license.</p> <p>786. Unlawful for persons not registered to practice.</p> <p>787. Not to apply when and to whom.</p> <p>788. Penalty for violation.</p> |
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Article 782. Nursing; persons entitled to registration; certificate of registration; practice without certificate.—That all nurses who are engaged in nursing at the time of the passage of this Act, and who shall show to the satisfaction of the said Board that they are of good moral character and were graduated prior to April, 1909, from a training school connected with a hospital or sanitarium giving two years general training, or prior to the year 1901, having given 18 months general training, and who maintains in other respects proper standards, shall be entitled to registration without examination, provided they register prior to January 1st, 1912. All persons who have heretofore received registration certificates in compliance with an Act of the Regular Session of the Thirty-first Legislature, being "An Act to define and regulate the practice of professional nursing, to create a Board of Nurse Examiners for the examination and licencing [licensing] of nurses, and to prescribe their qualifications, to provide for their proper registration and for the revocation of certificates, and to fix suitable penalties for the violation of this Act," shall not be required to obtain new registration certificates, but such certificates heretofore secured under said Act of the Thirty-first Legislature shall be in all things valid and binding and of full force and effect. All persons who are in training in the wards of a general hospital or sanitarium in this State where a two-years' training with a systematic course of instruction is given at the time of the passage of this Act, and shall graduate hereafter, and possess the above quali-

fications, shall be entitled to registration without examination. Provided application for registration certificate shall be made to the Board herein provided for, who shall issue proper certificate of registration without examination, if the applicant be found entitled thereto under the provisions of this Act. All nurses who have served in the army or navy of the United States, and have been honorably discharged, shall be entitled to registration without examination. It shall be unlawful hereafter for any person to practice nursing as a registered nurse, without a certificate from the State Board of Nurse Examiners. A nurse who has received his or her certificate according to the provisions of this Act shall be styled and known as a "Registered Nurse." No other person shall assume such title or use the abbreviation "R. N." or any other letters to indicate that he or she is a registered nurse. The Board in each instance shall require a registration fee of five (\$5.00) dollars. [Act 1909, ch. 117, § 4, amended; Act 1911, p. 166, ch. 89, § 1, superseding art. 782, revised Pen. Code.]

Explanatory.—Acts 1911, ch. 89, § 1, amends section 4 of ch. 117, of Acts 31st Legislature (1909) and thus supersedes art. 782, revised Pen. Code.

Art. 783. Penalty for.—Any person violating the provisions of this law, or who shall make any false representations to said board in applying for a certificate, shall be guilty of a misdemeanor, and, upon conviction, be punished by a fine of not more than three hundred dollars. [Act 1909, p. 228.]

Art. 784. Embalming; persons engaged or desiring to engage in practice, what required of.—Every person engaged, or desiring to engage, in the practice of embalming, in connection with the care and disposition of dead human bodies, within the state of Texas, shall make a written application to the State board of embalming for a license, accompanying the same with a license fee of five dollars, whereupon the applicant, as aforesaid, shall present himself or herself before said board at a time and place to be fixed by said board; and if the board shall find upon examination that the applicant is of good moral character, possessed of the knowledge of the venous arterial system, the location of the heart, lungs, bladder, womb and other organs of the human body, and the location of abdominal, pleural and thoracic cavities, location of the carotid, brachial, radial, ulnar, femoral and tibial arteries, a knowledge of the science of embalming and the care and disposition of the dead, and has a reasonable knowledge of sanitation and the disinfection of bodies of diseased persons, and the apartment, clothing and bedding in case of death by infectious or contagious diseases, the board shall issue to said applicant a license as a duly licensed embalmer, authorizing him to practice the science of embalming. Such license shall be signed by a majority of the board and attested by its seal. All persons receiving license under the provisions of this law shall have said license registered in the county clerk's office in the county in the jurisdiction of which it is proposed to carry on said practice, and shall display said license in a conspicuous place of business of said person so licensed. [Act 1903, p. 124.]

Art. 785. Shall annually obtain renewal license.—That every registered embalmer, who desires to continue the practice of his profession, shall annually thereafter, during the time he shall continue in such practice, on such date as said board may determine, pay to the secretary of said board a fee of two dollars for the renewal of said license. [Id., p. 125.]

Art. 786. Unlawful for persons not registered to practice.—It shall be unlawful for any person not a registered embalmer, to embalm or pretend to practice the science of embalming, in connection

with the care and disposition of the dead, unless said person is a registered embalmer, within the meaning of this chapter. [Id., p. 125.]

Art. 787. Not to apply when and to whom.—That nothing in this law shall apply to, or in any manner interfere with, the duties of any municipal, county, and state officer, or state institution, nor shall this law apply to any person simply engaged in the furnishing of burial receptacles for the dead, but shall only apply to such person or persons engaged in the business of embalming, in connection with the care and disposition of the dead. [Id., p. 125.]

Art. 788. Penalty for violation.—That any person who shall embalm, or attempt to practice the science of embalming, in connection with the care and disposition of the dead, without having complied with the provisions of this law, shall be guilty of a misdemeanor, and, upon conviction thereof, before any court, shall be sentenced to pay a fine of not less than fifty dollars or not more than one hundred dollars for each and every offense. All fines collected for the violation of any of the provisions of this law shall be paid into the public school fund of the state. [Id., p. 125.]

BARBERING—REGULATING SAME

Laws 1907, ch. 141, p. 273, relating to this subject was held unconstitutional in *Jackson v. State*, 55 App. 557, 117 S. W. 818, on the ground that it was a mechanical pursuit, and subject to a tax, in view of Const. art. 8, § 1, and on the further ground that inasmuch as it excepted certain persons from its operation, it was discriminatory and violated section 3 of the Bill of Rights forbidding the granting of special privileges.

CHAPTER TEN

VIOLATIONS OF QUARANTINE

Art.	Art.
789. Vessel landing from infected port.	795. Evading quarantine guard, etc.
790. Passing station without permission.	796. Violating quarantine regulations.
791. Going ashore without permission.	797. Conductor or person in charge of train or steamboat.
792. Landing goods without permission.	798. Merchant or person violating governor's proclamation.
793. Leaving quarantine station.	799. Physician knowingly concealing case of contagious disease.
794. Officer, etc., disobeying, etc., quarantine law.	

Article 789. [472] Vessel landing from infected port.—After the legal establishment of any quarantine station on the coast of this state, if any vessel shall land or arrive at such station from any infected port without a bill of health from the proper officer of said port, or with a false bill of health, the master or commanding officer of such vessel shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred nor more than five thousand dollars. [Act Aug. 13, 1870, p. 75; amended Act 1901, p. 305.]

Indictment.—Willson's Cr. Forms, 352.

Art. 790. [473] Passing station without permission.—Any master or commanding officer of a vessel that passes or attempts to pass any quarantine station on the coast of this state, during the continuance of the quarantine, without having first obtained permission from the health officer of such station so to do, shall be punished by imprisonment in the penitentiary not less than two nor more than five years, or by fine not less than five hundred nor more than ten thousand dollars. [Act Aug. 13, 1870, p. 75.]

Indictment.—Willson's Cr. Forms, 353.

Art. 791. [474] Going ashore without permission.—Any person belonging to or on board of a vessel placed under quarantine, who shall go ashore without the written permission of the health

officer of the station, shall be fined not less than fifty nor more than five hundred dollars. [Id.]

Indictment.—Willson's Cr. Forms, 354.

Art. 792. [475] Landing goods without permission.—Any master or officer of a vessel placed under quarantine, who shall land or permit to be landed from said vessel any goods, wares, merchandise or article whatsoever, while the same is under quarantine, without the written permission of the health officer of the quarantine station, shall be fined not less than fifty nor more than one thousand dollars for each article so landed. [Id.]

Indictment.—Willson's Cr. Forms, 355.

Art. 793. [476] Leaving quarantine station.—Any person detained at any quarantine station, who shall wilfully absent himself without leave of the officer having charge thereof, shall be deemed guilty of a misdemeanor, and, on conviction thereof by any court of competent jurisdiction, shall be punished by a fine of not less than ten dollars nor more than one thousand dollars. [Act April 12, 1883, p. 81.]

Indictment.—Willson's Cr. Forms, 356.

Art. 794. [477] Officer, etc., disobeying, etc., quarantine law.—Any health officer, guard or other employé, who shall knowingly and wilfully disobey or in any manner knowingly neglect or fail to perform any duty imposed upon him by the provisions of quarantine laws, rules and regulations of this state, or who shall disobey, knowingly, an order emanating from superior authority, shall be fined, upon conviction by a court of competent jurisdiction, in a sum not exceeding one thousand dollars; provided, that, in the meaning of this article, the governor and state health officer shall alone be deemed superior authority. [Id.; quarantine law, Act 18th Leg., p. 17.]

Indictment.—Willson's Cr. Forms, 357, 358.

Art. 795. [478] Evading quarantine guards, etc.—Any person coming from any port or district infected with yellow fever or any other infectious or contagious disease, who shall knowingly evade any guard or pass through any cordon of quarantine duly established, shall be deemed guilty of a misdemeanor, and, upon conviction by any court of competent jurisdiction, be punished by fine not exceeding one thousand dollars. [Act April 11, 1883, p. 81.]

Indictment.—Willson's Cr. Forms, 359.

Art. 796. [478a] Violating quarantine regulations.—Any person, who shall knowingly and wilfully violate any regulation of quarantine established by the governor, the state health officer, or the health officer of any county or city of this state, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty nor more than one thousand dollars. [Act 1901, p. 305.]

See art. 801, post.

Art. 797. [478b] Conductor or person in charge of train or steamboat.—If any conductor, or person in charge of any train, ship, steamboat or any other kind of common carriers, shall knowingly and wilfully bring into this state any person or thing contrary to the quarantine regulations as proclaimed by the governor, or state health officer, such conductor or person so knowingly and wilfully offending, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not to exceed five hundred dollars. [Id., p. 305.]

See art. 801, post.

Art. 798. [478c] Merchant or person violating governor's proclamation.—Any merchant or other person who shall knowingly

and wilfully order the shipment, or knowingly and wilfully receive any merchandise, whose shipment into the state is prohibited by the governor's proclamation, or any person who knowingly and wilfully sells and proceeds to deliver such merchandise or other article as above, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding five hundred dollars. [Id., p. 305.]

Indictment.—Willson's Cr. Forms, 362.

Art. 799. [478d] Physician knowingly concealing case of contagious disease.—Any physician who shall knowingly conceal any case of contagious disease, or who shall fail to report to the county or city health officer any case of contagious disease of which he may have knowledge shall, upon conviction, be fined in any sum not less than twenty-five dollars nor more than one hundred dollars. [Id., p. 305.]

Explanatory.—This article is in part superseded by Rule 1 of the new Sanitary Code (art. 801, post). In view of the concluding paragraph of the Sanitary Code, the offense of concealing a contagious disease, not described in Rule 1, still subsists.

Indictment.—Willson's Cr. Forms, 360, 361.

CHAPTER TEN A VETERINARIANS

Art.	Art.
799a. Compliance with requirements.	799e. Practice without compliance with act; penalty.
799b. Application for license; examination; provisos.	799f. What constitutes "practicing"; United States officers, non-resident practitioners, and other persons excepted.
799c. Payment of fee; persons excepted; disposition; bond.	799g. Grand jury; charge to.
799d. Registration of license; fee; removal to other county.	

Article 799a. Compliance with requirements.—That no person shall practice veterinary medicine or veterinary surgery in any of their departments, including veterinary dentistry, within this State, unless and until such persons shall have complied in all respects with the provisions of this Act. [Act 1911, p. 132, ch. 76, § 1.]

Constitutionality of act.—The regulation of the practice of veterinary medicine, surgery, and dentistry is within the police powers of the state. *Pistole v. State* (Cr. App.) 150 S. W. 618.

This act, being a police regulation, and not a tax measure, is not violative of Const. art. 8, §§ 1, 2, requiring taxation to be equal and uniform. *Id.*

This act is not violative of Const. U. S. art. 4, § 2, providing that the citizens of each state shall be entitled to the privileges and immunities of citizens of the several states, nor of the due process and equal protection provisions of the fourteenth amendment, despite the provisions of arts. 799c, 799d, 799f. *Id.*

Arts. 799a, 799b are not violative of Const. art. 1, §§ 3, 17, 19, providing that all men shall have equal rights, that private property shall not be taken for public use without adequate compensation, and that no citizen of the state shall be deprived of property, privileges, or immunities, except by due process of law. *Id.*

The title of this act: "An act to regulate the practice of veterinary medicine, surgery and dentistry; creating a board for the examination of applicants for the practice of veterinary medicine, surgery and dentistry; prescribing their powers, duties and qualifications; said board to be known as the 'State Board of Veterinary Examiners;' prescribing penalties for a violation of the provisions of this act, and declaring an emergency"—is not open to the objection that it is too general, and does not embrace the provisions of the act. *Id.*

Board of examiners.—In the trial of one for violating this act, it was no defense that the board of examiners consisted of only five members, though seven are required by law, and that three of the five were graduates of the same school; the presumption being that the Governor has not violated his sworn duty, such board being at least a de facto board, and the section of the statute requiring that no two members of the board shall be graduates of the same college would not disqualify the board, though more than two of them were graduates of a particular college, where the members so graduating were also graduates of other and diverse colleges. *Pistole v. State* (Cr. App.) 150 S. W. 618.

Art. 799b. Application for license; examination; provisos.—That any person desiring to practice veterinary surgery in this State shall make application for license to said State Board of

Veterinary Medical Examiners upon blanks furnished by said Board for such purpose. Said application shall be accompanied by the fee hereinafter prescribed and by satisfactory proof that the applicant is of good standing and character. His diploma shall be submitted for inspection by the Board. When these preliminary requirements are satisfied, the applicant shall present himself before the Board for examination upon the following subjects: Veterinary anatomy, veterinary pathology, chemistry, veterinary surgery, veterinary obstetrics, veterinary materia medica, veterinary sanitary science and police and veterinary practice. Provided, that until January first, 1912, persons who have been engaged in the practice of veterinary surgery or any of the branches thereof, including veterinary dentistry, in the State of Texas, as their principal occupation for at least one year immediately prior to the passage and approval of this Act, and are of good moral character, shall be entitled to a certificate of license on application to the Board, presentation of satisfactory evidence and payment of the regular application fee hereinafter prescribed. Such license to expire at the end of one year from date of issuing. Provided that nothing in this Act shall prohibit any person who has practiced veterinary surgery for five years prior to the enactment of this law from practicing in their county or residence only, without license by making affidavit before the district clerk of his county that he has practiced veterinary surgery for five years, but if such person shall move from such county of residence he shall comply with all the requirements of this Act before he shall be allowed to practice. [Id., § 5.]

Art. 799c. Payment of fee; persons excepted; disposition; bond.—That every person applying to said Board for a license to practice shall accompany such application with a fee of five dollars, which fee shall in no case be refunded; provided, the payment of a license fee of five dollars shall not be required of those who have practiced veterinary surgery in Texas for as much as one year before this Act shall become operative. All fees shall be held in the custody of the secretary-treasurer who shall give bond in the sum of two thousand dollars for their safe keeping. [Id., § 7.]

Art. 799d. Registration of license; fee; removal to other county.—That any person receiving a certificate of license from the Board of Veterinary Medical Examiners shall forthwith have it recorded in the office of the district clerk of the county in which he makes his residence, and shall display it in his regular place of business. The date of recording shall be recorded thereon, and said license, when so recorded, shall not be collaterally questioned, except as hereinafter provided. Until the license is recorded the holder shall not exercise any of the rights or privileges therein conferred; and in case said license is not recorded within three months from its date of issue it shall become invalid. The district clerk shall be paid his fee for recording such certificate by holder thereof. Any registered veterinarian removing his residence from one county in this State into another county in order to practice shall in like manner record his certificate of license in the county to which he removes. Practitioners who have registered in the county in which they reside may go from one county to another on professional business without being required to register. [Id., § 8.]

Art. 799e. Practice without compliance with act, penalty.—That every person who practices or attempts to practice veterinary medicine, surgery and dentistry in this State without first having complied with the provisions of this Act shall for each and every

day of such practice be guilty of a misdemeanor, and upon conviction thereof shall be fined in the sum of not less than twenty-five dollars nor more than two hundred dollars. [Id., § 12.]

Art. 799f. What constitutes "practicing"; United States officers, non-resident practitioners, and other persons excepted.—That any person shall be regarded as practicing veterinary medicine, surgery or dentistry within the meaning of this Act who professes publicly to be a veterinary surgeon or dentist, or who appends to his name any initials or title implying qualifications to practice or who shall treat, operate on or prescribe for any physical ailment in or any physical injury to or deformity of any domestic animal for which he shall receive compensation, either directly or indirectly. Nothing in this Act shall be construed to interfere with or punish veterinarians in the United States Army or in the United States Bureau of Animal Industry, while so commissioned, or any lawfully qualified veterinarians residing in other States or countries meeting registered veterinarians of this State on consultation, or any veterinarian residing on the border of a neighboring State and duly authorized under the laws thereof to practice extends [extending] into the limits of this State; provided, that such practitioner shall not open any office or appoint a place to meet patients within the limits of Texas. Nothing in this Act shall apply to persons gratuitously treating animals. It is further provided that the operations known as "dehorning," "castrating," and "spaying" shall not be regarded as the practice of veterinary surgery, nor the vaccination of cattle for blackleg as the practice of veterinary medicine, and nothing in this Act shall be construed to prohibit any one whomsoever from performing any of these operations on any wild or domestic animal. [Id., § 13.]

Art. 799g. Grand jury; charge to.—That the grand jury of each county in this State is hereby given inquisitorial power over all offenses against or violations of this Act, and the judges of the State district courts shall give the same in their charges to the grand juries, and it shall be the duty of the Board of Veterinary Medical Examiners or any member thereof, to report any violation of this Act to the proper authority. [Id., § 15.]

See art. 362a, ante.

CHAPTER ELEVEN

TEXAS STATE BOARD OF HEALTH

Art. 800. Creating same.	Art. 805g. Same; permitting animals to run at large.
801. Sanitary Code.	805h. Repeal.
802-805. [Amended.]	806. Members of board, inspectors and officers constituted peace officers.
805a. Charbon districts.	807. Sheriff and other officers to do what.
805b. Report of animals and persons suffering from charbon or anthrax.	808. When and by whom buildings and premises may be examined and inspected.
805c. Destruction of carcasses of animals dying from charbon or anthrax.	809. Oaths may be administered when and by whom.
805d. Quarantine of animals infected.	810. Witness testifying falsely, guilty of perjury.
805e. Proclamation of quarantine.	
805f. Election for prevention of animals from running at large in county within charbon districts.	

Article 800. Creating same.—The department of public health and vital statistics as now existing under the laws of this state is hereby abolished, and that there be created and established, in its stead, a state board of health, to be officially designated as Texas state board of health, which shall consist of seven members, who

shall be legally qualified practicing physicians, who shall have had at least ten years' experience in actual practice of medicine within the state of Texas, of good professional standing, who shall be graduates of reputable medical colleges, to be appointed biennially by the governor as soon as practicable after the passage of this bill, and thereafter on or before the tenth day of March, following his inauguration. One member of said board, who shall be appointed by the governor and confirmed by the senate, shall be designated by the governor as state health officer, and who shall be president and executive officer of the board. The members of said board shall hold their office for a term of two years, and until their successors shall be appointed and qualified, unless sooner removed for cause. [Act 1909, p. 340.]

Art. 801. Sanitary Code.—The following rules are hereby enacted as the "Sanitary Code for Texas," adopted for the promotion and protection of the public health and for the general amelioration of the sanitary and hygienic condition within this State, for the suppression and prevention of infectious and contagious diseases, and for the proper enforcement of quarantine, isolation and control of such diseases, to wit.

QUARANTINE AND DISINFECTION

Rule 1. *Physicians Shall Report Contagious and Pestilential Diseases and Deaths from Same.*—Every physician in the State of Texas shall report in writing or by an acknowledged telephone communication to the local health authority, immediately after his or her first professional visit, each patient he or she shall have or suspect of suffering with any contagious disease, and if such disease is of a pestilential nature, he shall notify the President of the State Board of Health at Austin by telegraph, or telephone at State expense, and he or she shall report to the said health authority every death from such disease immediately after it shall have occurred. The attending physician is authorized and it is made his duty to place the patient under restrictions of character described hereinbelow in the case of each and every respective disease.

Rule 2. *Local Health Authority Means City or County Health Officer or Local Board of Health.*—For the purpose of these regulations, the phrase "local health authority" shall be held to designate the city or county health officer, or local board of health, within their respective jurisdictions.

Rule 3. *"Contagious Diseases" Shall Include Asiatic Cholera, etc., and Be Reported to the President of the State Board of Health.*—The phrase "contagious disease" as used in these regulations shall be held to include the following diseases, whether contagious or infectious; and as such shall be reported to all local health authorities and by said authorities reported in turn to the President of the State Board of Health: Asiatic cholera, bubonic plague, typhus fever, yellow fever, leprosy, smallpox, scarlet fever (scarlatina), diphtheria (membranous croup), epidemic cerebro-spinal meningitis, dengue, typhoid fever, epidemic dysentery, trachoma, tuberculosis and anthrax.

Rule 4. *City and County Health Officers to Keep Record of Contagious Diseases.*—City and county health authorities shall keep a careful and accurate record of all cases of contagious diseases as reported to them, with the date, name, age, sex, race, location and such other necessary data as may be prescribed by the State Board of Health. And they shall also make a monthly report of all contagious diseases, of which they may be cognizant, to the President of the State Board of Health, before the fifth of the following month, upon blank forms provided by the State Board of Health. The reports on tubercu-

losis are to be privately kept and are to be considered in the light of a confidential communication, not for the purpose of isolation, but with the object of education in sanitary precautions, and to supply literature of the State Board of Health.

Rule 5. *Rules and Regulations as to Quarantine and Disinfection To Be Observed by Health Authorities, etc.*—The following rules of instruction for the regulation of quarantine, isolation and disinfection in the several contagious diseases, hereinbefore mentioned, are to be observed by all boards of health, health officers, physicians, school superintendents and trustees, and others. All health authorities of counties, cities, and towns in this State are hereby directed and authorized to establish local quarantine, hold in detention, maintain isolation and practice disinfection as hereinafter provided for, of all (such infected) persons, vehicles or premises which are infected or are suspected of being infected with any of the above named diseases whenever found.

(a) Absolute quarantine includes, first, absolute prohibition of entrance to or exit from the building or conveyance except by officers or attendants authorized by the health authorities, and the placing of guards if necessary to enforce this prohibition; second, the posting of a warning placard stating "contagious disease," in a conspicuous place or places on the outside of the building or conveyance; third, the prohibition of the passing out of any object or material from the quarantined house or conveyance; fourth, provision for conveying the necessaries of life under careful restrictions to those in quarantine.

(b) Modified quarantine includes, first, prohibition of entrance and exit, and in absolute quarantine except against certain members of the family authorized by the health authorities to pass in and out under certain definite restrictions; second, the placing of a placard as before; third, isolation of patient and attendant; fourth, prohibition of the carrying out of any object or material unless the same shall have been thoroughly disinfected.

(c) Absolute isolation includes, first, the confinement of the patient and attendants to one apartment or suite of apartments, to which none but authorized officers or attendants shall have admission; second, screening of room and entire house if necessary with not less than 16-mesh wire gauze; third, the prohibition of passing out of the sick room of any object or material until the same has been thoroughly disinfected; fourth, protection of the air of the house by hanging a sheet, kept constantly moist with a disinfectant solution, over the doorway of the patient's room or rooms and reaching from the top of the floor; fifth, if in the opinion of the local health authority the patient can not be treated, with reasonable safety to the public, at home, the removal of the patient and exposures to a contagious disease hospital or pest house.

(d) Modified isolation includes the confinement of the patient and attendants to one room or suite of rooms, to which none but authorized officers or attendants shall have admission, but allowing the attendants to pass out of the room after disinfection of person and complete change of clothing; second, screening as above mentioned; third, the prohibition of passing any object or material out of the sick room until it has been disinfected; fourth, protection of the doorway as before.

(e) Special isolation includes, first, prohibition of patient from attending any place of public assemblage; second, the providing of separate eating utensils for the patient; third, prohibition of sleeping with others or using the same towels or napkins.

(f) By complete disinfection is meant disinfection during illness, under direction of attending physician, of patient's body, of all excretions or discharges of patient and of all articles of clothing and

utensils used by patient, and after recovery, death or removal, the disinfection of walls, woodwork, furniture, bedding, etc.

(g) By partial disinfection is meant disinfection of discharges or excretions of patients and their clothing and the room or rooms occupied by the patient during illness.

Rule 6. *Disinfection Shall Be Done According to Direction of State Board of Health.*—All disinfection prescribed in these regulations shall be a part of the control of the disease, and shall be done according to the direction of the Texas State Board of Health in its circular on disinfection.

Rule 7. *Health Authority Shall Placard All Houses Where Contagious Diseases Exist.*—Upon notice that smallpox, diphtheria, scarlet fever, or other quarantinable disease exists within its jurisdiction, it shall be the duty of the local health authority to have the house in which such disease prevails placarded by placing a yellow flag or card not less than eight inches wide and twelve inches long with the words "contagious disease" and the quarantine regulations printed thereon in a conspicuous place on said house.

Rule 8. *Persons Forbidden Going to or Leaving Quarantined Premises.*—After the house is flagged, or placarded, all persons, except the attending physician or health officer, are forbidden from going in or leaving such premises, without the permission of the local health authority, and the carrying off, or causing to be carried off, of any material whereby such disease may be conveyed, is prohibited until after the disease has abated and the premises, dwelling and clothing have been disinfected and cleaned as the local health authority may direct.

Rule 9. *Person Affected or Exposed to Contagious Diseases Shall Obey Health Authority.*—It shall be the duty of all persons infected with any contagious disease, or who, from exposure to contagion from such disease, may be liable to endanger others who may come in contact with them to strictly observe such instructions as may be given them by any health authority of the State, in order to prevent the spread of such contagious disease, and it shall be lawful for such health authorities to command any person thus infected or exposed to infection to remain within designated premises for such length of time as such authority may deem necessary.

Rule 10. *Persons Having Certain Diseases Shall Not Be Allowed on Thoroughfares.*—All persons having any quarantinable disease are prohibited from riding on any public vehicle or conveyance, and from being upon public thoroughfares or in public assemblages.

Rule 11. *Placard Shall Not Be Destroyed or Removed.*—No person, or persons, shall alter, deface, remove, destroy or tear down any card posted by a local health authority. The occupant or person having possession or control of a building upon which a quarantine notice has been placed shall within twenty-four (24) hours after the destruction or removal of such notice by other than the proper health authority, notify the local health authority of such destruction or removal.

Rule 12. *Quarantinable Pestilential Diseases; Absolutely Quarantined.*—In the management and control of the following pestilential diseases: cholera, plague, typhus fever and yellow fever, the house must be placarded, premises placed in absolute quarantine, patient in absolute isolation and a complete disinfection done upon death or recovery taking place.

Rule 13. *Quarantinable Dangerous Contagious Diseases; Modified Quarantine.*—In the management and control of leprosy, smallpox, scarlet fever (scarlatina), diphtheria (membranous croup), and dengue, it is required that the house be placarded, premises placed in modified

quarantine, patient in modified isolation, and complete disinfection done upon death or recovery.

Rule 14. *Non-quarantinable Contagious Diseases.*—The management and control of typhoid fever, cerebro-spinal meningitis (epidemic), epidemic dysentery, trachoma (acute catarrhal conjunctivitis), tuberculosis and anthrax require special isolation and partial disinfection.

Rule 15. *Quarantinable for School Purposes; Barred from School Twenty-one Days.*—Persons suffering from measles, whooping cough, mumps, German measles (rotheln) and chickenpox, shall be required to be barred from school for twenty-one days (at the discretion of the local health officer) from date of onset of the disease, with such additional time as may be deemed necessary, and may be readmitted on a certificated [certificate] by him attesting to their recovery and non-infectiousness.

Rule 16. *Minor Diseases To Be Excluded During Illness.*—Those actually suffering from tonsilitis, scabies (itch), impetigo contagiosa, favus, shall be excluded from school during such illness and be readmitted on the certificate of the attending physician attesting to their recovery and non-infectiousness.

Rule 17. *Above Rules Not to Abrogate Other Measures.*—Provided that the above requirements shall in no sense be construed as abrogating any additional precautionary measures enforced by local health authorities, but it is expected that additional restrictive measures will be taken, at the discretion of the local health authorities when the necessity arises, more especially in the more densely populated cities and towns, or when violations of quarantine occur.

Rule 18. *Health Authorities to Investigate Reported Cases.*—Whenever a local health authority is informed or has reason to suspect that there is a case of smallpox, scarlet fever, or other reportable disease within the territory over which he has jurisdiction, he shall immediately examine into the facts of the case and shall adopt the quarantine or employ the sanitary measures as herein provided.

Rule 19. *Health Authority Shall See That Quarantine and Disinfection Is Carried Out.*—Within his jurisdiction, each and every local health authority shall see that the quarantining or disinfection of any house, building, car, vessel, or vehicle, or any part thereof and of any articles therein likely to retain infection, is carried out, and that all persons who have been in quarantine, are required to take a disinfecting bath before the same are released. And in the event of the disease having been smallpox, all persons exposed shall be isolated for eighteen days from the time of last exposure unless successfully vaccinated.

Rule 20. *Premises Occupied by Persons With Contagious Diseases To Be Disinfected Before Reoccupied.*—No person shall offer for hire or cause or permit any one to occupy apartments perviously occupied by a person ill with smallpox, scarlet fever, diphtheria, or tuberculosis, or any quarantinable disease, until such apartments shall have been disinfected under the supervision of the local health authority.

Rule 21. *On Failure to Disinfect Premises They Shall Be Placarded.*—Whenever these rules and regulations, or whenever the order or direction of the local health authority requiring the disinfection of articles, premises or apartments, shall not be complied with, or in case of any delay, said authority shall forthwith cause to be placed upon the door of the apartment or premises a placard as follows: "These apartments have been occupied by a patient suffering with a contagious disease and they may have become infected. They must not be again occupied until my orders directing the renovation and disinfection of same have been complied with. This notice must not be

removed, under penalty of the law, except by an authorized health official.”

Rule 22. *Nurses and Midwives Shall Report Redness of Eyelids or Inflammation to Health Authority.*—Whenever any nurse, midwife or other person not a legally qualified practitioner of medicine shall notice inflammation of the eyes or redness of the lids in a new-born child under his or her care, it shall be the duty of such person to report the same to the local health authority, or in his absence, any reputable physician, within twelve hours of the time the disease is first noticed.

Rule 23. *Householders or Heads of Families to Report Contagious Diseases.*—Every hotel proprietor, keeper of a boarding house or inn, and householder or head of a family in a house wherein any case of reportable contagious disease (including tuberculosis) may occur, shall report the same to the local health authority within twelve hours of the time of his or her first knowledge of the nature of such disease, unless previous notice has been given by the physician in attendance; and in cases of quarantinable diseases until instructions are received from the said local health authority shall not permit any clothing or other article which may have been exposed to infection to be removed from the house; nor shall any occupant of said house change his residence elsewhere without the consent of the said local health authority.

Rule 24. *Persons Suffering from Reportable Diseases Shall Not Work Where Food Products are Produced.*—No person suffering with any reportable disease, or who resides in a house in which there exists a case of smallpox, scarlet fever, diphtheria, or typhoid fever, shall work or be permitted in or about any dairy, or any establishment for the manufacture of food products, until the local health authority has given such a person a written certificate to the effect that no danger to the public will result from his or her employment or presence in such establishment.

Rule 25. *Health Authority Shall Send Attending Physician Printed Matter.*—Immediately after being notified of any case of smallpox, scarlet fever, ditheria [diphtheria], typhoid fever, or tuberculosis, the local health authority shall send to the attending physician, or with his approval directly to the patient the printed matter published by the State Board of Health relative to the prevention and control of such diseases.

Rule 26. *Persons With Trachoma or Contagious Catarrhal Conjunctivitis To Be Excluded From Schools.*—Persons afflicted with trachoma, granulated lids, or contagious catarrhal conjunctivitis must be excluded from schools, public assemblages, and from close association with other individuals, unless they are under the constant care and strict supervision of a competent physician, and hold a certificate from said physician stating that active inflammation has subsided, said certificate to be countersigned by a local health authority.

Rule 27. *Schools Temporarily Closed and Disinfected.*—A school house wherein a child suffering from smallpox, scarlet fever or diphtheria has been present, shall be deemed infected and must be temporarily closed and thoroughly disinfected and cleaned under the supervision of the local health authority before the reopening of the school.

Rule 28. *School May Be Reopened After Disinfection and Vaccination.*—In the event of the aforementioned disease being smallpox and in case the Board of Trustees having passed a regulation requiring a successful vaccination of all teachers and pupils, the school may be reopened immediately after the disinfection and cleaning, and all teachers and pupils who have been successfully vaccinated may re-

turn; otherwise the school shall be kept closed eighteen days or until the local health authority directs otherwise.

Rule 29. *Health Authority to Notify Superintendents of Pupils From Infected Houses.*—The local health authority shall notify the superintendent or principal of any school of the locations of quarantinable diseases, and if the superintendent or principal finds any attendants in such school who live in said houses, he shall deny them admission to the said schools, only admitting them again upon presenting a certificate from the attending physician, countersigned by the local health authority, that there is no longer danger from contagion.

Rule 30. *Children With Contagious Diseases Shall Not Attend School.*—No superintendent, principal or teacher of any school, and no parent, master or guardian of any child or minor, having the power and authority to prevent, shall permit any child or minor, having any quarantinable disease, or any child residing in any house in which any such disease exists or has recently existed, to attend any public, private, parochial, church or Sunday school until the requirements of these rules shall have been complied with.

Rule 31. *Health Authorities to Assume Control of Quarantine in Their Jurisdiction.*—In all incorporated cities and towns the city health authorities shall assume control and management of contagious diseases and exposures and practice quarantine, isolation and disinfection as herein provided. In those portions of all counties in this State, outside of incorporated cities and towns, the county health officer shall assume management and control of contagious diseases and exposures and practice quarantine, isolation and disinfection as herein provided.

Rule 32. *These Rules Not to Prevent Local Rules of Quarantine if No Conflict.*—Nothing contained in these regulations shall be construed to prevent any city, county or town from establishing any quarantine which they may think necessary for the preservation of the health of the same; provided, that the rules and regulations of such quarantine be not inconsistent with the provisions of these regulations and be consistent with and subordinate to said provisions, and the rules and regulations prescribed by the Governor and State Board of Health. It shall be the duty of the local health authority to at once furnish the President of the State Board of Health with a true copy of any quarantine orders and regulations adopted by said local authorities.

Rule 33. *Health Authorities May Pass Through Quarantine Lines.*—All health authorities shall have the privilege and shall be allowed to pass through all quarantine lines, whether instituted at the instance of State or local authorities, they first requesting permission and acquainting the officers or guards in charge with the fact of their being properly authorized health officers, and with the additional statement that they are fully acquainted with the nature of the disease that they are visiting, and further that they will take proper precautions to prevent carrying the infection themselves.

VITAL STATISTICS

Rule 34. *Physicians, Surgeons, Midwives and Parents Shall Report Births.*—All physicians, surgeons or accoucheurs (midwives) who may attend at the birth of a child, or, in the absence of such attendance, either parent of the child, shall report the fact, together with all statistical data relating thereto, within five days from time of the birth to the city or county registrar as hereinafter provided for.

See art. 758, ante.

Rule 35. *Undertaker Shall Report Deaths.*—Every person acting as undertaker shall file with the proper registrar a certificate of death

and all persons furnishing a coffin or box in which to bury the dead shall be deemed undertakers.

Rule 36. *City and County "Registrar."*—For the purposes of these rules and regulations the phrase "county registrar" shall be held to designate the clerk of the county court, when a birth or death is returnable from a county, outside of incorporated cities or towns; and in all such incorporated cities and towns the term city registrar shall be held to designate the city health officer or other city official, acting as registrar for said city, and all returns of births and deaths accruing [occurring] outside of incorporated cities and towns shall be made to the county registrar of the county in which said births and deaths occur; all returns of births and deaths occurring within any incorporated city or town shall be made to the city registrar of the city or town in which said births and deaths occur, and all returns of deaths where the bodies are buried within any incorporated city or town shall be made to the city registrar.

Rule 37. *In Incorporated Cities and Towns, City Health Officer to Act as City Registrar, etc.*—Each and every incorporated city or town in the State of Texas shall constitute a primary registration district. In such incorporated city or town, the city health officer shall be and shall be known as the city registrar. Each city registrar shall appoint a deputy whose duty it shall be to act in his stead in case of absence, illness or disability, and both city registrar and his deputy shall be subject to all rules and regulations herein mentioned. Provided, that in cities or towns where the city secretary or other city officials are, at the date of promulgation of the Sanitary Code for Texas, officiating as registrars of births and deaths under local ordinances which require a burial permit, based upon a duly accredited death certificate, before allowing the dead to be buried, such officers shall be continued as city registrars in and for such cities and towns, but shall be subject to the rules and regulations herein contained. That the body of any person whose death occurs in any said registration district shall not be interred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed or transported from said registration district until a permit for burial, removal or other disposition shall have been properly issued by the city registrar of the registration district in which the death or interment occurs. And no such burial or removal permit shall be issued by any registrar until a complete and satisfactory certificate and return of the death has been filed with him as hereinafter provided. Provided, that a transit permit issued in accordance with the law and health regulations of the place where death occurred, whether in Texas or outside of the State, may be accepted by the city registrar of the district where the body is to be interred or otherwise finally disposed of, as a basis upon which he shall issue a local burial permit, in the same way as if the death occurred in his city, but shall plainly enter on the face of the copy of the record which he shall make for return to the State Registrar the fact that it was a body shipped in for interment, and give the actual place of death. But when a body is removed from a district in Texas to an adjacent or nearby district for interment, not requiring the use of a common carrier or the issue of a transit permit, then the city registrar's burial permit from the district where death occurred may be accepted as authority for burial. It shall be the duty of the aforementioned city registrar to record in a permanently bound book, which shall be secured from the city for that purpose, all births and deaths which shall occur within their respective cities and towns, together with such statistics and data as shall be furnished him by the birth certificates and death certificates herein elsewhere provided for, and it shall be the duty of said city registrar to transmit all such original birth and death certificates received during the preceding

month to the State Registrar of Vital Statistics at Austin on or before the tenth day of the following month.

Rule 38. *Form of Certificate.*—All certificates of births and deaths shall be made in the manner prescribed by the State Board of Health and in the form of certificate prescribed by the State Registrar to the aforementioned registrars.

See art. 758, ante, and explanatory note.

Rule 39. *Undertaker Shall Fill Out Certificate and Obtain Particulars.*—In case of death (including stillbirths) in which any undertaker buries the dead or assists at such burial, it shall be the duty of such undertaker to accurately and properly fill out the death certificate as provided by the State Registrar, in so far as regards the “personal and statistical particulars,” and further, he shall obtain from the physician or coroner the answers to questions under the heading of “medical particulars” of the death certificate; said death certificate to be mailed or handed in by the undertaker to the county registrar within five days after said death occurs; provided, that in case the undertaker can not communicate with the physician or coroner within the five days specified, he shall mail the death certificate to such physician or coroner, as accurately and properly filled out as possible, for such physician or coroner to complete the “medical particulars” of the death certificate, in which event the aforesaid physician or coroner shall make report to the proper registrar.

Rule 40. *Physicians Shall Promptly Give Medical Particulars to Undertaker.*—It shall be the duty of every physician in the event of a death (including stillbirths) occurring in any case at which said physician is the last in attendance, to promptly and accurately fill out the questions in the “medical particulars” of the death certificate when the death certificate is presented by the undertaker.

Rule 41. *Physician Last in Attendance Shall Report Rural Deaths.*—In the event of a death occurring in the rural districts of the State and no undertaker being in attendance or responsible for the report of the death, the physician last in attendance or the coroner, in the event of his being called in, shall accurately and completely fill out the certificate of death and transmit it to the county registrar.

Rule 42. *Coroner Shall Give Information, Also Head of House.*—In case of death (including stillbirths) where a coroner shall hold an inquest to ascertain the cause of death, the said coroner shall answer the questions (medical particulars) as in Rule 39 to be answered by the attending physician, and answer them in as full and complete manner as the information from such coroner’s inquest will permit; and when a person dies without medical attendance and does not require the attendance of a coroner, the head of the household where such death occurs, or the next of kin, shall immediately notify the local health authority who shall, after proper investigation, and, if deemed necessary by him, after an autopsy to determine the cause of death, issue a certificate of death.

Rule 43. *Superintendents of Hospitals to Give Information.*—If the deceased died in a hospital or other institution, the person acting as undertaker shall present the certificate to the superintendent or head of such institution for the special information indicated on the blank for such cases. The undertaker shall then fill in the other information above required and transmit the complete certificate to the proper registrar.

Rule 44. *Undertakers Shall Report Physicians for Neglect of Giving Information.*—In the event of the neglect or refusal of the physician, coroner, superintendent or person in charge of any hospital or other institution to promptly and accurately fill out the death certificate as above required, and sign it, when so requested by an under-

taker, the same shall be immediately reported by the undertaker to the State Registrar for the purpose of prosecution.

Rule 45. *Stillborn or Those Dead Births of Seven Months Gestation To Be Reported.*—All stillborn children (those dead at birth after seven months gestation) shall be registered as births and also as deaths, and a certificate of both the birth and the death shall be filed with the proper registrar, in the usual form and manner, the certificate of birth to contain in place of the name of the child, the word "stillborn." The "medical particulars" of the death certificate shall be signed by the attending physician, if any, or midwife, and shall state the cause of death as "stillborn," with the cause of the stillbirth, if known, whether a premature birth, and, if born prematurely, the period of uterine gestation, in months, if known.

Rule 46. *Clerks Shall Record All Statistical Data.*—The clerk of the county court in every county in the State of Texas shall record all statistical data relating to such births and deaths as are reported to him from his county outside incorporated cities and towns in a permanently bound book which he shall secure and keep for that purpose, in form as supplied by the State Registrar, and shall transmit the original certificates to the State Registrar by the tenth of each month following the month in which they are received.

Rule 47. *Sextons Shall Keep Record.*—All sextons or superintendents of cemeteries are required to file all burial permits received and to record in a permanently bound book, the names of all persons interred, date of interment, place of burial, number of the grave or section of cemetery where buried and name of undertaker; and shall before the tenth of the following month make a report to the State Registrar of all deceased persons deposited in their respective cemeteries during the preceding month.

Rule 48. *State Registrar Shall Supply Blanks, etc.*—The State Registrar shall prepare, print and supply to all city and county registrars all blanks and forms used in reporting births and deaths or in otherwise carrying out the purposes of this regulation, and each county shall print and supply their county registrar and each city council supply their city registrar with a permanently bound book, in form prepared by the State Registrar for recording all statistical data relating to births and deaths in their respective jurisdictions; and the State Registrar shall prepare and issue such detailed instructions as may be required to secure the uniform observance of its provisions and the maintenance of a perfect system of registration. He shall carefully examine all certificates received and if any such are incomplete or unsatisfactory he shall require such further information to be furnished as may be necessary to make the record complete and satisfactory. And all physicians, midwives, informants or undertakers connected with any case, and all other persons having knowledge of the facts, are hereby required to furnish such information as they may possess regarding any birth or death upon demand of the State Registrar, in person, by mail, or through the county or city registrar. He shall further arrange, bind and permanently preserve the certificates in a systematic manner.

Rule 49. *City and County Registrars Shall Furnish Blanks to Those Required to Report.*—It shall be the duty of the city and county registrars to supply blank forms of certificate and such instructions as are applied to them by the State Registrar to all in their respective jurisdictions who are required to make reports under these regulations.

Rule 50. *City and County Registrars Examine All Certificates of Birth and Death.*—Each city and county registrar shall carefully examine each certificate of birth or death when received, and if any such are incomplete or unsatisfactory, he shall require such further infor-

mation to be furnished as may be necessary to make the record complete and satisfactory. He shall number consecutively the certificates of birth and death, in two separate series, beginning with the "number one" for the first birth and first death in each calendar year.

DEPOTS, RAILWAY COACHES AND SLEEPING CARS

Rule 51. *Contagious Diseases Barred From Public Vehicles.*—No person known to be suffering from any contagious disease such as smallpox, scarlet fever, diphtheria, measles or whooping cough shall be allowed to enter or ride in any day coach, sleeping car, interurban car or street car, and when any such person is discovered to be in any car as mentioned above, it shall be the duty of the conductor or other individual in charge of said car to notify the nearest or most accessible county or city health officer and the latter shall remove and isolate said patient as is proper in such case or circumstance.

Rule 52. *Depots, etc., To Be Ventilated and Heated.*—Each depot, railway coach, sleeping car, interurban car and street car while in use for the accommodation of the public shall be properly ventilated, and, if necessary, heated, and a sufficient amount of heat shall be furnished in time of need so that fresh air can be supplied without causing it to become unduly or uncomfortably cold; and the janitor, conductor, caretaker or other person in charge shall see to it that the air is replenished with fresh air from time to time as needed to prevent the same from becoming foul, unsanitary or oppressive.

Rule 53. *Cuspidors To Be Provided, Disinfected, etc.*—Cuspidors must be provided in adequate numbers in all waiting rooms of depots and railway stations; each day coach shall be provided with one cuspidor for each seat or every two chairs, and two in each smoking apartment; except that in each parlor car there may be as few as one cuspidor to every three seats and two cuspidors used in the smoking apartment; in each sleeping car shall be placed one cuspidor to each section and three cuspidors in the smoking apartment, one of which cuspidors, in the absence of a dental lavatory, shall be of an unusually large size and placed near the wash basin for use in washing the teeth; each aforementioned cuspidor shall contain not less than one-third of a pint of an approved disinfectant solution, and the cuspidor shall be emptied, washed in a similar solution and replenished each trip or every twenty-four hours.

Rule 54. *Dry Cleaning Prohibited.*—Dry dusting and dry sweeping is prohibited at all times in waiting rooms of depots and railway stations, or in railway coaches, sleeping cars, interurban cars and street cars.

Rule 55. *Coaches To Be Cleaned After Each Trip; How Cleaned.*—Railway day coaches shall be thoroughly cleaned at the end of each trip, and in no instance shall the day coach go uncleaned longer than two days when such coach is in use; the thorough cleaning of day coaches shall consist as follows:

(a) Windows and doors shall be first opened and the aisle-strip, if there be any, removed, and, when possible, thoroughly sunned.

(b) All upholstery shall be dusted and brushed, using the vacuum process cleaning apparatus whenever possible.

(c) Floor mopped or swept, after it has been sprinkled with an approved disinfectant solution, or preferably cleaned by sprinkling with sawdust moistened with said approved disinfectant and sweeping. After cleaning, as described, the floor must be scrubbed with soap and water to which may be added the same disinfectant solution.

(d) Closet floors, urinals, toilet bowls, and walls must be cleaned by washing, scouring and wiping with an approved disinfectant solution, to which soda ash or other cleansing agent may be added.

(e) All arms of seats and window ledges must be wiped free of dust with a damp cloth (preferably one wet with disinfectant solution).

(f) Provided, that where the vacuum cleaning apparatus is installed and coaches are thoroughly cleaned with this method daily, the aforementioned method of brushing, cleaning and scrubbing may be used as seldom as once in each period of seven days.

Rule 56. *Railway Stations To Be Cleaned.*—The sanitary method of cleaning as prescribed in the foregoing rule must be followed in the sanitation of waiting rooms of depots and railway stations once in every twenty-four hours.

Rule 57. *Dining Cars, etc., To Be Thoroughly Cleaned.*—Parlor, buffet and dining cars must be cleaned at cleaning terminals, as set forth in Rule 55 of this chapter. Carpets and draperies to be removed, dusted, sunned and aired. Food boxes, refrigerators, closets, drawers, and cupboards to be cleaned, scalded and treated with a solution containing 2 per cent. formaldehyde, or other approved disinfectant.

Rule 58. *Interurban and Street Cars To Be Washed, Disinfected, etc.*—Interurban cars and street cars must be washed with a hose and scrubbed thoroughly once every twenty-four hours, and must be disinfected with formaldehyde gas under the supervision of the local health authority immediately after any case of contagious disease has been discovered therein.

Rule 59. *Sleeping Cars To Be Cleaned; Disinfected.*—All sleeping cars shall be cleaned at cleaning terminals according to the methods set forth in Rule 55 above, at least twice during a period of every seven days; shall be disinfected with formaldehyde gas at least twice during a period of seven days; upon routes designated by the President of the State Board of Health, all sleeping cars shall be disinfected as seldom as once during a period of seven days. In addition to the foregoing, all sleeping cars shall be disinfected immediately after any case of contagious or infectious disease is discovered therein. All blankets used in sleeping cars must be thoroughly sterilized and washed at intervals of not more than ninety days.

Rule 60. *Record of Disinfection To Be Kept and Signed.*—On each passenger car operated in the State of Texas a disinfection record must be kept and preserved, and on same the following records are to be entered and kept, viz.:

1. Place and date of each disinfection.
2. Length of time devoted to each such thorough disinfection.
3. Each item in said record shall be inserted immediately after each act recorded, and the signature of the person or persons doing said cleaning or disinfection must appear beneath the said records.

Rule 61. *Water Coolers To Be Provided; Manner of Cleaning.*—All depots, railway coaches, sleeping cars, or interurban cars must be provided with a water cooler for the use of patrons and the traveling public; such water cooler must be so constructed as to be easily removed for the purpose of cleaning; must be emptied, rinsed and cleaned, and must be scalded and sunned when possible once in each period of twenty-four hours, and must be filled with good and wholesome drinking water when in service. Ice for use in water coolers must not be dumped on floors, sidewalks or car platforms. It must be washed and must be handled with ice-tongs.

Rule 62. *Expectorating on Floors Prohibited.*—Expectorating on the floor or walls or furniture of any waiting room in any depot, on any depot platform, in any railway coach, sleeping car, interurban car, or street car in this State, is prohibited. Placards calling attention of passengers and employes shall be hung in a conspicuous place in each of the aforementioned rooms and cars.

Rule 63. *Expectorating in Basins Prohibited.*—Brushing of teeth or expectorating in basins used for lavatory purposes is prohibited, and placards calling attention of passengers and employés shall be hung in a conspicuous place in the dressing room of passenger coaches.

Rule 64. *Separate Compartments for Negro Porters.*—Sleeping car companies shall provide compartments and bedding for their negro porters separate from those provided for their white passengers.

Rule 65. *Negro Porters Prohibited From Sleeping In.*—Negro porters shall not sleep in sleeping car berths nor use bedding intended for white passengers.

Rule 66. *Certain Floor Covering Prohibited.*—No waiting room in any depot or railway station shall be floored in part or entirely with burlap, cocoa matting, or sacking cloth.

Rule 67. *Water Closets To Be Provided.*—All depots and railway station shall provide adequate urinals and water closets for patrons and the traveling public; must keep them in proper sanitary condition, and if within five hundred feet of any public sewer, must make permanent sanitary connection with same. Any privy or box closet furnished by any such railway company shall be protected from flies by screening or other effective method, including hinged lids or other device for covering the opening in the seats of said closets. Such privies and closets as are not in connection with a sanitary sewer shall be provided with a water-tight box, or other receptacle underneath, and when full or at any time when its condition shall create a nuisance or become unsanitary, and in no instance shall such box closet go longer than one month before it must be emptied and disinfected with 5 per cent carbolic acid solution or other approved disinfectant solution.

Rule 68. *Railway Premises Shall Be Drained.*—The premises of all depots and railway stations shall be thoroughly drained, so that no stagnant water will collect on said premises.

Rule 69. *All Cisterns, etc., Shall Be Screened.*—All cisterns, fire water barrels, or other water containers upon the premises of any depot or railway station shall be screened with not less than 16-mesh wire gauze.

GOVERNING THE PREPARATION FOR TRANSPORTATION OF DEAD BODIES

Rule 70. *Bodies Dead of Pestilential Diseases.*—No body of any person dead of Asiatic cholera, bubonic plague, typhus fever or small-pox shall be transported except in a hearse or undertaker's wagon unless said body shall have been cremated.

Rule 71. *Bodies Dead of Dangerous Contagious Diseases.*—The bodies of those who have died of diphtheria (membranous croup), scarlet fever (scarlatina, scarlet rash), glanders, anthrax or leprosy, shall not be accepted for transportation unless prepared for shipment by being thoroughly disinfected by (a) arterial and cavity injection with an approved disinfectant fluid, (b) disinfecting and stopping all orifices with absorbent cotton, and (c) washing the body with the disinfectant, all of which must be done by a licensed embalmer, holding a certificate as such. After being disinfected as above, such body shall be encased in an air-tight zinc, tin, copper or lead-lined coffin, or iron casket, all joints and seams hermetically soldered, and all enclosed in a strong, tight wooden box. Or, the body being prepared for shipment by disinfecting as above, may be placed in a strong coffin or casket, and said coffin or casket enclosed in an air-tight copper or tin case, all joints and seams hermetically soldered and all enclosed in a strong outside wooden box.

Rule 72. *Bodies Dead of Non-quarantinable Contagious Diseases.*—The bodies of those dead of typhoid fever, puerperal fever, erysipelas, tuberculosis and measles, or other dangerous communicable disease, other than those specified in Rules 70 and 71, may be received for transportation when prepared for shipment by filling cavities with an approved disinfectant, washing the exterior of the body with the same, and stopping all orifices with absorbent cotton and encased in an air-tight coffin or casket; provided, that this shall apply only to bodies which can reach their destination within forty-eight hours from time of death. In all other cases such bodies shall be prepared for transportation in conformity with Rule 71. But when the body has been prepared for shipment by being thoroughly disinfected by an embalmer holding a certificate, as in Rule 71, the air-tight sealing may be dispensed with.

Rule 73. *Bodies Dead of Other Diseases.*—The bodies of those dead of diseases that are not contagious, infectious or communicable may be received for transportation when encased in a sound coffin or casket and enclosed in a strong outside box; provided, they reach their destination within thirty hours from time of death. If the body can not reach its destination within thirty hours from time of death, it must be prepared for shipment by filling cavities with an approved disinfectant, washing the exterior of the body with the same, and stopping all orifices with absorbent cotton, and encased in an air-tight coffin or casket. But when the body has been prepared for shipment by being thoroughly disinfected by a licensed embalmer as in Rule 71, the air-tight sealing may be dispensed with.

Rule 74. *Persons Accompanying Bodies Dead of Contagious Diseases.*—In cases of contagious or infectious diseases, the body must not be accompanied by persons or articles which have been exposed to the infection of the disease, unless certified by the health officer as having been properly disinfected; and before selling passage tickets, agents shall carefully examine the transit permit and note the name of the passenger in charge, and of any other proposing to accompany the body, and see that all necessary precautions have been taken to prevent the spread of disease. The transit permit in such cases shall specifically state who is authorized by the health authorities to accompany the remains. In all cases where bodies are forwarded under Rule 71, notice must be sent by telegraph to health officer at destination, advising the date and train on which the body may be expected. This notice must be sent by or in the name of the health officer at the initial point, and is to enable the health officer at destination to take all necessary precautions at that point.

Rule 75. *Bodies Not Shipped By Express.*—Every dead body not shipped by express must be accompanied by a person in charge, who must be provided with a passage ticket and also present a full first-class ticket marked "corpse" for the transportation of the body, and a transit permit showing physician's or coroner's certificate, name of deceased, date and hour of death, age, place of death, cause of death, and if of a contagious or infectious disease, the point to which the body is to be shipped, and when death is caused by any of the diseases specified in Rule 71, the names of those authorized by the health authorities to accompany the body. The transit permit must be made in duplicate, and the signatures of the physician or coroner, health officer and undertaker must be on both the original and duplicate copies. The undertaker's certificate and paster of the original shall be detached from the transit permit and pasted on the end of the coffin box. The physician's certificate and transit permit shall be handed to the passenger in charge of the corpse. The whole duplicate copy shall be sent to the official in charge of the baggage department of the

initial line and by him to the Secretary of the State Board of Health at Austin.

Rule 76. *Bodies Shipped By Express.*—When dead bodies are shipped by express, the whole original transit permit shall be pasted upon the outside box, and the duplicate forwarded by the express agent to the Secretary of the State Board of Health at Austin.

Rule 77. *Disinterred Bodies Treated as Contagious.*—Every disinterred body, dead from any disease or cause, shall be treated as contagious or dangerous to the public health and shall not be accepted for transportation unless said removal has been approved by the State or local health authorities having jurisdiction where such body is disinterred, and the consent of the health authorities of the locality to which the corpse is consigned has first been obtained; and all such disinterred remains shall be enclosed in a hermetically sealed (soldered) zinc, tin or copper-lined coffin or box. Bodies deposited in receiving vaults shall be treated and considered the same as buried bodies.

Rule 78. *Transfer of Dead Bodies in Transit.*—When it may become necessary to transfer dead bodies in transit from one railway train to another, or from one station to another, or from a station to a ferry, the affidavit of the undertaker and permit of the local health officer accompanying the remains shall be in all cases sufficient authority for such transfer.

Rule 79. *Certificate Furnished by Undertaker.*—No common carrier shall accept for transportation any body unless a certificate is furnished by the undertaker preparing such body for shipment to the effect that the foregoing rules have been complied with in the preparation for transportation of said body.

Penalty.—Any person who shall violate any of the rules, regulations or provisions of the Sanitary Code of Texas, as herein set forth, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than ten dollars and not more than one thousand dollars.

Repeal.—Provided, this Act shall not be construed to repeal any of the laws of this State now in force affecting the public health, which are not clearly in conflict herewith, but shall be construed to be cumulative to said laws.

[Act 1909, 1st S. S., p. 342, ch. 30, § 10, amended; Act 1911, p. 173, ch. 95, § 1, superseding art. 801, revised Pen. Code.]

Explanatory.—Act 1911, ch. 95, § 1, amends section 10 of chapter 30, Acts 31st Legislature "at its Regular Session" (the act was passed at the first called session). As art. 801, revised Pen. Code was made up from the section amended, such article is thereby superseded.

Arts. 802–805. [Amended. See Art. 801.]

Explanatory.—The above articles of the revised Pen. Code were made up from section 10, ch. 30, 1st called session of 31st Leg. and, hence, the amendment of section 10 (see art. 801, ante), worked their supersession.

Indictment.—Willson's Cr. Forms, 580.

Art. 805a. Charbon districts.—That all of that portion of the State of Texas in which charbon or anthrax has heretofore been prevalent or any district of the State of Texas in which charbon or anthrax may become prevalent, shall be known as charbon districts and shall be subject to the provisions hereof. [Act 1913, p. 147, ch. 78, § 2 (10a).]

Explanatory.—Act 1913, ch. 78, § 2, amends Act 1909, ch. 30, by adding thereto sections 10a to 10k, inclusive. The criminal provisions of such added sections are inserted in this compilation as arts. 805a–805h.

Art. 805b. Report of animals and persons suffering from charbon or anthrax.—That each person residing in a district where charbon or anthrax is prevalent or where the same is supposed to be prevalent shall report in writing to the county health officer, who

in turn shall report in writing to the president of the State Board of Health at Austin, all cases where an animal or animals are suffering with charbon or anthrax or supposed to have such disease, and each physician practicing in the State of Texas shall report in writing to the president of the State Board of Health all persons suffering from charbon or anthrax or supposed to be suffering from same and in case of failure to do so any person so failing shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than \$10.00 nor more than \$25.00 and each case of which no report is made shall constitute a separate offense. [Id., § 2 (10b).]

Art. 805c. Destruction of carcasses of animals dying from charbon or anthrax.—That carcasses of stock which have died from charbon or anthrax shall be destroyed by burning by the owner or person in charge within 24 hours after death and any owner or person having charge of said animals who should fail to destroy said carcasses as herein provided shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than \$25.00 nor more than \$100.00 and each 24 hours after the first 24 hours that said carcass is permitted to remain undestroyed shall be considered a separate offense. [Id., § 2 (10e).]

Art. 805d. Quarantine of animals infected.—The county health officer shall be the exclusive judge of the necessity of isolation or quarantine of all animals infected therewith and when in the judgment of said county health officer there exists a necessity thereof [therefor] said county health officer shall issue a proclamation directing that all animals of certain classes which he may specify in the infected district, in either the entire county or any political subdivision thereof, shall be placed and kept in an enclosure by the owners or keeper thereof, and any owner, or keeper of such animals for the owners, who shall fail or refuse to obey the requirement of such proclamation shall be fined in any sum not less than \$10.00 nor more than \$50.00 and where any owner or keeper for the owner shall have more than ten animals subject to the quarantine regulations herein provided the fine shall be doubled and each day that any owner or keeper for such owner shall fail to comply with the proclamation of said county health officer, shall constitute a separate offense and such quarantine shall continue and be in effect as long as in the judgment of such county health officer it may be necessary to prevent the spread of charbon or anthrax. [Id., § 2 (10f).]

Art. 805e. Proclamation of quarantine.—The proclamation of the county health officer provided for in Section 10f of this Act [art. 805d] shall be sufficient, if it name the kinds or classes of stock to which it shall apply and it shall be published in some newspaper published in the county if there be one; and if there be no newspaper it shall be posted in three public places in said county one of which shall be at the court house door of such county if the proclamation pertains to the whole county, but if only to a subdivision of the county, then in any three public places in such subdivision, and one insertion in a newspaper shall be sufficient, and such proclamation shall be effective three days after such notice is given. [Id., § 2 (10g).]

Art. 805f. Election for prevention of animals from running at large in county within charbon districts.—In all counties now affected with charbon or anthrax, or which may hereafter become affected, the qualified voters of such county or any political subdivision thereof may, in the manner hereinafter provided, prohibit the

running at large of cattle, horses, sheep, goats and hogs or any of such animals within such county or subdivision thereof; provided that, upon the petition of ten per cent of the qualified voters of such county or subdivision, thereof presented to the commissioners' court of such county in open session, requesting such court to order an election to be held in such county or political subdivision thereof said petition to state the territory within which an election is requested and the kinds of animals to be effected and also for what portions of the year it is desired to prohibit such stock from running at large, or whether the entire year, it shall be the duty of said commissioners' court to order such election to be held within such territory as may be petitioned for, naming the kinds of animals to be affected thereby and as designated in the order for such election; and such commissioners' court shall also designate in said order of election the time within which such stock is to be prohibited from running at large, whether for the entire year or for portions thereof; which the said court is hereby authorized to do in accordance with the petition therefor. Such commissioners' court is hereby authorized and it is made its duty to provide for the holding of such elections and compensation of officers thereof, provided that the expense of such election shall be borne by the county wherein such election is ordered and held; and provided further that in any such election so to be held the ballots shall read as follows: "For the Running at Large of Domestic Animals," and "Against the Running at Large of Domestic Animals."

Returns of such election shall be made by the presiding officers of the precinct or precincts of the county where such election is held, to the county judge of such county, whose duty it shall be to forthwith call the commissioners' court together for the purpose of canvassing the returns; and if it shall be found by the commissioners' court, upon a canvass of such returns, that a majority of the qualified voters of the county or subdivision thereof wherein such election was held, is in, favor of prohibiting the running at large of such domestic animals as hereinbefore named, then it shall be the duty of the commissioners' court of such county to forthwith declare the result of said election and give public notice thereof by proclamation of such court to be issued and posted within three public places of the county or subdivision thereof in which such election has been held. [Id., § 2 (10h).]

Art. 805g. Same; permitting animals to run at large.—From and after the issuance and posting of the proclamation hereinabove provided for, it shall be unlawful for any owner or keeper of such animals hereinabove designated or any of them to permit such animals as have been voted upon to run at large within such county or subdivision thereof at any time within which the same has been prohibited; and in case of failure or refusal of any owner or keeper of such stock or any of them to comply with such proclamation he shall be deemed guilty of a misdemeanor and shall be fined in any sum not less than five dollars (\$5.00) nor more than fifty dollars (\$50.00) and each day that any owner or keeper for such owner shall fail to comply with the law as herein provided for, shall constitute a separate offense. The venue of such prosecution shall lie in the counties where the offense is committed. [Id., § 2 (10i).]

Art. 805h. Repeal.—This Act shall not be construed to repeal the laws of this State now in force affecting the public health, which is not clearly in conflict herewith but shall be construed to be cumulative to the said law but all laws in conflict herewith are hereby repealed. [Id., § 2 (10j).]

Art. 806. Members of board, inspectors and officers constituted peace officers.—Each member of the said Texas state board of health, and each of its inspectors and officers, is hereby constituted a peace officer, and shall have power to arrest persons violating any of the provisions of the sanitary code [to be adopted by the board], of the violation of any public health, sanitary or quarantine law of the state; and such member, officer or inspector may so arrest such offenders without warrant when the offense is committed within the presence or sight of such member, officer or inspector, but otherwise only when in the execution of a warrant issued by a proper officer. [Act 1909, p. 345.]

Explanatory.—The words in brackets are superseded by the new Sanitary Code (see art. 801, ante).

Art. 807. Sheriff and other officers to do what.—It is hereby made the duty of all sheriffs and their deputies, and constables and their deputies, police officers, town marshals, state rangers, and all other peace officers, to assist in the apprehension and arrest of all persons violating any provisions, rules, ordinances or laws or the sanitary code for Texas, [as it may be adopted by said board,] or for violation of any public health, sanitary or quarantine laws of the sanitary code for Texas, [as it may be adopted by said inspectors and officers of said board,] to apprehend and arrest all persons who may commit any offense against the public health laws of this state, or the rules, regulations, ordinances and laws of the sanitary code for Texas [when adopted, published and promulgated by said board of health,] as provided in this law, when charged to execute a warrant of arrest issued by the proper officer for the apprehension and arrest of all persons charged with so offending. [Id., p. 346.]

Explanatory.—The words in brackets are superseded by the new Sanitary Code (see art. 801, ante).

Art. 808. When and by whom buildings and premises may be examined and inspected.—The members of the board of health and every person duly authorized by them, upon presentation of proper authority in writing, are hereby empowered, whenever they may deem it necessary in pursuance of their duties, to enter into, examine, investigate, inspect and view all grounds, public buildings, factories, slaughter houses, packing houses, abattoirs, dairies, bakeries, manufactories, hotels, restaurants and all other public places and public buildings where they may deem it proper to enter, for the discovery and suppression of disease, and for the enforcement of the rules, regulations and ordinances of the sanitary code for Texas [after it has been adopted, promulgated and published by the board] for the enforcement of any and all health laws, sanitary laws or quarantine regulations of this state. [Id., p. 346.]

Explanatory.—The words in brackets are superseded by the new Sanitary Code (see art. 801, ante).

Art. 809. Oaths may be administered, when and by whom.—The members of said board of health and its officers are hereby severally authorized and empowered to administer oaths and to summon witnesses and compel their attendance in all matters proper for the said board to investigate, such as the determination of nuisances, investigation of public water supplies, investigation of any sanitary conditions within the state, investigation of the existence of infection or the investigation of any and all matters requiring the exercise of the discretionary powers invested in said board and its officers and members, and in the general scope of its authority invested by this law. The several district judges and courts are hereby charged with the duty of aiding said board in its investigations and in compelling due observance of this law, and, in the event any witness summoned by said board or any of the officers or

members of the same, shall prove disobedient or disrespectful to the lawful authority of such board, officer or member, such person shall be punished by the district court of the county in which such witness is summoned to appear as for contempt of said district court. [Id., p. 346.]

Art. 810. Witness testifying falsely guilty of perjury.—Any witness, when summoned to appear before said board, who shall falsely testify as to any matters proper for the determination of any question which the board may be investigating, shall be deemed guilty of perjury, and shall be punished as provided by law for the offense of perjury. [Id., p. 346.]

TITLE 13

OF OFFENSES AFFECTING PROPERTY HELD IN COMMON FOR THE USE OF THE PUBLIC

Chap.	Chap.
1. Obstruction [or improper use] of navigable streams, and roads, streets and bridges.	4. Offenses relating to public grounds and buildings.
2. Offenses pertaining to public roads [drainage, levees], and irrigation.	5. Public or quasi public buildings—fire protection.
2a. Offenses relating to toll roads.	5a. Libraries, museums, etc.
3. Offenses relating to ferries.	6. Offenses relating to the protection of fish, birds and game.

CHAPTER ONE

OBSTRUCTION [OR IMPROPER USE] OF NAVIGABLE STREAMS, AND ROADS, STREETS AND BRIDGES

Art.	Art.
811. Obstruction of navigable streams.	819. Shall have attached suitable bell to give notice of approach.
812. Of roads, streets or bridges.	820. Penalty for violation.
813. Riding over bridges.	821. Destroying bridges, etc.
813a. Entering on toll bridge with intent to avoid payment of toll.	822. Unlawful to carry over any public bridge or culvert any traction engine, when.
814. Name of owner of automobile or motor vehicle to be registered.	823. Not applicable, when.
815. Speed of, regulated.	824. Commissioners' court may also regulate.
816. Not to be operated as to endanger life or limb.	825. Commissioners' court may control streets, etc., when.
817. Racing on street or public road prohibited.	826. Wilful obstruction of ditch, etc.
818. Operator when signaled shall come to a stand still.	826a. Depositing glass and other substances in highway.

Article 811. [479] Obstruction of navigable streams.—If any person shall obstruct the navigation of any stream which can be navigated by steam, keel or flat boats, by cutting and felling trees, or by building on or across the same any dike, mill-dam, bridge or other obstruction, he shall be fined not less than fifty nor more than five hundred dollars.

Construction of bridge.—It is a violation of this article for a railroad company while repairing a bridge across a navigable river in Texas to so obstruct the stream, as to prevent boats or vessels or rafts of logs from being propelled along the river. *Gulf, C. & S. F. Ry. Co. v. Meadows*, 56 Civ. App. 131, 120 S. W. 522.

Indictment.—Willson's Cr. Forms, 363.

Art. 812. [480] Of roads, streets, or bridges.—If any person shall wilfully obstruct or injure, or cause to be obstructed or injured in any manner whatsoever, any public road or highway, or any street or alley in any incorporated town or city, or any public bridge or causeway, he shall be fined in a sum not exceeding two hundred dollars. [Act 1913, p. 315, ch. 147, § 4, amending Art. 812, revised Pen. Code.]

See art. 823, post. See, also, art. 154, C. C. P. and note.

Explanatory.—Act 1913, ch. 147, was approved Apr. 7, 1913, and is an act relating to the powers of cities containing over 5000 inhabitants. Section 4 of this act, in which the amending provision is contained, recites: “ * * * Among the other powers that may be exercised by any such city, the following are hereby enumerated for greater certainty: * * * To enforce all ordinances necessary to protect health, life and property, and to prevent and summarily abate and remove all nuisances and to preserve and enforce the good government, order and security of the city and its inhabitants, and as incident to giving effect to the provisions hereof article 812 of the Penal Code of the state of Texas is hereby amended so as to hereafter read as follows:” (Text as above.) At the same session of the Legislature, but by an act approved Apr. 3, 1915 (ch. 128, p. 258) art. 812 of the Penal Code was again amended, reducing the maximum penalty for violation in the same manner as the later act above referred to, but extending the operation of the article to unincorporated towns or cities, and to bridges or causeways “within this state.” By this act the article is made to read as follows:

If any person shall wilfully obstruct or injure or cause to be obstructed or injured, in any manner whatsoever, any public road

or highway, or any street or alley, in any incorporated or unincorporated town or city or any public bridge or causeway within this State, he shall, upon conviction, be fined in any sum not exceeding two hundred dollars (\$200.00). [Act 1913, p. 258, ch. 128, § 1, amending Art. 812, revised Pen. Code.]

That the design of the two acts was the same is indicated by the emergency clause in the earlier amendment, which is as follows: "The fact that corporation courts have jurisdiction only to try offenses where the fine to be imposed shall not exceed two hundred dollars, and the further fact that the Court of Criminal Appeals of Texas has held that a city ordinance imposing a less fine than five hundred dollars for obstructing streets is void, by reason of being in conflict with the State law; and whereas, it is desirable that incorporated cities and towns should be clothed with authority to pass ordinances controlling their streets and alleys, and the fact that such cities and towns, incorporated under the general law, now have no such authority, creates an emergency and an imperative public necessity," etc. Inasmuch as a question may arise as to whether chapter 128 may be operative in spite of chapter 147, the compilers have set out the text of both amendments, with full explanation of the situation.

The original article reads as follows: "If any person shall willfully obstruct or injure, or cause to be obstructed or injured in any manner whatsoever, any public road or highway, or any street or alley in any incorporated town or city, or any public bridge or causeway, he shall be fined in a sum not exceeding five hundred dollars."

DECISIONS AFFECTING ARTICLE

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| 1. Offense. | 15. Advice as defense. |
| 2. Existence of highway. | 16. Obstruction as negligence. |
| 3. — Authority to establish. | 17. Erection of gates. |
| 4. — Notice of laying out. | 18. Fences. |
| 5. — Oath of commissioners. | 19. Complaint, information or indictment. |
| 6. — Payment of damages. | 20. — Variance. |
| 7. — Adverse or permissive use. | 21. Evidence. |
| 8. — Conclusiveness of report of jury. | 22. — Sufficiency. |
| 9. — Abandonment. | 23. Instructions. |
| 10. — Proof of existence. | 24. — Willful. |
| 11. Estoppel. | 25. Amount of fine. |
| 12. Streets and alleys. | 26. Venue. |
| 13. Reconstructing road. | 27. Plea of acquittal. |
| 14. Willfully. | |

1. **Offense.**—Where one owned land on both sides of a public road crossed by a creek spanned by a bridge, the fact that persons could not cross the creek except on the bridge, did not authorize him to fence the creek's banks from his land to the bridge. *Cornelison v. State*, 40 App. 159, 49 S. W. 384.

One is indictable for obstructing a public road where he places his fence along the same, though he leaves enough open way for the travel of the public, and also for closing up the remaining portion of the road by a fence. *Kelley v. State*, 46 App. 23, 80 S. W. 382.

Where the public road was not laid out at the point designated as having been obstructed, and the public were authorized to use the land which defendant fenced only until such time as he saw fit to inclose it, and such inclosure did not interfere with the road as laid out by the viewers and adopted by the commissioners' court, defendant was not guilty of obstructing a highway. *Farr v. State*, 55 App. 271, 116 S. W. 570.

If accused, as his father's employé, assisted in fencing a road, believing that his father had a right to do so, and knowing of no criminal intent of his father to obstruct the road, he was guilty of no offense. *Craighead v. State*, 55 App. 339, 116 S. W. 579.

2. **Existence of highway.**—A public road is one established as such by order of the commissioners' court in accordance with law. For the law regulating the establishment, etc., of public roads, see *Vernon's Sayles' Civ. St. 1914*, title 119, and *Amendatory Act of 18 Leg.*, special session, p. 19. *Act of 19 Leg.*, p. 25 and p. 92. In order to condemn private property to public uses, the law authorizing and directing it must be strictly observed and pursued, and the performance of what the law requires is a condition precedent to the authority to condemn. A public road cannot be laid out and established without the requirements of the law in such cases having first been complied with. *Davidson v. State*, 16 App. 336. To constitute a road ordered to be laid out by the commissioners' court, a public road, the designation of its locality by reference to natural objects, if from the nature of the country that can be done, and the adoption thereof by the county court, is sufficient; and it is as effectual as if made by passing over the ground, marking trees, or setting up mounds. *Floyd v. State*, 25 Tex. 277.

Compliance with the requirements of the statute is essential to the laying out and establishment of a road. *Davidson v. State*, 16 App. 336; *Floyd v. Turner*, 23 Tex. 292.

A road not located in accordance with the order of the commissioners' court establishing it is not a public road. *Owen v. State*, 24 App. 201, 5 S. W. 830.

Where a third class road is established, the owner of the land upon which it is located, who has consented to such location, without compensation therefor, may erect gates across such road, such as are described in the statute. But if the land has been condemned in accordance with law, he has no right to erect such gates. *Conner v. State*, 21 App. 176, 17 S. W. 157.

It is not necessary, to constitute a public road, that all obstructions be removed from it, and, though a part of such a road is under fence, the remaining part which is open to travel cannot be obstructed. *Kelley v. State*, 46 App. 23, 80 S. W. 382.

A conviction of obstructing a public road cannot be sustained, where it appears that the obstruction was placed, not in a public road, as created by the commissioners' court, but on a passageway adjoining the road, owned by accused and not shown to have been dedicated to public use. *Jones v. State* (Cr. App.) 153 S. W. 622.

3. — **Authority to establish.**—Only the commissioners court, as such, is authorized to establish and designate a public road. *Ehlers v. State*, 44 App. 156, 69 S. W. 148.

4. — **Notice of laying out.**—On trial for obstructing a public road it is not necessary to prove that notice of its laying out was given to the land owners. *Ewing v. State* (Cr. App.) 38 S. W. 618.

5. — **Oath of commissioners.**—A public road cannot be laid out and established without the requirements of the law in such cases having first been complied with, and one of the prerequisites is that those appointed to lay out the road shall, before proceeding to act as such, take the oath prescribed by statute. *Davidson v. State*, 16 App. 336.

6. — **Payment of damages.**—A condition precedent to the authority of the commissioners' court to take a person's land for a public road, is that said court, in the manner provided by law, shall ascertain the damage thereby accruing to such owner, and make compensation to him for the same. And changing a public road of the third class to one of the first class is taking the owner's land over which the road passes. *Thompson v. State*, 22 App. 328, 3 S. W. 232. And so is changing the road from a second to a third class one. *Bradley v. State*, 22 App. 330, 2 S. W. 828.

When a road has been laid out substantially in accordance with the law, the fact that a land owner across whose land such road runs has not received any damages, nor been allowed damages by the commissioners' court, does not justify him in obstructing such road. *Crouch v. State*, 39 App. 145, 45 S. W. 578.

A road which has been laid out and worked and used as a public road for fifteen years, although the order establishing it does not show that damages for taking the land were allowed or that he was notified of the proceedings, is a public road. *Ward v. State*, 42 App. 435, 60 S. W. 757.

7. — **Adverse or permissive use.**—In a prosecution for obstructing a public road the character of the road may be established as public by evidence of long continued use as such, and by an order of the county court assigning hands to work on it as a public road. *Berry v. State*, 12 App. 249.

In a prosecution for obstructing a public road the character of the road may be shown by proof of long continued use of it as such and by an order of the county court assigning hands to work on it as a public road, but a user by the public merely for a short time will not make it a public road. *Hall v. State*, 13 App. 269.

Mere travel over a road for a short period does not make it a public road. *Day v. State*, 14 App. 26.

Permissive use of road over another's land held not sufficient to establish right in public. *Smith v. State* (Cr. App.) 40 S. W. 736.

A road laid out, worked and recognized as a public road for fifteen years is a public road. *Ward v. State*, 42 App. 435, 60 S. W. 757; *Race v. State*, 43 App. 438, 66 S. W. 560.

Evidence showing that the road at the point of obstruction had never been designated, but was used by the public by the consent of the owner until such time as he should elect to inclose it; he was not guilty of obstruction, citing *Is-ham v. State*, 49 App. 324, 92 S. W. 808. *Farr v. State*, 55 App. 271, 116 S. W. 570.

Where a county commissioners' court ordered a road to be opened between two sections of land, and the county surveyor found that the defendant had a part of the adjoining section fenced, and had been in possession of such portion for more than 10 years, claiming title thereto, and he was given no notice of the appointment of a jury of freeholders to view the road as prescribed by law, he was not criminally responsible for obstructing the road, where he rebuilt his fence upon its being cut down by the road overseer in opening up the road. *Lewis v. State*, 64 App. 110, 141 S. W. 532.

Where, at the time a road was laid out by a jury of view on the line of a survey, there was an old road crossing such survey diagonally, and the owner of such survey, who was a member of the jury, told the other members that the public might continue to use the old road until he chose to fence the survey, the use of the old road by the public was not adverse to his title. *Rust v. State*, 71 App. 283, 158 S. W. 519.

In a prosecution for obstructing a public road, evidence for the state that overseers had been appointed for the road for every year from 1878 down to the trial would have supported a finding that the state had acquired title by limitation, where the road did not coincide with the road as laid out by the commissioners' court. *Rust v. State*, 71 App. 283, 158 S. W. 519.

8. — **Conclusiveness of report of jury.**—Where the jury of review reported the road laid out followed a certain boundary line, but the road actually laid out was two hundred yards from the reported route—that the reported route was never laid out or marked upon the ground, and had never been used or worked as a public road, but that the road as actually laid out and marked had been used by the public, and worked by the road overseer, it was held that the true public road was that actually used by the public, and recognized by the county authorities, and not the route reported by the jury of review. *Day v. State*, 14 App. 26.

The action of the commissioners' court in laying out and adopting a public road as reported by the jury of review cannot be questioned in a collateral proceeding by showing a want of the notice of the sitting of the jury of review, prescribed by Sayles' Ann. Civ. St. 1897, art. 4691, though the judgment of the commissioners' court establishing the road does not contain any recitation of notice. *Kelley v. State*, 46 App. 23, 80 S. W. 382.

The report of a jury of view appointed to lay out a road and the order of commissioners' court adopting such report could not be varied by the testimony of a juror that the report did not correctly describe the highway as in fact surveyed and adopted by the jury. *Rust v. State*, 71 App. 283, 158 S. W. 519.

9. — **Abandonment.**—The evidence showed that the road passed through defendant's land; that it had never been formally opened by the commissioner's court; that it had been used by travelers, but had been practically abandoned before the defendant fenced it. Defendant testified that he believed that he had a right to fence the land, and that the fence was built without any intention of violating the law; held, that the evidence is insufficient to support a conviction. *Meyer v. State*, 37 App. 460, 36 S. W. 255.

10. — **Proof of existence.**—A variance as to the road is immaterial on trial, if it is shown to be the same road alleged. *Sigler v. State*, 17 Tex. 304. It is not necessary to prove a classification; and proof that defendant acted as overseer is sufficient to show notification of his appointment, etc. *Id.* Under the Republic (1st Cong., p. 157) the commissioners could designate the route by natural objects, without going over the ground, marking trees, etc.; and if this designation was acted on by the county court, its status as a public road was fixed. *Floyd v. State*, 25 Tex. 277.

The public character of the road may be established, not only by the order of the commissioners' court, but also by proof that it has long been used as a public road, and that the commissioners' court has recognized it as such by assigning hands to work it, or by an order declaring it to be a road of a certain class. *Michel v. State*, 12 App. 108; *Berry v. State*, *Id.* 249; *Jolly v. State*, 19 App. 76; *McWhorter v. State*, 43 Tex. 666.

Evidence which shows that the fence alleged to be the obstruction was on the land of the accused when the road through it was established, and that the said road was never opened after it was established, will not support a conviction for obstructing a public road. *Rankin v. State*, 25 App. 694, 8 S. W. 932.

11. **Estoppel.**—One who, with full knowledge of the establishment of a public road subsequently petitions the commissioners' court to change such road, is estopped to question the legality of its establishment. *Kelley v. State*, 46 App. 23, 80 S. W. 382.

12. **Streets and alleys.**—The ordinance of a town authorizing the occupation of six feet of sidewalk for the purpose of a fruit stand would be a complete defense to obstruction if only the six feet were occupied. *Echols v. State*, 12 App. 615.

It was no offense under this article before its amendment to obstruct a street or alley in an unincorporated town. *McClanahan v. State*, 21 App. 429, 2 S. W. 813; *Echols v. State*, 12 App. 615; *Martin v. State*, 72 App. 454, 162 S. W. 1145.

Where a state law provides as a penalty for the obstruction of the streets of towns a fine not to exceed \$500, a town ordinance punishing the obstruction of its streets by fine not in excess of \$25 conflicts with the state law, and is void. *Ex parte Cross*, 44 App. 376, 71 S. W. 289.

A town ordinance punishing the obstruction of its streets by a fine not in excess of \$2500, being in conflict with this section, is void. *Ex parte Cross*, 44 App. 376, 71 S. W. 289.

13. **Reconstructing road.**—Where accused, against the protests and objection of the properly constituted county authorities, undertook to determine for himself that a road properly constructed by such authorities was not properly constructed, and attempted to take the matter and the law into his own hands and construct it differently to suit his own desires, he was guilty of violating this article. *Brown v. State* (Cr. App.) 166 S. W. 508.

14. **Willfully.**—The word "willful," when used in a penal statute, means more than its import in common parlance. It means with evil intent, or legal malice, or without reasonable ground to believe the act to be lawful. *Thomas v. State*, 14 App. 200; *Rose v. State*, 19 App. 470; *Loyd v. State*, *Id.* 321; *Shubert v. State*, 16 App. 645; *Trice v. State*, 17 App. 43; *Yoakum v. State*, 21 App. 260, 17 S. W. 254; *Parsons v. State*, 26 App. 192, 9 S. W. 490; *Musgrave v. State*, 28 App. 57, 11 S. W. 927.

Intent is a constituent element of this offense, and it must appear that the obstruction was willful on the part of the accused. Such intent is not to be presumed from the act of obstruction; but it must be proved as a fact, as such fact is proved in other offenses where it is an element of the offense. *Brinkoeter v. State*, 14 App. 67; *s. c.*, 16 App. 72; *Shubert v. State*, 16 App. 645; *Trice v. State*, 17 App. 43; *Loyd v. State*, 19 App. 321; *Sanborn v. State*, 21 App. 155, 17 S. W. 475; *Conner v. State*, *Id.* 176, 17 S. W. 157; *Baker v. State*, *Id.* 264, 17 S. W. 144; *Murphy v. State*, 23 App. 333, 4 S. W. 906; *Guthrie v. State*, *Id.* 339, 4 S. W. 906. And road must be legally established. *Owen v. State*, 24 App. 201, 5 S. W. 830; *Rankin v. State*, 25 App. 694, 8 S. W. 932; *Parsons v. State*, 26 App. 192, 9 S. W. 490; *Varnell v. State*, 26 App. 56, 9 S. W. 65; *Laroe v. State*, 30 App. 374, 17 S. W. 934.

When a road was obstructed by the accused, not willfully, but with the belief, based on good cause, that he had the legal right to obstruct it, he is not guilty of an offense. *Owen v. State*, 24 App. 201, 5 S. W. 830.

A person who, under a mistake of fact, erects a fence encroaching on a public road, without any intention to obstruct or knowledge that he is obstructing it, is not guilty of willfully obstructing a public road. *Sanborn v. State*, 21 App. 155, 17 S. W. 475.

The act of obstruction must be affirmatively shown to have been "wilful." *Laroe v. State*, 30 App. 374, 17 S. W. 934; *Parsons v. State*, 26 App. 192, 9 S. W. 490; *Cornelison v. State*, 40 App. 159, 49 S. W. 384.

In a prosecution for wilfully obstructing a public road, the court charged that by the word "wilful" is meant that defendant knew at the time of the alleged obstruction that such road was a public road of the second class, and said obstruction was placed there with an evil intent. Held a proper legal definition of the term "wilful." *Cornelison v. State*, 40 App. 159, 49 S. W. 384.

The court in defining the offense should use the word "wilfully" as this is of the essence of the offense and should also define its meaning. *Dyrley v. State* (Cr. App.) 63 S. W. 631.

Evidence that accused went to the county commissioner of the precinct and inquired about the boundaries of the road and was authorized by the county commissioner to fence the road was sufficient to present an issue of fact for the jury whether accused's act was willful, which should have been submitted by a proper instruction, although there was evidence for the state that he was not authorized to fence the road by the county commissioner, since if the jury believed the evidence first referred to they could hardly have found that he acted with evil intent and legal malice. *Rust v. State*, 71 App. 283, 158 S. W. 519.

In a prosecution for violating the statute prohibiting the obstruction of streets in an incorporated town, evidence that accused was advised by the mayor and others that he had a right to place the posts, which were the alleged obstruction, where he placed them after incorporation was voted out, was admissible on the question of wilfulness. *Martin v. State*, 72 App. 454, 162 S. W. 1145.

Where accused claimed that he acted solely to protect his premises from back-water caused by the road, evidence that when a county commissioner sent word to accused declining to take any action, and stating that the road was not the cause of the water backing up, accused said: "It seems we have no commissioner, and no commissioners' court; just let's take the matter in our own hands and attend to it," and that when warned by a constable that he and those aiding him would be prosecuted, he replied, "Let's go ahead and cut it in five or six places anyhow, and just let them prosecute"—was relevant on the question of wilfulness. *Brown v. State* (Cr. App.) 166 S. W. 508.

Where it appeared that defendant stated that he did not wish to do anything in respect to closing certain lands, except what was agreeable to the commissioners' court, and that he would remove any fence that they did not want where he had placed it, the charge, especially where there was an issue of wilfulness, should have defined the word "wilful." *Carney v. State* (Cr. App.) 175 S. W. 155.

15. Advice as defense.—But after the road has been legally established the owner of land condemned for that purpose cannot disregard the order of the commissioners court even on the advice of attorneys that the order establishing the road was void. *Crouch v. State*, 39 App. 145, 45 S. W. 573.

The fact that defendant obstructed the road after he knew that it had been used as a third-class road was willful, and that his attorney advised him that the order was void was no defense as tending to show that his act was not willfully done. *Ward v. State*, 42 App. 435, 60 S. W. 757.

An attorney's opinion that the road is not a legal one is no defense on a trial for obstructing the road. *Ward v. State*, 42 App. 435, 60 S. W. 758.

One bound by the judgment of the commissioners' court establishing a public road cannot, in the face of the facts and his knowledge of the establishment of the road, in a prosecution for obstructing such public road, show his good faith or negative the imputation of wilfulness in stopping up the road, by evidence as to his belief based on what others may have advised him in regard to fencing up the road. *Kelley v. State*, 46 App. 23, 80 S. W. 382.

16. Obstruction as negligence.—An obstruction of a street in an incorporated city in violation of this article is as to a person injured while using the street at the place of obstruction, negligence per se. *Shippers Compress Warehouse Co. v. Davidson*, 35 Civ. App. 558, 80 S. W. 1033.

17. Erection of gates.—To erect a gate across a public road of the first or second class constitutes an illegal obstruction of same. *Jolly v. State*, 19 App. 76.

The erection of a gate across a road of the third class would not have constituted an illegal obstruction of same, provided defendant complied with the requirements of the law in the construction thereof. *Jolly v. State*, 19 App. 76.

18. Fences.—The fact that after the establishment of a road one places his fence within the bounds of said road, and the commissioners' court does not remove the obstruction, does not relieve such person of liability for subsequently closing up the road by fencing it. *Kelley v. State*, 46 App. 23, 80 S. W. 382.

19. Complaint, information or indictment.—Willson's Cr. Forms, 364, 366.

An indictment under this article need not allege the materiality of the obstruction, or that the road had been duly laid off, or negative the right to obstruct. *State v. Collins*, 38 Tex. 189. It need not allege the class of the road, but if it does, the allegation is descriptive and must be proved. *Meuly v. State*, 3 App. 382. It may be charged that the defendant "did unlawfully and wilfully obstruct and cause to be obstructed a public road." *Day v. State*, 14 App. 26.

An indictment charging the obstruction of a public road need not allege the materiality of the obstruction, or that the road was laid off by the proper public authorities, or negative defendant's right to obstruct same. *State v. Collins*, 38 Tex. 189.

An indictment charging an obstruction of a public road need not allege the particular class of road; but when the offense charged is described with unnecessary particularity it is necessary to prove it substantially as described. *Meuly v. State*, 3 Tex. App. 382.

Indictment must allege that road was a public one. *McClanahan v. State*, 21 App. 429, 2 S. W. 813.

An indictment charging defendant with wilfully obstructing a public road and highway does not charge two distinct offenses. *Laroe v. State*, 30 App. 374, 17 S. W. 934.

An indictment held sufficient to charge obstruction of a public road. *Richardson v. State*, 46 App. 83, 79 S. W. 536.

The complaint or indictment in a prosecution for violating the statute before its amendment, which prohibits the wilful obstruction of a street in an incorporated town, was defective for not alleging that the town at the time was an incorporated town. *Martin v. State*, 72 App. 454, 162 S. W. 1145; *McClanahan v. State*, 21 App. 429, 2 S. W. 813; *Echols v. State*, 12 App. 615.

20. — **Variance.**—In a prosecution on a complaint and information charging the obstruction of an avenue extending north and south on the east side of an addition to a town, and known as G. avenue, by erecting a fence across it, where the only witness testified that the avenue obstructed ran east and west, and where the maps in evidence did not show any such avenue in the addition, the proof did not correspond with the allegations. *Carney v. State* (Cr. App.) 175 S. W. 155.

21. **Evidence.**—Defendant's testimony that previous to the obstruction he was informed by the person who laid out the road that he laid it out without authority is admissible on the question of willfulness. *Laroe v. State*, 30 App. 374, 17 S. W. 934.

Orders of the commissioners' court requiring defendant to open a dam which he had built alongside a public highway are not admissible against defendant in a prosecution for obstructing the highway predicated on the building of a dam, where defendant admitted having built the dam. *Richardson v. State*, 46 App. 83, 79 S. W. 536.

In a prosecution for obstructing a public road defendant cannot show good faith, and contradict the imputation of willfulness, by showing the prosecution by him of injunction proceedings with reference to the road subsequent to his obstruction thereof. *Kelley v. State*, 46 App. 23, 80 S. W. 382.

In a prosecution for obstructing a public road by fencing same, defendant's father being the owner of the land on both sides thereof, it was error to exclude testimony of a county commissioner that the father obtained verbal permission to locate the road at his own expense, where the court instructed that the fact that accused was his father's employé did not justify his act; the testimony tending to show a lack of willfulness or criminal intent on accused's part. *Craighead v. State*, 55 App. 339, 116 S. W. 579.

22. — **Sufficiency.**—Evidence held insufficient to sustain a conviction of obstructing a public road. *Farrier v. State*, 54 App. 536, 113 S. W. 763; *Meyer v. State*, 37 App. 460, 36 S. W. 255.

Evidence held to support a conviction. *Brown v. State* (Cr. App.) 166 S. W. 508.

23. **Instructions.**—An instruction to acquit defendant of obstructing a road if the jury believed from the evidence that he was not guilty held erroneous. *Brinkoeter v. State*, 14 App. 67.

It was not error to refuse a charge that, if defendant thought he was placing the obstruction on his own land, he should be acquitted, since the material question was whether it was in fact a public road. *Cornelison v. State*, 40 App. 159, 49 S. W. 384.

Where there was no question that defendant closed the road at a point in the road as designated by the jury of review and the commissioners' court, a charge that the true public road was the one actually laid out on the ground by the jury of review, and not the land lines or the route described in the report of the jury of review, was not prejudicial. *Kelley v. State*, 46 App. 23, 80 S. W. 382.

An instruction defining a public road as one actually reviewed and laid out on the ground by a jury of review appointed by and acting under authority from the commissioners' court, their written report describing the road having been approved and recorded by the commissioners' court, was proper. *Kelley v. State*, 46 App. 23, 80 S. W. 382.

A charge confining the investigation of the jury to the period between the 23d of February and the 27th of June, was not subject to criticism on the ground that it deprived defendant of any right under a plea of former acquittal of obstructing the same public road on the 14th of January, but it rather conserved that right. *Kelley v. State*, 46 App. 23, 80 S. W. 382.

An instruction that there was testimony as to the location of accused's fence, which is claimed by the state to be the obstruction, but the testimony on that point was conflicting, and that the jury was not required to harmonize conflicts in the evidence, but were free to believe any of the witnesses, was objectionable as misleading. *Jacobs v. State*, 55 App. 149, 115 S. W. 531.

Where accused testified that he had obtained permission from the commissioners' court to survey the land at his own expense and locate the boundary lines of the road, and that he surveyed the land and placed a fence five feet from the line on his own land, leaving that much land for the benefit of the public not called for by the field notes, the refusal to charge that if accused, when he built the fence, believed that it was built on his own land, or on the boundary line of the road, he should be acquitted, was erroneous. *Craighead v. State*, 55 App. 460, 117 S. W. 816.

24. — **Willful.**—The giving of instructions that willfulness would be presumed from the act of obstructing and that when the facts constituting the offense have been proven it devolves on defendant to show facts in justification held error. *Brinkoeter v. State*, 14 App. 67.

Failure to instruct on the meaning of "willful" held error. *Trice v. State*, 17 App. 43.

Failure to define "wilful" held error. *Loyd v. State*, 19 App. 321.

The defense being that the road was not wilfully obstructed, it was error for the court to fail to instruct as to the statutory meaning of the word "wilfully," the omission being called to the attention of the court. *Sneed v. State*, 28 App. 56, 11 S. W. 834.

In such prosecution it was incumbent on the court to define the word "wilfully" to the jury. *Dyrley v. State* (Cr. App.) 63 S. W. 631.

Where, in a prosecution for obstructing a road, the court instructed that, in order to convict, the jury must believe that the act was wilful, it was not necessary to give defendant's requested instructions on wilfulness. *Kelley v. State*, 46 App. 23, 80 S. W. 382.

25. Amount of fine.—Where accused, against the protests and objection of the properly constituted county authorities, cut a solid smooth gravel road, and put in a wooden culvert, thereby injuring and obstructing the road, and later commenced cutting the road at another point, a fine of \$50 was proper. *Brown v. State* (Cr. App.) 166 S. W. 508.

26. Venue.—A conviction of obstructing a highway will be set aside where the statement of facts fails to show that the road alleged to have been obstructed was situated in the county. *Robinson v. State* (Cr. App.) 39 S. W. 678.

27. Plea of acquittal.—In a prosecution for obstructing a road on March 3, the striking of a plea showing an acquittal of obstructing the same road on January 14th held not prejudicial. *Kelley v. State*, 46 App. 23, 80 S. W. 382.

Art. 813. [481] Riding or driving over bridges.—If any person shall ride or drive over any bridge belonging to any county, or to any municipal or private corporation, faster than a walk, he shall be fined in any sum not exceeding one hundred dollars. [Act 22d Leg., p. 131.]

Indictment.—Willson's Cr. Forms, 365.

Art. 813a. Entering on toll bridge with intent to avoid payment of toll.—If any person or persons in this State shall wilfully enter upon any toll bridge maintained wholly or partly within this State without the consent of those in charge of such bridge, with the intent to avoid the payment of the toll lawfully chargeable for crossing the same, such person or persons shall be deemed trespassers and guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five dollars nor more than one hundred dollars. [Act 1915, p. 154, ch. 100, § 1.]

Art. 814. Name of owner of automobile or motor vehicle to be registered.—All owners of automobiles or motor vehicles shall, before using such vehicles or machines upon the public roads, streets or driveways, register with the county clerk of the county in which he resides, his name, which name shall be registered by the county clerk in consecutive order, in a book to be kept for that purpose, and shall be numbered in the order of their registration; and it shall be the duty of such owner or owners to display in a conspicuous place on said machine the number so registered, which number shall be in figures not less than six inches in height. The county clerk shall be paid by such owner or owners a fee of fifty cents for each machine registered. [Act 1907, p. 193.]

Indictment.—Willson's Cr. Forms, 732L.

Art. 815. Speed of regulated.—No automobile or motor vehicle shall be driven or operated upon any public road, street or driveway at a greater rate of speed than eighteen miles an hour, or upon any public road, street or driveway, within the built up portions of any city, town or village, the limits of which shall be fixed by the municipal officers thereof, at a greater rate of speed than eight miles an hour, except where such city or town may, by an ordinance or bylaw, allow a greater rate of speed; provided, the speed limit shall not apply to race courses or speedways. [Id., p. 193.]

Validity of act.—The validity of this article is not affected by art. 816, declaring that no operator of an automobile shall drive the same at any speed greater than is reasonable and proper, having regard to the travel and use of the road by others, which is but a limitation on the speed rates fixed in art. 815, and though art. 816 is invalid because uncertain, art. 815 is valid. *Byrd v. State*, 59 App. 513, 129 S. W. 620.

Construction of act.—This article creates two offenses, and the exception relates only to the latter offense. *Byrd v. State*, 59 App. 513, 129 S. W. 620.

Existence of road.—A conviction for the violation of this article must be reversed, where the evidence does not establish that the road where the automobile was run was a public road. *Allen v. State* (Cr. App.) 169 S. W. 1151.

Excessive speed as negligence.—The driver of an automobile which was injured in turning to avoid a railroad locomotive at a crossing was guilty of negligence per se in approaching at from 15 to 25 miles per hour in violation of this article, in the absence of any showing that a greater speed was permitted by ordinance; and no recovery could be had from the railroad. *Houston Belt & Terminal Ry. Co. v. Rucker* (Civ. App.) 167 S. W. 301.

Intent.—This article does not make the intent of an operator of an automobile an element of the offense; but an operator must at his peril keep within the statutory limit. *Goodwin v. State*, 63 App. 140, 138 S. W. 399.

Defenses.—A driver of an automobile is not relieved from the penalty for operating it at a speed in excess of that fixed by Acts 30th Leg. c. 96, on the ground that the automobile was under the control of a third person riding therein, unless the driver shows that he was under duress and drove the automobile at the instance of the third person. *Goodwin v. State*, 63 App. 140, 138 S. W. 399.

Indictment or complaint.—Willson's Cr. Forms, 732m.

A complaint alleging that accused operated an automobile at a greater speed than 18 miles an hour on a public road not a speedway charges a violation of this article. *Goodwin v. State*, 63 App. 140, 138 S. W. 399.

— **Negating exception.**—Indictment to be sufficient must negative exception named in the article. *Byrd v. State*, 59 App. 513, 129 S. W. 620.

Art. 816. Not to be operated as to endanger life or limb.—No person in charge of an automobile or motor vehicle on any public road, street or driveway, shall drive the same at any speed greater than is reasonable and proper, having regard to the traffic and use of the public road, street or driveway by others, or so as to endanger the life or limb of any person thereon. [Id., p. 193.]

Validity of article.—The validity of art. 815, fixing the maximum speed of automobiles on public roads, is not affected by this article which is but a limitation on the speed rates fixed in art. 815, and though art. 816 is invalid because uncertain, art. 815 is valid. *Byrd v. State*, 59 App. 513, 129 S. W. 620.

Effect on civil duty.—Even if this article was too indefinite to be enforced as a penal statute, it was sufficient as a remedial statute imposing a civil duty so as to render its violation negligence per se. *Solan & Billings v. Pasche* (Civ. App.) 153 S. W. 672.

Art. 817. Racing on street or public road prohibited.—All drivers or operators of automobiles or motor vehicles are prohibited from racing upon any public road, street or driveway. [Id., p. 193.]

Art. 818. Operator when signaled shall come to a standstill.—Any person driving or operating an automobile or motor vehicle shall, at the request, or signal by putting up the hand, or by other visible signal from a person riding or driving a horse or horses or other domestic animal, cause such vehicle or machine to come to a standstill as quickly as possible, and to remain stationary long enough to allow such animal to pass. [Id., p. 193.]

Art. 819. Shall have attached suitable bell to give notice of approach.—Every driver or operator of an automobile or motor vehicle shall have attached thereto a suitable bell or other appliance for giving notice of its approach, so that, when such attachment is rung or otherwise operated it may be heard a distance of three hundred feet, and shall carry a lighted lamp between one hour after and one hour before sunrise. [Id., p. 193.]

Art. 820. Penalty for violation.—Every one who violates any of the six preceding articles shall be punished by a fine of not less than five dollars nor more than one hundred dollars. [Id., p. 193.]

Art. 821. [482] Destroy, injure or misplace bridge, culvert, ditch, signboard, etc.—Any person who shall knowingly or willfully destroy, injure or misplace any bridge, culvert, drain, sewer, ditch, signboard, mile post, or tile, or anything of like character placed upon any road for the benefit of the same, shall be guilty of a misdemeanor, and, upon conviction thereof, punished by fine of not more than five hundred dollars, and shall be liable to the

county and any person injured for all damages caused thereby. [Act 22d Leg., ch. 97, p. 149, § 22.]

Art. 822. [482a] Unlawful to carry over any public road or culvert any traction engine, when.—It shall be unlawful for any person to transport or carry over any public bridge or culvert, upon any public road or highway, or any street or alley in any incorporated town or city, any traction engine with lugs on the wheels thereof, and to carry or transport over any such public bridge or culvert any traction engine or separator, without having first provided and placed in position skids upon which the wheels of said traction engine or separator shall be run, which said skids shall be not less than three inches thick, twelve inches in width and sixteen feet in length; and any person violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding five hundred dollars. [Act 1907, p. 189.]

Art. 823. [483] Not applicable, when.—No person shall be punished, under article 812, who places obstructions in the streets or alleys of an incorporated city or town for purposes of building or improvement, under the sanction of the corporate authorities of such city or town.

Art. 824. [484] Commissioners' court may regulate.—Nothing in this chapter contained shall be so construed as to prevent the commissioners' courts of the several counties, or the municipal authorities of towns or cities, from adopting such regulations as they may deem proper relative to the removal of obstructions from public roads, streets or bridges, and to enforce the same by due process of law.

See notes under art. 812.

Art. 825. [485] Commissioners' court may control streets, etc., when.—In all cities and incorporated towns in the state of Texas in which, from any cause, there is not a de facto municipal government in the active discharge of their official duties, the commissioners' court of the county in which such city or incorporated town is situated shall assume and have control of the streets and alleys thereof, and shall have the same worked under the law and regulations for the working of public roads; and such streets and alleys, for the purposes of this law, shall be held and denominated public roads; provided, that all residents of any city or town having no de facto city government, not otherwise exempt from road duty, shall be liable to road service as in other cases. [Act March 4, 1885, p. 25.]

Art. 826. [485a] Wilful obstruction of public ditch or diversion of water.—If any person shall wilfully obstruct any public ditch, or shall wilfully divert the water from its proper channel, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than five nor more than five hundred dollars, and shall also be liable for any and all damages accruing to any person or persons or corporation or county for any such act. [Acts of 1895, p. 155; Act 1897, p. 99.]

Explanatory.—In the revised Penal Code the above article was ascribed to Acts 1895, p. 155. The provision was re-enacted, without change of language, by Acts 1897, p. 99, § 15. See art. 836, and note thereunder.

Indictment.—Willson's Cr. Forms, 379.

Art. 826a. Depositing glass and other substances in highway.—That hereafter it shall be unlawful for a person to wilfully throw or deposit in or on any public road, street, or alley any glass bottle, glass, nails, tacks, hoops, wire, cans or any other substance, likely to injure any person, animal, automobile or vehicle and any

person violating any of the provisions hereof, shall upon conviction thereof, be fined any sum not less than five dollars nor more than two hundred dollars. [Act 1913, p. 131, ch. 71, § 1.]

CHAPTER TWO

OFFENSES PERTAINING TO PUBLIC ROADS, [DRAINAGE, LEVEES], AND IRRIGATION

Art.	Art.
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Article 827. [486] Refusal to serve as overseer.—If any person, subject to public road duty under the laws of this state, shall wilfully fail or refuse to serve as overseer of any road in his road district or precinct, when duly appointed as such overseer by the commissioners' court of his county, he shall be fined not less than ten nor more than fifty dollars. [Act July 29, 1876, p. 67.]

Duty to accept appointment.—A road overseer has no option of accepting or rejecting an appointment as road overseer, but must perform the service required of him as prescribed, and within the time prescribed. *State v. Chinn*, 29 Tex. 497.

Ignorance as defense.—Defendant's inability to read and write is no defense in prosecution for wilfully refusing to serve as road overseer. *France v. State* (Cr. App.) 77 S. W. 452.

Indictment.—Willson's Cr. Forms, 367.

Art. 828. [487] Failure of duty as overseer.—If any overseer of a public road in this state shall wilfully fail, neglect or refuse to perform any duty imposed upon him by law, or shall so fail, neglect or refuse to keep the roads, bridges and causeways in his precinct or district clear of obstructions and in good order, or shall wilfully suffer such roads, bridges or causeways to remain uncleared and out of repair for twenty days at any one time, he shall be fined not less than ten nor more than twenty-five dollars. [Id., p. 68.]

Character of road.—It is not necessary to prove that the road has been classified. *Sigler v. State*, 17 Tex. 304.

Appointment of overseer.—Proof that the defendant acted as overseer of the road is sufficient evidence of his appointment as such, and that he had been notified of such appointment. *Sigler v. State*, 17 Tex. 304. A formal acceptance of such appointment by him need not be shown. *State v. Chinn*, 29 Tex. 497.

For an order appointing an overseer held sufficient, see *Tincher v. State*, 19 Tex. 156.

Willful.—To constitute an offense the neglect of duty by road overseer must be shown to have been willful. Such overseer is charged only with reasonable diligence, and if, because of lack of available means, he fails to keep his road in repair, he is not liable. *Moore v. State*, 27 App. 439, 11 S. W. 457. See, also, *Parker v. State*, 29 App. 372, 16 S. W. 186; *Howell v. State*, 29 App. 592, 16 S. W. 533; *Laroe v. State*, 30 App. 374, 17 S. W. 934.

Removal of obstructions.—An overseer of a public road is not only authorized, but it is made his duty to remove from such road all unauthorized obstructions, and in performing such duty he is justified by the law in removing a fence which has been erected across such road. *Schott v. State*, 7 App. 616.

Repair of streets.—An indictment will not lie against an overseer for failing to keep a road in repair within the limits of an incorporated city or town, for the reason that the commissioners' court has no jurisdiction over the subject-matter. But where there is not a de facto municipal government, the commissioners' court has jurisdiction to control the streets and alleys of the city or town, and in such case the overseer would be liable. *State v. Jones*, 18 Tex. 874.

Burden of proof.—See notes under art. 52, ante, and art. 785, C. C. P.

Indictment.—Willson's Cr. Forms, 368.

Indictment need not allege specifically the county in which the road is situated, if it designates said road as leading from the county seat of the county, naming the county, to the line of said county. *State v. Lee*, 15 Tex. 252. But on exception, the omission to allege the road precinct, by number or otherwise, with sufficient certainty to identify the road assigned, is fatal. Thus to allege, that it was "road number seven in said county," is insufficient. *State v. Hail*, 21 Tex. 587.

An indictment alleging that defendant was duly elected road overseer of Road Precinct No. 1 of a certain road leading from Austin by certain places to the county line and took upon himself his duties as such, and charging that he failed to keep the roads, bridges, and causeways within his said precinct clear and in good order, sufficiently charged that the offense was committed in Travis County. *State v. Lee*, 15 Tex. 252.

An indictment for failure to keep the road in repair, is sufficient when it charges that the defendant was overseer of a certain specific precinct of a certain designated public road in the county, and that he willfully suffered such road of which he was overseer to remain uncleared and out of repair for twenty days at one time. *State v. Forrest*, 30 Tex. 503. It would, perhaps, be better pleading, to designate the twenty days time during which the road was suffered to remain out of repair.

An indictment under the 23d section of the road law was sufficient where it charged that defendant was overseer of a certain precinct of a certain road in the county and neglected to keep same in good repair and suffered same to remain out of repair for twenty days at one time. *State v. Forrest*, 30 Tex. 503.

An indictment was defective where it failed to show that defendant road overseer was bound by law to keep the road in repair. *Massure v. State*, 36 Tex. 377.

Variance.—A variance in the description of the road in the indictment, and that described in the order establishing such road, is immaterial if it be proved to be the same road, and the description of it in the indictment is appropriate. *Sigler v. State*, 17 Tex. 304.

Art. 829. [488] Same subject.—If any overseer of a public road in this state shall fail, within six months after his appointment as such, to measure the road or roads in his precinct or district and set up posts of lasting timber at the end of each mile leading from the court house, or some other noted place or town, and to mark on such posts in legible words and figures the distance in miles to such court house, or other noted place, or shall fail, when any such post is destroyed or removed, to replace the same with another marked as the original, or shall fail to affix or set up at the forks of all public roads in his district or precinct index boards with the directions pointing toward the most noted places to which they lead, he shall be fined in the sum of five dollars. [Id., p. 67.]

Elements of offense.—The neglect to set up mileposts for any consecutive six months is not necessarily an offense. This consists in not doing it within six months after his appointment. *State v. Smith*, 25 Tex. Supp. 64. Nor does a penalty attach upon a failure to "measure the road," but for failure "to set up mileposts." *State v. Mathis*, 30 Tex. 506.

Evidence.—Evidence that defendant acted as road overseer was admissible and sufficient proof that he had been notified of his appointment. *Sigler v. State*, 17 Tex. 304.

In the prosecution of a road overseer for failure to keep a road in repair, it need not be proven that the road has been classified. *Sigler v. State*, 17 Tex. 304.

Burden of proof.—See notes under art. 52, ante, and art. 785, C. C. P.

Indictment and information.—Willson's Cr. Forms, 370-372.

The indictment need not describe the order establishing a road. *Sigler v. State*, 17 Tex. 304.

After verdict indictment is sufficient if it describes the road and the breach of duty with such certainty as to notify the defendant of the precise facts constituting the offense. *Sennett v. State*, 17 Tex. 308.

The omission to allege the road precinct by number or otherwise, with sufficient certainty to identify the road assigned is fatal. *Hardeman v. State*, 25 Tex. 179.

Where the indictment is for failure to put up mileposts, it must be alleged that such failure was within six months after his appointment as overseer. *Hardeman v. State*, 25 Tex. 179; *State v. Smith*, 25 Tex. Supp. 64; *State v. Chinn*, 29 Tex. 497. It should, in such case, negative the fact that there is any other "noted place or town" between the termini of the precinct. *State v. Mathis*, 30 Tex. 506.

An indictment describing the road as "road No. 7 in M. county," held insufficient. *Hardeman v. State*, 25 Tex. 179.

An indictment not describing with certainty the road of which defendant was appointed overseer, held insufficient. *Hardeman v. State*, 25 Tex. 179.

An indictment of a road overseer for wilfully failing to keep a road in repair, which charges that defendant, "of the county of F.," on a specified date, "in the county and state aforesaid, was the duly appointed overseer of a public road then and there situated," giving the section and precinct, sufficiently avers that the road was in F. county. *Howell v. State*, 29 App. 592, 16 S. W. 533.

Pleading and proof.—Where the offense is described with unnecessary particularity, it is necessary to prove it substantially as described. *Meuly v. State*, 3 App. 382.

Where one of the several modes in which the statute may be violated has been selected and declared on, the prosecution can prove no other but must prove the case as alleged. *Howell v. State*, 29 App. 592, 16 S. W. 533.

Art. 830. [489] Road commissioner failing to comply; penalty.—Any road commissioner who shall wilfully fail to comply with any duty required of him shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by fine of not less than twenty-five nor more than two hundred dollars. [Act April 6, 1889, 21st Leg., ch. 111, § 5.]

Indictment.—Willson's Cr. Forms, 369.

Art. 831. [490] Road superintendent failing to comply; penalty.—Any road superintendent who shall wilfully fail or refuse to comply with any provision of law or order of the commissioners' court shall be guilty of a misdemeanor, and, on conviction thereof, punished by fine of not less than twenty-five nor more than two hundred dollars for each offense. [Act 22d Leg., ch. 97, p. 149, § 21.]

Counties exempted, see article 6976, Vernon's Sayles' Civ. St. 1914.

Art. 831a. Age limitation of workers on public roads, etc.—No person in this state under the age of twenty-one years, or over the age of forty-five years, shall be required to work upon the public roads of this state or upon the streets and alleys of any city or town of this state. [Act 1895, p. 160, ch. 102, § 1.]

Explanatory.—The above provision was omitted from the revised Pen. Code of 1911. As it seems to be unrepealed, and in view of the decision in *Berry v. State*, 156 S. W. 626, it is inserted in this compilation.

Art. 832. [491] Failure to attend when summoned.—If any person, liable to work upon the public roads, after being legally summoned, shall fail or refuse to attend, either in person or by able and competent substitute, or fail or refuse to furnish his team or tools at the time and place designated by the person summoning him, or to pay to such road overseer the sum of one dollar for each day he may have been notified to work on the public roads, or to pay to such overseer the sum of one dollar and fifty cents for each day he may have been notified to furnish his team for road work, or, having attended, shall fail or refuse to perform good service or any other duty required of him by law, or the person under whom he may work, or, if any one shall fail to comply with any duty required of him as provided by law, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, fined in any sum not exceeding twenty-five dollars. [Act July 29, 1876, p. 60; Act 1899, ch. 15; amended, Act 1901, p. 277.]

Payment of money.—The payment of money in lieu of attendance and work must be made to the overseer. A tender or payment made to an unauthorized person is no defense to a prosecution under the preceding article. *Gross v. State*, 4 App. 249.

Applicability of act to city.—This article has no application to a citizen of a city which, under its charter, exercises exclusive control over the streets, alleys and public highways within the city limits. *Ex parte Roberts*, 28 App. 43, 11 S. W. 782.

A town or city incorporated under the general laws has the power, by ordinance, to compel its citizens to work its streets under penalty of fine and imprisonment. *Ex parte Bowen*, 34 App. 107, 29 S. W. 269.

A city can impose such penalties as it sees fit without reference to the State law in regard to working the roads subject to the limitations of punishment as fixed by the jurisdiction of their local courts. *Ex parte Drake*, 55 App. 233, 116 S. W. 49.

Residence.—If accused did not make his home in a particular road precinct and was a transient person working in boats on the bay most of the time, he could not

be convicted of failing to work the public roads in the district; the state being required to show that he was subject to road duty and had lived within the boundaries of the road precinct long enough to make him a road hand. *Anselin v. State*, 72 App. 17, 160 S. W. 713.

Complaint and information.—Willson's Cr. Forms, 373, 374.

A complaint and information which charged that accused was a delinquent poll tax payer in the county, liable under the law to work upon a certain public road, and was legally summoned to do so at a certain time and place by the road commissioner for the district, and wilfully failed and refused to do so, etc., was insufficient because failing to allege that accused was liable and in default of payment of a tax for a year within the period of limitation. *Bluitt v. State*, 56 App. 525, 121 S. W. 168.

Evidence.—In a prosecution for failure of a delinquent poll tax payer to appear for road work, while a strong inference might arise from an agreed statement of facts reciting that accused was correctly assessed for a poll tax in 1905 for that year by the tax assessor, as shown by the tax rolls of the county, and that he did not pay any poll tax in 1905 or 1906, that a poll tax had been levied for those years, it could not, in the absence of proof to that effect, be assumed that there had been a levy, in the absence of a clear agreement to that effect. *Bluitt v. State*, 56 App. 525, 121 S. W. 168.

Art. 833. [493] Failure to open boundary lines.—Whenever the commissioners' court of any county in this state shall duly declare the boundary lines between the lands of different persons a public highway, in accordance with law, if any person or owner shall fail, neglect or refuse, for twelve months after legal notice thereof, to leave open his land, free from all obstructions, for ten feet on his side of the line designated, he shall be fined not more than twenty dollars for each month after the twelve months afore-said in which he may so fail, neglect or refuse. [Act July 29, 1876, p. 69.]

Indictment.—Willson's Cr. Forms, 375.

Art. 834. [494] Leaving gates open on third-class roads.—Any person or persons placing a gate on or across any third-class road, or on or across any road such as is designated in article 833 of the Penal Code, shall be required to keep said gate and the approaches to the same in good order; and the gate shall be ten feet wide and so constructed as to cause no unnecessary delay to the traveling public in opening and shutting the same, and provide a fastening to hold said gate open till the passengers go through; and such person or persons shall place a permanent hitching post and stile block on each side of, and within sixty feet of, such gate. Any person or persons who may hereafter place a gate on or across a third class road, or on or across any road such as is designated in article 493 [833], who shall wilfully or negligently fail to comply with the requirements of this article shall be deemed guilty of a misdemeanor, and, on conviction, may be fined in any sum not less than five nor more than twenty dollars for each offense; and each week of said failure shall constitute a separate offense. Any person or persons who shall wilfully or negligently leave open any gate on or across any third class road, or on or across any road such as is designated in article 493 [833], shall be deemed guilty of a misdemeanor, and, on conviction, may be fined in any sum as above provided for. [Amended by Act Feb. 2, 1874, S. S., p. 18.]

Construction of act.—For construction of this article, see *Jolly v. State*, 19 App. 76, and *Conner v. State*, 21 App. 176, 17 S. W. 157; and note the first mentioned decision to the effect that if the road obstructed by the gate is not a public road of either class, then the leaving open of such a gate would be a violation of article 1250 of this Code.

Indictment.—Willson's Cr. Forms, 376.

Art. 835. [495] Violation of irrigation laws.—If any person amenable to the laws governing irrigation shall fail or refuse to work on any ditch or aqueduct when summoned so to do by the proper authority, he shall be fined not less than one nor more than five dollars. [Act Dec. 20, 1861.]

Explanatory.—The above article seems to have been superseded by the new irrigation acts (*Vernon's Sayles' Civ. St.* 1914, arts. 4991-5107-105). Arts. 5002m

and 5002o, Vernon's Sayles' Civ. St. 1914 seem to be the only vestige of the old provisions requiring work on irrigation ditches. The new provisions contemplate a civil rather than a criminal remedy against delinquents.

Indictment.—Willson's Cr. Forms, 377.

Art. 836. Persons obstructing ditch constructed under the drainage law.—If any person shall wilfully or negligently obstruct, or cause to be obstructed, any ditch constructed under the drainage law of this state, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than ten dollars nor more than one hundred dollars. [Act 1899, p. 100.]

Explanatory.—While the revisers of the Penal Code ascribed the above provision to Act 1899, p. 100, it may have been the design to construct a composite provision applicable to all the groups of the drainage law. Act 1899, p. 100, as originally enacted, has reference to the group placed under chapter 2 of Title 47, Rev. St. 1911. The corresponding penal provision for the group represented by chapter 2, Title 47, Rev. St. 1911 is found in Acts 1897, p. 99, § 15. This provision was carried into the Penal Code as art. 826. The group represented by chapter 4, Title 47, Rev. St. 1911, carried a penal provision (Acts 1907, p. 88, ch. 40, § 39), and this provision was inserted in the revision as art. 1253, post. Art. 1253 was superseded by Act 1911, ch. 118, § 40 (art. 1253, post).

Indictment.—Willson's Cr. Forms, 380.

Art. 836a. Destruction of works constructed by State Levee and Drainage Board.—Any person or persons who shall wilfully destroy or deface any corner, line, mark, bench mark or other object fixed or established in connection with the work herein authorized [Arts. 5529a-5529j, Vernon's Sayles' Civ. St. 1914] shall be deemed guilty of a misdemeanor, and upon a conviction thereof, shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars; or by imprisonment in the county jail for a period of not less than thirty days; or by both such fine and imprisonment. [Act 1909, ch. 81; Act 1911, ch. 88; Act 1913, p. 296, ch. 145, § 9.]

Art. 837. [496] Injuring irrigation canal, etc.—Any person who shall wilfully or through gross negligence injure any irrigating canal or its appurtenances, wells or reservoirs, or who shall waste the water thereof, or shall take the water therefrom without authority, shall be deemed guilty of a misdemeanor, and, for each offense, shall be liable to a fine not exceeding two hundred dollars. [Act March 19, 1889, p. 100, § 14; Act 1895, p. 25, § 16; amended, Act 1899, p. 301.]

See art. 1252.

Explanatory.—Acts 1913, ch. 171 re-enacts Acts 1895, p. 25, of which this article was a part (section 16), and creates separate offenses of the various acts denounced by this article. See arts. 837a, 837e, 837f, 837i, 837m, post. The result would seem to be that this article is wholly or partly superseded. See, also, art. 1252.

Information.—Willson's Cr. Forms, 378.

In a prosecution for the wrongful taking of water from an irrigating canal, the information in failing to allege ownership of the canal was fatally defective, this article being analogous to those of theft and malicious mischief involving a trespass upon the property of others. *Dolan v. State*, 60 App. 5, 129 S. W. 840.

Art. 837a. Taking water without permit.—Any person, association of persons, corporation or irrigation district, or any agent, officer, employé or representative of any person, association of persons, corporation or irrigation district, who shall wilfully take, divert or appropriate any of the water of this State, or the use of such water, for any purpose, without first complying with all the provisions of this Act [Vernon's Sayles' Civ. St. 1914, arts. 4991-5011s], shall be deemed guilty of a misdemeanor; and on conviction thereof shall be fined in any sum not exceeding one hundred dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment; and each day that such taking, diversion or appropriation of water shall continue shall constitute a separate offense; and the possession

of such water, except when the right to its use is acquired in accordance with the provisions of law, shall be prima facie proof of the guilt of the person, association of persons, corporation, irrigation district, or the agent, officer, employé or representative of any person, association of persons, corporation or irrigation district. [Act 1895, p. 25; Act 1913, p. 367, ch. 171, § 39.]

Art. 837b. Use of streams for conveying stored water.—For the purpose of conveying and delivering storm, flood or rain water from the place of storage to the place of use as provided in the preceding Section [art. 5001m, Vernon's Sayles' Civ. St. 1914] it shall be lawful for any person, association of persons, corporation or irrigation district to use the banks and bed of any flowing natural stream within this State; under and in accordance with such rules and regulations as may be prescribed by the Board of Water Engineers; and such board shall prescribe rules and regulations for such purpose. No person, association of persons, corporation, or irrigation district who has not acquired the right to the use of such conserved or stored waters as provided in the last preceding Section [art. 5001m, Vernon's Sayles' Civ. St. 1914] shall take, use, or divert same. [Act 1913, p. 370, ch. 171, § 51.]

Art. 837c. Penalty for unlawful interference.—Any person, association of persons, corporation, or irrigation district, of [or] the agent, officer, employee, or representative of any such person, association of persons, corporation, or irrigation district who shall wilfully interfere with the passage of or take, divert, or appropriate such conserved or stored water during the passage and delivery thereof as provided in the last two preceding sections [art. 837b, ante, and art. 5001m, Vernon's Sayles' Civ. St. 1914], shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined in any sum not exceeding one hundred dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment. [Id., § 52.]

Art. 837d. Interference with headgates, etc., forbidden.—Any person, who shall wilfully open, close, change or interfere with any headgate or water box, without lawful authority, or who shall wilfully use water or conduct water in or through his ditch or upon his land, to which water he is not entitled, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum of not less than ten dollars, and not more than one hundred dollars, or by imprisonment in the county jail for a term not exceeding sixty days; provided, that the possession or use of water to which the person using or possessing same shall not lawfully be entitled shall be prima facie proof of the guilt of the person so using or in possession of same. [Id., § 69.]

Art. 837e. Penalty for injuring works.—Any person or persons who shall knowingly and wilfully cut, dig, break down, destroy, or injure, or open any gate, bank, embankment or side of any ditch, canal, reservoir, flume, tunnel or feeder or pump or machinery, building, structure or other work, which is the property of another, or in which another owns an interest, or which is in the lawful possession or use of another or others, and which is used for the purpose of irrigation or milling or mining, or manufacturing, or for the development of power or for domestic purposes, or for stock-raising, with intent maliciously to injure any person, association or corporation or irrigation district, or for the gain of any person, association or corporation, so cutting, digging, breaking, injuring or opening any such work hereinbefore in this Section named, or with the intent of stealing or taking or causing to run out or waste out of

any such ditch, canal or reservoir, feeder or flume, any water for his own profit, benefit or advantage or to the injury of any person, association or corporation lawfully entitled to the use of such water or to the use or management of such ditch, canal, tunnel, reservoir, feeder, flume, machinery, structure or other irrigation work, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten dollars nor more than one thousand dollars, and may be punished by imprisonment in the county jail for any term not exceeding two years, or by both such fine and imprisonment. [Id., § 70.]

Art. 837f. Penalty for polluting or obstructing canals, etc.—Any person or persons who shall deposit in any canal, lateral, reservoir or lake, used for any of the purposes enumerated in this Act [arts. 4991–5011s, Vernon's Sayles' Civ. St. 1914] the carcass of any dead animal, tin cans, discarded buckets or pails, garbage, ashes, baling or barbed wire, earth, offal or refuse of any character, or any other article or articles which might pollute or obstruct the flow of water in any such canal or other similar structure, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than ten dollars, nor more than one hundred dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment. [Id., § 71.]

Art. 837g. Diversion of water from watershed prohibited when.—It shall be unlawful for any person, association of persons, corporation, or irrigation district to take or divert any of the water of the ordinary flow, underflow, or storm flow of any stream, water course, or watershed in this State into any other natural stream, water course, or watershed to the prejudice of any person or property situated within the watershed from which such water is proposed to be taken or diverted. [Id., § 81.]

Art. 837h. Same; permit; proceedings.—Before any person, association of persons, corporation, or irrigation district shall take any water from any natural stream, water course, or watershed in this State into any other watershed, such person, association of persons, corporation, or irrigation district shall make application to the Board of Water Engineers for a permit so to take or divert such waters, and no such permit shall be issued by the board until after full hearing before said board as to the rights to be affected thereby, and such hearing shall be held and notice thereof given at such time and such place in such mode and manner as the board may prescribe; and from any decision of the board an appeal may be taken to the district court of the county in which such diversion is proposed to be made in the mode and manner prescribed in this Act for other appeals from the decision of the board. [Id., § 82.]

Art. 837i. Same; penalty.—If any person, association of persons, corporation, irrigation district, or the agent, attorney, employé, or representative of any such person, association of persons, corporation or irrigation district, shall take or divert any waters from one natural stream, water course, or watershed into any other watershed contrary to the provisions of the last two preceding Sections of this Act [arts. 837g, 837h], he, it or they, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine in any sum not less than one hundred dollars nor more than five hundred dollars or by imprisonment in the county jail for any term not exceeding six months, and each day that such taking or diversion shall continue shall constitute a separate offense. [Id., § 83.]

Art. 837j. Johnson Grass and Russian Thistle.—It shall be unlawful for any person, association of persons, corporation or irrigation district owning, leasing or operating any ditch or canal or reservoir or cultivating any lands, abutting upon any reservoir, ditch, flume, canal, waste-way or lateral to permit Johnson Grass or Russian Thistle to go to seed upon such reservoir, ditch, flume, canal, waste-way or lateral within ten feet of the high water line of any such reservoir, ditch, flume, canal, waste-way or lateral, where the same crosses or lies upon land in the ownership or control of any such person, association of persons, corporation or irrigation district, and any one violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction therefor shall be fined in any sum not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment. [Id., § 90.]

Art. 837jj. Same; limitation of preceding article.—That Section 90 [art. 837j] of the Acts of the Thirty-Third Legislature of Texas, approved April 9, 1913, General Laws, Thirty-third Legislature, pages 358 et seq., relating to irrigation, shall have no application to cases of lands or ditches located in Tom Green, Sterling, Irion and Schleicher county, in which the land abutting upon the reservoir, ditch, flume, canal, wasteway or lateral owned and cultivated by the person, association of persons or corporations owning or operating such reservoir, ditch, flume, canal, wasteway or lateral. [Act 1915, p. 127, ch. 74, § 1.]

Art. 837k. Artesian wells.—An artesian well is defined for the purposes of this Act to be any artificial well in which, if properly cased, the waters will rise by natural pressure above the strata in which they are found. [Act 1913, p. 378, ch. 171, § 91.]

Art. 837l. Waste defined.—Waste is defined for the purposes of this Act in relation to artesian wells to be the causing, suffering or permitting the waters of an artesian well to run into any river, creek or other natural water course or drain, superficial or underground channel, bayou, or into any sewer, street, road, highway, or upon the land or any other person than that of the owner of such well, or upon the public lands, or to run or percolate through the strata above that in which such water is found: unless it be used for the purposes and in the manner in which it may be lawfully used on the premises of the owner of such well; provided, that nothing in this Section shall be construed to prevent the use of such water, if suitable, for the proper irrigation of trees standing along or upon any street, road or highway, or for ornamental ponds or fountains, or the propagation of fish or for the purposes authorized by this Act. [Id., § 93.]

Art. 837m. Penalty for waste.—Any person causing, suffering, or permitting the waste of water from an artesian well as defined in the last preceding Section [art. 837l] shall be deemed guilty of a misdemeanor, and upon conviction therefor shall be fined in any sum not less than twenty-five dollars nor more than five hundred or by imprisonment in the county jail for any period not exceeding six months, or by both such fine and imprisonment. [Id., § 94.]

Art. 837n. Record of boring, etc.—Any person boring or causing to be bored any artesian well shall keep a complete and accurate record of the depth and thickness and character of the different strata penetrated, and when such well is completed, shall transmit by registered mail to the Board of Water Engineers a copy of such record. Any person violating the provisions of this section shall

be deemed guilty of a misdemeanor and upon conviction therefor shall be fined in any sum not less than ten dollars nor more than one hundred dollars. [Id., § 95.]

Art. 837o. Oil wells.—Nothing in the preceding Sections numbered ninety-one to ninety-five [arts. 837k–837n, ante, and art. 5011h, Vernon’s Sayles’ Civ. St., 1914] inclusive, shall be construed to apply to any oil well, and the status of such oil wells shall be unaffected by this Act. [Id., § 96.]

Art. 837p. Partial invalidity.—If any provision of this Act shall be held unconstitutional, it shall not be held to invalidate any other provision of this Act. [Id., § 99.]

CHAPTER TWO A

OFFENSES RELATING TO TOLL ROADS

<p>Art. 837q. Toll road corporations may promulgate rules and regulations.</p> <p>837r. May not refuse reasonable use of road.</p>	<p>Art. 837s. Trespass on property of toll road corporation.</p> <p>837t. Obstruction of toll road.</p>
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Article 837q. Toll road corporations may promulgate rules and regulations.—Every toll road corporation [Vernon’s Sayles’ Civ. St. 1914, arts. 1278a–1278u] shall have the power to promulgate, by its board of directors, all necessary and reasonable rules and regulations relating to the manner in which traffic shall move over any toll road operated by it, and to refuse the use of such road to any person who shall fail or refuse to abide by such rules and regulations; and shall be empowered to fix and charge tolls for the use of such roads; provided, that such rules and regulations shall not be contrary to law, and provided that the rate to be charged for each class of vehicle shall be the same to all in each of such classes. [Act 1913, p. 145, ch. 77, § 22.]

Art. 837r. May not refuse reasonable use of road.—No such corporation shall have the right arbitrarily to refuse the use of such road to any person who shall offer to pay the regular toll therefor, except that such corporation shall be authorized to refuse to permit such road to be used by any vehicle which shall render the same unduly hazardous to the patrons of said road or damaging to the surface thereof, or to any person who shall fail or refuse to abide by the reasonable and necessary traffic regulations promulgated by such corporation. [Id., § 23.]

Art. 837s. Trespass on property of toll road corporation.—It shall be unlawful for any person to trespass or enter upon the property or right of way of any such corporation without its consent except as to crossings provided by law, and any person so trespassing or unlawfully entering thereupon shall be deemed guilty of a misdemeanor and upon conviction shall be fined in a sum not less than \$25.00 nor more than \$100.00. [Id., § 24.]

Art. 837t. Obstruction of toll road.—It shall be unlawful for any person to in any manner obstruct any such toll road, or to place thereon any thing or substance which would be reasonably calculated to result in injury to any patron of such road, or damage to any vehicle which might be run over the same; and any person so placing any such obstruction or thing or substance on any such road shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum not less than \$50.00 nor more than \$200.00. [Id., § 25.]

CHAPTER THREE

OFFENSES RELATING TO FERRIES

Art. 838. Keeping ferry without license.	Art. 839. Failure to keep good boats, etc.
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Article 838. [497] Keeping ferry without license.—If any person or firm shall keep any ferry over any water course, navigable stream, lake or bay in this state, and shall charge or receive any money, property, or other valuable thing, for crossing passengers or property at such ferry, without first obtaining license, as is now or as may hereafter be required by law, such person or firm shall be punished by fine not less than fifty nor more than two hundred dollars. [Act Feb. 11, 1860, p. 98.]

See chap. 10, title 119, Vernon's Sayles' Civ. St. 1914, for law regulating ferries.
Indictment.—Willson's Cr. Forms, 381.

Art. 839. [498] Failure to keep good boats.—If the owner of any licensed ferry in this state shall fail to keep, at all times, good, safe and substantial boats, sufficient in number for the ready accommodation of the public, or shall fail to keep the banks on each side of the ferry in good repair, and so graded that the ascent shall not exceed one foot in every seven feet from the water's edge to the top of the bank, or shall fail to give ready attendance on all passengers desiring to cross with their animals, wagons, or other property, or shall charge higher rates of ferriage than those fixed by the proper authority, he shall be fined not less than ten nor more than one hundred dollars. [Act March 4, 1875, pp. 58-59.]

Indictment.—Willson's Cr. Forms, 382-385.

CHAPTER FOUR

OFFENSES RELATING TO PUBLIC GROUNDS AND BUILDINGS

Art. 840. Injuring or defacing a public building	Art. 852. Purchaser turning loose too many stock upon leasehold land.
841. "Public building" defined.	852a. Construction of fences without gates.
842. All officers to report violations.	853. Other statutes relating to public lands.
843. Driving in capitol grounds, etc.	854. Permitting fence to stand, etc.
844. Injuring roadway, public grounds or property of state prohibited.	855. Articles that apply to prosecutions.
845. Not to apply, when.	856. When the law does not apply.
846. "Public grounds" defined.	857. Unlawful to herd horses, etc.
847. Hitching in capitol grounds.	858. Penalty.
848. Pass-keys to state capitol.	859. Turning loose excess of stock on leased land.
849. Taking property from public grounds.	860. Illegal fencing, etc., of public lands.
850. Unlawful fencing, using, etc., public land.	860a. Suits to be brought.
851. Not applicable, when.	

Article 840. [499] Injuring or defacing a public building.—If any person shall wilfully injure or deface any public building, or the furniture therein in this state, he shall be fined not less than five nor more than five hundred dollars. The word "deface" in this chapter shall be held to apply to writing, carving or scratching on the walls or plastering or furniture of said building, or staining the same with paint or any other article which will produce a discoloration of the same. [Act May 14, 1888, p. 5, § 5.]

Injuring building.—One breaking the window-panes of and shooting into a schoolhouse is guilty of injuring it, within the statute punishing the injuring or defacing of a public building, though it be conceded that the injury did not amount to a defacing. *Thurston v. State*, 58 App. 308, 125 S. W. 31.

Indictment.—Willson's Cr. Forms, 386. See art. 841.

Sufficiency of evidence.—Evidence held to show that accused was the person who maliciously injured a public building, authorizing a conviction. *Thurston v. State*, 58 App. 308, 125 S. W. 31.

Art. 841. [500] “Public building” defined.—The term “public building” as used in the preceding article means the capitol and all other buildings in the capitol grounds at the seat of government, including the general land office and the executive mansion, the various state asylums and all buildings belonging to either, all college or university buildings erected by the state, all court houses and jails and all other buildings held for public use by any department or branch of government, state, county or municipal; and the specific enumeration of the above shall not exclude other buildings not named, properly coming within the meaning and description of a public building.

What constitutes “public building.”—A building intended to be protected is a public building owned or controlled and held by the public authorities for a public use. A house in which public school is taught is not necessarily a public building. *Cleavinger v. State*, 43 App. 280, 65 S. W. 90.

A schoolhouse is a “public building.” *Thurston v. State*, 58 App. 308, 125 S. W. 31.

Indictment.—*Willson’s Cr. Forms*, 386.

When the offense is injuring or defacing a public building other than one that is specifically named in the preceding article, the indictment must allege that the building was “a public one held for public use.” *Brown v. State*, 16 App. 245; *Pratt v. State*, 19 App. 276; *Clark v. State*, 23 App. 260, 5 S. W. 115.

Indictment must allege that said church was a public building then and there held for public use. *Burkhalter v. State (Cr. App.)* 104 S. W. 901.

An indictment charging injury to property pertaining to a public building to wit, “the Colorado High School Building,” should allege that such building was held for public use; it not being one of those enumerated in the statute. *Hughes v. State*, 59 App. 360, 128 S. W. 904.

Art. 842. [501] All officers to report violations.—It is the especial duty of all executive officers of the state and the county officers of the various counties to aid in the execution of the two preceding articles, and to report all violations thereof to the proper authorities for immediate prosecution. [Act Jan. 4, 1862, p. 51.]

Indictment.—*Brown v. State*, 16 App. 245; *Pratt v. State*, 19 App. 276; *Clark v. State*, 23 App. 260, 5 S. W. 115; note under § 841.

Art. 843. [502] Driving in capitol grounds.—If any person shall drive, ride or lead, or cause to be driven, ridden or led, any horse or other animal to the capitol grounds at the seat of government, or into the inclosure of the state cemetery, without the consent of the keeper or superintendent of said grounds or cemetery, he shall be fined not exceeding twenty-five dollars. [Act April 29, 1874, p. 165.]

Indictment.—*Willson’s Cr. Forms*, 387, 389.

Art. 844. Injuring roadway, public grounds or property of state prohibited.—It shall be unlawful for any person or persons to drive, or cause to be driven, over or along any roadway in any of the public grounds of this state, any heavy vehicle, or vehicle for carrying merchandise, or vehicle heavily loaded, or otherwise reasonably calculated to injure or deface such roadways, or to make their maintenance more expensive; or to drive, or cause to be driven, any vehicle or conveyance of any kind, or to drive, or cause to be ridden, any animal of any kind, over, across, or along any of the footpaths or walks in such grounds, or on the turf of such grounds, or at any place therein, except on and along the roadways and at the hitching places provided therefor; or to hitch any horse or team in any of said public grounds, or to the fences surrounding the same, unless at some place especially provided therefor, or to cause or permit any horse, not being driven to some vehicle or ridden, or any cow, sheep, goat, hog, or other animal reasonably calculated to injure said grounds, or anything pertaining thereto, or go into or remain in any portion of said grounds; or to cut, pull,

break, bruise, remove, or in anywise injure any tree, or shrub or vegetation of any kind growing thereon; or disturbing any birds' nests or eggs; or to in any wise injure, deface or in any way interfere with any chair, bench, seat, hydrant, frame, fence, gate, erection or structure of any kind therein or thereon or connected therewith; or to fish or wash or bathe in or any way pollute the waters of any lake or pond, or stream, therein, or to obscenely or indecently expose any part of his or her person, or to do any indecent act thereon. Any person violating any of the several provisions of this law shall be guilty of a misdemeanor, and shall be fined in any sum not less than five nor more than one hundred dollars. [Act 1903, p. 187.]

Indictment.—Willson's Cr. Forms, 388.

Art. 845. Not to apply, when.—This law shall not apply to anything done by the lawful custodian of the public grounds on which said act is performed, or under his authority and direction, and which is done in the reasonable discharge of his duties as such custodian, or in the use of such grounds for the purpose to which they are dedicated by the state. [Id., p. 187.]

Art. 846. "Public grounds" defined.—The term "public grounds," as used in this law, includes all grounds owned by the state, and used and maintained by it in connection with any public building or institution, whether for governmental, educational, eleemosynary or other purpose, and all state cemeteries and all parks maintained at the expense of the state. [Id., p. 187.]

Art. 847. [503] Hitching in capitol grounds.—If any person shall hitch any animal to any tree or shrub in the capitol grounds or state cemetery, he shall be punished as prescribed in the preceding article. [Act April 29, 1874, p. 165.]

Indictment.—Willson's Cr. Forms, 390.

Art. 848. [503a] Pass-keys to state capitol.—It shall not be lawful for any person to make or have made, or to keep in his possession, a pass or master key to the rooms and apartments in the state capitol, unless authorized to do so by the superintendent of public buildings and grounds; and any person violating the provisions of this article shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined in any sum not exceeding one hundred dollars. [Acts of 1895, p. 79.]

Indictment.—Willson's Cr. Forms, 392.

Art. 849. [504] Taking property from public grounds.—If any person shall take, remove, injure or destroy any species of public property pertaining to public building, as defined in article 841, or to the grounds belonging to such building, he shall be fined not less than twenty-five nor more than one hundred dollars.

Public building.—An indictment charging injury to property pertaining to a public building to wit, "the Colorado High School Building," should allege that such building was held for public use; it not being one of those enumerated in the statute. *Hughes v. State*, 59 App. 360, 128 S. W. 904.

Indictment.—Willson's Cr. Forms, 391.

Art. 850. [505] Unlawful fencing, using, etc., public lands.—It shall be unlawful for any person to fence, use, occupy or appropriate, by herding or line-riding, any portion of the public lands of the state, or of the lands belonging to any particular fund specified in this act, without having first obtained a lease of such lands in accordance with the provisions of this act. Any person, whether owner of stock, manager, agent, employé or servant, who shall fence, use, occupy or appropriate, by herding or line-riding, any portion of such lands without a lease thereof, shall be deemed guilty of a misdemeanor and shall, upon conviction, be fined not less than

one hundred nor more than one thousand dollars, and, in addition thereto, shall be imprisoned in the county jail for a period of not less than three months nor more than two years. Each day of such fencing, using, occupying or appropriating, by herding or line-riding, shall be deemed a separate offense; and any person so offending may be prosecuted, by indictment or information, in the proper court of the county where any portion of the land lies or to which it may be attached for judicial purposes, or in the county of Travis; and jurisdiction of such offenses is hereby vested in said courts; and, in case any indictment or information is preferred or filed against a non-resident of this state for a violation of this article, it shall be the duty of the governor to demand the extradition of the defendant from the proper officer of any state or territory where he may be found, in order that he may be brought to trial. "Fencing," within the meaning of this article, is the erection of any structure of wood, wire, or both, or any other material intended to prevent the passage of cattle, horses, mules, asses, sheep, goats or hogs, whether the same shall inclose lands on all sides or be erected on one or more sides. Any appropriation of land belonging to any particular fund specified in this act, or of the public lands of this state, without having first obtained a lease thereof, by fencing of any kind, or by inclosures consisting partly of fencing and partly of natural obstacles, or impediments to the passage of live stock, shall be deemed an unlawful appropriation, punishable as provided in this article for appropriating such lands; and each day said land is so appropriated shall be deemed a separate offense. [Act April 1, 1887, p. 89, § 18.]

Explanatory.—At the time this article was placed in the revised Penal Code the act from which it was derived (Act 1887, p. 89, § 18) had been superseded by Act 1895, p. 74. The latter act, however, was carried into the revised Penal Code as art. 860, post. The later act was substantially the same as the earlier one, except that the proviso (art. 851) of the early act was omitted from the act of 1895. The result would seem to be that the revisers of 1911 inadvertently restored a proviso, which the legislature, in 1895, intended to strike out.

Art. 851. [506] Not applicable, when.—The provisions of this act, as set forth in the preceding article, shall not apply to persons who are moving or gathering or holding for shipment any stock mentioned in said article; provided, the said persons have not erected any fence on such lands or continue on said lands longer than one week. [Id., § 19.]

Explanatory.—This proviso was not contained in the later act of 1895. See art. 860, and art. 850 and note thereunder.

Art. 852. [507] Turning loose too many stock on leasehold land.—No purchaser or other person than the lessee of public free school, asylum and public lands shall be permitted to turn loose within such leasehold more than one head of horses or mules or cattle for any ten acres of land purchased, owned or controlled by him and uninclosed, or in lieu thereof, four head of sheep or goats to every ten acres so purchased, owned or controlled and uninclosed. Each violation of this provision of this article, which restricts the number of stock that may be turned loose on lands leased from the state, shall be an offense; and the owner, on conviction, shall be punished by a fine not less than one dollar for each head of stock he may so turn loose; and each thirty days' violation of the provisions of this article shall constitute a separate offense. [Act April 1, 1887, p. 88, § 15; amended by Act April 28, 1891, p. 181.]

Explanatory.—Between Apr. 28, 1891, the date of the amendatory act from which the above article was taken, and 1911, the date of the revision, the subject matter of the above article had been three times re-enacted, viz. Acts 1895, p.

71, § 18; Acts 1897, p. 187, ch. 129; and Acts 1901, p. 292, ch. 125, § 5. However, in these various re-enactments, no substantial change was made in the language of the provision.

Indictment.—Willson's Cr. Forms, 585.

Art. 852a. [422d, 508] Construction of fences without gates.—It shall be unlawful for any person or corporation who may have used any of the lands, by joining fences or otherwise, to build or maintain more than three miles, lineal measure, of fence running in the same general direction without a gateway in the same, which gateway must be at least ten feet wide, and shall not be locked or kept closed so as to obstruct free ingress and egress; provided, that all persons who have fences already constructed in violation of the provisions of this law shall have two months from the time this act takes effect within which to conform with the provisions thereof; provided further, that if any person or persons shall build or maintain more than three miles, lineal measure, running in the same direction without providing such gateway he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than two hundred nor more than one thousand dollars, and each day that such fence remains without such gateway shall constitute and be punished as a separate offense; provided further, that the construction of gates as provided for in this article shall apply only to pasture lands; provided further, that when herds of cattle, horses, sheep or goats are driven through this state from one place to another place in this state, and it becomes necessary for such stock to pass through any inclosed pasture of any person who has leased any of the aforesaid lands, such lessees of such inclosure shall permit such stock to pass through such pasture; provided, that the owner of such stock so driven through any such inclosure shall move the same as expeditiously and with as little delay as practicable through such inclosure. [Act Apr. 1, 1887, p. 90, § 21.]

Explanatory.—The above provision was carried into the revised Penal Code of 1895 as art. 508, but it was omitted from the revision of 1911. In view of the decision in *Bugby-Coleman Land & Cattle Co. v. Matador Land & Cattle Co.*, 26 Civ. App. 260, 63 S. W. 914, recognizing the constitutionality and continued existence of the statute, it is included in this compilation.

Constitutionality of act.—This law is not in violation of the constitution. Inasmuch as a lessee's right to maintain the inclosure was founded upon his lease of the school lands from the State he must be held to have consented to what the law imposes as one of the conditions of the lease and right to inclose. *Bugby-Coleman Land & Cattle Co. v. Matador Land & Cattle Co.*, 26 Civ. App. 260, 63 S. W. 914.

Recovery of damages.—The lessee cannot recover damages caused by sheep in grazing while being moved expeditiously through his inclosed lands. *Acrey v. McKenzie*, 30 Civ. App. 255, 70 S. W. 367.

Art. 853. [509] Other statutes relating to public lands.—Each and every person who shall have inclosed, by fencing or otherwise, any of the public free school lands belonging to the state, and shall use the same to the exclusion of the public, shall pay an annual rental value therefor of the sum of twenty-five dollars for each section so inclosed.

And it shall be the duty of the surveyor of each county to make a report to the county commissioners' court on the first Monday in June each year of the number of sections of public school lands in his county inclosed during the past year, and the names of the person or persons controlling such inclosed lands, and the number of sections controlled by him or them, respectively.

And the said court, at the first regular term thereafter, shall make a list of the names of the persons controlling such public free school lands, the number of sections so controlled by each person, and the aggregate amount due from each person, at the rate of twenty-five dollars for each section so inclosed and controlled, which list shall be recorded by the clerk of said court, and

a certified copy thereof forwarded by him to the comptroller of public accounts, and a like copy delivered to the collector of taxes for said county.

The collector of taxes, on receipt of such list, shall proceed to collect the same under the same provisions and penalties as is imposed by law for the collection of taxes.

All moneys collected under the provisions of this act shall be paid by the collector into the state treasury and constitute a part of the available school fund; provided, that the state may resume control of said land at any time.

Any person who shall control inclosed lands belonging to the public free schools, and fail to pay the rental value as specified under the provisions of this act, upon the demand of the collector, shall be subject to prosecution upon complaint, information or indictment, and fined in the sum of one hundred dollars for each section so inclosed. [Act April 17, 1879, pp. 101-2.]

Explanatory.—It would seem that this article was superseded, in part at least, by the act of Apr. 1, 1887, p. 89, § 18 (art. 850, ante).

Description of land in indictment.—An indictment for unlawfully fencing lands of another is sufficient when it describes the land as a certain half of a certain section. It is not necessary for the number of acres to be stated. *Gibbs v. State*, 39 App. 476, 46 S. W. 645.

Art. 854. Permitting fence to remain standing round land of another, etc.—If any person or corporation shall knowingly make or permit to remain standing any fence on or around the land of another, or the public, public school, university or asylum lands of this state, without the written consent of the owner thereof duly acknowledged, or a duly executed lease of such land from the proper authority in a case of public, public school, university or asylum lands, as the case may be, duly recorded in the county where the land lies or to which it is attached for judicial purposes, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, fined in any sum not less than fifty cents nor more than one dollar per acre per month for each month so inclosed, or fined and imprisoned in the county jail for any period not over two years. Within the meaning of person, as used in this act, is included every man managing or controlling for a corporation, firm or joint stock company, and any and every individual or person who shall aid, assist or direct in the violation of this act. Half of all fines collected under the provisions of this act shall be paid to the person or persons informing on the person or corporation who shall unlawfully inclose any land; provided, that each three months said land is so inclosed shall constitute a separate offense. A fence, within the meaning of this act, is any structure of wood, wire, or both, or any other material intended to prevent the passage of cattle, horses, mules, asses, sheep, goats or hogs. Where persons or corporations have unlawfully fenced land belonging to the state, or public school, university or asylum lands, it shall be the duty of the attorney general, either in person or by proxy, to institute proceedings in the name of the state against any person or incorporation so unlawfully inclosing said lands; and the expense incurred in employing counsel to prosecute such cases shall be deducted from the fine or fines collected from any person or corporation violating the provisions of this act, the balance to be paid to the fund to which it belongs. [Act Feb. 7, 1884, pp. 68-69.]

Art. 855. Articles that apply to prosecutions.—In all prosecutions under this chapter, the provisions of articles 1290 and 1291 of the Penal Code of the State of Texas shall apply. [Id.]

Art. 856. When the law does not apply.—This chapter shall not apply to persons who have heretofore settled upon lands not

their own, where the inclosure is two hundred acres or less, and where the principal pursuit of such person upon the land and is that of agriculture. [Id.]

Art. 857. Unlawful to herd horses, etc.—It shall be unlawful for any person, firm or corporation to herd, or aid in herding, or cause to be herded, loose-herded or detained for grazing by line-riding, any cattle, horses, mules, asses, sheep or goats on any vacant public domain, school, university or asylum lands within this state, unless the same shall have been leased from the proper authority; provided, that this section of this act shall not apply to persons herding such stock, in gathering for or carrying to and from market, or in moving the same from one section of the country to another. [Id.]

Explanatory.—When the above provision was carried into the revised Penal Code it had been superseded by the Act of Apr. 1, 1887 (art. 850, ante) and by Act 1895, p. 74 (art. 860, post). See note under art. 850.

Art. 858. Penalty.—Any person who shall knowingly violate any of the provisions of article 857 shall be guilty of a misdemeanor, and upon conviction, shall be fined one hundred dollars for each year or part of a year, for each section or part of a section (meaning six hundred and forty acres of land or less, whether surveyed in sections or not), which shall be used contrary to the provisions of said article. [Id.]

See note under preceding article.

Art. 859. [509a] Turning loose excess of stock on leased lands.—Each violation of the provisions of article 852 of this Code, which restricts the number of stock that may be turned loose on lands leased from the state, shall be an offense; and the offender, on conviction, shall be punished by fine of one dollar for each head of stock he may so turn loose; and each thirty days' violation of the provisions of said article shall constitute a separate offense. [Act 1895, p. 71.]

See note under art. 852.

Art. 860. [509b] Illegal fencing, etc., of public lands.—It shall be unlawful for any person to fence, use, occupy or appropriate by herding or line-riding, any portion of the public lands of the state, or of the lands belonging to the public free schools or asylums, without having first obtained a lease of such lands. Any person, whether owner of stock, manager, agent, employé or servant, who shall fence, use, occupy or appropriate by herding or line-riding any portion of such lands without a lease thereof, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than one hundred nor more than one thousand dollars, and, in addition thereto, shall be imprisoned in the county jail for a period of not less than three months nor more than two years. Each day of such fencing, occupying, using or appropriating by herding or line-riding shall be deemed a separate offense; and any person so offending may be prosecuted by indictment or information in the proper court of the county where any portion of the land lies, or to which it may be attached for judicial purposes, or in the county of Travis; and jurisdiction of such offenses is hereby vested in said courts; and in case any indictment or information is preferred or filed against a nonresident of this state for a violation of this article, it shall be the duty of the governor to demand the extradition of the defendant from the proper officer of any state or territory where he may be found, in order that he may be brought to trial. "Fencing," within the meaning of this article, is the erection of any structure of wood, wire, or both, or any other material intended to prevent the passage of cattle, horses, mules, asses, sheep,

goats or hogs, whether the same shall inclose lands on all sides or be erected on one or more sides. Any appropriation of land belonging to any particular fund specified in said act or of the public lands of this state, without having first obtained a lease thereof, by fencing of any kind, or by inclosures consisting partly of fencing and partly of natural obstacles or impediments to the passage of live stock, shall be deemed an unlawful appropriation, punishable as provided in this article for appropriating such lands, and each day said land is appropriated shall be deemed a separate offense. [Id., p. 74.]

See arts. 850 and 857, and notes thereunder.

Art. 860a. Suits to be brought.—When said agents [state land agents; Vernon's Sayles' Civ. St. 1914, art. 5460 et seq.] shall have reported that any public free school, asylum, or other public lands is or has been used or occupied or inclosed without authority of law, or that any timbered land belonging to any of said fund has been or is being destroyed, or depredated upon to the injury of such land, or the detriment of such fund, the governor shall investigate same, and in his discretion direct that suit be instituted for the recovery of such sums as may appear to be proper under this act, and article 5467 [Rev. St. 1911] or he may transmit such documents as he may deem proper to the proper officer or court for the purpose of criminal proceeding, as provided for in articles 850, 851, 852, 853, 859, 860 of the Penal Code and neither of said remedies shall be exclusive of the other, but the one shall be cumulative of the other, and the state may use either or both remedies; provided, that this shall not repeal any pre-existing criminal law. [Act 1899, p. 176, ch. 104, § 2; Rev. Civ. St. 1911, art. 5464.]

Explanatory.—The above provision was omitted from the revised Penal Code. Inasmuch as it has a bearing on the criminal laws of the state, it is included in this compilation, in view of the decision in *Berry v. State*, 156 S. W. 626.

CHAPTER FIVE

PUBLIC OR QUASI PUBLIC BUILDINGS—FIRE PROTECTION

[Sanitary regulations of hotels, etc., see Title 12, ch. 1A.]

Art.		Art.	
861.	Every public lodging house to be furnished with.	867.	Tenant or lessee may do what.
862.	How constructed.	867a.	Certain buildings to be provided with fire escapes.
863.	Where constructed.	867b.	Duties of officers as to enforcement of act.
864.	Placards indicating way to.	867c.	Notice to owners of buildings.
865.	Every bedroom to be provided with rope.	867d.	Penalty for violation of act.
866.	Penalty for violation.		

Article 861. Every public lodging house to be furnished with.—Every building or structure kept, used or maintained as, or advertised as, or held out to the public to be, an inn, hotel or public lodging house or place where sleeping accommodations are furnished to the public, whether with or without meals, shall have and be provided with, at each and every floor above the second floor, or at every floor twenty feet or more above the ground, two or more iron or steel fire escapes to be attached securely on the outside of the walls of such buildings or structures; and such buildings or structures shall have and be provided with a way of egress to said fire escapes, which way of egress and fire escapes shall, at all times, be kept free and clear of obstructions and in good repair and ready and suitable for immediate use. [Act 1907, p. 164.]

Explanatory.—This act is to some extent superseded by Act 1915, ch. 12 (arts. 867a-867d, post).

Art. 862. How constructed.—Said fire escapes shall consist of iron or steel ladders reaching from the roof of the building to within twelve feet of the ground, and the rungs of said ladders must be at least six inches from the wall, so that a secure foothold and handhold on same may be had, and the ladders must be securely bolted to and through the wall, and must be capable of sustaining a weight of fifteen hundred pounds avoirdupois, and that each floor above the ground floor, with proper open connections and exit to these ladders, shall be iron or steel balconies or landings, with strongly braced iron or steel hand railings, capable of sustaining a weight of fifteen hundred pounds avoirdupois. Said landings or balconies and the hand railings thereof shall be securely bolted to and through the walls, and in case of wooden buildings, said ladders, landings or balconies and hand railings shall be securely bolted to and through, or clamped with iron or steel clamps to and around, the upright studding or frame proper of the building. [Id., p. 164.]

Art. 863. Where constructed.—All fire escapes shall be located as far as possible, consistent with accessibility, from stairways, elevator hatchways and other openings in the floors, and shall be located on two or more sides of the building, and as far apart as is consistent with the construction and location of the building. [Id., p. 164.]

Art. 864. Placards indicating way to.—Placards or signs, indicating plainly the way to fire escapes, shall be placed and kept continuously in conspicuous places in the offices, hallways and in every bedroom of such building. [Id., p. 164.]

Art. 865. Every bedroom to be furnished with rope.—Every building or structure not more than two stories high from the ground, and where the second floor is less than twenty feet above the ground, kept, used or maintained as, or advertised as, or held out to the public to be, an inn, hotel or public lodging house or place where sleeping accommodations are furnished to the public, whether with or without meals, shall have and be provided with, in every bedroom on the floor above the ground floor, a manilla or hemp rope of at least five-eighths of an inch thickness, firmly knotted at least at every fifteen inches of its length, and long enough to reach within four feet of the ground, and to be securely fastened within the room not less than three feet above the base or sill of the window or opening, and so with strength of rope and fastening be capable of sustaining a weight of not less than five hundred pounds avoirdupois. [Id., p. 164.]

Art. 866. Penalty for violation.—Any person or persons owning, keeping or maintaining, controlling or managing, any building or structure kept as, used as, maintained as, or advertised as, or held out to the public to be, an inn, hotel, public lodging house or place where sleeping accommodations are furnished to the public, whether with or without meals, in violation of the provisions of this act, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than twenty-five nor more than two hundred dollars; and each and every day any person owning, keeping, maintaining, controlling or managing any building or structure kept as, maintained as, or advertised as, or held out to the public to be, an inn, hotel, public lodging house or place where sleeping accommodations are furnished to the public, whether with or without meals, in violation of the provisions of this law, shall constitute a separate offense. [Id., p. 165.]

Art. 867. Tenant or lessee may do what.—The tenant or subtenant, lessee or sub-lessee, of any building, coming within the pro-

visions and requirements of this act, may, when the owner or his agent fails to comply with the provisions of this act, contract for and have constructed and erected said fire escapes in accordance with the requirements of this law, and may deduct the cost of same from the amount due, or the amounts that may become due such landlord or lessor on account of the rent or lease of such building. [Id., p. 165.]

Art. 867a. Certain buildings to be provided with fire escapes.—That every building of over two stories in height now or hereafter used in whole or in part as a seminary, college, academy, school house, dormitory, hotel, apartment house, or lodging house or theater or place of public amusement, including halls for public gatherings, other than private residences, or any manufacturing, wholesale or retail mercantile establishment, factories, or work shops, warehouses where five or more persons shall be assembled, shall be provided with at least one, and as many additional fireproof stairways or ladders or iron spiral fire escape on the exterior of such building placed in such position and as many in number as may be designated by the head of the fire department of that city or town, in or near which such building may be located, if there be one, or by the mayor, if there be no head of such fire department, or by the Commissioner of Labor Statistics, if such building be not in or near any incorporated city or town, or one having a head of its fire department. If one or more fire escapes or ladders are required on each side of such buildings for the accommodation and protection of the guests, assemblies, employés or inmates of such buildings, now or hereafter, used in whole or in part as a seminary, college, academy, school house, theater or place of public amusement, including halls for public gatherings other than private residences, or by any manufacturing wholesale or retail mercantile establishment, factories or work shops, warehouses, where five or more persons shall be assembled or a place of public resort, shall be provided therewith; such stairways or ladders shall connect the cornice with the top of the first story of any such building by a metal platform, balcony, piazza, or other safe and convenient resting place on a level with the floor of each story so connected and of sufficient length to permit access to the same from not less than two windows of each story. They shall be convenient of access from the interior of the building, commodious in size and form and of sufficient strength to be safe for the purpose of ascent and descent. It shall be the duty of the school board controlling any school in Texas, conducted in a building two or more stories in height, to have the building equipped with necessary fire escapes as is provided herein. [Act 1915, p. 20, ch. 12, § 1.]

Art. 867b. Duties of officers as to enforcement of act.—It shall be the duty of fire chiefs or marshals of fire departments, mayor or chief of police or city marshal of all such cities and towns in which the building is located, or by the Commissioner of Labor Statistics and his factory inspectors, to enforce the provisions of the foregoing section. The term "balcony, piazza, or other safe and convenient resting place" shall not be construed to mean any wooden or iron awning which might intervene between such stairways and such landing upon the ground or sidewalk. [Id., § 2.]

Art. 867c. Notice to owners of buildings.—Any person who shall fail to comply with the provisions of Section one (1) of this Act [art. 867a] within sixty days after being notified in writing to do so by either of the said officers whose duty it may be to give such notice, shall be punished according to law; said chief or marshal of all such cities and towns in which the buildings are located, or

by the Commissioner of Labor Statistics or his factory inspectors, upon receiving notice or obtaining knowledge, that any person within his jurisdiction has not so complied with said provisions, shall file a written statement to that effect with the county attorney of the county in which such building is located, and such being done, such county attorney shall prosecute such persons, firms, corporations or agents having charge of such buildings. [Id., § 3.]

Art. 867d. Penalty for violation of act.—The owners, tenants, firms, corporations, agents or other persons in charge of any business within either of the foregoing sections, who shall fail or neglect, after a written notice has been given him [them] in accordance with the preceding sections, to comply with any of the provisions of said preceding section which are applicable to the building owned, leased, or in his charge, shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than fifty dollars, nor more than two hundred dollars. [Id., § 4.]

CHAPTER FIVE A

LIBRARIES, MUSEUMS, ETC.

Article 867e. Detaining books, etc.—That whoever wilfully detains any book, newspaper, magazine, pamphlet, manuscript, or other property belonging to any public or incorporated library, reading room, museum, or other educational institution for thirty days after notice in writing to return the same, given after the expiration of the time which by the rules of such institution such articles or other property may be kept, shall be punished by a fine of not less than \$1.00 nor more than \$25.00, and the said notice shall bear on its face a copy of this Section. [Act 1913, p. 281, ch. 140, § 1.]

CHAPTER SIX

OFFENSES RELATING TO THE PROTECTION OF FISH, BIRDS AND GAME

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| Art. | Art. |
| 868. [Repealed.] | 881. Penalty for violating two preceding articles. |
| 869. Unlawful to use nets; certain counties exempted. | 882. Selling or purchasing game. |
| 870. Taking fish by means of nets, etc., without consent of owner. | 883. Netting or trapping prohibited. |
| 871. Conviction may be had on unsupported testimony of accomplice. | 884. Unlawful to kill wild geese or ducks. |
| 872. Duty of persons erecting dams and other obstructions. | 885. Killing of in certain counties at night prohibited. |
| 873. Limiting fish that may be taken and sold. | 886. Certain game not to be killed for a period of five years. |
| 874. Number of squirrels that may be taken and sold. | 887. Killing certain harmless birds prohibited. |
| 875. Not to apply to certain counties. | 888. Killing of certain other birds or fowls prohibited. |
| 876. Sale of squirrels prohibited in county of Montgomery. | 889. Open season when; killing of over certain number of game prohibited. |
| 876a. Shipping squirrels. | 889a. Deer call or decoy. |
| 877. Catching of fish, etc., in counties of Montgomery and Newton. | 889b. Open season for doves. |
| 877a. Fishing in valley of Medina river; bass; weight and number of fish. | 889c. Open season for bob-whites, quail, or partridges. |
| 877b. Same; sale or purchase of fish. | 889d. Penalty for violation of two preceding articles. |
| 877c. Same; penalty. | 890. Unlawful to receive for transportation. |
| 877d. Same; cumulative of general law. | 891. Exception when lawfully killed; shipping affidavit. |
| 877e. Same; catching for bait. | 892. What birds not protected. |
| 878. Wild game, property of public. | 893. Domestic birds excepted. |
| 879. Unlawful to kill or have in possession any wild bird but game bird as defined. | 894. Possession of prohibited bird applies to any such bird. |
| 880. Unlawful to destroy nest or eggs of wild birds. | |

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| <p>Art.
895. Possession during protected season prima facie evidence of guilt.</p> <p>896. Game, fish and oyster commissioner to enforce law.</p> <p>897. Has power of sheriff, may arrest without warrant.</p> <p>898. Penalty for violation.</p> <p>899. Hunting license to be procured, when.</p> <p>900. Person hunting who refuses to show license.</p> <p>901. Oysters culled from public beds, etc.; penalty; cancellation of license.</p> <p>902. Planting prohibited, when.</p> <p>903. Unlawful to receive for shipment, when.</p> <p>904. Unlawful to rake dredge, etc.; penalty.</p> <p>905. Unlawful to destroy or deface buoy.</p> <p>906. Unlawful to catch fish, green turtle, etc.; how and when.</p> <p>907. Catching same by explosives or poison.</p> <p>908. Penalty for failure to take out license as a fisherman.</p> <p>909. Sale of certain fish of certain weight prohibited.</p> <p>910. Sale of turtle and terrapin of certain weight prohibited.</p> <p>911. Catching fish or terrapin with drag seine during breeding season; proviso.</p> <p>912. Person fishing with drag seine to return fish of certain size to water.</p> <p>913. Coast survey charts as evidence.</p> <p>914. Closed season for oysters.</p> <p>915. Use of screens on taking water from public waters.</p> <p>916. Taking fish, turtle, terrapin or oysters, with seine without license.</p> | <p>Art.
917. Dealer in fish and oysters shall take out license; requirements; "wholesale dealer" defined.</p> <p>918. Selling uncultured oysters; penalty.</p> <p>919. Duty of game, fish and oyster commissioner.</p> <p>920. Theft from private oyster bed.</p> <p>921. Selling oysters gathered for planting.</p> <p>922. Gathering seed oysters without license.</p> <p>923. Penalty for selling fish, turtle, oysters, etc., without license.</p> <p>923a. Permit to use dredges for oysters.</p> <p>923b. Closing overworked reefs; notice.</p> <p>923c. Seizure of unlawful fishing devices and instrumentalities.</p> <p>923d. Penalty for taking oysters from closed reef.</p> <p>923e. Complaint before justice of the peace.</p> <p>923f. What devices may not be used for fishing.</p> <p>923g. Having in possession or carrying seine or drag net into prohibited waters.</p> <p>923h. Dealer's license forfeited on conviction.</p> <p>923i. Obstruction or diversion of waters.</p> <p>923j. Measure for sale of oysters.</p> <p>923k. Taking boat, etc., into prohibited waters.</p> <p>923l. Seining for gars, turtle, etc., not prohibited; seining by county authorities.</p> <p>923m. Seining for drum fish; permit; superintendence.</p> <p>923n. Taking of marl, sand, shells, or mudshells from fishing waters; permit; proviso.</p> |
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Article 868. [Repealed.]

Explanatory.—The subject-matter of this article is dealt with in Acts 1897, ch. 153; Acts 1903, ch. 119; Acts 1905, ch. 61; Acts 1907, chs. 75, 78. Acts 1911, ch. 110, re-enacts the article, and expressly repeals Acts 1907, ch. 75. Acts 1913, ch. 135, § 2, expressly repeals art. 868, Penal Code. This would seem to supersede Acts 1911, ch. 110, especially in view of art. 907, Pen. Code, as amended by the repealing act of 1913, above referred to.

Indictment.—Willson's Cr. Forms, 394.

Indictment must state that the fish was taken in fresh waters. *Taylor v. State* (Cr. App.) 55 S. W. 832.

Art. 869. Unlawful to use nets; certain counties exempted.—If any person shall at any time during the year take, catch, ensnare or entrap any fish, except minnows for bait by means of nets or in any other manner than with ordinary hooks and line or trot line, except as specified in Section One, Chapter 78, of the General Laws of the Regular Session of the Thirtieth Legislature, [art. 868] such person shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five nor more than one hundred dollars; provided that the following counties are hereby exempt from the provisions of this section: Anderson, Angelina, Archer, Baylor, Bosque, Brazos, Brown, Burnet, Brazoria, Bowie, Camp, Caldwell, Chambers, Cherokee, Cass, Clay, Galveston, Comanche, Collin, Delta, De Witt, Eastland, Fannin, Freestone, Fayette, Gillespie, Goliad, Grimes, Hamilton, Hardin, Hopkins, Hill, Hood, Houston, Hunt, Jack, Jefferson, Johnson, Jones, Kaufman, Knox, Lamar, Limestone, Liberty, Llano, Mason, Matagorda, Mitchell, Morris, Nacogdoches, Newton, Orange, Panola, Polk, Rains, Rockwall, Red River, San Augustine, Sabine, Stephens, Shackelford, San Jacinto, Shelby, Smith, Throckmorton, Trinity, Tyler, Titus; Upshur, Van Zandt, Webb, Walker, Wharton, Wood

and Young; provided that the Counties of Gregg, Harrison and Rusk shall be exempt from the provisions of this Section as to the waters of Sabine River but no further, and that Harrison County shall be exempt from the provisions of this Section in so far as it applies to the waters of Big Cypress above Tuscombie Bridge and Little Cypress; provided that in the County of McLennan it shall not be unlawful for any person to take or catch fish by means of net or seine from any stream in said county from May 15 to October 1st of each year and that it shall not be unlawful for any person or persons to take or catch fish by net or seine in Palo Pinto County from June 15th to October 1st of each year; provided that Clay county shall be exempt from the provisions of this Section along the waters of the Wichita and Red Rivers; also Jack County along the waters of Trinity River, provided that the counties of Austin, Washington, and Palo Pinto shall be exempt from the provisions of this Section along the waters of Brazos river, provided further that in the county of Falls it shall not be unlawful for any person or persons to take or catch fish by means of net or seine from any stream in said county from June 15th to September 1st of each year. Provided further that it shall be unlawful for any person or persons to build any trap in or across any stream or lake in Wood County, Texas, for the purpose of catching or taking fish from any such stream or lake, and any person violating this provision shall be punished as provided by this Act. [Act 1897, ch. 153; Act 1899, chs. 55, 69; Act 1901, ch. 18; Act 1901, 1st S. S., ch. 17; Act 1903, ch. 119; Act 1905, ch. 61; Act 1907, chs. 75, 78; Act 1909, p. 95; Act 1911, ch. 110; Act 1911, ch. 113; Act 1911, 1st S. S., ch. 17; Act 1913, ch. 41; Act 1913, ch. 96, amended; Act 1915, p. 15, ch. 10, § 1.]

Explanatory.—Act 1913, ch. 135, § 2 repeals art. 869, Penal Code, but as the Act of 1915 re-enacts its subject-matter, the new act is given the old code number. Act 1915, ch. 10, § 1, amends "section 2, chapter 96, of the General Laws of the Regular Session of the Thirty-third Legislature, relating to the taking of fish, as amended by chapter 96 of the General Laws of the Regular Session of the Thirty-third Legislature" so as to read as above. It was probably the intent to amend section 2, chapter 49 of the acts of the 31st Legislature, as amended, etc. The misdescription of the act amended is probably immaterial in view of the clear intent as shown by the subject-matter of the act.

Indictment.—Willson's Cr. Forms, 393.

Art. 870. Taking fish by means of nets, etc., without consent of owner.—Any person who shall take, catch, ensnare or entrap any fish by means of nets or seines or by muddying, ditching or draining any lake, pool or pond in any county within this State without the consent of the owner of such lake, pool or pond, shall be subject to the penalty hereinbefore prescribed in Section 2 of this Act [art. 869, ante, as amended] and in all prosecutions under this Act, the burden of proof of such consent of the owner shall devolve and be upon the defendant. [Act 1907, ch. 78, § 2; Act 1909, p. 96, repealed; Act 1911, ch. 110, § 5, superseded; art. 870, revised Pen. Code, superseded; Act 1911, p. 233, ch. 113, § 3 [2].]

Indictment.—Willson's Cr. Forms, 393.

Art. 871. Conviction may be had on unsupported testimony of accomplice.—Any court, officer or tribunal, having jurisdiction of the offense set forth in this chapter, or any district or county attorney, may subpoena persons, and compel their attendance as witnesses to testify as to violations of any of the provisions of this law; and any person so summoned and examined shall not be liable to prosecution for any of the violations of this law about which he may testify; and a conviction for said offense may be had upon the unsupported evidence of an accomplice or participant. [O. C.]

Art. 872. [513] Duty of persons erecting dams and other obstructions.—It shall be the duty of every person, firm, or corporation, municipal or private, who has heretofore erected, or who may hereafter erect any dam, water weir, or other obstruction or weirs on any regular flowing stream within this state to build, construct and keep in repair fish ways, or fish ladders, at such dam, water weir, or obstruction, so that at all seasons of the year fish may ascend above such dam, weir, or obstruction, to deposit their spawn. Any person, firm or corporation, or the agent or employé or officer of any corporation, whether private or municipal, who shall erect such dam, weir, or obstruction, or any firm, person, or corporation whether private or municipal, who shall own or maintain, any such dam, obstruction or weir, who shall fail or refuse to build, construct and keep in repair such fish way, or fish ladder, within 90 days after having been notified by the Fish, Game and Oyster Commissioner of this state to do so, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than \$25.00 nor more than \$500.00; provided, that each week after the expiration of 90 days after receiving notice, as herein provided that such person, firm or corporation, municipal or private, shall fail or refuse to so build, construct and keep in repair, such fish way or fish ladder, shall constitute a separate offense. [O. C.; Act Apr. 17, 1879, p. 100, § 1; Act 1915, p. 118, ch. 67, § 1, amending art. 872, revised Pen. Code.]

Art. 873. Limiting fish that may be taken and sold.—It shall be, and is unlawful for any person to take, in any way, more than fifty pounds of any fresh water fish, for sale or barter for money or anything of value whatsoever; provided, that any one person shall be allowed to take and sell as much as fifty pounds of fish in one week, and no more than fifty pounds of fish in any one week of seven days; provided, the counties of Wharton and Nueces shall be exempt from the provisions of this law. [Act 1905, p. 222.]

Art. 874. Number of squirrels that may be taken and sold.—It shall be, and is unlawful, for any person to kill more than ten squirrels in any one day of twenty-four hours; and it is not lawful for any person to sell more than five squirrels in any one week of seven days. [Id., p. 222.]

Art. 875. Not to apply to certain counties.—If any person shall violate any provision of the two preceding articles, said person shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than five dollars, with commement in the county jail not less than one day nor more than ten days. Provided, the said provisions shall not apply to any county situated in the ninth and twelfth and thirty-first and fifth and eighteenth and twenty-first and seventeenth and tenth and second and twenty-fourth and fifteenth and fourteenth senatorial districts of Texas. [Id., p. 222.]

Art. 876. Sale of squirrels prohibited in county of Montgomery.—It shall be unlawful for any person to sell, or offer for sale, or ship for sale, in the county of Montgomery, any squirrels; and any person violating the provisions of this article, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars. [Act 1907, ch. 63, § 2; Act 1909, p. 117.]

Art. 876a. Shipping squirrels.—It shall be unlawful for any person to ship or cause to be shipped, or for any express company, railroad company or other common carrier or the officers,

agents, servants or employes of the same, to receive for the purpose of transportation, or to transport, carry or take beyond the limits of the county of Liberty in the State of Texas any wild squirrels. Any person violating the provisions of this Section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars; and each such shipment shall constitute a separate offense. [Act 1911, p. 98, ch. 56, § 1.]

Art. 877. [513a] Catching of fish, etc., in counties of Montgomery and Newton.—It shall be unlawful for any person in the counties of Montgomery and Newton in the state of Texas, at any time during the year, to take, catch, ensnare or entrap any fish by means of nets, traps, poison or dynamite, or in other manner than with the ordinary hook and line or trot line, in any of the fresh waters, lakes or streams of this state in said counties; and any person violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars and not more than one hundred dollars; provided, that this article shall not be construed to prevent the catching of fish by nets in any of the lakes in said county, except Grand Lake. [Act 1907, ch. 63, § 1; Act 1909, p. 133.]

Art. 877a. Fishing in valley of Medina river; bass; weight and number of fish.—It shall be unlawful for any person who shall fish in any water which is located in the valley of the Medina river, where the lower or diversion dam above the town of Castroville crosses the Medina river in Medina county, Texas, to a point on the Medina river in Bandera county, Texas, which, by following the meanders of the Medina river upward toward its source, shall constitute a distance of twenty-five miles, or in any water which is impounded in Medina county, Texas, by said lower or diversion dam, or in any water which is impounded in Medina county, Texas, and in Bandera county, Texas, by what is known as the upper or main dam which crosses the Medina river, a distance of about four miles above the said lower or diversion dam, to catch and retain, or have in his possession, any bass or other fish of the bass species, which shall weigh less than one pound; or to catch and retain, or have in his possession, in any one day, more than a total aggregate of ten bass or other fish of the bass species; or to catch and retain, or have in his possession in any one day, a total aggregate of more than twenty perch, crappie or sun fish, or other fish of the perch, crappie or sunfish species, which shall be larger than two inches long; or shall, at any time during the month of March, April and May of any year, make use of a dowgiac or other similar device for catching fish, but this provision shall not prohibit what is known as fly fishing. [Act 1915, p. 135, ch. 84, § 1.]

Art. 877b. Same; sale or purchase of fish.—It shall be unlawful for any person to sell, or offer for sale, or to buy, any fish caught in any of the waters described in Section 1 [art. 877a] hereof. [Id., § 2.]

Art. 877c. Same; penalty.—Any person violating any provision of this Act shall be guilty of a misdemeanor, and upon conviction shall be fined not less than \$5.00 nor more than \$15.00, for each violation of this law, and each fish caught in violation of this Act shall be deemed a separate violation hereof, and a separate offense, and he may be prosecuted either in the county where the fish is caught, or where he is found with them in his possession, or where the fish are sold, or bought, or where they are offered for sale. [Id., § 3.]

Art. 877d. Same; cumulative of general law.—This special law is meant to be cumulative of the General Law of the State of Texas, and is not meant to repeal the General Law of the State of Texas. [Id., § 4.]

Art. 877e. Same; catching for bait.—Nothing in this Act shall prohibit the catching of more than twenty perch or sunfish to be used for bait, provided none of the perch or sunfish so caught to be used for bait shall be larger than two inches in length. [Id., § 5.]

Art. 878. Wild game, property of public.—All the wild deer, wild antelope, wild Rocky Mountain sheep, wild turkey, wild ducks, wild geese, wild grouse, wild prairie chickens (pinnated grouse), wild Mongolian or English pheasants, wild quail or partridges, wild doves, wild pigeons, wild plover, wild snipe, wild jacksnipe, wild curlews, wild robins, wild Mexican pheasants or chachalaca, and all other wild animals, wild birds and wild fowls found within the borders of this state, shall be, and the same are hereby declared to be the property of the public. [Act 1897, ch. 149, § 1; Act 1903, ch. 137; Act 1907, p. 278.]

Art. 879. Unlawful to kill or have in possession any wild bird but game bird as defined.—It shall be unlawful for any person in the state of Texas to kill, catch or have in his or her possession, living or dead, any wild bird, other than a game bird, or to purchase, to offer or expose for sale, transport or ship within or without the state, any such wild bird after it has been killed or caught, except as permitted by this law; and no part of the plumage, skin or body of any bird protected by this article shall be sold or had in possession for sale. For the purposes of this article, the following only, shall be considered game birds: Wild turkey, wild ducks, wild geese, wild grouse, wild prairie chicken (pinnated grouse), wild Mongolian or English pheasants, wild quail or partridges, wild doves, wild pigeons, wild plover, wild snipe, wild jacksnipe, wild curlews, wild robins and wild Mexican pheasants or chachalaca. [Act 1903, ch. 137; Act 1907, p. 278.]

Art. 880. Unlawful to destroy nest or eggs of wild birds.—It shall be unlawful for any person in the state of Texas to take or needlessly destroy the nest or eggs of any wild bird, or have such nest or eggs in his or her possession, except as permitted by this law. [Act 1903, ch. 137; Act 1907, p. 279.]

Art. 881. Penalty for violating two preceding articles.—Any person violating any of the provisions of Sections 2 and 3 of this Act [arts. 879, 880] shall be deemed guilty of a misdemeanor and shall upon conviction be fined not less than ten nor more than one hundred dollars for each bird, living or dead, or a part of a bird, nest or set of eggs or part thereof, possessed in violation of this Act. [Act 1903, ch. 137; Act 1907, p. 279, § 4, amended; Act 1911, p. 101, ch. 60, § 1, superseding art. 881, revised Pen. Code.]

Art. 882. Selling or purchasing game.—Whoever shall sell or offer for sale, have in his or her possession for the purpose of sale, or whoever shall purchase or have in his possession after purchase any wild deer, wild antelope or wild Rocky Mountain sheep, killed in this State, or the carcass thereof, or the hide thereof, or the antlers thereof, or whoever shall sell or offer for sale, or have in his possession for the purpose of sale, or whoever shall purchase or have in his possession after purchase any of the game or game birds mentioned in Section 1 of this Act [art. 878] killed or taken within this State shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor

more than one hundred dollars. [Act 1897, ch. 149, § 2; Act 1903, ch. 137; Act 1907, p. 279, § 5, amended; Act 1911, p. 101, ch. 60, § 1, superseding art. 882, revised Pen. Code.]

Validity of act.—This statute is constitutional. The legislature may restrict the citizen in the slaughter of game, and inhibit the sale of game slaughtered under that restriction. *Ex parte Blardone*, 55 App. 189, 115 S. W. 338, 116 S. W. 1199, 21 L. R. A. (N. S.) 667.

Indictment.—Willson's Cr. Forms, 403, 404.

Art. 883. Netting or trapping prohibited.—The netting or trapping of any wild bird or wild fowl mentioned in Sections 1 and 2 of this Act [arts. 878, 879] at any season of the year is hereby prohibited; and any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. [Act 1897, ch. 149, § 3; Act 1903, ch. 137; Act 1907, p. 279, § 6, amended; Act 1911, p. 102, ch. 60, § 1, superseding art. 883, revised Pen. Code.]

Indictment.—Willson's Cr. Forms, 405.

Art. 884. Unlawful to kill wild geese or ducks.—It shall be unlawful to destroy any wild geese or wild ducks by any means otherwise than by an ordinary gun, capable of being held to and shot from the shoulder, and whoever violates the provisions of this Section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. [Act 1897, ch. 149, § 4; Act 1903, ch. 137; Act 1907, p. 279, § 7, amended; Act 1911, p. 102, ch. 60, § 1, superseding art. 884, revised Pen. Code.]

Indictment.—Willson's Cr. Forms, 406.

Art. 885. Killing of in certain counties at night prohibited.—If any person shall, in either of the counties of Harris, Jefferson, Galveston, Brazoria, Matagorda, Nueces, Aransas, Refugio, Lavaca, San Patricio, Cameron, Hidalgo or Calhoun, shoot or shoot at, with a gun of any description, or hunt or kill in any manner, any wild duck, wild goose or any other kind of wild aquatic fowl at night, that is, between sunset and sunrise, he shall be fined not less than five nor more than twenty dollars. [Act 1901, p. 301.]

Art. 886. Certain game not to be killed for a period of five years.—It shall be unlawful for any person to kill, take or destroy any wild Mongolian or English pheasant, wild prairie chicken (pinnated grouse), wild antelope or wild Rocky Mountain sheep, for the space of five years next after this Act takes effect; and any persons violating the provisions hereof shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. [Act 1897, ch. 149, § 5; Act 1903, ch. 137; Act 1907, p. 279, § 8, amended; Act 1911, p. 102, ch. 60, § 1, superseding art. 886, revised Pen. Code.]

Explanatory.—The above act took effect 90 days after adjournment of the legislature on March 11, 1911.

Indictment.—Willson's Cr. Forms, 407.

Art. 887. [518] Killing certain harmless birds prohibited.—If any person shall wilfully kill, or in any manner injure, any mocking bird, whippoorwill, night hawk, blue bird, red bird, finch, thrush, linnet, wren, martin, swallow, bobolink, cat bird, nonpareil, scissortail, he shall be deemed guilty of a misdemeanor, and, upon conviction before a justice of the peace or other court of competent jurisdiction, he shall be fined a sum of not less than five nor more than fifteen dollars. [Act March 15, 1881, p. 30.]

Indictment.—Willson's Cr. Forms, 401.

Art. 888. [519] Killing of certain other birds or fowls prohibited.—If any person shall wilfully kill any seagull, tern, shear-water, egret, heron or pelican, or shall wilfully take from their nests, or in any manner destroy, any egg or eggs of any seagull, tern, shear-water, egret, heron or pelican, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than five nor more than twenty-five dollars; provided, that the killing of any of the birds above enumerated, or taking of their eggs with intent to preserve the same for scientific purposes, shall not be construed to be a violation of this act. [O. C.]

Indictment.—Willson's Cr. Forms, 402.

Art. 889. Open season, when; killing of over certain number of game prohibited.—It shall be unlawful for any person to kill, ensnare, or entrap, or in any way destroy any wild deer in the period of time embraced between the first day of January and the first day of November in each year; provided, it shall be unlawful for any person at any season of the year to take, kill, trap or ensnare any wild female deer or shatter fawn within this State; and provided, further, that it shall be unlawful for any person to take, kill, trap or ensnare more than three wild buck during the months of November and December of any one year; provided, it shall be unlawful to kill any wild turkey in the period of time embraced between the first day of April and the first day of December of each year, or more than three wild turkey in the period of time embraced in the months of December, January and February of each year, or any wild quail or partridge, or any dove within the period of time embraced between the first day of February and the first day of November in each year; provided, it shall be unlawful, except herein elsewhere provided, for any person in any one day to kill or destroy more than twenty-five of the birds or fowls mentioned in Section 1 of this Act [Art. 878, ante] that are permitted to be taken or killed in any one day. It shall further be unlawful for any person at any time to hunt deer or other game mentioned in Section 1 of this Act by aid of what is commonly known as a hunting lamp or lantern, or any other light used for the purpose of hunting at night; and after the space of five years next after this Act takes effect, it shall be unlawful for any person to kill, trap or ensnare or in any way destroy any wild antelope or Rocky Mountain sheep in the period of time embraced between the first day of January and the first day of November of each year; provided further, that it shall be unlawful for any person to kill, trap or ensnare more than two wild antelopes or one Rocky Mountain sheep during the months of November and December of each year; and any wild Mongolian or English pheasants, wild turkey or any prairie chicken (pinnated grouse), in the period of time embraced between the first day of February and the first day of November of each year. Any person violating any provisions of this Section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. [Act 1897, ch. 149, § 6; Act 1903, ch. 137; Act 1907, p. 280, § 9, amended; Act 1911, p. 102, ch. 60, § 1, superseding art. 889, revised Pen. Code.]

Explanatory.—The above act took effect 90 days after adjournment of the legislature on March 11, 1911.

Sufficiency of evidence.—Evidence in a prosecution for killing a wild deer out of season held to sustain a finding that the deer was killed in the close season in 1910 or 1911. *Baker v. State* (Cr. App.) 153 S. W. 631.

Indictment.—Willson's Cr. Forms, 399, 400, 408.

Art. 889a. Deer call or decoy.—It shall be unlawful for any person at any time of the year within this state, to use a deer call,

whistle, decoy, horn, call, pipe, reed, or other devise, mechanical or natural, for the purpose of calling or attracting the attention of any deer, and any person hunting deer by such means, or attempting to use such means in hunting deer, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment of not less than twenty days or more than ninety days, or both by said fine and imprisonment, and each and every such unlawful act shall constitute a separate offense. [Act 1915, p. 162, ch. 107, § 1.]

Explanatory.—Act 1915, ch. 107, § 1, provides “that there shall be added to Article 889 of the Revised Criminal Statutes * * * an article to be known as Article 889a.”

Art. 889b. Open season for doves.—From and after the passage of this Act it shall be unlawful for any person within this State to kill, ensnare, entrap or in any way destroy any wild doves between the first day of March and the first day of September of any year. [Act 1915, 1st S. S., p. 43, ch. 22, § 2, amending Act 1915, ch. 123, § 1.]

Explanatory.—Act 1915, ch. 123 and the amendatory act (Act 1915, S. S. ch. 22), in their titles, amend ch. 6, Title 13, of the Penal Code, by inserting therein articles 889a and 889b. As the legislature at the same session enacted another provision to be designated as article 889a, the two articles in question are here designated as articles 889b and 889c. The act took effect 90 days after adjournment of legislature on March 20, 1915.

Art. 889c. Open season for bob-whites, quail, or partridges.—From and after the passage of this Act it shall be unlawful for any person in this State to kill, entrap, ensnare or in any way destroy any bob-whites, quail or partridges in this State, between the first day of February and the first day of December of any year; provided, it shall be unlawful for any person at any time to kill or destroy in one day more than fifteen of the birds or fowls mentioned in this Act or in Article 878 of this chapter. [Act 1915, 1st S. S., p. 43, ch. 22, § 3, amending Act 1915, ch. 123.]

See note under preceding article.

Art. 889d. Penalty for violation of two preceding articles.—Any person violating the provisions of this law shall be deemed guilty of a misdemeanor and on conviction shall be punished by a fine of not less than ten (\$10.00) dollars nor more than one hundred (\$100.00) dollars, or by imprisonment in the county jail for not less than five nor more than thirty days, or by both such fine and imprisonment. [Act 1915, 1st S. S., p. 43, ch. 22, § 4.]

Art. 890. Unlawful to receive for transportation.—It shall be unlawful for any express company, railroad company, or other common carrier, or the officers, agents, servants or employes of the same, to receive for the purpose of transportation, or to transport, carry or take beyond the limits of the State, or within this State, except as hereinafter provided, any wild animal, bird or water fowl mentioned in Section 1 of this Act [Art. 878, ante], or the carcass thereof, or the hide thereof. Any persons violating the provisions of this Section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. Provided, that each shipment shall constitute separate offense, and that such express company, or other common carrier, or its agents, servants or employes shall have the privilege of examining any suspected package for the purpose of determining whether such package contains any of the articles mentioned herein. [Act 1897, ch. 149, § 7; Act 1903, ch. 137; Act 1907, p. 280, § 10, amended; Act 1911, p. 103, ch. 60, § 1, superseding art. 890, revised Pen. Code.]

Indictment.—Willson's Cr. Forms, 409.

Art. 891. Exception when lawfully killed; shipping affidavit.— Nothing in this Act shall be construed [to] prohibit the transportation or shipment of any of the game, birds or wild fowls mentioned in Section 1 of this Act [Art. 878, ante], when lawfully taken or killed, from the place of shipment to the home of the person who killed the same; provided, the person who killed said game, birds or fowls, shall accompany said game, birds or fowls on the same train or common carrier from the point of shipment to the said point of destination, and provided further, that the person desiring to ship or transport said game, birds or fowls shall first make the following affidavit in writing before some officer authorized by law to administer oaths, and deliver same to said railroad or common carrier, or to the agent of said railroad or common carrier, at the point of shipment; and upon filing the affidavit, such party shall be permitted to transport to his home in accordance herewith not exceeding twenty-five of any wild game bird, when such number is permitted to be killed or the kind offered for shipment, except wild duck, provided that such party may be permitted to transport seventy-five wild ducks upon filing the affidavit containing the provisions as stipulated in the affidavit prescribed:

State of Texas, County of Before me, the undersigned authority, on this day personally appeared....., who, after being by me duly sworn, upon oath says: I live at in the County of, in the State of; that I have killed (state the number and kind of game, birds or fowls), which [I] desire to ship from, incounty, to my home, which game I killed for my own use and not for sale, and same shall not be sold, and same will be accompanied by me from the point of shipment to the point of destination; that I have not killed or shipped exceeding three buck deer during this hunting season and have not killed or shipped exceeding twenty-five birds or fowls mentioned in Section 1 of this Act, except wild ducks, in any one day during the present hunting season; and that I have in no way violated any of the provisions of this bill; (and if such game to be shipped be wild duck) then such party shall further make affidavit that the shipment I offer is wild duck only; that the number does not exceed seventy-five, and I killed the said duck in three days consecutively, and that I did not kill more than twenty-five of same in any one day.

Sworn to and subscribed by.....before me this..... day of, 19....

.....
Name and official character of officer.

And thereupon said game birds or fowls shall be transported or shipped by railroad or other common carrier in the name of the person making said affidavit to the home of said person, and shall mark on the card attached to said game, birds or fowls the words, "Affidavit Made." Any person violating the provisions of this Section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than ten nor more than one hundred dollars. [Act 1903, ch. 137; Act 1907, p. 281, § 11, amended; Act 1911, p. 103, ch. 60, § 1, superseding art. 891, revised Pen. Code.]

Indictment.—Willson's Cr. Forms, 409a.

Art. 892. What birds not protected.—The English or European house sparrows, hawks, crows, buzzards, black birds, rice birds and owls are not included among the birds protected by this chapter. Nothing herein contained shall be construed to prevent any person

or persons from killing birds that are at the time destroying his growing crop. [Act 1903, ch. 137; Act 1907, p. 282.]

Art. 893. Domestic birds excepted.—Nothing in this chapter shall prevent the keeping of any bird in a cage as a domestic pet; provided, that such bird shall not be sold or exchanged or offered for sale or exchange, or transported out of the state; provided that nothing herein contained shall be construed to prohibit the sale or shipment of canary birds or parrots. [Act 1903, ch. 137; Act 1907, p. 282.]

Art. 894. Possession of prohibited bird applies to any such bird.—Whenever in this chapter the possession of any bird is prohibited, said prohibition shall apply equally to a bird coming from outside the state as to one taken within the state. [Act 1903, ch. 137; Act 1907, p. 282.]

Art. 895. Possession during protected season prima facie evidence of guilt.—Possession at any time of the year during which the game, birds and wild fowl of the state are protected herein shall be prima facie evidence of the guilt of the person in possession thereof. [Act 1897, ch. 149, § 8; Act 1903, ch. 137; Act 1907, p. 282.]

Art. 896. Game, fish and oyster commissioner to enforce law.—It is hereby made a special duty of the game, fish and oyster commissioner to enforce the statutes of this state for the protection and preservation of wild game and wild birds, and to bring or cause to be brought actions and proceedings in the name of the state of Texas to recover any and all fines and penalties provided for in the laws now in force or that may hereafter be enacted relating to wild game and wild birds. Said game, fish and oyster commissioner may make complaint and cause proceedings to be commenced against any person for violation of any of the laws for the protection and propagation of game or birds without the sanction of the county attorney in which such proceedings are commenced, and in such case he shall not be required to furnish security for costs. Said commissioner shall at any and all times seize and take possession of all birds and animals that have been caught, taken or killed, or had in possession or under control, or have been shipped contrary to any of the laws of this state; and such seizure may be made without a warrant. All birds or animals, seized by the commissioner, shall be disposed of in such manner as may be directed by any court having competent jurisdiction to hear and determine cases for violation of the game and bird laws of this state. [Act 1907, p. 254.]

Art. 897. Has power of sheriff, may arrest without warrant.—Said game, fish and oyster commissioner shall have the same power and authority to serve criminal process as sheriffs, and shall have the same power as sheriffs to require aid in executing such process.

Said commissioner may arrest without warrant any person found by him in the act of violating any of the laws for the protection or propagation of game or wild birds, and take such person forthwith before a magistrate having jurisdiction. Such arrests may be made on Sunday, and in which case the person arrested shall be taken before a magistrate having jurisdiction, and proceeded against as soon as may be, on a week day following the arrest. [Id., p. 255.]

Art. 898. Penalty for violation.—Any person violating the provisions of this law shall be punished, upon conviction, by fine not exceeding one hundred dollars and the cost of prosecution, or imprisonment in the county jail not exceeding thirty days, or both such fine and imprisonment, in the discretion of the court.

And the court shall sentence the offender to be confined in the county jail, until such fine is paid, for any period not exceeding one hundred days; and, in all cases where a fine and imprisonment is imposed, the sentence shall provide that, if the fine and costs are not paid at the time of the expiration of such imprisonment, the person serving such sentence shall be further detained in jail until such fine and costs are paid, for any period stated; provided, that the whole term of imprisonment shall not exceed six months. [Id., p. 257.]

Art. 899. Hunting license to be procured, when.—It shall hereafter be unlawful for any person who has not been a bona fide inhabitant of and resident citizen of this state, for six months last past to hunt for or kill any game or birds protected by the laws of this state, without first procuring a hunting license from the game, fish and oyster commissioner, permitting him to do so, and by paying to said commissioner the sum of fifteen dollars. Said license shall be dated when issued, and shall remain in force until the first day of September, following thereafter. It shall hereafter be unlawful for any person to hunt or kill any game quadrupeds or game birds or wild fowl protected by the game laws of this state, except in the county of his residence or in the counties adjoining the county of his residence, or on land owned or controlled by him, without first obtaining a state hunting license from the game, fish and oyster commissioner, permitting him to do so. Any person who has been a bona fide resident of this state for six months last past may procure a hunting license to hunt outside the boundaries of the county in which he resides, by paying a license fee of one dollar and seventy-five cents to the county clerk of the county in which he resides, to be dated when issued. Such license shall expire the first day of September of each year following such date. Said license shall authorize the person named therein to use firearms in the hunting or killing game birds during the hunting season of that year, but only in the manner and time prescribed by law. Said license shall limit the number and quality of game which may be taken or killed, in accordance with the provisions of law governing the subject. [Act 1909, p. 456.]

Art. 900. Person hunting who refuses to show license.—Any person found hunting, in open season, any game protected by the laws of the state, and who shall refuse to show his license herein provided for to any sheriff, deputy sheriff, constable, game commissioner or deputy game commissioner, or any other person or persons, on whose lands said person or persons are found hunting, or to any person who has the land under their control, on demand, shall be deemed guilty of a violation of the provisions of this law, and, upon conviction, shall be liable to the penalties provided herein. [Id., p. 456.]

Art. 901. [525] Oysters culled from public beds, etc.; penalty; cancellation of license.—It shall be unlawful for any person to fail or refuse to scatter the culls of such oysters as he may take from the oyster reefs as directed by the Game, Fish and Oyster Commissioner, and any person so failing or refusing to scatter such culls, as directed, by the Commissioner, shall be deemed guilty of a misdemeanor and on conviction, he shall be fined in a sum of not less than ten nor more than one hundred dollars. And on such conviction the Game, Fish and Oyster Commissioner may cancel the license of the captain of the boat, and he shall also cancel the license of such person to gather oysters, on which such person is employed or for which he is gathering oysters, and no new license shall be issued to such captain or to such person convicted for a period of

three years. [Act 1891, p. 155, § 2; Act 1897, ch. 98, § 1; Act 1913, p. 268, ch. 135, § 1, amending art. 901, revised Pen. Code.]

Explanatory.—Act 1891, p. 155, § 2, from which art. 901 was constructed, seems to have been superseded, prior to the revision, by Act 1897, p. 127, ch. 98, § 1, which reads as follows: "When oysters are gathered as prescribed in article 529s of this act, from the public beds or reefs, except for planting, they must be culled, and the young oysters and dead shells must be returned to the original reef or bed while the young oysters are yet alive, and not to exceed ten hours from the time of taking from the water bed or reef. Any person offending against this article shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than two hundred and fifty dollars for each and every offense."

Art. 902. [526] Planting prohibited, when.—It shall be unlawful for any person to plant or purchase oysters for planting, bedding or depositing, or for marketing, or for any other purpose whatever, from the first day of May to the first day of September in any year, except by permission of the Game, Fish and Oyster Commissioner, and, if any person shall violate the provisions of this Article, he shall be deemed guilty of a misdemeanor, and, on conviction shall be fined for each offense not less than ten nor more than one hundred dollars. [Act 1891, p. 155, § 6; Act 1913, p. 269, ch. 135, § 1, amending art. 902, revised Pen. Code.]

Art. 903. [526a] Unlawful to receive for shipment, when.—It shall be unlawful for any transportation company operating within this State, its officers, agents or employes, to receive for shipment, or to ship, within the boundaries of this State, from the first day of May to the first day of September of any year, any oysters from any public bed or reef, for depositing or for marketing; provided, that nothing in this Chapter shall be so construed as to prohibit any such transportation company, its officers, agents or employees, from shipping, or receiving for shipment, any oysters taken from a private bed, located under the laws of this State, offered for shipment by the owner or owners, locator or locators, of such bed; such fact to be established by the written affidavit of the person or persons offering such oysters for shipment, made before an officer authorized to take oaths. Any officer, agent or employee of such transportation company, violating the provisions of this Section shall be deemed guilty of a misdemeanor, and, upon conviction shall be fined for each offense not less than ten nor more than one hundred dollars. [Act 1907, p. 233; Act 1913, p. 269, ch. 135, § 1, amending art. 903, revised Pen. Code.]

Art. 904. [528] Unlawful to rake, dredge, etc.; penalty.—It shall be unlawful for any person or persons to rake, dredge or excavate with machinery any public oyster bed or oyster reefs in the waters of this State without first having obtained permission of the Game, Fish and Oyster Commissioner to so dredge or excavate with machinery. Any person or persons who shall violate the provisions of this Article shall, on conviction, be fined in any sum not less than five hundred nor more than one thousand dollars. Each day's violation of any of the provisions of this Article shall constitute a separate offense. [Act 1907, p. 233, § 8; Act 1913, p. 269, ch. 135, § 1, amending art. 904, revised Pen. Code.]

Art. 905. [529] Unlawful to destroy or deface buoy.—Any person who shall wilfully deface, injure or destroy or remove any buoy, markers, or fence, or any parts thereof, used to designate or enclose a private oyster bed in this State, without the consent of the owner thereof, or any buoy, marker or sign placed or used by the Game, Fish or Oyster Commissioner for the purpose of designating any waters closed against fishing or oyster taking, without the consent of the Game, Fish and Oyster Commissioner, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined

in any sum not less than ten nor more than two hundred dollars. [Act 1899, ch. 56; Act 1901, p. 302; Act 1913, p. 269, ch. 135, § 1, amending art. 905, revised Pen. Code.]

Indictment.—Willson's Cr. Forms, 569.

Art. 906. [529b] Unlawful to catch fish, green turtle, etc.; how and when.—It shall be unlawful for any person to catch or attempt to catch any fish, green turtle, loggerhead, terrapin or shrimp in any of the bays or navigable waters of this State, within the limits or within one mile of the limits of any city or town in this State, with seines, dragnets, fykes, set nets, trammel nets, traps, dams or weirs. A town or city in the meaning of this Act shall be a collection of one hundred families within an area of one square mile. Any one violating any of the provisions of this Act shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined in any sum not less than twenty-five nor more than two hundred dollars. In all prosecutions under the provisions of this Act, the identification of the boat from which such violation or violations occur shall be prima facie evidence against the owner, lessee, person or persons in charge or master of such boat. [Act 1897, p. 213; Act 1913, p. 269, ch. 135, § 1, amending art. 906, revised Pen. Code.]

Construction of act.—This article as amended by Acts 33d Leg. c. 135, which act amended arts. 901-923 inclusive, and adding thereto articles 923a-923k, which article provided a penalty for violation of any provision of the act, when construed with the other provisions of the act which imposed different penalties for violation of the other articles, and to effectuate the intent of the Legislature, imposes the penalty only upon the violation of that article, and not upon the other articles of the act. *Sterrett v. Gibson* (Civ. App.) 168 S. W. 16.

Indictment and information.—Willson's Cr. Forms, 395.

Under this article and art. 911, an information charging defendant in the alternative with catching "fish or terrapin or both fish and terrapin with a drag seine or set net" is fatally defective. *Venturio v. State*, 37 App. 653, 40 S. W. 974.

Art. 907. [529c] Catching same by explosives or poison.—The catching, taking or killing of fish, green turtle or terrapin in any of the salt waters or fresh waters, lakes or streams in the State by poison, lime, dynamite, nitroglycerine, giant powder or other explosives, is hereby prohibited; and any person offending against this Article, shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than twenty-five dollars nor more than two hundred dollars; and by confinement in the county jail not less than thirty nor more than ninety days. [O. C.; amended, Act 1897, p. 125; Act 1913, p. 270, ch. 135, § 1, amending art. 907, revised Pen. Code.]

Art. 908. [529d] Penalty for failure to take out license as a fisherman.—Any person who shall engage in the business of fishing or catching green turtle or terrapin or shrimp for market without first having procured a license therefor, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than ten dollars nor more than two hundred dollars. [Act 1897, p. 125; Act 1913, p. 270, ch. 135, § 1, amending art. 908, revised Pen. Code.]

Indictment.—Willson's Cr. Forms, 396.

Art. 909. [529e] Sale of certain fish of certain weight prohibited.—It shall be unlawful for any person to have in his or her possession or to sell or ship any red fish more than twelve pounds in weight or less than one and one-half pounds in weight; any trout of less than three-fourths of one pound in weight; sheepshead, flounder, Spanish mackerel or pompano of less than one-half pound in weight. It shall also be unlawful for any person to place or stretch in or across any water any seine or net for the purpose of catching or holding fish for a longer period of time than ten hours. Any person offending against this Article shall, upon conviction, be fined in any sum not less than ten nor more than two hundred dol-

lars. [Act 1899, ch. 56; Act 1907, p. 238, ch. 126; Act 1909, p. 329; Act 1913, p. 270, ch. 135, § 1, amending art. 909, revised Pen. Code.]
Indictment.—Willson's Cr. Forms, 397.

Art. 910. [529f] Sale of turtle and terrapin of certain weight prohibited.—It shall be unlawful for any person to sell or ship any green turtle of less than twelve pounds in weight or terrapin of less than six inches in length of under shell, or to catch or sell any terrapin from the first day of May to the first day of August. Any person offending against this Article shall, upon conviction, be fined in any sum not less than ten nor more than two hundred dollars. [O. C.; Act 1913, p. 270, ch. 135, § 1, amending art. 910, revised Pen. Code.]

Art. 911. [529g] Catching fish or terrapin with drag seine during breeding season; proviso.—It shall be unlawful for any person, during the breeding season, consisting of the months intervening between June first and September first of each year, to catch any fish or terrapin in the bays, tidal or coastal waters of this State by the use of a drag seine; or to drag any seine or net or other device, except a minnow seine for catching bait of not more than twenty feet in length or a shrimp seine of not more than fifty feet in length for catching shrimp only. And, it shall be unlawful for any person to place or set or drag any net or seine or use any other device for taking fish, other than the ordinary hook and line or cast net, or minnow seine of not more than twenty feet in length, within the waters of any pass leading from the Texas coastal waters into the Gulf of Mexico, or within one mile of such pass, or within the waters of any pass, stream or canal leading from one body of Texas bay or coastal waters into another body of such waters. And the Game, Fish and Oyster Commissioner, whenever he has reason to believe that fish are breeding, or that it is destructive to fish, to permit fishing in any of such tidal waters, shall have power and authority to close such waters against fishing with any net, seine or other device, except by hook and line or cast net or minnow net of no greater length than twenty feet; but such commissioner shall give notice of his intention to close any such waters against fishing with nets and seines for two weeks prior to such closing by posting notices in public places near such waters; and after the date set in such notices for the closing of such waters, it shall be unlawful to drag, seine or set nets in such waters for that period of time that the commissioner shall in the notices declare they shall be closed. Any person offending against the provisions of this Article, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by fine of not less than \$25.00 nor more than \$200.00; and each day shall constitute a separate offense, and in all prosecutions under this article the identification of the boat from which the violation occurred shall be prima facie evidence against the owner of the party last in charge of such seines or nets or on such boat.

Nothing in the foregoing article shall be taken to prohibit fishing on the Gulf Beach outside of one mile of the passes at any time and with any net or seine authorized by the provisions of this chapter. And provided further, that this section is not intended to prevent the use of trammel nets, gill nets or other nets, when used strictly as set nets, except in passes, streams, canals and in waters within one mile of passes leading from coastal waters into the Gulf of Mexico. [Act 1897, ch. 98; Act 1899, ch. 56; Act 1909, p. 329; Act 1913, ch. 135; Act 1913, 1st S. S., p. 33, ch. 23, § 1.]

Prohibited territory.—A defined channel, extending between Padre and Mustang Islands, through which the tide flows and ebbs, leading from the interior end

of a strait to Corpus Christi Bay, one of the coast waters of Texas on the Gulf of Mexico, through which channel the Gulf waters flow, is a part of the Corpus Christi Pass, within this article as amended. *Gibson v. Sterrett* (Civ. App.) 144 S. W. 1189.

Seining is prohibited in the entire length of the channel known as Corpus Christi Pass leading from Corpus Christi Bay to the Gulf of Mexico by this article as amended. *Gavinia v. State* (Cr. App.) 145 S. W. 594.

Principal offenders.—See notes under article 74, ante.

Indictment and information.—Willson's Cr. Forms, 398.

An information charging accused with seining and dragging a seine is sufficient to charge a violation of this article as amended. *Gavinia v. State* (Cr. App.) 145 S. W. 594.

See *Venturio v. State*, 37 App. 653, 40 S. W. 974; note under 906.

Question of law.—See notes under art. 786, C. C. P.

Whether Corpus Christi Pass is covered by this article as amended, is a question of law, and not of fact, and hence a charge that, if accused did seine and drag a seine in that pass, he was guilty of violating that section, was not a charge on the weight of the evidence. *Gavinia v. State* (Cr. App.) 145 S. W. 594.

Sufficiency of evidence.—Evidence in a prosecution for seining in prohibited waters held to justify a refusal of a peremptory instruction for defendant. *Gavinia v. State* (Cr. App.) 145 S. W. 594.

Art. 912. [529h] Person fishing with drag seine to return fish of certain size to water.—Any person fishing with a drag seine or set net, for sale or market, shall return all fish, green turtle or terrapin of the sizes and weights, specified in Articles 909 and 910 of the Penal Code, to the water, while they are yet alive, except sharks, gars, rays, catfish and sawfish; and the size of the meshes of the fish seines shall not be less than one and one-half inches square, not including the bag nor shall any seine exceed twelve hundred feet in length; and any person offending against this Article shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten dollars nor more than two hundred dollars. [Act 1897, ch. 98; Act 1909, p. 331; Act 1913, p. 271, ch. 135, § 1, amending art. 912, revised Pen. Code.]

Art. 913. [529i] Coast survey charts as evidence.—All United States Coast Survey Charts covering the coast of Texas shall be admissible as evidence in all prosecutions under this Act. [O. C.; Act 1913, p. 271, ch. 135, § 1, amending art. 913, revised Pen. Code.]

Art. 914. [529j] Closed season for oysters.—It shall be unlawful for any person to take or catch oysters from any public beds or reefs, for sale or for market, from the first day of April to the first of September of each year. Any person offending against this Article shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than ten dollars nor more than two hundred dollars; and each day shall constitute a separate offense; provided that part of Laguna Madre, south and west of Baffin's Bay, be exempted from the operation of this Article. [Act 1907, ch. 126; Act 1909, p. 331; Act 1913, p. 271, ch. 135, § 1, amending art. 914, revised Pen. Code.]

For public and private beds defined, see Vernon's Sayles' Civ. St. 1914, article 2981.

Art. 915. [529j½] Use of screens on taking water from public waters.—It shall be the duty of every person, firm or corporation using pumps for the purpose of taking water from the public waters of the State, when directed to do so by the Game, Fish and Oyster Commissioner to place screens over the mouth of the intake pipe for the purpose of preventing fish from entering said pipe. The size of and regulations for placing such screens shall be designated by the Game, Fish and Oyster Commission. Any person, firm or corporation failing to comply with this Article, after notification by the Game, Fish and Oyster Commissioner so to do shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars; and each day shall constitute a separate offense.

[Act 1909, p. 331; Act 1913, p. 271, ch. 135, § 1, amending art. 915, revised Pen. Code.]

Art. 916. [529/] Taking fish, turtle, terrapin, or oysters, with seine without license.—It shall be unlawful for any person to catch any fish, green turtle or terrapin, with seine or set net for market, in any of the bays or coast waters of this State, or gather any oysters with tongs or otherwise, for market or planting, from any of the public reefs or beds in this State, without having a license from the Game, Fish and Oyster Commissioner, or his deputy. Any person offending against this Article shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than ten dollars nor more than two hundred dollars; and each day shall constitute a separate offense. [Act 1897, ch. 98; Act 1899, p. 77; Act 1913, p. 271, ch. 135, § 1.]

Explanatory.—Pen. Code 1895, arts. 529k, 529l, were held unconstitutional in *Gustafson v. State*, 48 S. W. 518, as involving discrimination against nontaxpaying citizens.

Art. 917. Dealer in fish and oysters shall take out license; requirements; "wholesale dealer" defined.—For the protection of the fish and oyster industry any individual, firm or corporation, engaged in or who may engage in, the business of a wholesale dealer or dealers in fish and oysters, shall on or before the first day of September of each year, secure from the Game, Fish and Oyster Commissioner, or one of his deputies, a license granting such individual, firm or corporation, permission to engage in said occupation. For the purpose of obtaining this license the applicant desiring same must make written application to the Game, Fish and Oyster Commissioner, or one of his deputies, in which he (the applicant) shall set forth, under oath, if required, that he is a citizen of the United States; he shall also agree that, because of the privilege which he applies for from the State of Texas, that all products handled by him shall at all times be subject to the inspection of the Game, Fish and Oyster Commissioner, or any of his deputies; and in said application he shall authorize said Commissioner or any of his deputies to enter his place of business, or any place where he may have such products stored, and inspect same. He shall also agree to keep a correct record of all fish and oysters handled by him under this Chapter in a book to be furnished by the Game, Fish and Oyster Commissioner; and, further, that failure on his part to keep a correct record shall be grounds for the forfeiture of his license granted him under the application aforesaid. This application, having been duly executed and delivered to the Game, Fish and Oyster Commissioner, or any of his deputies, together with the fee for same, it shall then be the duty of the Game, Fish and Oyster Commissioner, or his deputy, to issue to the applicant a license to engage in the business set forth in the application. Said license must be signed by the Game, Fish and Oyster Commissioner, or one of his deputies, stamped with the seal of his office, and state the name of the licensee, place of business and the kind of license applied for, and shall be good for twelve months following the date of issuance. For such license the applicant shall pay one dollar for each one thousand pounds of fish handled by him, and a tax of one cent per barrel on oysters handled by him, which tax shall be paid monthly; the tax to be paid on the first of each month, which may be due upon the said products handled during the preceding month, as shown by the record books hereinbefore mentioned. And any person, firm or corporation, or association of persons, or any officer, agent or employee of any company, corporation or association of persons who

shall engage in the business of a wholesale dealer in fish and oysters, or either, without procuring a license to follow said business, or without paying the tax required by this Article, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than two hundred dollars, and each day such business may be engaged in in violation of this Article shall constitute a separate offense; and upon conviction for pursuing said occupation without payment of the tax required by law or for any other violation of the game, fish and oyster law, the license of such dealer shall be forfeited. A wholesale dealer, within the meaning of this Article, is one who is engaged in the fish and oyster business as a dealer, supplying the retail and wholesale trade, or either, by sales in quantities of fifty (50) pounds or more of fish, and of oysters of five (5) barrels or more. [Act 1909, p. 327; Act 1913, p. 272, ch. 135, § 1, superseding art. 917, revised Pen. Code.]

Art. 918. [529n] Selling unculled oysters; penalty.—Any person offering, for sale, or who shall sell, any cargo of oysters which shall contain more than five per cent of young oysters, shall be deemed guilty of a misdemeanor, and, upon conviction shall be fined not less than ten dollars nor more than two hundred dollars. Any oyster that measures less than three and one-half inches from hinge to mouth shall be deemed a young oysters for the purpose of this and the preceding Article [Art. 917]. [Act 1897, ch. 98; Act 1909, p. 327; Act 1913, p. 273, ch. 135, § 1, amending art. 918, revised Pen. Code.]

Art. 919. [529o] Duty of Game, Fish and Oyster Commissioner.—It shall be the duty of the Game, Fish and Oyster Commissioner or his deputy, when he thinks that any cargo of oysters offered for sale, contains more than five per cent of young oysters, to take as many as he may deem necessary from such cargo, cull them and measure the young oysters, or those that measure less than three and one-half inches from the hinge to the mouth, and ascertain to the best of his ability, the proportion of the young oysters by number to the marketable oysters; and, if the young oysters be in greater proportion than five per cent, the cargo shall be deemed unculled, and the owner shall be deemed guilty of the offense prescribed in Article 918 of the Penal Code. [Act 1907, ch. 126; Act 1909, p. 327; Act 1913, p. 273, ch. 135, § 1, amending art. 919, revised Pen. Code.]

Art. 920. [529p.] Theft from private oyster bed.—It shall be unlawful for any person to take oysters from a private bed, or to take oysters deposited by one making up a cargo for market or family use, without the consent or permission of the owner thereof; and anyone offending any provisions of this Article shall be deemed guilty of theft and, upon conviction, shall be punished as provided by law for the offense of theft. [O. C.; Act 1913, p. 273, ch. 135, § 1, amending art. 920, revised Pen. Code.]

Repeal.—This statute was passed subsequent to the enactment of Penal Code, article 527, and there is such an irreconcilable conflict between the two that both cannot stand, therefore, such article 527 is repealed. *Ragazine v. State*, 47 App. 46, 84 S. W. 833.

Art. 921. [529t] Selling oysters gathered for planting.—It shall be unlawful for any person gathering oysters for planting on locations obtained from the State or on private property, to sell, market or in any way dispose of oysters so gathered at the time of gathering, for any other purpose than planting, provided, this shall not be considered as meaning the right to dispose of a location or oyster bed. Any person offending against this Article shall

be deemed guilty of a misdemeanor and, upon conviction, shall be fined in any sum not less than fifty nor more than two hundred dollars. [Act 1897, ch. 98; Act 1907, p. 238; Act 1913, p. 273, ch. 135, § 1, amending art. 921, revised Pen. Code.]

Art. 922. [529u] Gathering seed oysters without license.—It shall be unlawful for any person, firm or corporation or joint stock company to gather seed oysters for planting without having first obtained a permit or license to do so from the Game, Fish and Oyster Commissioner, or his deputy, said permit or license to designate the reef or beds from which the applicant is allowed to gather seed oysters; and any person, agent, employee or officer of a firm, corporation or joint stock company gathering or having gathered oysters for planting from any bed or reef designated, or who has not a permit or license for gathering seed oysters, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than fifty nor more than two hundred dollars. [Act 1899, p. 77; Act 1913, p. 273, ch. 135, § 1, amending art. 922, revised Pen. Code.]

Art. 923. Penalty for selling fish, turtle, oysters, etc., without license.—Any person who shall market or offer to market any fish, turtle, terrapin, shrimp or oysters taken from salt waters of this State, or any fish taken from any fresh water lakes or streams, in any quantity greater than fifty pounds, shall pay the tax and obtain the permit, as prescribed by law, before disposing of any part of said product, and if he or any other person shall sell or shall dispose of any part of said product for shipment or storage before obtaining said permit, the person so selling or disposing of said product, or any part thereof, shall be deemed guilty of a misdemeanor and, upon a conviction, shall be fined not less than ten nor more than two hundred dollars. In prosecutions in this and other similar cases, the fact of the fish, turtle, terrapin, shrimp and oysters being of the varieties that are found in the waters of this State shall be prima facie evidence that said fish, turtle, terrapin, shrimp or oysters were taken from the waters of this State. [Act 1905, p. 134; Act 1913, p. 273, ch. 135, § 1, amending art. 923, revised Pen. Code.]

Art. 923a. Permit to use dredges for oysters.—Whenever the Game, Fish and Oyster Commissioner believe that an oyster bed can be improved by the use of dredges in it, he may grant the use of such dredges in such reefs, but only under the superintendence, supervision and in the presence of a deputy Fish and Oyster Commissioner. [Act 1913, p. 274, ch. 135, § 1.]

Construction of act.—Art. 906, as amended by Acts 33d Leg. c. 135, which act amended arts. 901-923 inclusive, and adding thereto articles 923a-923k, which article provided a penalty for violation of any provision of the act, when construed with the other provisions of the act which imposed different penalties for violation of the other articles, and to effectuate the intent of the Legislature, imposes the penalty only upon the violation of that article, and not upon the other articles of the act. *Sterrett v. Gibson* (Civ. App.) 168 S. W. 16.

Art. 923b. Closing overworked reefs; notice.—Whenever the Game, Fish and Oyster Commissioner believes that any public reef is being overworked or damaged in any way he may close such reef against any one taking oysters from it, but before he closes such reef he shall give two weeks' notice of such closing posting notices in such fish houses as are in two towns nearest such reefs. In such notices he shall state the date of closing and the time for which such reefs shall be closed. [Id.]

See notes under art. 923a, ante.

Art. 923c. Seizure of unlawful fishing devices and instrumentalities.—Nets, seines, boats or other devices for catching, fish, un-

lawfully used in the waters of this State, or boats, dredges, barges and tongs unlawfully used in violating the oyster laws of this State, are hereby declared public nuisances and may be summarily seized, destroyed and abated by the Game, Fish and Oyster Commissioner, or his deputies and no action for damages shall be maintained against such Commissioner or his deputies for such seizure, destruction and abatement. [Id.]

See notes under art. 923a, ante.

Validity of act.—In the exercise of the power of the state to protect fish, it may not only prohibit the use of seines and nets, but to enforce such regulation may declare seines and nets to be a nuisance, and require their abatement, as was done by this article. *Sterrett v. Gibson* (Civ. App.) 168 S. W. 16.

Art. 923d. Penalty for taking oysters from closed reef.—Any person who shall take any oysters from any oyster reef which has been closed by the Game, Fish and Oyster Commissioner shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than twenty-five nor more than two hundred dollars. [Id.]

See notes under art. 923a, ante.

Art. 923e. Complaint before justice of the peace.—Complaint against any person for the violations of the game, fish and oyster laws of this State may be made before any justice of the peace of the county in which the offense is charged to have been committed, and he shall have jurisdiction to try and dispose of such cases, provided the penalties prescribed for such offenses are within the jurisdiction of justices of the peace. [Id.]

See notes under art. 923a, ante.

Art. 923f. What devices may not be used for fishing.—It shall be unlawful for any person to take or catch any fish, in the public fresh water rivers, creeks, lakes, bayous, pools, lagoons or tanks of this State by any other means than by the ordinary hook and line or trout line, or by set or drag net or or seine the meshes of which are less than three inches square, or trammel net, the meshes of any part of which are less than four inches square or by a minnow seine of no more than twenty feet in length, and it shall be unlawful for any person to place in the public fresh water rivers, creeks, lakes, bayous, pools, lagoons or tanks of this State any net or other device or trap for taking or catching fish other than a set net or drag net or seine, the meshes of which are less than four inches square. Any person violating any provision of this Section shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined any sum not less than twenty-five nor more than one hundred dollars. All fresh water streams or bayous emptying into the tidal waters of this State are, for the purpose of this Act, hereby declared fresh water streams to their mouths. [Id.]

See notes under art. 923a, ante.

Art. 923g. Having in possession or carrying seine or drag net into prohibited waters.—It shall be unlawful for any person to carry into or have in his possession in any waters where seining is prohibited, any seine or drag net, and any such person who shall carry into or have in his possession any such seine or drag net shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in a sum of not less than ten nor more than one hundred dollars, and any seine or drag net so carried into or found in such waters shall be deemed a nuisance, and the Game, Fish and Oyster Commissioner or his deputy are required to abate such nuisance by the destruction of such nets, as provided in this Act. Provided, that this Act shall not apply to the closed waters within one mile of any town. [Id.]

See notes under art. 923a, ante.

Art. 923h. Dealer's license forfeited on conviction.—On the conviction of any wholesale dealer or the conviction of any licensed fisherman or oysterman, the license of such dealer shall be forfeited and the Game, Fish Oyster Commissioner shall not issue to such dealer, fisherman or oysterman another license for a period of three years. [Id.]

See notes under art. 923a, ante.

Art. 923i. Obstruction or diversion of waters.—It shall be unlawful for any person to wilfully obstruct the natural flow of waters into any of the public waters of this State or two [to] wilfully divert the water from any of the public lakes, streams or ponds of this State, except for domestic or other necessary uses or for irrigation purposes, and any person so offending shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined in a sum of not less than fifty nor more than one hundred dollars. [Id.]

Art. 923j. Measure for sale of oysters.—Any person who uses any measure in the sale of oysters other than the measure established by this Act shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined in a sum of not less than ten nor more than one hundred dollars. [Id.]

The act does not prescribe the measure referred to.

See notes under art. 923a, ante.

Art. 923k. Taking boat, etc., into prohibited waters.—Any person who shall wilfully and with intent to injure the owner take any boat, seine or net or other device for fishing into prohibited waters, or shall use said articles for the unlawful taking or catching of fish, so as to cause the destruction of same, shall be guilty of a misdemeanor and punished by a fine of not less than ten nor more than two hundred dollars, and by confinement in the county jail not less than thirty nor more than ninety days. [Id.]

See notes under art. 923a, ante.

Validity of act.—This article is a valid exercise of the power of the state to regulate the right of fishery. *Sterrett v. Gibson* (Civ. App.) 168 S. W. 16.

Art. 923l. Seining for gars, turtle, etc., not prohibited; seining by county authorities.—The provisions of this Act relative to use of seines in fresh water streams shall not prevent the seining for gars, turtle and other natural enemies of fish, under the supervision of the Game, Fish and Oyster Commissioner or a deputy; and the commissioners' court of any county is hereby authorized to have any stream, creek or lake in said county seined for the purpose of destroying any gar, turtle or other natural enemies of the fish which may be caught from such waters, said seining to be done under the supervision of and in the presence of the Game, Fish and Oyster Commissioner or a deputy. The expenses of said seining to be borne by the said county, or by the citizens thereof; all good or edible fish which may be caught or taken in said seine to be returned to the waters. [Id.]

See notes under art. 923a, ante.

Art. 923m. Seining for drum fish; permit; superintendence.—Any person leasing an oyster claim or oyster reef in waters where seining is prohibited, may apply to the Game, Fish and Oyster Commissioner for permission to seine for drum fish in such waters. In his application he shall make oath that the drum fish are seriously damaging his oysters, and that if he is permitted to seine for such drum fish in such waters, he will not take or destroy any other food fish but will throw them back in the water. If the Commissioner is satisfied that such damage is being done, he may grant such permission to the person applying for it, specifying in such permit the length and mesh of the seine to be used, the length

of time in which it is to be used, and the claim or reef on which it is to be used. And such Commissioner shall assign a deputy Fish and Oyster Commissioner to superintend such seining and no seine shall be dragged except in his presence, and for which, a person obtaining the permission to seine, as set forth above, shall pay to the Game, Fish and Oyster Commissioner, \$2.50 per day to be placed in the special fish and oyster fund, for such services. The person granted such permission shall board the deputy Fish and Oyster Commissioner during his superintendence of such seining. If the person obtaining the permission shall violate any of the provisions of this Act, he shall be prosecuted and punished under the criminal laws of this State applicable in such cases. [Act 1913, p. 306, ch. 146, § 1, amending Art. 4018, Rev. St. 1911.]

Art. 923n. Taking of marl, sand, shells, or mudshells from fishing waters; permit; proviso.—If any person, association of persons, corporate or otherwise, shall, for himself or itself, or for or on behalf of or under the direction of another person, association of persons, corporate or otherwise, take or carry away any of the marl, sand or shells or mudshell included in this Act, [Vernon's Sayles' Civ. St. 1914, arts 4021b–4021i] or shall disturb any of said marl, sand shells or mudshell or oyster beds or fishing waters, or shall fish in any fresh water lake or shall operate in or upon any of said places for any purpose other than that necessary or incident to navigation or dredging under State or Federal authority, without having first obtained a written permit from the Game, Fish and Oyster Commissioner for the territory in which such operation is carried on, such person, association of persons, corporate or otherwise, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum of money not less than ten dollars nor more than two hundred dollars, and one-half of the proceeds arising from such fines shall be appropriated to the road and bridge fund of the county in which the conviction is had and one-half shall be appropriated to the fish and oyster fund. Provided, however, that there may be taken and appropriated from beneath the waters of Galveston Bay, sand for filling and raising the grade of Galveston Island, without making payment therefor to the Game, Fish and Oyster Commission or to the State of Texas. [Act 1911, p. 120, ch. 68, § 9; Act 1913, p. 329, ch. 154, § 1.]

TITLE 14

OF OFFENSES AGAINST TRADE, COMMERCE AND THE CURRENT COIN

Chap.

1. Of forgery and other offenses affecting written instruments.
2. Forgery of land titles, etc.
3. Of counterfeiting and diminishing value of current coin.
4. Of offenses which affect foreign commerce.
5. Public warehousemen and warehouses.
6. Bureau of cotton statistics.
7. False weights and measures.
- 7a. Weight of cotton bales.

Chap.

8. Of offenses by public weighers.
- 8a. Commercial fertilizers.
- 8b. Live stock commission merchants.
- 8c. Commission merchants.
- 8d. Loan brokers.
- 8e. Employment agencies.
- 8f. Contracting stevedores.
- 8g. Public accountants.
- 8h. Sale of corporate stock.
- 8i. Sale of patent rights.
9. Miscellaneous offenses.

CHAPTER ONE

OF FORGERY AND OTHER OFFENSES AFFECTING WRITTEN INSTRUMENTS

Art.

924. "Forgery" defined.
925. Alteration also forgery.
926. Intent to injure, etc., necessary.
927. "Instrument in writing" defined.
928. "Alter" defined.
929. "Another" includes what.
930. "Pecuniary obligation" defined.
931. "Transferred or in any manner have affected" defined.
932. All participants guilty.
933. Filling up over signature.
934. Person not guilty, when.
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Art.

937. Passing forged instruments.
938. Preparing implements for forgery.
939. Possession of forged instruments with intent to pass.
940. Evidence in case of bank bills.
941. Falsely reading instrument.
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945. Same in acknowledgments.
946. Prosecutions under one indictment.

Article 924. [530] "Forgery" defined.—He is guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing, purporting to be the act of another, in such manner that the false instrument so made would (if the same were true) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever.

1. Nature and elements of offense.
2. — Intent.
3. — Nature and apparent efficacy of instrument.
4. — Particular instruments.
5. — Injury from forgery.
6. Forgery and uttering forged instrument distinguished.
7. Forgery and swindling in same transaction.
8. Swindling distinguished.
9. Principals.
10. Accomplice.
11. Defenses.
12. Venue.
13. Indictment.
14. — Statutory form.
15. — Intent.
16. — Description of or setting forth instrument in general.

17. — Variance between purport and tenor clauses.
18. — Facts extrinsic to instrument.
19. — Designation or description of parties.
20. — Counts and election.
21. — Issues, proof, and variance.
22. Evidence.
23. — Presumptions and burden of proof.
- 23½. — Introduction of forged instrument.
24. — Admissibility.
25. — Comparison of handwriting.
26. — Other offenses.
27. — Weight and sufficiency.
28. Instructions and questions for jury.
29. Verdict.

1. Nature and elements of offense.—The common law definition of forgery is, "the fraudulent making or alteration of a writing to the prejudice of another's right." This definition is sufficiently comprehensive to include official as well as private writings, but has not been adopted in the Code of this state. Rogers v. State, 8 App. 401.

2. — Intent.—See notes under art. 926, post.

3. — **Nature and apparent efficacy of instrument.**—Pecuniary obligation, see post, art. 930; *Johnson v. State*, 40 App. 605, 51 S. W. 382, 76 Am. St. Rep. 742; *Tracy v. State*, 49 App. 37, 90 S. W. 308.

A written instrument, to be the subject of forgery, must be valid, if genuine, for the purpose intended. If void or invalid on its face, and it cannot be made good by averment, the crime of forgery cannot be predicated upon it. It must be an instrument which, if it were true, would create, increase, diminish, discharge, or defeat a pecuniary obligation, or would transfer, or in some manner affect property. *Anderson v. State*, 20 App. 595; *Henderson v. State*, 14 Tex. 503; *Howell v. State*, 37 Tex. 591; *Rollins v. State*, 22 App. 548, 3 S. W. 759, 58 Am. Rep. 659.

Any written instrument which, if true, would create, increase, diminish, discharge or defeat a pecuniary obligation, or would transfer or in some manner affect property, is subject-matter of forgery. But if void or invalid on its face, and it cannot be made good by averment, forgery cannot be predicated upon it. *Hendricks v. State*, 26 App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; *King v. State*, 27 App. 567, 11 S. W. 527, 11 Am. St. Rep. 203.

An instrument void on its face is a subject of forgery if extrinsic facts are alleged showing that the holder might be enabled by reason thereof to defraud another. *Forcy v. State*, 60 App. 206, 131 S. W. 585, 32 L. R. A. (N. S.) 327; *Green v. State*, 63 App. 510, 140 S. W. 444; *Hendricks v. State*, 26 App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; *Daud v. State*, 34 App. 460, 31 S. W. 376.

But if the legality of the instrument be but doubtful, and by proper averments its legality can be shown, it is the subject of forgery. *Rollins v. State*, 22 App. 548, 3 S. W. 759, 58 Am. Rep. 659; *Daud v. State*, 34 App. 460, 31 S. W. 376; *Carder v. State*, 35 App. 105, 31 S. W. 678; *Scott v. State*, 40 App. 107, 48 S. W. 523.

An instrument void on its face cannot be the subject of forgery. *Forcy v. State*, 60 App. 206, 131 S. W. 585, 32 L. R. A. (N. S.) 327; *Scott v. State*, 40 App. 107, 48 S. W. 523; *King v. State*, 42 App. 108, 57 S. W. 840, 96 Am. St. Rep. 792; *Green v. State*, 63 App. 510, 140 S. W. 444.

Signing of a fictitious name, with fraudulent intent, is forgery. *Hocker v. State*, 34 App. 359, 30 S. W. 783, 53 Am. St. Rep. 716; *Davis v. State*, 37 App. 218, 39 S. W. 296.

It is immaterial as to where in the instrument the signature appears, if it purports to have been placed there to give it authenticity. *Crawford v. State*, 31 App. 51, 19 S. W. 766; *Elkins v. State*, 35 App. 207, 32 S. W. 1047.

Undated instrument. *Boles v. State*, 13 App. 650.

Forgery may be predicated upon an instrument which, if true, would tend, though might not actually, defeat or discharge an obligation. *Fonville v. State*, 17 App. 368.

If the instrument would create a pecuniary obligation upon the purported maker if genuine it is the subject of forgery. *Scott v. State*, 40 App. 107, 48 S. W. 523.

The name of payee in forged instrument or something from which to ascertain to whom payment is to be made is essential. *Colter v. State*, 40 App. 166, 49 S. W. 379.

Unstamped instrument. *Thomas alias Moon v. State*, 40 App. 565, 51 S. W. 242, 46 L. R. A. 454, 76 Am. St. Rep. 740.

Order to "let Bare have \$5 in grosses and charge the same to" the purported drawer is an order for articles of value, implies an obligation to the extent of \$5, and without the averment of extrinsic facts will support an indictment for forgery. *Hendricks v. State*, 26 App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463. And see *Williams v. State*, 24 App. 342, 6 S. W. 531.

A written instrument which, if genuine, would be valid, can be made the basis of an indictment for forgery. *Hendricks v. State*, 26 App. 176, 9 S. W. 555. See *Alexander v. State*, 28 App. 186, 12 S. W. 595; *Sweet v. State*, 28 App. 223, 12 S. W. 590; *Hooper v. State*, 30 App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926; *Burks v. State*, 24 App. 326, 6 S. W. 300.

If the instrument is void or invalid upon its face, and incapable of being made good by the averment of extrinsic facts, an indictment for forgery cannot be predicated upon it. *Hendricks v. State*, 26 App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; *Daud v. State*, 34 App. 460, 31 S. W. 376.

Signing a dead person's name to a check with intent to defraud is forgery. *Brewer v. State*, 32 App. 74, 22 S. W. 41, 40 Am. St. Rep. 760.

Two parties of the same name lived in different counties, defendant secured the signing of one of their names to the instrument representing him to be the other one; held, that he was guilty of forgery. *Peel v. State*, 35 App. 308, 33 S. W. 541, 60 Am. St. Rep. 49.

Where one person induces another to sign a third person's name to a bond intending to pass such instrument as the bond of such party and does so pass it, he is guilty of forgery. *Peel v. State*, 35 App. 308, 33 S. W. 541, 60 Am. St. Rep. 49.

The alleged forged instrument was set out as follows: "May 22, 1897. Mr. Brin Pies let John Womble hame ine thing that he wont J O Thompson;" held, the instrument does not on its face import such an obligation as would constitute forgery. *Womble v. State*, 39 App. 24, 44 S. W. 827.

To constitute the basis of forgery, the instrument must appear on its face to be, or must in fact be, one which, if true, would possess some legal validity, or in other words must be legally capable of effecting a fraud. *Cagle v. State*, 39 App. 109, 44 S. W. 1097, and authorities cited.

A good test is whether the subject-matter of the alleged forgery would create a pecuniary liability upon the purported maker, if it were genuine. And every instrument purporting to be a complete pecuniary obligation on the part of the maker, is the subject of forgery. *Scott v. State*, 40 App. 105, 48 S. W. 523.

It is not necessary to constitute forgery that the instrument be full and complete. If it is complete so far as the maker is concerned, it is sufficient. *Spicer v. State*, 52 App. 177, 105 S. W. 813.

One of two persons having the same name who signs the name to a note with intent that it may be used in trade as the note of the other, is guilty. *Edwards v. State*, 53 App. 50, 108 S. W. 673, 126 Am. St. Rep. 767.

The bond of the guardian of an infant over 14 years of age was the subject of forgery, even though no notice was given of the application for guardianship letters and the bond was not filed for nearly 40 days after waiver of citation by the minor and the appointment of accused as guardian. *Jones v. State*, 60 App. 67, 130 S. W. 1012.

A writing valid on its face though invalid as a matter of fact or under the proof, is the subject of forgery. *King v. State*, 57 S. W. 840; *Jones v. State*, 60 App. 67, 130 S. W. 1012.

An instrument valid on its face may be forged, though extrinsic facts exist which would avoid it if genuine, or though other steps would have been necessary to have perfected it. *Jones v. State*, 60 App. 67, 130 S. W. 1012.

A written instrument filled in over the genuine signature of the purported maker, agreeing to give defendant a sum of money for his equity in land for which the signer had sued, and agreeing not to dispossess defendant until the amount named is paid, is an instrument subject to forgery. *Wheeler v. State*, 62 App. 370, 137 S. W. 124.

Where the reading is so imperfect and obscure that, without extrinsic evidence, it does not show a capacity of effecting fraud, it is not a subject of forgery. *Green v. State*, 63 App. 510, 140 S. W. 444.

An instrument to be the subject of forgery must be of a character calculated to deceive. *Bagley v. State*, 63 App. 606, 141 S. W. 107.

Where a contract of insurance demanded proof by affidavit with proper seal of death of insured, an indictment for passing a forged proof of death, which set cut an affidavit without a seal, did not allege an instrument which was the subject of forgery. *Bagley v. State*, 63 App. 606, 141 S. W. 107.

Where accused, who was indebted upon a note, falsely uttered a receipt, which purported to show that the note had been paid, and in an action on the note pleaded the receipt, and offered parol testimony to explain the receipt, which was ambiguous, he was guilty of forgery, though the receipt taken by itself was unintelligible. *Barber v. State*, 64 App. 89, 142 S. W. 582.

In a prosecution for forging an express money order, which recited on its face that any alteration, defacement, or mutilation rendered the order void it is no defense to show that the written word of the amount of the order was so blurred and smeared as to be illegible, where it appeared that the amount of the order as expressed in numerals was clear, for bad writing or bad spelling will not vitiate an instrument. *Cheesebough v. State*, 70 App. 612, 157 S. W. 761.

Under this article an alleged forged instrument must on its face be a completed instrument, or, if not a completed instrument, the indictment must allege extrinsic facts to show that the instrument, if genuine, would be a valid instrument. *Ritter v. State* (Cr. App.) 176 S. W. 727.

4. — Particular instruments.—Order for payment of money though not addressed to any particular person. *Dixon v. State* (App.) 26 S. W. 500; *Kennedy v. State*, 33 App. 183, 26 S. W. 78; *Green v. State* (Cr. App.) 140 S. W. 444.

Order for money or goods, though neither accepted nor filled. *Keeler v. State*, 15 App. 111; *Crawford v. State*, 31 App. 51, 19 S. W. 766.

Instrument purporting to be a deed, but neither witnessed nor acknowledged, is valid as a contract and is the subject of forgery. *Lassiter v. State*, 35 App. 540, 34 S. W. 751; *Howard v. State*, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812.

Bail bond. *Costly v. State*, 14 App. 156.

Telegram requesting a bank to honor a draft on the sender. *Morris v. State*, 17 App. 660.

School voucher. *Thomas v. State*, 18 App. 213; *Mee v. State*, 23 App. 566, 5 S. W. 243.

Telegram requesting remittance of money to sender. *Dooley v. State*, 21 App. 549, 2 S. W. 884.

Deed purporting to convey the homestead of husband and wife without the certificate of the wife's separate acknowledgment is not. *Johnson v. State*, 40 App. 611, 51 S. W. 382, 76 Am. St. Rep. 742.

Receipt for money. *Hennessey v. State*, 23 App. 340, 5 S. W. 215; *Barber v. State*, 64 App. 89, 142 S. W. 582.

Order to "let Bare have \$5 and charge the same to" the purported drawee. *Hendricks v. State*, 26 App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463.

Order for diploma. *Alexander v. State*, 28 App. 186, 12 S. W. 595.

Raised check. *Mason v. State*, 31 App. 306, 20 S. W. 564.

Time check. *Daud v. State*, 34 App. 460, 31 S. W. 376.

Railroad ticket. *Overly v. State*, 34 App. 500, 31 S. W. 377; *Robinson v. State*, 35 App. 54, 43 S. W. 526, 60 Am. St. Rep. 20.

Bill of sale "This is to certify that I have sold and delivered one bay mare x x sold to J. C. R., sold by J. F. E." *Elkins v. State*, 35 App. 207, 32 S. W. 1047.

Appeal bond. *Peel v. State*, 35 App. 308, 33 S. W. 541, 60 Am. St. Rep. 49.

School teacher's voucher, unless accompanied by the affidavit required by law, is not the subject of forgery. *Caffery v. State*, 36 App. 198, 36 S. W. 82, 61 Am. St. Rep. 841. But in this case see the dissenting opinion of Davidson, Judge.

Simple request to let the bearer, or third party, have goods, without imposing a charge on anyone, is not. *Crawford v. State*, 40 App. 344, 50 S. W. 378.

Unstamped instrument requiring stamp. *Thomas, alias Morse, v. State*, 40 App. 562, 51 S. W. 242, 46 L. R. A. 454, 76 Am. St. Rep. 740.

Married woman's name to note, if note on its face shows that it was signed by married woman. *King v. State*, 42 App. 108, 57 S. W. 841, 96 Am. St. Rep. 792.

Instrument in following terms: "October 20 Mr. J. W. Claybrook, please pay

to Joe Plemons Eight dollars an fifty cents \$8.50 fore I. A. Butler." *Plemons v. State*, 44 App. 555, 72 S. W. 854.

Statutory convict bond. *Crayton v. State*, 45 App. 84, 73 S. W. 1046.

Will, during life-time of testator, is not. *Huckaby v. State*, 45 App. 577, 78 S. W. 942, 108 Am. St. Rep. 975.

School warrant. *Tracy v. State*, 49 App. 37, 90 S. W. 308.

Receipt. *Knezek v. State*, 49 App. 157, 90 S. W. 1099.

Bill of sale. *Gaut v. State*, 49 App. 493, 94 S. W. 1034.

Check drawn by married woman living with her husband. *Miller v. State*, 50 App. 536, 100 S. W. 380.

Guardian's bond. *Jones v. State*, 60 App. 67, 130 S. W. 1012.

Order for goods payable to bearer, though it did not contain a promise to pay for the goods. *Forcy v. State*, 60 App. 206, 131 S. W. 585, 32 L. R. A. (N. S.) 327.

Order for goods "To Mr. R. Jacobs & sons please fill this order for me 17\$ 35c Harvey romal." *Forcy v. State*, 60 App. 206, 131 S. W. 585, 32 L. R. A. (N. S.) 327.

Proofs of loss under insurance policy. *Bagley v. State* (Cr. App.) 141 S. W. 107.

Express money order. *Cheesebourn v. State*, 70 App. 612, 157 S. W. 761.

Indorsement of confederate pension warrant drawn payable to the order of a pensioner who had died, whether the warrant was negotiable or not. *Dreben v. State*, 71 App. 341, 162 S. W. 501.

Where the drawer of a check after it was paid by the bank on which it was drawn altered the date thereof and inserted a provision that it was to be applied on a particular note held by the payee and given by the drawer after the check was paid, thereby making it purport to evidence a payment on such note, he was guilty of "forgery" within this article as one of the tests of whether an instrument is the subject of forgery is whether, if the instrument were true, the holder would be enabled to maintain or defeat a civil suit by such instrument (citing Words and Phrases, Forgery). *Bunker v. State* (Cr. App.) 177 S. W. 108.

5. — Injury from forgery.—See art. 926, post.

6. Forgery and uttering forged instrument distinguished.—Forgery and uttering forged instrument are distinct offenses. *Green v. State*, 36 App. 109, 35 S. W. 971; *Preston v. State*, 40 App. 80, 48 S. W. 581.

7. Forgery and swindling in same transaction.—*Scott v. State*, 40 App. 108, 48 S. W. 523.

8. Swindling distinguished.—Where one fills in the blank spaces of a printed receipt, the signature of which is not in writing, nor resembles manuscript, but is printed in bold type, he is not guilty of forgery, but of swindling. *Heath v. State*, 49 App. 49, 89 S. W. 1063, 122 Am. St. Rep. 783.

Where a person obtained money from a bank by the unauthorized signing of the name of another to a note, it is forgery and indictable as such, rather than as swindling. *Ashmore v. State* (Cr. App.) 150 S. W. 196.

9. Principals.—See notes under article 74 ante.

10. Accomplice.—See notes under article 79, ante, and C. C. P. art. 801.

11. Defenses.—See *Webb v. State*, 47 App. 305, 83 S. W. 394; *Plemons v. State*, 44 App. 555, 72 S. W. 854.

Subsequent ratification of the act of the person whose name was forged does not condone the forgery. *Countee v. State* (Cr. App.) 33 S. W. 127.

That a firm owed accused or his father for work performed is no defense to a prosecution for forging a check purporting to be drawn by the firm, though accused intended that the amount thereof should be credited on the account. *Morville v. State* (Cr. App.) 141 S. W. 96.

It is no defense to a prosecution for forging the names of others to a promissory note that accused did not think that they would object, it appearing that one of the parties whose name he subscribed to the note refused to sign it, and that the others refused to ratify the signature thereafter. *Meredith v. State* (Cr. App.) 164 S. W. 1019.

12. Venue.—See C. C. P. art. 235.

13. Indictment.—Willson's Cr. Forms, 410.

Necessary allegations: *Shanks v. State*, 25 Tex. Supp. 326; *State v. Baggerly*, 21 Tex. 757; *Anderson v. State*, 20 App. 595; *Thomas v. State*, 18 App. 213; *Smith v. State*, Id., 399; *Roberts v. State*, 2 App. 4; *Westbrook v. State*, 23 App. 401, 5 S. W. 248; *Millsaps v. State*, 38 App. 570, 43 S. W. 1015; *Colter v. State*, 40 App. 165, 49 S. W. 379; *Labbaite v. State*, 6 App. 257; *Hennessy v. State*, 23 App. 340, 5 S. W. 285; *Overly v. State*, 34 App. 500, 31 S. W. 377; *Robinson v. State*, 35 App. 54, 43 S. W. 526, 60 Am. St. Rep. 20; *Bell v. State*, 21 App. 270, 17 S. W. 155; *Chester v. State*, 23 App. 577, 5 S. W. 125; *Hooper v. State*, 30 App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926; *Crawford v. State*, 31 App. 51, 19 S. W. 766, and cases cited; *Thurmond v. State*, 25 App. 366, 8 S. W. 473; *Lucas v. State*, 39 App. 48, 44 S. W. 825; *Webb v. State*, 39 App. 534, 47 S. W. 356; *Brooks v. State*, 45 App. 206, 75 S. W. 507; *Franklin v. State*, 46 App. 181, 78 S. W. 934; *Usher v. State*, 47 App. 93, 81 S. W. 309; *Knezek v. State*, 49 App. 157, 90 S. W. 1099; *Huckaby v. State*, 45 App. 577, 78 S. W. 942, 108 Am. St. Rep. 975.

It must be alleged that the instrument charged to be a forgery was made without lawful authority. *Shanks v. State*, 25 Tex. Supp. 326.

Indictment which alleges that the forged instrument "did create a pecuniary obligation" is inconsistent, incongruous and fatally defective. If it was false and forged it could not create a pecuniary obligation. *Scott v. State*, 40 App. 107, 48 S. W. 523.

An indictment charging in one part the entire instrument as forged and in another that appellant knew the indorsement was forged, held not duplicitous. *Strang v. State*, 32 App. 219, 22 S. W. 680.

An indictment charging forgery of an instrument purporting to be a deed which was neither witnessed nor acknowledged, charges an offense. *Lassiter v. State*, 35 App. 540, 34 S. W. 751.

Indictment held good, though the letters "A. D." before the year were omitted. *Whorton v. State* (Cr. App.) 152 S. W. 1082.

An indictment, charging accused with passing a forged instrument by introducing it in evidence on the trial of an action in the court held by a justice of the peace, sufficiently designated such court as the "justice court"; such court being known and generally called by that name. *Bunker v. State* (Cr. App.) 177 S. W. 108.

Where a count, in an indictment charging accused with passing a forged instrument, also contained allegations that accused forged such instrument, they could be eliminated as surplusage. *Bunker v. State* (Cr. App.) 177 S. W. 108.

14. — **Statutory form.**—See art. 470 C. C. P. Form No. 27.

15. — **Intent.**—See C. C. P. art. 454 and notes.

For indictment held sufficient, though it failed to charge the intent to defraud, see *Howard v. State*, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812.

Where, though an indictment for forgery charges that the offense was "with intent to injure and defraud," a conviction may be had upon a showing that the offense was committed with intent either to injure or defraud. *Howard v. State* (Cr. App.) 143 S. W. 178.

16. — **Description of or setting forth instrument in general.**—It is sufficient to charge the gravamen of the offense in the language of the code, and set out the forged instrument in *hæc verba*. *Labbaite v. State*, 6 App. 483.

An indictment designating the instrument as a "school voucher or check" is sufficient, the instrument being set out in *hæc verba*. *Thomas v. State*, 18 App. 213.

The indictment must purport to and must set out the alleged false instrument by its tenor, unless it be impracticable to do so, in which case it must specifically allege the reason for not setting it out and then allege its substance, and so describe it as to identify it with reasonable certainty. *Smith v. State*, 18 App. 399; *Thomas v. State*, 18 App. 213; *Baker v. State*, 14 App. 332; *White v. State*, 3 App. 605; *State v. Baggerly*, 21 Tex. 757.

In setting out an alleged forged instrument it is not necessary to set out any writing put upon the instrument subsequent to the forgery. *Hennessey v. State*, 23 App. 340, 5 S. W. 215; *May v. State*, 15 App. 430; *Labbaite v. State*, 6 App. 257.

It is sufficient if the instrument is set out in *hæc verba*. *Westbrook v. State*, 23 App. 401, 5 S. W. 248.

Indictment held to sufficiently allege that the instrument was set out in *hæc verba*. *Miller v. State* (Cr. App.) 34 S. W. 267.

Indorsement on back of forged instrument held essential. *Robinson v. State*, 35 App. 54, 43 S. W. 526, 60 Am. St. Rep. 20; *Daud v. State*, 34 App. 460, 31 S. W. 376; *Overly v. State*, *Id.*, 500, 31 S. W. 377.

An indictment for forging a railroad ticket should set out the stamp and indorsement on the back of the ticket. *Robinson v. State*, 35 App. 54, 43 S. W. 526, 60 Am. St. Rep. 20.

An indictment for forgery of a postal money order should, when the forged order cannot be procured, set out a substantial copy of it. *Pierce v. State*, 38 App. 604, 44 S. W. 292.

It is sufficient to set out the instrument by its tenor alleged to have been forged. *Webb v. State*, 39 App. 504, 47 S. W. 356; *Id.* (Cr. App.) 44 S. W. 498.

A memorandum on a note which forms no part of it need not be copied in the indictment in setting out the forged instrument. *Adkins v. State*, 41 App. 577, 56 S. W. 64.

Revenue stamps on forged paper (a note) are not part of the paper and need not be described. *Giles v. State* (Cr. App.) 57 S. W. 99.

Indictment is sufficient if it pleads the substance of the forged instrument. *Dudley v. State* (Cr. App.) 58 S. W. 111.

Indorsements on a forged note constitute no part of the note and need not be set out in the indictment. *Beer v. State*, 42 App. 505, 60 S. W. 962, 96 Am. St. Rep. 810.

The indictment alleged: That, at the time of the offense, R. Jacobs & Sons was a business firm. That Harvey Roamell had credit with such firm. That accused fraudulently passed as true to the said R. Jacobs a false and forged instrument in writing, as follows: "To Mr. R. Jacobs & sons please fill this order for me 17 \$ 35 ¢ Harvey romal." That in such instrument the term "Mr. Jacobs & sons" was meant for "R. Jacobs & Sons"; the word "oder" for the word "order"; the figures "17 \$ 35 ¢" for \$17.35; and the name "Harvey romal" for "Harvey Roamell"—all of which was intended for an order from Harvey Roamell upon R. Jacobs & Sons, in favor of the bearer for \$17.35 worth of goods. Held that, if the instrument was the subject of forgery, the indictment sufficiently set forth the purport of the instrument so as to make it valid. *Forey v. State*, 60 App. 206, 131 S. W. 585, 32 L. R. A. (N. S.) 327.

An indictment charging that accused on a specified date, within the county and state, and before the presentment of the indictment, did without lawful authority, and with intent to injure and defraud, wilfully and fraudulently make a false instrument in writing purporting to be the act of another, to wit, purporting to be the act of L., he being a fictitious person, "which false and forged instrument was to the tenor as follows," and then copying a check alleged to have been forged, was sufficient. *McGee v. State*, 62 App. 358, 137 S. W. 686.

An indictment which alleges that accused, with intent to defraud, fraudulently made a false instrument in writing to the tenor following, then setting out in *hæc verba* an obligation binding one to pay to another a specified sum, is sufficient,

within the rule that it is not necessary that an indictment for forgery contain a purport clause. *Whittaker v. State* (Cr. App.) 147 S. W. 599.

An indictment for forgery of a check need not allege an indorsement thereon, put on it at the banker's request after its presentation at the bank; the check being a complete instrument without the indorsement. *Whorton v. State* (Cr. App.) 152 S. W. 1082.

An indictment for the forgery of a railroad receiver's certificate for the amount due discharged employes, which sets forth a blank certificate furnished by the receivers to their agents to be used in paying off employes, and which sets forth the meaning of all the terms in the blanks, and which sets forth a copy of a certificate charged to have been forged, is sufficient as against the objection that the alleged forged instrument did not appear on its face to be one on which, if genuine, the receivers could be held liable, in that neither their names nor the word "receivers" appears in the alleged forged certificate; the names of the receivers and the word "receivers" not appearing in the blank form. That the blank copy of the certificate did not have on its face "Supt. of Machinery," and that the forged certificate did have such words, did not render the indictment invalid. *Ritter v. State* (Cr. App.) 176 S. W. 727.

17. — **Variance between purport and tenor clauses.**—The purport and tenor clauses of the indictment must not be repugnant, and if so setting out the instrument in *hæc verba* will not cure such defect; thus where the purport clause described the instrument as a "check for money on the city bank of Dallas" and the instrument set out was a check on the "city bank" without designation of place, the indictment was bad. *Roberts v. State*, 2 App. 4; *Westbrook v. State*, 23 App. 401, 5 S. W. 248.

Repugnancy as to name of bank in indictment for forgery of a check held fatal. *Roberts v. State*, 2 App. 4.

The indictment alleged in the purport clause that the indorsement forged purported to be the act of Wm. M. Cook, Jr., and the indorsement shown in the tenor clause was Wm. Cook pr Wm. M. Cook Jr W L Thulemeyer; held, the variance was fatal. *Thulemeyer v. State*, 38 App. 349, 43 S. W. 83.

The indictment need not set out the forged instrument, both by its purport and its tenor, but if it does, any repugnancy between the two allegations is fatal. *Westbrook v. State*, 23 App. 401, 5 S. W. 248.

Variance as to name held fatal. *English v. State*, 30 App. 470, 18 S. W. 94; *Black v. State*, 46 App. 109, 79 S. W. 308; *Booth v. State*, 36 App. 600, 38 S. W. 196.

In an indictment it was alleged that the instrument purported to be the act of C. R., a fictitious person; then the indictment set out the instrument which was signed C. R.; held, there was no variance. *Hocker v. State*, 34 App. 359, 30 S. W. 783, 53 Am. St. Rep. 716.

Where the indictment alleged the forgery to be the apparent act of J. and the instrument set out showed it to have been signed by C., the variance was fatal. *Overly v. State*, 34 App. 500, 31 S. W. 377.

Where an indictment for forging a railroad ticket charged that the instrument purported to be the act of one J., agent for said road, and the instrument set out was signed C., Gen'l P. & Tkt Agt.; held, that the variance was fatal. *Overly v. State*, 34 App. 500, 31 S. W. 377.

The indictment charged that the forged instrument purported to be the act of M. W. Leonard and another, the tenor clause showed it to be the act of W. W. Linard and another; held, variance fatal. *Campbell v. State*, 35 App. 182, 32 S. W. 899.

Indictment alleged the instrument purported to be the act of Mr. Andrew Arlow and set out an instrument signed L. B. P. & Co. and Andrew Arlow; held, variance fatal. *Fite v. State*, 36 App. 4, 34 S. W. 922.

Act of single and several parties. *Stephens v. State*, 36 App. 386, 37 S. W. 425; *Tracy v. State*, 49 App. 37, 90 S. W. 308; *Crayton v. State*, 45 App. 84, 73 S. W. 1046; *Gibbons v. State*, 36 App. 469, 37 S. W. 861.

The purport clause alleged the forged instrument to be the act of G.; the tenor clause showed it to be the act of S. and G.; held, the variance was fatal. *Darbyshire v. State*, 36 App. 547, 38 S. W. 173.

Indictment alleged instrument to be the act of M. & Co., and set out the instrument signed M. & Co., with the letter "M." written under signature; held, no variance. *Young v. State* (Cr. App.) 40 S. W. 793.

The indictment set out the names of the members of the firm separately. In the tenor clause the first two names signed were joined by the character &; held, no variance. *Sawyers v. State*, 39 App. 481, 46 S. W. 814.

When the purport clause alleges the forged instrument to be the act of a corporation, and the tenor clause shows it to be the act of the president and secretary of the corporation, the variance is fatal. *Millsaps v. State*, 38 App. 570, 53 S. W. 1015.

Indictment need not set out forged instrument by both its tenor and purport clauses, but if it should do so, any repugnance between the two will be fatal. *Hanks v. State* (Cr. App.) 54 S. W. 588.

Variance as to date. *Hickman v. State*, 44 App. 533, 72 S. W. 587.

An indictment for forging a county convict bond should set it out in *hæc verba* and allege that it was approved by the county judge. *Crayton v. State*, 45 App. 84, 73 S. W. 1046.

18. — **Facts extrinsic to instrument.**—See *Costley v. State*, 14 App. 156; *Anderson v. State*, 20 App. 595; *Rollins v. State*, 22 App. 548, 3 S. W. 759, 58 Am. Rep. 659; *Hendricks v. State*, 26 App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; *King v. State*, 27 App. 567, 11 S. W. 525, 11 Am. St. Rep. 203; *Jonier v. State*, 48 App. 360, 87 S. W. 1039; *Knezek v. State*, 49 App. 157, 90 S. W. 1099; *Simms v. State*, 32 App. 277, 22 S. W. 876; *Carder v. State*, 35 App. 105, 31 S. W. 678; *Overly*

v. State, 34 App. 500, 31 S. W. 377; *Womble v. State*, 39 App. 24, 44 S. W. 827; *Belden v. State*, 50 App. 565, 59 S. W. 563; *McBride v. State*, 48 App. 213, 88 S. W. 237; *Allen v. State*, 44 App. 63, 68 S. W. 286, 100 Am. St. Rep. 839; *Fischl v. State*, 54 App. 55, 111 S. W. 410; *Rubio v. State*, 50 App. 177, 95 S. W. 120.

Where the forged instrument is set out in *hæc verba*, it is not necessary to allege that it would if true have created, discharged, or affected any pecuniary liability. *Labbaite v. State*, 6 App. 483; *Horton v. State*, 32 Tex. 79; *Morris v. State*, 17 App. 660. Rule otherwise where instrument on its face does not import an obligation. *Belden v. State*, 50 App. 565, 99 S. W. 563.

Where the forged instrument is not plain in meaning, explanatory averments should be used and also innuendoes showing what the misspelled and ambiguous words in the instrument mean. *Crawford v. State*, 40 App. 345, 50 S. W. 378.

Where the forged instrument is not plain in its meaning it should be made so by innuendo averments. *Polk v. State*, 40 App. 669, 51 S. W. 909.

If the forged instrument imports no legal liability on its face the indictment should allege by appropriate innuendoes such intrinsic facts as will invest it with legal force. *Carder v. State*, 35 App. 105, 31 S. W. 678.

An indictment for forging a check, drawn by the trustees to pay a school teacher, which fails to allege that the affidavit of the teacher (as required by art. 3962, *Sayles' Civ. Stats.*, Rev. Ed.) accompanied the check, is fatally defective. *Caffey v. State*, 36 App. 198, 36 S. W. 82, 61 Am. St. Rep. 841.

An instrument void on its face cannot be made good by averment. *Caffey v. State*, 36 App. 198, 36 S. W. 82, 61 Am. St. Rep. 841. And see *Carder v. State*, 35 App. 105, 31 S. W. 678, and cases cited.

If the instrument is incomplete in form, the indictment must set out the extrinsic facts to show that, if genuine, it would be valid. *Cagle v. State*, 39 App. 109, 44 S. W. 1097; *Scott v. State*, 40 App. 105, 48 S. W. 523; *Carder v. State*, 35 App. 105, 31 S. W. 678.

In forgery if the paper declared on be not one of the ordinary instruments used in commercial transaction, but dependent upon extrinsic facts to create a liability, such facts must be alleged in the indictment. *Cagle v. State*, 39 App. 109, 44 S. W. 1097.

Where an instrument on its face does not import a pecuniary obligation there must be explanatory averments, showing how the instrument became an obligation affecting money or property. *Lynch v. State*, 41 App. 209, 53 S. W. 693.

Innuendo averments are unnecessary where a forged instrument clearly imports on its face a pecuniary obligation. *Reeves v. State*, 51 App. 604, 103 S. W. 894.

Explanatory averments to explain the instrument set forth in an indictment for forgery are proper to explain what may not otherwise be intelligible. *Chappel v. State*, 58 App. 52, 124 S. W. 657.

Since a check imports a pecuniary obligation on its face, an indictment for the forgery thereof need not allege that the purported maker had funds in the bank on which it is drawn. *Reeseaman v. State*, 59 App. 430, 128 S. W. 1126.

In an indictment against a railroad station agent who was authorized to hire and pay extra help required at his station, taking receipts therefor which were turned in as a part of his accounts as cash, for forgery of such a receipt, an allegation that it was a part of his duty to have the party to whom the money was paid sign a receipt, and when signed it was his duty to turn it in as cash, imported a legal obligation in the performance of his services for the company. *Pelton v. State*, 60 App. 412, 132 S. W. 480, Ann. Cas. 1912C, 86.

An indictment against a railroad station agent for forging a labor receipt for money paid for services rendered at his station, in order to have shown that the receipt created, increased, discharged, or defeated a legal pecuniary obligation, should have alleged that it was defendant's duty to account to the railroad company for all moneys coming into his hands belonging to it and for all moneys paid out by him for the company, and to make a report of all moneys collected and paid out, and that when defendant, as agent, paid out money for extra labor and took receipts therefor, the company became bound to repay him if paid out of his own money, or, if paid out of money belonging to the company in his possession, to give him credit therefor on an accounting or report. *Pelton v. State*, 60 App. 412, 132 S. W. 480, Ann. Cas. 1912C, 86.

An indictment for forgery of an instrument reading, "2/16, 1911. let Roy Denman have 685 [meaning thereby \$6.85] L. T. Burns," the explanation as to its meaning being an averment of the pleader, is good on demurrer, since the explanatory averment is suggested by the instrument itself, and made necessary in the indictment to show that the three figures meant \$6.85. *Green v. State*, 63 App. 510, 140 S. W. 444.

A check calling for "\$50.75 Fifty Cents and 75/100 Dollars" is so uncertain as to be insufficient to support an indictment for forgery, in the absence of innuendo averments alleging its true meaning. *Lamb v. State* (Cr. App.) 148 S. W. 1088.

Where the instrument, claimed to have been forged, as set out in the indictment, was an ordinary check on a bank, which imported a pecuniary obligation on its face, it was not necessary for the indictment to allege that the instrument would have created a pecuniary obligation if valid. *Davis v. State*, 70 App. 253, 156 S. W. 1171.

An indictment alleging the forging of a check payable to the order of a firm named, "\$15.00 Fifteen no/Dollars For Goods," was not defective for not alleging what was meant by the word "no," or the words "For Goods"; their meaning being well known in the commercial world. *Davis v. State*, 70 App. 253, 156 S. W. 1171.

In a prosecution for forgery, where the instrument on its face was a negotiable one imparting a pecuniary obligation, it was unnecessary for the indictment to contain any explanatory averments. *Cheesebourn v. State*, 70 App. 612, 157 S. W. 761.

An indictment for making a false instrument purporting to be a receipt by the treasurer of a life insurance company for a premium on a policy was not defective because of the omission of extrinsic averments showing how and in what manner it might become possessed of capacity to defraud, since the instrument, if true on its face, would create a legal obligation on the part of the treasurer to pay the company the sum, the receipt of which was therein acknowledged. *Lamb-Campbell v. State*, 72 App. 628, 162 S. W. 879.

An indictment for making a false instrument purporting to be a receipt by the treasurer of a life insurance company for a premium on a policy need not allege that the treasurer had authority to issue such receipts, as the duty to do so necessarily follows the holding of the office of treasurer. *Lamb-Campbell v. State*, 72 App. 628, 162 S. W. 879.

An indictment for forgery, containing the following innuendo: "That in said false and forged instrument, if true, the words, 'Bmt. Tex.,' were * * * intended for 'Beaumont, Texas,' and the name 'T. G. Tigmosk' * * * was meant * * * for 'T. G. Lignoski'; and the said instrument * * * was intended for an order from Ed Weiss upon the Sun Pipe Line Company * * * in favor of T. G. Lignoski, whereby the said Sun Pipe Line Company should pay to the said T. G. Lignoski" a certain sum—sufficiently explained the instrument set out in the indictment to make it available as a basis of the charge of forgery and render the indictment good. *Johnson v. State* (Cr. App.) 170 S. W. 144.

19. — Designation or description of parties.—See art. 456, C. C. P., and notes thereunder.

The indictment need not name the party intended to be defrauded. *Johnson v. State*, 35 App. 271, 33 S. W. 231; *Labbaitte v. State*, 6 App. 483; *Johnson v. State*, 1 App. 146; *Pye v. State*, 71 App. 94, 154 S. W. 222; *Davis v. State*, 70 App. 253, 156 S. W. 1171.

If the forged instrument purport to be the act of a partnership, the name of such partnership and the name of each individual member thereof should be averred. *Labbaitte v. State*, 6 App. 483.

An indictment alleging that a school voucher or check purported to be signed by three persons designated by their names, and that it purported to be their act as trustees of a certain school community, was a sufficient allegation that said three persons were trustees of said school community, and that said voucher or check purported to be their official act as such. *Thomas v. State*, 18 App. 213.

The instrument must purport to be the act of another and the indictment must so allege and must name the person whose act it purports to be. *Henderson v. State*, 20 App. 304.

Indictment charging intent to defraud is sustained by evidence that the name forged was the name of a fictitious person. *Johnson v. State*, 35 App. 271, 33 S. W. 231.

For sufficiency of indictment alleging that defendant fraudulently made a forged instrument purporting to be the act of another, "a fictitious person," see *Hocker v. State*, 34 App. 359, 30 S. W. 783, 53 Am. St. Rep. 716.

Where the instrument is set out in *hæc verba*, the name of the person whose act it purports to be need not be averred. *Westbrook v. State*, 23 App. 401, 5 S. W. 248.

The indictment must show whether the beneficiary in a forged instrument was a partnership, an individual or a corporation. *Carder v. State*, 35 App. 105, 31 S. W. 678.

The indictment in one place alleged the instrument to be the act of "Mr. J." and in another part alleged it to be the act of "Mrs. J.;" held, fatally defective. *Fite v. State*, 36 App. 4, 34 S. W. 922. See, also, *Stephens v. State*, 36 App. 386, 37 S. W. 425; *Gibbons v. State*, 36 App. 469, 37 S. W. 861; *Booth v. State*, 36 App. 600, 38 S. W. 196.

An indictment alleging, in one clause, the instrument to be the act of B., and in another clause to be the act of B. and another, is fatally defective. *Fite v. State*, 36 App. 4, 34 S. W. 921.

It is not necessary that the indictment charging the forgery of a firm name set out the names of the individual members of the firm. *Howard v. State*, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812; distinguished from *Labbaitte v. State*, 6 App. 483.

An indictment alleging the forged instrument to be the check of a transfer company should show whether such company was a corporation or a partnership. *Hutton v. State* (Cr. App.) 38 S. W. 209.

Indictment alleged the forgery of J. C. Pray, Agt., to a bill of lading; held, no sufficient allegation that Pray was the agent of the railroad company. *Beasley v. State*, 39 App. 688, 47 S. W. 991.

Where alleged forged paper is signed by firm name the names of the members need not be alleged or that their names were unknown. *Brod v. State*, 42 App. 71, 57 S. W. 671.

Where the person injured by the forgery of a check is the purported maker, the indictment need not allege whether the bank on which the check was drawn was a corporation, joint-stock company, or partnership. *Reeseman v. State*, 59 App. 430, 128 S. W. 1126.

An indictment for forgery, where the instrument is set out according to its tenor, is not defective in failing to allege that the act purported to be that of another than the defendant, where there is no similarity between the name of defendant and that on the instrument, so as to cause confusion. *Hardin v. State*, 60 App. 129, 131 S. W. 552.

It is necessary where the forged paper is set out according to its tenor to allege name of party forged to the instrument. *Rhudy v. State*, 42 App. 225, 58 S. W. 1008.

Where an alleged forged check was payable to "Abilene D. G. Co. or bearer," it being payable to bearer, it was not essential to a conviction that the indictment should contain explanatory averments as to who was meant by "Abilene D. G. Co." *Carter v. State*, 61 App. 609, 136 S. W. 47.

An indictment for forging a false instrument purporting to be the act of "Austin Bros." is not insufficient for failing to allege that they constituted a firm, and to state the names of the members thereof. *Morville v. State*, 63 App. 551, 141 S. W. 98.

An indictment for the forgery of a receipt which, as set out, was signed by a named person to whom defendant was indebted is sufficient, though it did not allege that the instrument was the act of such person, and did not name the person whose act the instrument purported to be. *Barber v. State*, 64 App. 89, 142 S. W. 582.

An indictment for the forgery of an obligation purporting to bind a person named to pay a specified sum to "the L. B. Price Mercantile Company" is good, without alleging whether the latter is a partnership or corporation; it not being claimed that it executed the instrument. *Whittaker v. State* (Cr. App.) 147 S. W. 599.

An indictment for forgery need not state whose act it purports to be, nor who it was intended to defraud; it need only be charged that it was executed without lawful authority, and with intent to defraud. *Pye v. State*, 71 App. 94, 154 S. W. 222.

An indictment charging the forgery of a check need not allege that "S. F. Hackney and son," the payee, was a firm. *Davis v. State*, 70 App. 253, 156 S. W. 1171.

It was not necessary that the indictment, charging the forgery of a check on a bank, allege whether the bank was incorporated or unincorporated; it not being the injured party. *Davis v. State*, 70 App. 253, 156 S. W. 1171.

An indictment for making a false instrument, purporting to be a receipt by the treasurer of a life insurance company for a premium on a policy, need not allege whether or not the company is a corporation. *Lamb-Campbell v. State*, 72 App. 628, 162 S. W. 879.

An indictment which merely set out the check which was drawn on the First National Bank and dated Mexia, Texas, is sufficient without allegations as to what first national bank it was drawn on for the check would have been a forgery, whatever bank may have been intended to be defrauded. *Bowen v. State*, 72 App. 404, 162 S. W. 1146.

20. — Counts and election.—See article 946, post, and C. C. P. art. 481, and notes thereunder.

21. — Issues, proof, and variance.—See *Fite v. State*, 36 App. 4, 34 S. W. 922; *Stephens, Id.*, 386, 37 S. W. 425; *Davis v. State*, 37 App. 218, 39 S. W. 296; *Thulemeyer v. State*, 38 App. 349, 43 S. W. 83; *Pierce v. State, Id.*, 604, 44 S. W. 232; *Sawyers v. State*, 39 App. 481, 46 S. W. 814; *Williams v. State*, 47 App. 605, 85 S. W. 800; *Morris v. State*, 52 App. 288, 106 S. W. 383; *Lasister v. State*, 49 App. 532, 94 S. W. 233; *Wisdom v. State*, 49 App. 534, 95 S. W. 505; *Bader Alias Leifeste v. State*, 44 App. 184, 69 S. W. 506; *Miller v. State*, 50 App. 536, 100 S. W. 380; *Baird v. State*, 51 App. 322, 101 S. W. 991; *Simms v. State*, 32 App. 277, 22 S. W. 876; *Lovejoy v. State*, 40 App. 89, 48 S. W. 520.

Where an indictment undertakes to set out the forged instrument according to its tenor the strictest proof is required, and this is furnished only by an exact copy. Tenor imports an exact copy and requires the strictest proof. *Fischl v. State*, 54 App. 55, 111 S. W. 411, 412; *Feeney v. State*, 58 App. 152, 124 S. W. 944; *Simmons v. State*, 61 App. 7, 133 S. W. 687.

Where the indictment alleged that an entire deed was a forgery, and set out the deed, including the certificate of acknowledgment, in haec verba, it was not error to allow the state to prove the certificate, as well as the deed, to be a forgery. *Ham v. State*, 4 App. 645.

Where the indictment alleged that the forged instrument purported to be the act of Abraham Barnes, but the signature to the instrument was A. Barnes, it was held there was no variance. *Ham v. State*, 4 App. 645.

Where the indictment set out the alleged forged note, ignoring an indorsement on the back thereof, such omission was held immaterial, and the note was admissible in evidence. *Labbaite v. State*, 6 App. 483; *May v. State*, 15 App. 430.

Where the indictment charged that the forged instrument was signed "Pat Whelan," proof that it was signed "P" Whelan or "D" Whelan, did not support the allegation. *Murphy v. State*, 6 App. 554.

If the alleged forged instrument be set out in haec verba, a variance, otherwise than by misspelling, between the words of the instrument as set out, and those of the instrument put in evidence, will be fatal to the prosecution. *Thomas v. State*, 18 App. 213.

The mere misplacement of a dot belonging to the letter "i" in setting out a proper name, does not constitute a variance. *Hennessy v. State*, 23 App. 340, 5 S. W. 215.

The indictment charged the instrument to be the act of a fictitious person, the instrument on its face did not show it to be the act of a fictitious person; held, no variance. *Hocker v. State*, 34 App. 359, 30 S. W. 783, 53 Am. St. Rep. 716.

On trial for forgery of a draft the indictment in the tenor clause had on the left-hand side the letters F. N. B. The draft had on the left-hand side a monogram F. N. B.; held, no variance. *DeAlberts v. State*, 34 App. 508, 31 S. W. 391.

An indictment alleged the instrument to be the act of Wm. R. Robinson; on the trial the State proved that Wm. R. Robinson was a fictitious person; held, no error. *Chapman v. State* (Cr. App.) 34 S. W. 621; citing *Johnson v. State*, 35 App. 271, 33 S. W. 231.

An indictment charging the instrument to be the act of one R., evidence that R. is a fictitious person is admissible. *Chapman v. State* (Cr. App.) 34 S. W. 621.

The indictment charged the forgery of a deed as purporting to be the act of John Cotton, Jr. The introduction of a patent to John Cotton, Assignee, etc., is not a variance. *Lassiter v. State*, 35 App. 540, 34 S. W. 751.

The fact that the deed set out in an indictment for forgery contains no certificate of acknowledgment, while that offered in evidence has such certificate appended, is not a variance; a deed and its acknowledgment being separate and distinct. *Lassiter v. State*, 35 App. 540, 34 S. W. 751.

Under an indictment setting out the forged instrument and intent to defraud, it is admissible to prove that the signature is that of a firm. *Howard v. State*, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812.

The indictment alleged the instrument to be the act of one Mc.; the instrument introduced in evidence showed it to be the act of Mc. and T.; held, variance fatal. *Booth v. State*, 36 App. 600, 38 S. W. 196.

Under indictment for forging a postal money order the evidence showed that defendant forged the name of the payee to the order; held, a fatal variance between allegation and proof. *Pierce v. State*, 38 App. 604, 44 S. W. 292.

Where the instrument set out purported to be the act of N. Webb, and the proof showed the instrument to be signed by J. N. Webb, the variance was fatal. *Webb v. State*, 39 App. 534, 47 S. W. 356; *Id.* (Cr. App.) 44 S. W. 498.

Variance between the alleged forged check, as set out in the indictment and the instrument itself as tendered in evidence, is fatal. *Feeney v. State*, 58 App. 152, 124 S. W. 944.

The indictment alleged that the forged instrument contained a description of a tract of land in the J. A. "2 league grant on S. B. B. of which I am the owner," etc. The alleged forged instrument described the tract as in the J. A. "2 league grant N. S. B. B. of which I am the owner," etc. The state claimed that a capital "N" was intended for the quoted word "on" in the instrument as alleged; but an inspection of the original instrument showed that the capital "N" used with the letters "N. S. B. B." was identical with the same letter as used elsewhere in the description. Held, that there was a fatal variance. *Bedford v. State*, 60 App. 83, 131 S. W. 314.

If the grand jury, in finding an indictment for forgery, could, by the use of process in summoning witnesses they knew of, have ascertained and charged in the indictment a substantial copy of the note alleged to have been forged, and they heard no witnesses, but set out the substance of the note in the indictment, such conduct was ground for reversal where upon the trial a variance was proved between the note alleged to have been forged and the note charged as to the amount thereof, the place of payment, and a provision as to its being secured by pledge of sureties. *Carlton v. State*, 60 App. 584, 132 S. W. 775.

The variance between an indictment for forgery, which sets out the instrument in *hæc verba*, including the signature "Doff G.," and which alleges that the name was intended for "Dolph G.," and the instrument introduced in evidence was signed by "Dolph G.," the right name of the person whose signature was forged, is fatal. *Simmons v. State*, 61 App. 7, 133 S. W. 687.

Where no forgery was predicated on the indorsement of a check, it was not a fatal variance that the check offered in evidence bore an indorsement not described in the indictment. *McGee v. State*, 62 App. 358, 137 S. W. 686.

The record of a forgery case should not be treated as presenting a variance because the charge was that the forged check purported to be signed by "R. C. Cameron & Son," whereas a critical analysis of the signature shows "R. C. Cammon & Son," or "R. C. Camnon & Son," especially since the check was identified as the one accused passed, and he filed an affidavit incorporating the check with the name spelled "Cameron." *Feeny v. State*, 62 App. 585, 138 S. W. 135.

Defendant was indicted for forging a check payable to C., "or bearer," in the amount of "Seven fifté Dollars." The check offered in evidence was not payable to bearer, but directed the bank to pay C. "seven and 50/100 Dollars," adding the letters "C. N. B.," not appearing on the copy set out in the indictment. Held, that the two instruments were not the same, and that there was a fatal variance. *Mills v. State* (Cr. App.) 145 S. W. 368.

Though an indictment for passing a forged check alleged that the bank upon which the check was drawn was incorporated, it was not necessary to prove such allegation; the instrument not having been passed on the bank but on another. *Bunker v. State* (Cr. App.) 177 S. W. 108.

22. **Evidence.**—See notes under C. C. P. art. 783, et seq.

Howard v. State, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 799; *McGlasson v. State*, 37 App. 620, 40 S. W. 503, 66 Am. St. Rep. 842; *Preston v. State*, 41 App. 300, 53 S. W. 127, 831; *Whittle v. State*, 43 App. 468, 66 S. W. 771.

For mode of making out a *prima facie* case, and establishing venue, see *Henderson v. State*, 14 Tex. 503.

23. — **Presumptions and burden of proof.**—Where the forgery of a deed is charged, it must be proved that the person whose name was forged owned the land. *Horton v. State*, 32 Tex. 79; *Henderson v. State*, 14 Tex. 503.

That the instrument was made without lawful authority must be proved, and without such proof the case is not made out. *Shanks v. State*, 25 Tex. Supp. 326.

When the State shows that the defendant signed the name of a third person to a note without his knowledge or consent, it is not necessary to prove an intent to defraud. *Green v. State*, 36 App. 109, 35 S. W. 971.

In a prosecution for passing an alleged false writing, to justify a conviction the writing itself must be produced in court, or it must be accounted for by showing the accused has possession of it, or that it has been destroyed. *Bobbit v. State*, 59 App. 314, 128 S. W. 1104.

To justify a conviction of passing a forged instrument, the instrument itself must be introduced in evidence. *Muniz v. State*, 59 App. 365, 128 S. W. 1104.

Where accused, indicted for the forgery of an obligation of receivers of a railroad corporation, did not under oath plead that the corporation was not duly incorporated, but his only plea was an oral one of not guilty, it was not necessary for the state to prove that the corporation was duly incorporated. *Ritter v. State* (Cr. App.) 176 S. W. 727.

23½. — Introduction of forged instrument.—The forged instrument being accessible, its introduction in evidence was imperative. *Dovalina v. State*, 14 App. 312.

As to practice when the forged instrument is lost, destroyed or is in the possession of the defendant, see *Rollins v. State*, 21 App. 148, 17 S. W. 466; *Henderson v. State*, 14 Tex. 503; *Thornley v. State*, 36 App. 119, 34 S. W. 264, 35 S. W. 981, 61 Am. St. Rep. 836; *Patterson v. State*, 17 App. 102; *Johnson v. State*, 9 App. 249; *Caston v. State*, 31 App. 304, 20 S. W. 585.

The rule that before a recorded instrument can be offered in evidence it must have been filed with the papers in the case three days before the trial does not apply in prosecutions for forgery. *Caston v. State*, 31 App. 304, 20 S. W. 585.

In a prosecution for forging a check, complete and valid on its face, the check was admissible in evidence. *Davis v. State*, 70 App. 253, 156 S. W. 1171.

24. — Admissibility.—It is competent to prove that a name partially obliterated was at the time of the execution of the instrument plainly written. *Inman v. State*, 35 App. 36, 30 S. W. 219.

Evidence to prove explanations alleged in the indictment is admissible. *Daud v. State*, 34 Tex. 460, 31 S. W. 376.

On trial defendant offered to prove that he had ample means and money on his person at the time of the alleged forgery: First, in order to show that there was no motive. Second, to show that if he under such circumstances committed the forgery he was insane; held, properly excluded. *DeAlberts v. State*, 34 App. 508, 31 S. W. 391.

The State cannot corroborate the testimony of the purported maker of the instrument by proving by others that he had, in talking with them, always repudiated the instrument. *McGlasson v. State*, 38 App. 351, 43 S. W. 93.

Evidence that defendant had turned over all of his property to the prosecutor should not be admitted unless there was something to show its bearing upon the question. *McGlasson v. State*, 38 App. 351, 43 S. W. 93.

A deed which is the connecting link between the forged deed and defendant is admissible to show his interest in the transaction. *Preston v. State*, 40 App. 80, 48 S. W. 581.

On a trial for passing a forged instrument, evidence that accused the date he passed the check boarded a train and stated that he was going to a designated town, but went to another, and that accused told the witness that he had changed his mind, was relevant and admissible, though not in rebuttal of any evidence of accused. *Fluewellian v. State*, 59 App. 334, 128 S. W. 621.

On a trial for passing a forged check purporting to be signed by one "Obrey F.," evidence that "Aubrey F." and "Ovay F." did not sign the check nor authorize accused to do so was relevant, where the state attempted to prove that there was no such person as "Obrey F.," and that if the check was intended to be the act of "Aubrey" or "Ovay" it was forged. *Fluewellian v. State*, 59 App. 334, 128 S. W. 621.

In a trial for forging a check of a fictitious firm, the state could show that no such firm ever existed or was known in the county, especially since the check purported to be drawn for services rendered by accused. *Feeny v. State*, 62 App. 585, 138 S. W. 135.

In a trial for forging an instrument purporting to be the act of "Austin Bros.," the state could show that the firm was composed of two certain persons, and that the instrument was in the handwriting of neither, and authorized by neither. *Morville v. State*, 63 App. 551, 141 S. W. 98.

In a prosecution for the forgery of a receipt for the amount of a note executed by accused, evidence that the payee had, after the date of the execution of the receipt, placed the note in the hands of an attorney for collection was admissible. *Barber v. State*, 64 App. 89, 142 S. W. 582.

In a prosecution for uttering a forged note, on which the names of several individuals had been forged, evidence that if the note had been presented to some of them they would have signed it, at defendant's request, was properly excluded as immaterial. *Jordan v. State* (Cr. App.) 143 S. W. 623.

In a prosecution for uttering a forged note, evidence that the holder, in consideration of payment of the note and others alleged to have been made and uttered at the same time, agreed to mark them settled and deliver them to defendant, and that he also agreed to execute a petition, asking the court to dismiss the prosecution because, in the holder's opinion, there was no criminal intent, was inadmissible. *Jordan v. State* (Cr. App.) 143 S. W. 623.

The evidence in a forgery prosecution showed that a check was given to accused, F., for \$2.25 on a certain bank, and that, when it was presented, the name of the payee had been changed to J., or bearer, and the amount raised from \$2.25 to \$7.25, and the check for the latter amount was cashed. Held, that the evidence that the check for \$7.25 was cashed at the bank was admissible, though accused was not charged with passing a forged instrument. *Frye v. State* (Cr. App.) 146 S. W. 199.

Where, in a prosecution for forgery of a check, it was claimed that defendant carried the forged check to witness for the purpose of having it cashed, the witness was properly asked whether he had any business transaction with defendant on the day defendant tendered the check to witness to be cashed, to which the witness answered that defendant presented the check to be cashed, and stated that P. sent him down for that purpose. *Douglass v. State* (Cr. App.) 148 S. W. 1089.

The state's case, on a prosecution for forgery of the check of C., being one of circumstantial evidence, and the only question being whether the forgery, which was not denied, was committed by defendant, a check on the same bank, previously given by C. to defendant and cashed by him at the bank, was admissible as showing his knowledge of where C. banked, and his opportunity to examine his signature. *Whorton v. State* (Cr. App.) 152 S. W. 1082.

Where defendant admitted that he signed and intended to sign the name of the prosecuting witness to the note, and showed that about the date of the note she came to him to borrow money, and that he understood her to request him to obtain it for her, and signed her name for that purpose, and where the prosecuting witness denied defendant's statements, she was properly permitted to testify that she had not signed the note or authorized defendant to sign her name to it. *Pye v. State*, 71 App. 94, 154 S. W. 222.

In a prosecution for forging the indorsement of a confederate pensioner to whom the warrant had been issued after he had died, the necessary affidavits required to accompany such warrant, stating the county of the pensioner's residence, his post office address, and that he was the identical person to whom a pension had been granted, and that the conditions which existed at the time of making the application, on which the pension was granted, still existed, which were also shown to have been forged by accused, and which were clearly identified, were admissible. *Dreeben v. State*, 71 App. 341, 162 S. W. 501.

In a prosecution for forgery of an order, purporting to be signed by W. on the S. Co., a witness' testimony that he had purchased another order from defendant signed by W. on such company at about the same time was properly admitted, where defendant admitted that he sold the alleged forged order, but claimed that it had been given to him by a third person to cash, and that he did not sign W.'s name thereto. *Johnson v. State* (Cr. App.) 170 S. W. 144.

Testimony that defendant brought to the witness an order signed by W., and that because it was not properly worded the witness wrote out the order copied in the indictment and introduced in evidence, and gave it to defendant, telling him that if he would get W. to sign it he would cash it for him, and that defendant subsequently returned with such order with W.'s name signed thereto, whereupon the witness cashed same, was admissible. *Johnson v. State* (Cr. App.) 170 S. W. 144.

Accused gave a check March 13, 1912, and was subsequently charged with altering it after its payment by the bank by changing its date to March 13, 1914, and inserting a provision that it was to be applied on a particular note, and with passing it as so altered. Held, that it was permissible to show by the officers of the bank that such a check was paid on March 22, 1912, and that no such transaction had taken place at any time from March 13, 1914, to March 22, 1914. *Bunker v. State* (Cr. App.) 177 S. W. 108.

25. — Comparison of handwriting.—See note under C. C. P. art. 814.

26. — Other offenses.—See note under C. C. P. 783.

27. — Weight and sufficiency.—Facts held sufficient. *Barnwell v. State*, 1 App. 745; *Costley v. State*, 14 App. 156; *Murphy v. State*, 49 App. 488, 93 S. W. 543; *Fonville v. State*, 17 App. 368; *Hennessey v. State*, 23 App. 340, 5 S. W. 215; *Hughes v. State*, 59 App. 294, 129 S. W. 837; *Terry v. State*, 60 App. 60, 130 S. W. 1004; *Dreeben v. State*, 71 App. 341, 162 S. W. 501.

Evidence that witness has no recollection of ever giving defendant authority to sign his name will not support conviction. *Roberts v. State* (Cr. App.) 53 S. W. 865.

Evidence held insufficient, see *Horton v. State*, 32 Tex. 79; *Montgomery v. State*, 12 App. 323; *S. C.*, 13 App. 74; *Dovalina v. State*, 14 App. 312; *Smith v. State*, 18 App. 399; *Murphy v. State*, 6 App. 554; *Brown v. State*, 55 App. 9, 114 S. W. 820.

In a prosecution for forgery, where the defendant had been conducting business under the name of his servant and had written letters under that name, evidence held insufficient to support a conviction of forgery for signing servant's name. *Fench v. State*, 60 App. 432, 132 S. W. 478.

The state proved that accused falsely represented himself to be B., and claiming to be B. purchased goods in that name, and in payment thereof executed a check in the name of B. Held, that such facts establish a prima facie case of forgery without proof that B. was a fictitious person, or that defendant did not have the right to sign B.'s name. *Carter v. State*, 61 App. 609, 136 S. W. 47.

Evidence, in connection with a plea of guilty, held to sustain a conviction for forgery with the imposition of the lowest authorized penalty. *Weatherford v. State* (Cr. App.) 165 S. W. 581.

Evidence held sufficient to sustain a conviction of forging a receipt for \$75 in signing the name of another actually existing person, or the name of a fictitious person. *Walderen v. State* (Cr. App.) 174 S. W. 348.

28. Instructions and questions for jury.—See notes under following article and, also, C. C. P. art. 735 et seq., and notes thereunder.

See *Thornley v. State*, 36 App. 119, 34 S. W. 264, 35 S. W. 981, 61 Am. St. Rep. 836; *Garza v. State*, 38 App. 317, 42 S. W. 563; *Feeney v. State*, 58 App. 152, 124 S. W. 944; *Plemmons v. State*, 44 App. 555, 72 S. W. 854; *Spicer v. State*, 52 App. 177, 105 S. W. 813; *Gaut v. State*, 49 App. 493, 94 S. W. 1034; *Usher v. State*, 47 App. 93, 81 S. W. 309; *Lasister v. State*, 49 App. 532, 94 S. W. 233; *Baird v. State*, 51 App. 322, 101 S. W. 991; *Green v. State*, 36 App. 109, 35 S. W. 971; *Lovejoy v. State*, 40 App. 89, 48 S. W. 520.

It is proper to charge that the defendant is guilty if he forged the note or any part of it. *Darbyshire v. State*, 36 App. 547, 38 S. W. 173.

It is error to charge the mere making of the forged instrument constitutes the offense without proof that it was made without lawful authority. *Shanks v. State*, 25 Tex. Supp. 326.

Where there is no allegation of forgery by altering a genuine instrument it is error to charge that forgery is committed by altering a genuine instrument. *Johnson v. State*, 40 App. 612, 51 S. W. 382, 76 Am. St. Rep. 742.

Where evidence of collateral facts, or of a distinct offense is admitted to prove guilty knowledge or a criminal intent, the charges should apprise the jury of the purpose and scope of such evidence, and instruct them to not consider it as proof of the commission of the offense, but only as evidence bearing upon the issues of guilty knowledge or criminal intent. *Francis v. State*, 7 App. 501; *Hennessy v. State*, 23 App. 340, 5 S. W. 215.

It is the duty of the trial judge to construe an alleged forged instrument and to instruct the jury as to its legal effect had it been genuine. *Burks v. State*, 24 App. 326, 6 S. W. 300; *Id.*, 24 App. 332, 6 S. W. 303.

An instruction that the instrument must be such, if true, as would have "transferred or affected any property or any money whatever," is not erroneous because of the use of the word "money," though the statute uses only the word "property," as "property" includes "money." *Williams v. State*, 58 App. 82, 124 S. W. 954.

29. **Verdict.**—See C. C. P. arts. 763 et seq., and notes thereunder.

Verdict failing to find on an essential element of the offenses and to assess punishment, is an absolute nullity. *O'Connor v. State*, 37 App. 267, 39 S. W. 368.

Art. 925. [531] Alteration also forgery.—He is also guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall alter an instrument in writing, then already in existence, by whomsoever made, in such manner that the alteration would (if it had been legally made) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever.

See notes under art. 924, ante.

Intent, see post, art. 926.

Offense.—Forgery by alteration is committed by the fraudulent endorsement of the name of the payor on an existing negotiable note. And so is the raising of a draft or check forgery by alteration. *Strang v. State*, 32 App. 219, 22 S. W. 680; *Mason v. State*, 31 App. 306, 20 S. W. 564; *Mason v. State*, 32 App. 95, 22 S. W. 144, 408.

The raising of the figures on a voucher check would increase the pecuniary liability of its maker, and the person who raised such figures would be guilty of forgery, though he did not sign the receipt on the reverse side of the check. *Horn v. State* (Cr. App.) 150 S. W. 948.

Indictment.—Willson's Cr. Forms, 411.

The indictment must set forth what was done. It must be alleged in what the alteration consisted, so as to advise the defendant of the very words he is alleged to have changed. It must be alleged whether it was by changing, obliterating, adding to, or erasing words and figures, so as to leave no uncertainty of what is intended to be charged. *State v. Knippa*, 29 Tex. 295; *Hennessy v. State*, 23 App. 340, 5 S. W. 215.

As to indictment for forgery by alteration of scholastic census, see *Munoz v. State*, 40 App. 460, 50 S. W. 949.

An indictment charging accused with fraudulently altering a pay check by indorsing the name of the payee thereon was not bad for failing to allege the drawee was a firm, corporation, or partnership. *Carter v. State*, 55 App. 43, 114 S. W. 839.

Indictment is not duplicitous because in one portion it describes the entire instrument as forged, and in another charges that the defendant knew that the endorsement was forged. *Strang v. State*, 32 App. 219, 22 S. W. 680.

Where forgery of a railroad ticket is charged, the fact that it consisted of filling in the destination and placing a stamp on the back should have been charged. *Overly v. State*, 34 App. 500, 31 S. W. 377.

In an indictment for raising a check drawn on a bank it is not necessary to allege that such bank is a corporation. This is necessary when defendant is charged with forging the signature of the bank. *Lucas v. State*, 39 App. 48, 44 S. W. 825.

Explanatory averments. *Johnson v. State*, 40 App. 605, 51 S. W. 382, 76 Am. St. Rep. 742.

The purport clause of the indictment charged that the instrument (forged by an indorsement) had been executed by G. N. Y., while the tenor clause said G. N. Y., paymaster. There was no variance because of use of word paymaster in tenor clause and not in purport clause. *Carter v. State*, 55 App. 43, 114 S. W. 840.

Where accused was charged with altering a bank check made on a printed blank used by the bank, and which the cashier refused to pay upon presentation, and the drawer, the cashier, and the constable, who saw part of the check, were all residents of the county and witnesses before the grand jury, the destruction of the check by accused did not excuse the failure of the indictment to describe the instrument correctly according to its tenor. *Collum v. State* (Cr. App.) 153 S. W. 1144.

Instructions.—Charge on forgery by alteration is improper where there is no allegation to that effect. *Johnson v. State*, 40 App. 612, 51 S. W. 382, 76 Am. St. Rep. 742.

Art. 926. [532] Intent to injure, etc., necessary.—The false making or alteration to constitute forgery, must be done with in-

tent to injure or defraud; and the injury must be such as affects one pecuniarily, or in relation to his property.

Cited, *Heimes v. State*, 59 App. 420, 129 S. W. 123.

Offense.—The intent to injure or defraud anyone, whether it does or not, is the gravamen of forgery. *Scott v. State*, 40 App. 105, 48 S. W. 523; *Green v. State*, 35 App. 109, 35 S. W. 971; *Ashmore v. State* (Cr. App.) 150 S. W. 196.

Intent to defraud is the essence of this offense, but it is immaterial whether this intent is or not directed toward any particular person, and it is sufficient if the state or some person may be affected. *Henderson v. State*, 14 Tex. 503; *Montgomery v. State*, 12 App. 323. See, also, *Lucas v. State*, 39 App. 48, 44 S. W. 825.

The injury must be such as affects one pecuniarily, or in relation to his property; but it is not necessary that the accused intended to injure or defraud any particular person, or that any particular person was injured or defrauded by the forgery. *Ashmore v. State* (Cr. App.) 150 S. W. 196.

Ratification.—A defendant may be convicted though the person whose name was forged ratified his act. *Countee v. State* (Cr. App.) 33 S. W. 127.

Indictment.—Willson's Cr. Forms, 411.

See notes under article 924, ante.

Evidence.—Other offenses, see notes under Code Cr. Proc. art. 783; *Ham v. State*, 4 App. 645; *Francis v. State*, 7 App. 501; *Burks v. State*, 24 App. 326, 6 S. W. 300; *Id.*, 24 App. 332, 6 S. W. 303; *Hennessy v. State*, 23 App. 340, 5 S. W. 215; *Mason v. State*, 31 App. 306, 20 S. W. 564.

The fact of forgery, itself, will be sufficient to show an intention to defraud. *Henderson v. State*, 14 Tex. 503.

Questions for jury.—The court must submit the issue, raised by the testimony, that accused had authority from the person whose name was charged to have been forged to sign his name. *White v. State*, 61 App. 498, 135 S. W. 562.

Art. 927. [533] "Instrument in writing" defined.—The words "instrument in writing," as used in articles 924 and 925, and elsewhere in this chapter, include every writing, purporting to make known or declare the will or intention of the party whose act it purports to be, whether the same be of record or under seal or private signature, or whatever other form it may have. It must be upon paper or parchment, or some substance made to resemble either of them. The words may be written, printed, stamped or made in any other way, or by any other device. And the words, "in writing," "write," "written," include all these modes of making. An instrument, partly printed or stamped, and partly written, is an instrument in writing. In order to come within the definition of forgery, the signature, when made otherwise than by writing, must be made to resemble manuscript.

Signature in bold type.—Signature in bold type not in writing or resembling manuscript. *Heath v. State*, 49 App. 49, 89 S. W. 1063, 122 Am. St. Rep. 783.

Indictment.—Willson's Cr. Forms, 413.

Art. 928. [534] "Alter" defined.—The word "alter," in the definition of forgery, means to erase or obliterate any word, letter or figure, to extract the writing altogether, or to substitute other words, letters or figures for those erased, obliterated or extracted, to add any other word, letter or figure to the original instrument, or to make any other change whatever which shall have the effect to create, increase, diminish, discharge or defeat a pecuniary obligation, or to transfer, or in any other way affect, any property whatever.

See *Mason v. State*, 31 App. 306, 20 S. W. 564; *Id.*, 32 App. 95, 22 S. W. 144, 408; *Strang v. State*, 32 App. 219, 22 S. W. 680.

Indictment.—See notes under article 924, ante.

Art. 929. [535] "Another" includes, what.—The instrument must purport to be the act of "another;" and, within the meaning of this word, as used in defining forgery, are included this state, the United States, or either of the states or territories of the Union; all the several branches of the government of either of them; all public or private bodies, politic and corporate; all courts; all officers, public or private, in their official capacity; all partnerships in professions or trades; and all other persons, whether real or fictitious, except the person engaged in the forgery.

Offense.—Fraudulently signing the name of a dead or a fictitious person to an instrument in writing is forgery. *Henderson v. State*, 14 Tex. 503; *Brewer v.*

State, 32 App. 74, 22 S. W. 41, 40 Am. St. Rep. 760; Davis v. State, 34 App. 117, 29 S. W. 478; Hocker v. State, 34 App. 359, 30 S. W. 783, 53 Am. St. Rep. 716; Johnson v. State, 35 App. 271, 33 S. W. 231.

Art. 930. [536] "Pecuniary obligation" defined.—"Pecuniary obligation" means every instrument having money for its object, and every obligation for the breach of which a civil action for damages may be lawfully brought.

Pecuniary obligations.—Instances of "pecuniary obligation:" Peel v. State, 35 App. 308, 33 S. W. 541, 60 Am. St. Rep. 49; Keeler v. State, 15 App. 111; Hendricks v. State, 26 App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; Reddick v. State, 31 App. 587, 21 S. W. 684; Anderson v. State, 20 App. 595; Kennedy v. State, 33 App. 183, 26 S. W. 78; Boles v. State, 13 App. 650; Crawford v. State, 31 App. 51, 19 S. W. 766; Womble v. State, 39 App. 24, 44 S. W. 827; Scott v. State, 40 App. 105, 48 S. W. 523.

A date is not indispensable to an instrument creating a pecuniary obligation. Boles v. State, 13 App. 650.

A bail bond is a pecuniary obligation, and is the subject of forgery, notwithstanding it had not been forfeited. Costley v. State, 14 App. 156.

It is not essential that the forged instrument, if true, should actually discharge or defeat an obligation; it is sufficient if it tends to do so. Fonville v. State, 17 App. 368.

An order "Let Bare have \$5 in grosses, and charge same to" the purported drawer, is an order for articles of value, implies an obligation, and is the subject of forgery. Hendricks v. State, 26 App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463.

A diploma from a school or college is not a "pecuniary obligation," and hence does not come within the purview of this article, but it is a species of "property," and, as such, a fraudulent order for its delivery is the subject of forgery. Alexander v. State, 28 App. 186, 12 S. W. 595.

An order for payment of money may create pecuniary obligation without being addressed to any particular person, and hence a subject of forgery. Dixon v. State (App.) 26 S. W. 500; Kennedy v. State, 33 App. 183, 26 S. W. 78.

An instrument purporting to be a statement of time of a work man is a pecuniary obligation. Daud v. State, 34 App. 460, 31 S. W. 376. See, also, Williams v. State (Cr. App.) 32 S. W. 544.

A person cannot be convicted of forging the will of a living person. A will is not effective until after death of testator. Huckaby v. State, 45 App. 577, 78 S. W. 944, 108 Am. St. Rep. 975.

An instrument need not, without explanatory averments, import a financial obligation, in order to be made the subject of forgery. Forey v. State, 60 App. 206, 131 S. W. 585, 32 L. R. A. (N. S.) 327.

Confederate pension warrant. Dreeben v. State, 71 App. 341, 162 S. W. 501.

Questions for jury.—Whether or not an instrument imports a pecuniary obligation is a question for the court, and it should be determined in the charge to the jury. Overly v. State, 34 App. 500, 31 S. W. 377.

Art. 931. [537] "Transferred or in any manner have affected" defined.—By an instrument which would "have transferred or in any manner have affected" property, is meant every species of conveyance, or undertaking in writing, which supposes a right in the person purporting to execute it, to dispose of or change the character of property of every kind, and which can have such effect when genuine.

See notes under art. 924, ante.

Art. 932. [538] All participants guilty.—He is guilty of making or altering, as the case may be, under articles 924 and 925, who, knowing the illegal purpose intended, shall write, or cause to be written, the signature, or the whole or any part, of a forged instrument. All persons engaged in the illegal act are deemed guilty of forgery.

Peel v. State, 35 App. 308, 33 S. W. 541, 60 Am. St. Rep. 49; Robinson v. State, 35 App. 54, 43 S. W. 526, 60 Am. St. Rep. 20; Heard v. State, 9 App. 1; Ex parte Rogers, 10 App. 655, 38 Am. Rep. 654; Rogers v. State, 11 App. 608; Williams v. State, 24 App. 342, 6 S. W. 531; Mason v. State, 32 App. 95, 22 S. W. 144, 408; Dillard v. State (Cr. App.) 177 S. W. 99.

Art. 933. [539] Filling up over signature.—It is forgery to make, with intent to defraud or injure, a written instrument, by filling up over a genuine signature, or by writing on the opposite side of a paper so as to make the signature appear as an indorsement.

See Overly v. State, 34 App. 500, 31 S. W. 377; Robinson v. State, 35 App. 54, 43 S. W. 526, 60 Am. St. Rep. 20; Montgomery v. State, 12 App. 323.

Offense.—Where defendant filled check for another purpose and made it payable to another person than that for which it was given him, held, forgery. Hooper v. State, 30 App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926.

A written instrument filled in over the genuine signature of the purported maker, agreeing to give defendant a sum of money for his equity in land for which the signer had sued, and agreeing not to dispossess defendant until the amount named is paid, is an instrument subject to forgery. *Wheeler v. State*, 62 App. 370, 137 S. W. 124.

Where a confederate pension warrant was drawn payable to the order of a pensioner who had died, and the warrant came into the hands of defendant, a clerk in the pension commissioner's office, who forged an indorsement of the pensioner's name on the back of the warrant and cashed it, the forgery of such instrument was sufficient to "in some manner affect the property" so as to constitute forgery without reference to whether the warrant was negotiable or not. *Dreeben v. State*, 71 App. 341, 162 S. W. 501.

Indictment.—Willson's Cr. Forms, 412, 413. See *Booth v. State*, 36 App. 600, 38 S. W. 196; *Colter v. State*, 40 App. 165, 49 S. W. 379.

An indictment of a railroad station agent for forging a receipt for money claimed to have been paid by him for extra labor rendered at his station charging that defendant, after procuring a receipt to be signed in blank, filled in an amount much larger than that owing or paid to the employé, held fatally defective for failure to show that any pecuniary obligation would have been created, increased, discharged, or defeated by the receipt if it had been true. *Pelton v. State*, 60 App. 412, 132 S. W. 480, Ann. Cas. 1912C, 86.

Art. 934. [540] Person not guilty, when.—When the person making or altering an instrument in writing acts under an authority which he has good reason to believe, and actually does believe, to be sufficient, he is not guilty of forgery, though the authority be in fact insufficient and void.

See *Sweet v. State*, 28 App. 223, 12 S. W. 590; *Burge v. State*, 32 App. 359, 23 S. W. 692; *Williams v. State*, 24 App. 342, 6 S. W. 531.

Instructions.—Charge held sufficient, see *McCay v. State*, 32 App. 233, 22 S. W. 974.

The court must submit the issue, raised by the testimony, that accused had authority from the person whose name was charged to have been forged to sign his name. *White v. State*, 61 App. 498, 135 S. W. 562.

An instruction, in a prosecution for forgery, that if accused actually believed he had authority to sign to a check the name which he signed thereto, the jury should acquit, cannot be complained of for not being based upon the hypothesis that accused "reasonably" believed, etc. *Davis v. State*, 156 S. W. 1171.

Art. 935. [540a] Altering teacher's certificate is forgery.—Any person who shall unlawfully and wilfully raise, change, or alter, any teacher's certificate or diploma or other instrument having the force of a teacher's certificate, shall be deemed guilty of forgery, and, upon conviction thereof, shall be punished by confinement in the penitentiary for a term of not less than two nor more than seven years. [Acts of 1893, p. 205.]

See *Thomas v. State*, 18 App. 213; *Mee v. State*, 23 App. 566, 5 S. W. 243; *Alexander v. State*, 28 App. 186, 12 S. W. 595; *Brooks v. State*, 45 App. 206, 75 S. W. 507.

Art. 936. [541] Penalty.—If any person be guilty of forgery he shall be punished by confinement in the penitentiary not less than two nor more than seven years.

Indictment.—Willson's Cr. Forms, 685.

Art. 937. [542] Passing forged instrument.—If any person shall knowingly pass as true, or attempt to pass as true, any such forged instrument in writing as is mentioned and defined in the preceding articles of this chapter, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years.

See notes under article 924, ante, and article 946, post.

Offense.—Having a forged deed placed on record is a sufficient uttering. *Henderson v. State*, 14 Tex. 503.

Article 932, ante, is not pertinent to this offense. *Hatch v. State*, 8 App. 416, 34 Am. Rep. 751.

It is an offense to knowingly utter as true a forged instrument, which, at the time it was forged, was not the subject of forgery, but which was made the subject of forgery before it was uttered. *Johnson v. State*, 9 App. 249.

An instrument which cannot be the basis of a prosecution for forgery cannot be the basis of a prosecution for this offense. *Anderson v. State*, 20 App. 598.

The pledging of a forged instrument as security for a debt, under an agreement to redeem the same within a specified time, is an uttering of the same within the meaning of the statute, and the trial court did not err in refusing to charge the jury to the converse of this rule, and to the effect that, to constitute the uttering of the forged instrument, it must have been given by the accused absolutely in payment or exchange. *Thurmond v. State*, 25 App. 366, 8 S. W. 473.

One who passes the check of a fictitious person, representing it to be the check of another, is guilty of passing a forged instrument. *Davis v. State*, 34 App. 117, 29 S. W. 478.

Depositing forged notes as security for a debt is the passing of same within the meaning of the statute. *Nichols v. State*, 39 App. 80, 44 S. W. 1091.

One may be convicted of passing a forged instrument not in his handwriting. *Leslie v. State* (Cr. App.) 47 S. W. 367.

Essential ingredients of the offense of passing forged instruments are the forgery itself and knowledge of defendant of the forgery. *Hanks v. State* (Cr. App.) 56 S. W. 922.

It is an offense to attempt to pass as true an altered teacher's certificate. *Brooks v. State*, 45 App. 206, 75 S. W. 507.

It is an offense to attempt to pass as true a forged diploma or teacher's certificate. *Brooks v. State*, 45 App. 206, 75 S. W. 509.

Where a person passes a check purporting to be signed by a fictitious person, and which he falsely represents has been executed and given him by some person whom the testimony discloses is fictitious, he is guilty of passing a forged instrument. *Boswell v. State*, 59 App. 161, 127 S. W. 820.

Accused presented a forged check to the teller of a bank. The teller took it to the vice president, who engaged accused in conversation to detain him until an officer should arrive. The vice president asked him if he wanted the money in \$10 bills, and asked accused if he would not leave some of the money in the bank on deposit, to which he replied that he did not wish to. Held, that there was an attempt to pass the check on the vice president, though it was presented to the teller. *Houston v. State*, 59 App. 505, 128 S. W. 618.

Venue.—See C. C. P. art. 235.

Indictment.—Willson's Cr. Forms, 414. See C. C. P. arts. 454, 481, and notes thereunder.

Indictment held sufficient. *Peterson v. State*, 25 App. 70, 7 S. W. 530; *Thurmond v. State*, 25 App. 366, 8 S. W. 473.

The indictment must charge that the uttering was knowingly done. *Henderson v. State*, 14 Tex. 503; *Morris v. State*, 17 App. 660.

Indictment under this article sufficient which alleges that accused "did wilfully, knowingly and fraudulently, pass as true to one F. a forged instrument in writing to the tenor following," and then setting out the instrument. *Cagle v. State*, 39 App. 109, 44 S. W. 1097.

If the paper declared on be not an instrument ordinary in commercial transactions, but is contractual in form, and depends on extrinsic facts to create a liability, such extrinsic facts must be averred. *Cagle v. State*, 39 App. 109, 44 S. W. 1097.

An indictment alleging that accused uttered a forged instrument of the tenor as follows: "Bartlett, Tex. (meaning thereby Bartlett, Texas). Receipt of cotton seed Sept. 9/30/07 (meaning thereby September 30, 1907), Three dollars & 65c (meaning thereby Three & $\frac{65}{100}$ dollars), 3.65 (meaning thereby \$3.65). [Signed] Rev. Peach (meaning thereby Lewis Pietzsch)"—is sufficient; the explanatory averments explaining what might otherwise be unintelligible. *Chappel v. State*, 58 App. 52, 124 S. W. 657.

Since, in a prosecution for uttering a forged check under the statute requiring that the instrument uttered be passed with an intent to injure or defraud, the indictment need not allege any particular person who was intended to be injured or defrauded, in a prosecution for passing a forged check to a certain person, the indictment need not allege that such person received the check as agent for a bank. *Heimes v. State*, 59 App. 420, 129 S. W. 123.

An indictment for uttering a forged check was not fatally defective for failure to allege whether the company purporting to have drawn the check was a partnership, a joint-stock company, or a corporation. *Brown v. State*, 60 App. 505, 132 S. W. 789.

An indictment for uttering a forged check was not fatally defective for failure to allege whether the bank was a partnership, a joint-stock company, or a corporation, or what business it was engaged in. *Brown v. State*, 60 App. 505, 132 S. W. 789.

An indictment is not fatally defective for failure to allege that the instrument was made or uttered without lawful authority and with intent to defraud. *Brown v. State*, 60 App. 505, 132 S. W. 789.

An indictment for uttering a forged note, which alleges that accused fraudulently made a false instrument in writing purporting to be the act of another, which instrument "is in substance as follows," and which then sets out the instrument in *hæc verba*, sufficiently sets out the alleged false instrument. *Slatter v. State*, 61 App. 243, 136 S. W. 770.

An indictment for passing a forged instrument, which alleges that accused passed as true a forged instrument to a person named with intent to defraud a third person, but which fails to allege any legal relation between them, is fatally defective. *Bagley v. State*, 63 App. 606, 141 S. W. 107.

It was not necessary to allege an indorsement on a check, where it was shown that it was placed there long subsequent to the execution of the instrument, and not until it was delivered to the indorsee. *Wesley v. State* (Cr. App.) 150 S. W. 197.

An indictment without extrinsic or innuendo averments, charging defendant with passing the following instrument: "Mr. Bartay please let Jim Whitmire have the plows if he dont pay you I will Yours Respectfully Mr. Sam. Pier"—was insufficient. *Whitmire v. State*, 70 App. 475, 156 S. W. 1179.

Where accused was charged with passing a forged instrument upon one person, proof that he passed it upon a third person is insufficient to warrant a conviction. *Brown v. State*, 71 App. 45, 158 S. W. 533.

Evidence.—See C. C. P. arts. 783, et seq., and notes thereunder.

Evidence held not sufficient. *Whitmire v. State*, 70 App. 475, 156 S. W. 1179; *Leeper v. State*, 27 App. 694, 11 S. W. 644.

If the utterer of a forged note, made payable to himself, represents the maker as at a particular place and engaged in a particular business, evidence that it is not that person's note is sufficient prima facie proof of forgery; for accused, being the payee, must have known who was the maker. *Barnwell v. State*, 1 App. 745.

On the question of intent, the state may prove previous attempts of defendant on the same day to pass the alleged forged instrument. *Burks v. State*, 24 App. 326, 6 S. W. 300.

The state introduced in evidence the alleged forged instrument before proving that the same was written by the accused, but subsequently produced such proof. Held, that such practice, though irregular, was not materially erroneous. *Williams v. State*, 24 App. 342, 6 S. W. 531.

Evidence that the defendant was drunk about the time he passed a forged check, does not justify a charge on temporary insanity when there is no evidence that the defendant was drunk at the time he signed the check. *Howard v. State*, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812.

On trial for uttering a forged deed executed at the time of execution of another deed conveying the premises to defendant, evidence of the entire transaction was admissible. *Preston v. State*, 40 App. 72, 48 S. W. 581.

On a prosecution for uttering a forged deed by presenting it for record, where the pendency of a civil action against accused is shown, it is admissible on the question of intent to show introduction of the deed in evidence by defendant on his behalf in that action. *Preston v. State*, 40 App. 72, 48 S. W. 581.

The proof must show that defendant knew, at the time he passed the instrument, that it was forged. *Feeny v. State*, 58 App. 152, 124 S. W. 944.

To support a conviction under an indictment alleging that accused passed a forged instrument to an individual to defraud an insurance company, the evidence must show a legal connection between the individual and the company. *Bagley v. State*, 63 App. 606, 141 S. W. 107.

Evidence held to identify accused as the person who passed a forged instrument, justifying his conviction therefor. *Adams v. State* (Cr. App.) 143 S. W. 185.

Where only one note was described in the indictment, and there was nothing in the record to show that such note was part of a transaction in which eleven notes, aggregating \$2,300, were given, the note described in the indictment was not subject to exclusion, because it was one of a series of notes, all of which were passed at the same time. *Jordan v. State* (Cr. App.) 143 S. W. 623.

Questions for jury.—The defense that defendant had bought the instrument from another party, and that he could neither read nor write, should have been submitted to the jury. *Garza v. State*, 38 App. 317, 42 S. W. 563.

Instructions.—See C. C. P. arts. 735, et seq., and notes thereunder.

"Knowingly" and "pass" are not words of technical meaning and need not be defined in the charge. *Peterson v. State*, 25 App. 70, 7 S. W. 530; *Thurmond v. State*, 25 App. 366, 8 S. W. 473.

It is incumbent on the court to charge the statutory definition of forgery, or to explain the constituents of that offense. *Ham v. State*, 4 App. 645.

While it was competent, in a prosecution for attempting to pass a forged instrument, for the state to prove that the accused attempted to pass the same forged instrument to another than the person alleged in the indictment, and at another time and place, it was incumbent on the court to charge the jury that such evidence was admissible only upon the issue of the fraudulent intent of the accused in the transaction on trial. Omission to so charge was fundamental error. *Burks v. State*, 24 App. 332, 6 S. W. 303. See, also, *Burks v. State*, 24 App. 326, 6 S. W. 300; *Francis v. State*, 7 App. 501; *Hennessy v. State*, 23 App. 340, 5 S. W. 215.

And further on charge of court, see *Mason v. State*, 31 App. 306, 20 S. W. 564; *Davis v. State*, 34 App. 117, 29 S. W. 478; *Shanks v. State*, 25 Tex. Supp. 326; *Hennessy v. State*, 23 App. 340, 5 S. W. 215; *Burks v. State*, 24 App. 326, 6 S. W. 300; s. c., 24 App. 332, 6 S. W. 303.

An instruction requiring defendant's conviction if the instrument was forged, and if the defendant "did knowingly pass said instrument as true," was faulty, in that it failed to require that defendant must have known that the instrument was forged at the time he passed it, in order to render him guilty. *Feeny v. State*, 58 App. 152, 124 S. W. 944.

Where, the court had defined forgery, and charged that if defendant had unlawfully passed the alleged forged instrument as true, with intent to injure and defraud, he would be guilty, the jury having inquired whether the use of a fictitious name in making a check with intent to defraud, and knowingly passing the same with intent to defraud, constituted two separate offenses, punishable separately, the court did not err in charging in reply, that it did, and that if the jury found, beyond a reasonable doubt, that both such offenses had been committed, they should find defendant guilty of only one offense, and should state under which count of the indictment the conviction was had. *Boswell v. State*, 59 App. 161, 127 S. W. 820.

Where on a trial for attempting to pass a forged note the evidence showed that all the names, save the name of accused, were forgeries, and that accused stated to the person to whom he attempted to pass the note that the maker had signed the note while sitting on his horse, a charge that an attempt to pass a forged instrument must be done with intent to injure or defraud was applicable. *Slatyer v. State*, 61 App. 243, 136 S. W. 770.

In a prosecution for having possession of a known forged instrument with intent to pass it, a requested charge that, if the name signed to the instrument

purported to be the act of Fred Williamson and the jury found the name to it to be Freed William, they should acquit, is properly refused where the name actually signed to the instrument, as shown by the copy in the indictment and the instrument itself in evidence, was Freed William. *Woodard v. State* (Cr. App.) 170 S. W. 309.

Verdict.—See C. C. P. arts. 763, et seq., and notes thereunder.

Art. 938. [543] Preparing implements for forgery.—Whoever shall prepare in this state any implements or materials, or engrave any plate for the purpose of being used in forging the notes of any bank, whether within this state or out of it, and whether the same be incorporated or not, or who shall have in his possession in this state any such implements, materials or engraved plate, with intent to be used for the purpose above mentioned, shall be imprisoned in the penitentiary not less than two nor more than five years.

Indictment.—Willson's Cr. Forms, 415, 416.

Art. 939. [544] Possession of forged instrument with intent to pass.—If any person shall knowingly have in his possession any instrument of writing, the making of which is by law an offense, with intent to use or pass the same as true, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1859, p. 169.]

Indictment.—Willson's Cr. Forms, 417.

Art. 940. [545] Evidence in case of bank bills.—Upon the trial of any indictment for the forgery of any bank bill, or for passing, or attempting to pass, any such bill as true, or for knowingly having in possession any such forged bank bill, evidence that bills or notes, purporting to be issued by any bank, are commonly received as currency, or proof of the existence of such bank by parol testimony, shall be deemed sufficient to show its legal establishment and existence.

See *Elkins v. State*, 35 App. 207, 32 S. W. 1047; *O'Connor v. State*, 37 App. 267, 39 S. W. 368.

Art. 941. [546] Falsely reading instrument.—If any one, with intent to defraud, shall, either by falsely reading or falsely interpreting, any pecuniary obligation or instrument in writing, which would in any manner affect property, or by misrepresenting its contents, induce any one to sign such instrument as his act, or give assent to it in such manner as would make it his act, if not done under mistake, the person, so offending, shall be imprisoned in the penitentiary not less than two nor more than five years.

Offense.—The mere fact that a deed absolute on its face may have been intended as a mortgage will not preclude a prosecution under this article. Nor would the fact that a deed to a homestead absolute in form may be shown by parol to be intended as security for a loan, convey no title, change the fact that the instrument was legitimate subject for prosecution under this article. *Lewis v. State*, 48 App. 149, 86 S. W. 1028.

Indictment.—Willson's Cr. Forms, 418.

Art. 942. [547] Substituting one instrument for another.—If any person, with intent to defraud, shall substitute one instrument of writing for another, and, by this means, induce any person to sign an instrument materially different from that which he intended to sign, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years.

Indictment.—Willson's Cr. Forms, 419.

Art. 943. Mutilate, destroy, deface any book, record or other document kept by officer of this state, punishment for.—If any person, without authority of law, shall wilfully and maliciously change, alter, mutilate, destroy, deface or injure any book, papers, record or any other document, required or permitted by law to be kept by any officer within this state, he shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding five

thousand dollars, or by imprisonment in the penitentiary not less than one nor more than five years. [Act 1899, p. 301.]

Indictment.—Willson's Cr. Forms, 550.

Art. 944. [548] Falsely personating another.—If one shall falsely personate another, whether bearing the same name or not, and, in such assumed character, shall give authority to any person to sign such assumed name to any instrument in writing which, if genuine, would create, increase, diminish or discharge any pecuniary obligation, or would transfer, or in any way affect any property, he shall be imprisoned in the penitentiary not less than two nor more than seven years.

See *Peel v. State*, 35 App. 308, 33 S. W. 541, 60 Am. St. Rep. 49.

Indictment.—Willson's Cr. Forms, 420.

Art. 945. [549] Same in acknowledgments.—If any person shall falsely personate another, whether bearing the same name or not, and in such assumed character shall, before any officer authorized by law to authenticate instruments of writing for registration, acknowledge the execution of an instrument of writing purporting to convey, or in any manner affect, an interest in property, such instrument purporting to be the act of the person whose name is so assumed, and the acknowledgment thereof being such as would entitle the instrument to be registered, he shall be punished by confinement in the penitentiary not less than two nor more than ten years.

Indictment.—Willson's Cr. Forms, 421.

This offense is nearly allied to forgery, and the indictment should be framed with an equal degree of certainty as in that offense. The falsely authenticated instrument should be set out; or cause be shown for not setting it out; the property to be affected by it should be sufficiently described; the purpose of the acknowledgment should be averred, and the authority of the accused to make it should be negated. *Martin v. State*, 1 App. 586.

Indictment hereunder should set out the falsely authenticated instrument or explain not doing so; sufficiently describe the property to be affected; aver the purpose of the acknowledgment, and negative the authority of the accused. *Martin v. State*, 1 App. 586.

Need not allege the whereabouts or residence of the person falsely personated. *Freeman v. State*, 20 App. 558.

Art. 946. [549a] Prosecutions under one bill of indictment.—A conviction for any of the offenses, mentioned in articles 924, 937 and 939 of this Code, shall be a bar to any other prosecution under said articles, based upon the same transaction or same forged instrument of writing; provided, that one or more of said several offenses may be charged by separate counts in the same bill of indictment, and prosecuted together to final judgment, without election by the state as to which it relies upon for conviction; and provided, further, a judgment of conviction shall specify which offense or under which count the defendant is found guilty, and shall assess but one penalty not exceeding the greatest punishment fixed by law to the highest grade of offense of which defendant is convicted; and it is hereby declared unlawful for any county or district attorney, or any person acting as such, to wilfully or knowingly demand or receive fees for more than one prosecution that could have been combined or prosecuted in one bill of indictment, and subject to the penalties prescribed by law for the punishment of extortion of illegal fees. [Acts of 1895, p. 106.]

Time of taking effect.—This article did not take effect till 90 days after April 30, 1895, and so was unavailable in a case tried July 23, 1895.

Indictment.—Willson's Cr. Forms, 410, 414.

An indictment may in separate counts charge forgery, and the uttering of a forged instrument knowing it to be forged. *Boles v. State*, 13 App. 650; *Barnwell v. State*, 1 App. 745; *Bell v. State*, 21 App. 270, 17 S. W. 155; *Keeler v. State*, 15 App. 111; *Dovalina v. State*, 14 App. 312; *Chester v. State*, 23 App. 677, 5 S. W. 125; *Pitts v. State*, 40 App. 667, 51 S. W. 906.

An election cannot be required between counts for forging and for uttering. *Carr v. State*, 36 App. 3, 34 S. W. 949.

But the court submitting but one of the counts in its charge is tantamount to an election by the state, and the dismissal of the other count. *Stephens v. State*, 36 App. 386, 37 S. W. 425.

Jeopardy.—This article limits the defense of former jeopardy in offenses defined by articles 924, 937, and 958 of this Code to former conviction, and does not include former acquittal. *Green v. State*, 36 App. 109, 35 S. W. 971; *Hooper v. State*, 30 App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926; *Reddick v. State*, 31 App. 587, 21 S. W. 684; *Inman v. State*, 35 App. 36, 30 S. W. 219.

Forgery and uttering same forged instrument are distinct offenses and conviction or acquittal for one does not bar the other. *Preston v. State*, 40 App. 80, 48 S. W. 581; *Hooper v. State*, 30 App. 412, 17 S. W. 1066; 28 Am. St. Rep. 926; *Preston v. State*, 40 App. 72, 48 S. W. 581.

The offense of attempting to pass an instrument knowing it to be forged is different from the offense of having possession of an instrument knowing it to be forged with intent to use and pass it as true; hence an acquittal of the first offense does not bar a prosecution for the second. *Woodard v. State* (Cr. App.) 170 S. W. 309.

Verdict.—Under an indictment containing counts for forgery and uttering a forged instrument there cannot be a general verdict and judgment for both offenses. *Pitts v. State*, 40 App. 667, 51 S. W. 906.

Where an indictment contains a count for forgery and another for uttering, and the evidence supports both counts, a general verdict can be entered upon either. *Carr v. State*, 36 App. 3, 34 S. W. 949.

Where the indictment charges forgery in one count and uttering the forgery in another, a general verdict of guilty without specifying the count is good, but the court in entering judgment and sentence must recite the offense of which defendant is adjudged guilty. *Jacobs v. State*, 42 App. 353, 59 S. W. 1112.

CHAPTER TWO

FORGERY OF LAND TITLES, ETC.

Art.	Art.
947. "Forgery of patents," etc., defined.	951. Proof and allegations necessary in indictment; proof of intent to defraud United States, etc., no variance.
948. False certificate by officers, forgery.	952. Venue.
949. Knowingly uttering forged instrument.	953. Rules in forgery applicable.
950. Non-residents may commit; venue.	

Article 947. [550] "Forgery of patents," etc., defined.—Every person who falsely makes, alters, forges or counterfeits, or causes or procures to be falsely made, altered, forged or counterfeited, or in any way aids, assists, advises or encourages the false making, altering, forging or counterfeiting of any certificate, field notes, returns, survey, map, plat, report, order, decree, record, patent, deed, power of attorney, transfer, assignment, release, conveyance or title paper, or acknowledgment, or proof of record, or certificate of record belonging or pertaining to any instrument or paper, or any seal, official or private stamp, scroll, mark, date, signature, or any paper, or any evidence of any right, title, or claim of any character, or any instrument in writing, document, paper or memorandum, or file of any character whatsoever, in relation to or affecting lands, or any interest in lands in this state, with the intent to make money or other valuable thing thereby, or with intent to set up a claim or title, or aid or assist any one else in setting up a claim or title, to lands or any interest in lands, or to prosecute or defend a suit, or aid or assist any one else in prosecuting or defending a suit with respect to lands, or to cast a cloud upon the title, or in any way injure, obtain the advantage of, or prejudice the rights or interest of, the true owners of lands, or with any fraudulent intent whatever, shall be deemed guilty of forgery, and be punished by imprisonment in the state penitentiary at hard labor not less than five nor more than twenty years. [Act July 28, 1876, p. 59.]

Constitutionality.—The various articles of this chapter held constitutional. *Grooms v. State*, 40 App. 319, 50 S. W. 370; *Johnson v. State*, 9 App. 249; *Ham v. State*, 4 App. 645; *Francis v. State*, 7 App. 501; *Rogers v. State*, 11 App. 608; *Hanks v. State*, 13 App. 289.

Offense.—To take any one step or do any one act or thing in the commission of the offense, if any fraudulent intent may be reasonably inferred therefrom, is an offense under this article. *Phillips v. State*, 6 App. 364.

Instruments subject of forgery.—An instrument in the form of a deed though not acknowledged or witnessed, is a subject of forgery. *Lassiter v. State*, 35 App. 540, 34 S. W. 751, *Howard v. State*, 37 App. 494, 36 S. W. 475, 66 Am. St. Rep. 812.

A forged transfer of land, though a blank be left for the name of the transferee, is an instrument within the meaning of the statute. *Phillips v. State*, 6 App. 364.

The fabrication of a certificate of a notary public, purporting to authenticate the acknowledgment of a conveyance or transfer, is forgery, but was not an offense prior to the enactment of this article. *Rogers v. State*, 8 App. 401. It was an offense, however, to knowingly utter as true a fabricated certificate, though fabricated before this statute. *Johnson v. State*, 9 App. 249.

A deed purporting to convey the homestead of husband and wife without the certificate of the wife's separate acknowledgment, is not subject to forgery. *Johnson v. State*, 40 App. 611, 51 S. W. 382, 76 Am. St. Rep. 742.

A written instrument filled in over the genuine signature of the purported maker, agreeing to give defendant a sum of money for his equity in land for which the signer had sued, and agreeing not to dispossess defendant until the amount named is paid, is an instrument subject to forgery. *Wheeler v. State*, 62 App. 370, 137 S. W. 124.

An affidavit reciting that the deponent had conveyed land by quitclaim deed will estop him from asserting title; hence the forgery of such an affidavit falls within the act declaring that every person who forges or falsely makes any paper affecting the title to land shall be deemed guilty of forgery. *Dillard v. State* (Cr. App.) 177 S. W. 99.

Where the owner of real estate put in circulation a letter reciting a conveyance of the land, intending that a purchaser from a third person should rely thereon, he is estopped to assert his title. *Dillard v. State* (Cr. App.) 177 S. W. 99.

Parties liable.—Any act in furtherance of the offense from which a fraudulent intent can be inferred comes within the purview of this article. And the least degree of concert or collusion between plural parties in the illegal transaction makes the act of one the act of all. *Phillips v. State*, 6 App. 364; *Heard v. State*, 9 App. 1.

Jurisdiction and venue.—See arts. 950, 952, post; C. C. P. art. 235.

Indictment.—Willson's Cr. Forms, 422.

Proof of signature of "A. Barnes," when the indictment charged "Abraham Barnes," is no variance. *Ham v. State*, 4 App. 645.

A distinct variance between the attestation clause of a deed and the *haec verba* allegation of the indictment, disqualifies the former as evidence. *Ex parte Rogers*, 10 App. 655, 38 Am. Rep. 654.

An indictment which alleges that accused unlawfully and with intent to defraud assisted the forging of a signature to a certain deed purporting to entitle the grantee named therein to certain lands which, if true, would have affected the title and interest in such lands, sufficiently charged that the instrument would have affected the title to lands. *Thompson v. State* (Cr. App.) 152 S. W. 893.

Where an indictment charging forgery of an affidavit affecting title to land set forth the affidavit, which showed wherein it affected title, explanatory averments are unnecessary. *Dillard v. State* (Cr. App.) 177 S. W. 99.

Evidence.—Comparison of handwriting, see C. C. P. art. 814.

Other offenses, see C. C. P. art. 783; *Preston v. State*, 40 App. 72, 48 S. W. 581.

The state must prove that the party whose name to a deed was forged was the owner of the land. *Henderson v. State*, 14 Tex. 503; *Horton v. State*, 32 Tex. 79.

In a prosecution for uttering a forged deed, proof that the certificate of authentication was forged is competent, it being set out. *Ham v. State*, 4 App. 645.

Evidence, in a prosecution for the forgery of a note purporting to be secured by trust deed on certain described property, held sufficient to sustain a conviction. *Pye v. State*, 71 App. 94, 154 S. W. 222.

Instructions.—The charge must define or explain "forgery." *Ham v. State*, 4 App. 645.

See charges properly given and refused, and one which should have been given in relation to proof of execution. *Hatch v. State*, 6 App. 384.

In a prosecution for forging and passing a forged instrument affecting title to land, the case must be submitted under Pen. Code 1911, arts. 947, 949, defining that particular offense, and not the general statute. *Dillard v. State* (Cr. App.) 177 S. W. 99.

Art. 948. [551] False certificate by officers forgery.—If any person authorized by law to take the proof or acknowledgment of any instrument, document or paper whatsoever, affecting or relating to the title of lands in this state, wilfully and falsely certify that such proof or acknowledgment was duly made, or if any person fraudulently affixes a fictitious or pretended signature purporting to be that of an officer or any other person, though such person never was an officer or never existed, he shall be deemed guilty of forgery and punished as provided in article 947 of this chapter. [Id.]

See notes under the preceding article.

Offense.—Since the act referred to, the fabrication of instruments in the nature of official acts,—those, for instance, of a notary public—has been forgery. *Rogers v. State*, 8 App. 401.

Even before the act of 1876, to utter or pass a fabricated certificate of authentication was an offense. *Johnson v. State*, 9 App. 249.

Indictment.—Willson's Cr. Forms, 423, 424.

Art. 949. [552] Knowingly uttering forged instruments.—Every person who knowingly utters, publishes, passes or uses, or who in any way aids, assists in or advises the uttering, publishing, passing or using as true and genuine any false, forged, altered or counterfeited certificate, field-notes, returns, survey, map, plat, report, order, decree, record, patent, deed, power of attorney, transfer, assignment, release, conveyance, title papers, acknowledgment or proof for record or certificate of record belonging or pertaining to any instrument or paper, or any evidence of any right, title or claim of any character whatsoever, or any instrument in writing, document, paper, memorandum or file, or any official or private seal, or any scroll, mark, date or signature in any way relating to, or having any connection with, land, or any interest in land in this state, with the intent mentioned in article 947 of this chapter, or with any other fraudulent intent whatsoever, shall be deemed guilty and be punished in like manner as is provided in article 947 of this chapter. And the filing or causing or directing to be filed, or causing or directing to be recorded, in the general land office of the state, or in any office of record or in any court in this state, or the sending through the mails or by express, or in any other way, for the purpose of filing or record of any such false, altered, forged or counterfeited matter, documents, conveyances, papers or things, knowing the same to be false, altered, forged or counterfeited, shall be an uttering, publishing and using within the meaning of this article. [Id.]

Indictment.—Willson's Cr. Forms, 425.

Instructions.—In a prosecution for passing a forged instrument, the court should instruct that, in order for defendant to be convicted, he must have done so with intent to defraud. *Feeney v. State*, 124 S. W. 944.

In a prosecution for passing a forged instrument, where the count in the indictment upon which the conviction was predicated alleged that the party whose act the instrument on its face purported to be was a fictitious person, the jury should have been instructed on this averment. *Feeney v. State*, 124 S. W. 944.

In a prosecution for forging and passing a forged instrument affecting title to land, the case must be submitted under Pen. Code 1911, arts. 947, 949, defining that particular offense, and not the general statute. *Dillard v. State* (Cr. App.) 177 S. W. 99.

Art. 950. [553] Non-residents may commit, venue.—Persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this chapter, which do not in their commission necessarily require a personal presence in this state—the object of this chapter being to reach and punish all persons offending against its provisions, whether within or without the state. An indictment, under this chapter, may be presented by the grand jury of Travis county, in this state, or in the county where the offense was committed, or in the county where the land lies about which the offenses named in this chapter were committed. [Id.]

See notes under art. 947.

Constitutionality.—The preceding articles, and all the other provisions of this chapter are constitutional. *Ham v. State*, 4 App. 645; *Francis v. State*, 7 App. 501; *Johnson v. State*, 9 App. 249; *Hanks v. State*, 13 App. 289.

Jurisdiction and venue.—See art. 952, post, and C. C. P. art. 235.

Persons out of the state may commit the offense defined, and be indicted therefor, either in the county of Travis, the county in which the offense was committed, or the county in which the land to be affected is situate. *Ham v. State*, 4 App. 645; *Francis v. State*, 7 App. 501; *Rogers v. State*, 11 App. 608; *Hanks v. State*, 13 App. 289; *Grooms v. State*, 40 App. 319, 50 S. W. 370; *Johnson v. State*, 9 App. 249.

And the statutes in force prior to the act of 1876, conferred such jurisdiction upon the courts of this state. *Ex parte Rogers*, 10 App. 655, 38 Am. Rep. 654; *Rogers v. State*, 11 App. 608; *Hanks v. State*, 13 App. 289.

Proof showing that a conspiracy to fabricate land titles was entered into in this state, and that one or more of the overt acts were perpetrated in this state, the

courts of this state had jurisdiction independent of the act of 1876—this article. *Ex parte Rogers*, 10 App. 655, 38 Am. Rep. 654.

As Travis county has original jurisdiction under this article, it is competent, by agreement of parties, to transfer cases filed in another jurisdictional county to Travis. *Grooms v. State*, 40 App. 319, 50 S. W. 370.

Indictment.—Willson's Cr. Forms, 422.

Art. 951. [554] Proof and allegations necessary in indictments; proof of intent to defraud the United States, etc.—Upon indictment under this chapter, to warrant a conviction, it shall only be necessary to prove that the person charged took any one step, or did any one act or thing in the commission of the offense, if from such step, act or thing any of the intentions hereinbefore mentioned, or any other fraudulent intention, may be reasonably inferred; nor shall it be any defense to a prosecution under this chapter that the matter, act, deed, instrument or thing was in law, either as to substance or form, void, or that the same was not in fact used for the purpose for which it was made or designed; and it shall only be necessary in an indictment under this chapter to state with reasonable certainty the act constituting the offense, and charge, in connection therewith, in general terms, the intention to defraud, without naming the person or persons it was intended to defraud; and, on trial of such indictment, it shall be sufficient and shall not be deemed a variance if there appears to be an intent to defraud the United States, or any state, territory, county, city, town or village, or any body corporate, or any public officer in his official capacity, or any co-partnership or member thereof, or any particular person. [Id.]

See notes under arts. 947, 950.

Indictment.—Willson's Cr. Forms, 422.

Art. 952. [555] Venue.—Indictments under this chapter may be presented and the offenses prosecuted in any of the counties prescribed in title 4, chapter 2, of the Code of Criminal Procedure. [Id.]

Indictment.—Willson's Cr. Forms, 422.

Art. 953. [556] Rules in forgery applicable.—The rules prescribed in chapter 1 of this title, relative to the offense of forgery, so far as the same are applicable, shall apply to the various offenses enumerated in this chapter. [Id.]

CHAPTER THREE

OF COUNTERFEITING AND DIMINISHING VALUE OF CURRENT COIN

Art.	Art.
954. "Counterfeiting" defined.	959. Making dies, etc., and having them in possession.
955. "Altering" also counterfeiting.	960. Passing coin of diminished value.
956. Resemblance need not be perfect.	961. "Gold and silver coin" defined.
957. Punishment.	962. What sufficient to constitute passing.
958. Passing counterfeit coin.	

Article 954. [557] "Counterfeiting" defined.—He is guilty of counterfeiting who makes, in the semblance of true gold or silver coin, any coin of whatever denomination, having in its composition a less proportion of the precious metal of which the true coin intended to be imitated is composed than is contained in such true coin, with intent that the same should be passed in this state or elsewhere.

Jurisdiction.—This and the following articles make the counterfeiting of the gold or silver coins of the United States an offense against this state, and confers jurisdiction of such offense upon the courts of this state. *Martin v. State*, 18 App. 224.

Congress has expressly conferred and recognized the jurisdiction of state courts over counterfeiting. *Stroube v. State*, 49 App. 581, 51 S. W. 357.

Offense.—One who passes a copper cent so changed by some chemical way as to make it appear to be a ten-cent piece and passes it as such may be convicted of passing counterfeited coin. *Glass v. State*, 45 App. 605, 73 S. W. 1068, 108 Am. St. Rep. 980.

Venue.—See C. C. P. art. 236.

Indictment.—Willson's Cr. Forms, 426.

Instructions.—See *Stroube v. State*, 40 App. 581, 51 S. W. 357.

Art. 955. [558] "Altering" also counterfeiting.—He is also guilty of counterfeiting who, with like intent, alters any coin of lower value so as to make it resemble coin of higher value.

Indictment.—Willson's Cr. Forms, 427.

Art. 956. [559] Resemblance need not be perfect.—The resemblance between the true and the false coin need not be perfect to constitute the offense of counterfeiting.

See notes to article 954.

Art. 957. [560] Punishment.—Any person who shall counterfeit any gold or silver coin shall be punished by imprisonment in the penitentiary not less than five nor more than ten years.

Art. 958. [561] Passing counterfeit coin.—If any person, with intent to defraud, shall pass, or offer to pass, as true, or bring into this state, or have in his possession, with intent to pass as true, any counterfeit coin, knowing the same to be counterfeit, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years.

See notes under art. 954.

Indictment.—Willson's Cr. Forms, 428.

Art. 959. [562] Making dies, etc., and having them in possession.—If any person, with the intention of committing the offense of counterfeiting or of aiding therein, shall make or repair, or shall have in his possession any die, mould or other instrument whatever, designed or adapted, or usually employed for making coin, or shall prepare, or have in his possession, any base metal prepared for coinage, with intent that the same may be used for the purpose of counterfeiting, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years.

Indictment.—Willson's Cr. Forms, 429.

Art. 960. [563] Passing coin of diminished value.—If any person shall, with intent to profit thereby, diminish the weight of any gold or silver coin, and shall afterward pass it for the value it would have had before it was so diminished, or send it to any place, whether in the state or out of it, with the intent that the same may be passed, he shall be punished by imprisonment in the penitentiary not less than two nor more than five year. [Act Feb. 12, 1858, p. 169.]

Indictment.—Willson's Cr. Forms, 430.

Art. 961. [564] "Gold and silver coin" defined.—By the gold or silver coin mentioned in this chapter is meant any piece of gold or silver of which one of these metals is the principal component part, and which passes as money in the United States, either by law or usage, whether the same be of the coinage of the United States or of any foreign country.

Indictment.—Willson's Cr. Forms, 426.

Art. 962. [565] What sufficient to constitute passing.—It is sufficient to constitute the offense of passing, or attempting to pass, under the provisions of this chapter, if the counterfeit coin be delivered or offered to another, with the intention of defrauding, or enabling such other person to defraud, although such counterfeit coin be not delivered or offered at the full value which it would bear if genuine.

CHAPTER FOUR

OF OFFENSES WHICH AFFECT FOREIGN COMMERCE

Art. 963. Shipping articles without inspection.	Art. 966. Same subject.
964. Altering marks, etc.	967. Fraudulent insurance.
965. False packing.	968. Harboring deserting seamen.

Article 963. [566] Shipping articles without inspection.—If any person shall export from this state, or ship for the purpose of exportation to any one of the United States or to any foreign port, any article of commerce which, by any law of the state, may be required to be inspected by a public inspector, without having caused such inspection to be made according to law, he shall be fined not exceeding one hundred dollars.

Indictment.—Willson's Cr. Forms, 431.

Art. 964. [567] Altering marks, etc.—If any person shall counterfeit or alter the mark, brand or stamp directed by any law of the state to be put on any article of commerce, or on the box, cask or package containing the same, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year.

Art. 965. [568] False packing.—If any person shall, with intent to defraud, put into any hogshead, barrel, cask or keg, or into any bale, box or package containing merchandise or other commodity usually sold by weight, any article whatever of less value than the merchandise with which such bale, box, package, hogshead, barrel, cask or keg is apparently filled, or, with intent to defraud, shall sell or barter, give in payment, or expose to sale, or ship for exportation, any such hogshead, barrel, cask, keg, box, bale or package of merchandise, or other commodity with any such article of inferior value concealed therein, he shall be punished by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars.

Offense.—Where the prosecution was for falsely packing a bale of cotton, it was held that it matters not at what time the sand or dirt was put into the cotton, provided it was done by the defendant, and for the purpose, and with the intent to defraud, and in a manner calculated to accomplish such purpose at the time. It is not necessary to constitute the offense of false packing that the defendant should have been present at the time of packing, and at that very time should have put the sand and dirt into the cotton. If the sand and dirt were mingled by him with the cotton, while the said cotton was in the seed, and by his act it went into the bale of cotton when the cotton was packed, the offense was as complete as if he had put the sand and dirt into the cotton while it was being packed. *Jones v. State*, 22 App. 680, 3 S. W. 478.

The gravamen of this offense is packing a bale with an article of less value than the pretended article. Packing a bale of cotton with an "inferior quality" of cotton, is no offense. *Lidtkje v. State*, 27 App. 500, 11 S. W. 629.

Sale and intent to defraud, coupled with a guilty knowledge that the bale of cotton was falsely packed, or knowledge of such facts as would put him on inquiry, is of the essence of this offense, and unless shown conviction cannot stand. *Anderson v. State*, 30 App. 699, 18 S. W. 866.

Indictment.—Willson's Cr. Forms, 432, 433.

It is not essential to an indictment under this article that the name of the person intended to be defrauded shall be alleged. *Holden v. State*, 18 App. 91.

The specific intent to defraud must be alleged. *Holden v. State*, 18 App. 91.

Instructions.—This article defines two separate and distinct offenses. When the indictment charges and the evidence suggests but one it is error to submit both to the jury. *Jones v. State*, 22 App. 680, 3 S. W. 478.

Art. 966. [569] Same subject.—If any person shall, with intent to deceive and defraud, conceal within any hogshead, cask, barrel, box, bale, keg or package, containing merchandise or other commodity, any merchandise or commodity of a quality inferior to that which such hogshead, cask, barrel, bale, keg or package is

filled, or any substance of less value, he shall be fined not exceeding five hundred dollars. [Act Feb. 12, 1858, p. 170.]

Offense.—The offense defined by article 965 is the false packing with merchandise of any article whatever of less value than the merchandise, the intent being to defraud. That defined by article 966 may be committed in like manner, but also by packing with merchandise articles of like character but of inferior value. And in any event the false packing must have been willful and with intent to defraud. *Lidtke v. State*, 27 App. 500, 11 S. W. 629.

Indictment or complaint.—Willson's Cr. Forms, 434.

A complaint which charged defendant with concealing inferior cotton inside a bale of superior cotton, but did not charge that the cotton so concealed was of less value, was not defective; for there are two ways of violating the statute, one by concealing merchandise of inferior quality, and the other by substitutions of less value, and the pleader, having selected the first, is not bound to charge the other violation. *Jordan v. State*, 60 App. 178, 131 S. W. 539.

Instructions.—While it was undesirable that the charge should contain a full statement of the statute, yet as the court, when applying the law to the facts, charged the jury directly and pertinently to the facts in the case on trial, the error was harmless, and will not cause reversal. *Jordan v. State*, 60 App. 178, 131 S. W. 539.

Art. 967. [570] Fraudulent insurance.—If any person shall cause insurance to be made in this state upon any merchandise or other commodity represented to be already shipped, or about to be shipped, at any place, whether within this state or out of it, and shall, with the intent to defraud the insurer, ship articles of value less than one-half the represented value of those insured, or of a different kind from those insured, he shall be punished by fine in a sum not exceeding the amount for which such merchandise or commodity may be insured.

Indictment.—Willson's Cr. Forms, 435.

Art. 968. [571] Harboring deserting seamen.—The municipal authorities of incorporated towns and cities, being shipping ports, may make such regulations as are deemed proper for the punishment of keepers of boarding houses and others who knowingly lodge, entertain or conceal seamen who have deserted from any merchant vessel in their respective ports; but they shall not affix a higher penalty for such offense than a fine of fifty dollars, or imprisonment in jail for thirty days.

CHAPTER FIVE

PUBLIC WAREHOUSEMEN AND WAREHOUSES

Art.	Art.
969. "Public warehousemen" and "warehouses" defined.	less otherwise stamped; warehouseman not to issue receipt for his own property proviso.
970. Owner or operator shall obtain certificate and file bond.	976. Penalty for violation of law.
971. Warehouse receipts for property stored; form; duplicates.	976a. Civil liability in addition to criminal.
971a. Supervision of warehouses by Commissioner of Insurance and Banking; examinations.	977. Not applicable to private warehousemen or private warehouse receipts.
971b. Form for cotton warehouse receipts.	977a. Cotton and grain receipts may be issued to farmers under supervision of Board of Supervisors of warehouses; blanks for such receipts.
971c. Liens on cotton to be stated in receipt; non-negotiable receipts.	977b. Same; owners may issue promissory notes on deposit of warehouse receipts in state banks; negotiability of notes.
971d. Exchange of non-negotiable for negotiable receipt.	977c. Same; penalty for unlawful issuance of receipts or notes.
971e. False statement or concealment concerning liens.	977d. Same; contract with state banks as to compensation.
972. Unlawful to issue receipt unless goods are deposited.	977e. Same; landlord's lien not to be impaired; penalty.
973. When and to whom property stored shall be delivered; liability; cancellation of receipt.	
974. Shall not limit liability.	
975. Warehouse receipt negotiable un-	

Article 969. "Public warehousemen" and "warehouses" defined.—All persons, firms, companies or corporations who shall receive cotton, tobacco, wheat, rye, oats, rice, oil, or any kind of

produce, wares, merchandise, or any description or personal property in store for hire, under the provisions of this Act, shall be deemed and taken to be public warehousemen; and all warehouses which shall be owned or controlled, conducted and managed in accordance with the provisions of this Act, shall be deemed and taken to be public warehouses, provided that a public warehouse for the storage of cotton may, within the meaning of this Act, include a lot or parcel of land inclosed with a lawful fence, the gates or entrances to which shall be kept securely locked at night. [Act 1901, p. 251; Act 1913, 1st S. S., p. 93, ch. 37, § 2, amending Art. 969, revised Pen. Code.]

Art. 970. Owner or operator shall obtain certificate and file bond.—The owner, proprietor, lessee or manager of any public warehouse, whether an individual, firm or corporation, before transacting any business in such public warehouse shall procure from the county clerk of the county in which the warehouse or warehouses are situated, a certificate that he is transacting business as a public warehouseman under the laws of the State of Texas, which certificate shall be issued by said clerk upon a written application, setting forth the location and name of such warehouse or warehouses, and the name of each person, individual, or a member of the firm, interested as owner or principal in the management of the same, or, if the warehouse is owned or managed by a corporation, the names of the president, secretary and treasurer of such corporation shall be stated, which application shall be received and filed by such clerk and preserved in his office, and the said certificate shall give authority to carry on and conduct the business of a public warehouse within the meaning of this Act, and shall be revocable only by the district court of the county in which the warehouse or warehouses are situated, upon a proceeding before the court, on complaint by written petition of any person, setting forth the particular violation of the law, and upon process, procedure and proof, as in other civil cases. The person receiving a certificate, as herein provided for, shall file with the county clerk granting same, a bond payable to the State of Texas, with good and sufficient surety, to be approved by said clerk, in the penal sum of five thousand dollars, conditioned for the faithful performance of his duty as a public warehouseman,—which said bond shall be filed and preserved in the office of such clerk. [Act 1901, p. 251; Act 1913, 1st S. S., p. 93, ch. 37, § 3, amending art. 970, revised Pen. Code.]

Indictment.—Willson's Cr. Forms, 461.

Art. 971. Warehouse receipts for property stored; form; duplicates.—On application of the owner or depositor of the property stored in a public warehouse, the warehouseman shall issue, over his own signature, or that of his duly authorized agent, a public warehouse receipt therefor, to the order of the person entitled thereto; which receipt shall purport to be issued by a public warehouse, shall bear date of the day of its issue, and shall state upon its face the name of the warehouse and its location, the description, quantity, number and marks of the property stored, where such receipt is for cotton it shall state the class and weight, and the date on which it was originally received in warehouse, and that it is deliverable upon the return of the receipt, properly indorsed by the person to whose order it was issued, and on payment of all charges for storage, and insurance, which charges shall be stated on the face of the receipt. All such receipts shall be numbered consecutively, in the order of their issue; and when such receipt

is for cotton, the receipt shall state whether the cotton therein described is exposed to the weather or is under shelter; and a correct record of such receipts shall be kept in a well-bound book, which shall be, at all reasonable hours, open to examination by any interested person; and no two receipts bearing the same number shall be issued from the same warehouse during the same year, nor shall any duplicate receipts be issued, except in the case of a lost or destroyed receipt, in which case the new receipt shall bear the same date and number as the original, and shall be plainly marked on its face, "duplicate" and provided, that no such duplicate receipt shall be issued by the public warehouseman until adequate security acceptable to the warehouseman be deposited with or to the order of said warehouseman, to protect the party or parties who may finally hold the original receipt in good faith and for a valuable consideration. [Act 1901, p. 251; Act 1913, 1st S. S., p. 94, ch. 37, § 4, amending Art. 971, revised Pen. Code.]

Art. 971a. Supervision of warehouses by Commissioner of Insurance and Banking; examinations.—The supervision of public warehouses shall be under the control of the Commissioner of Insurance and Banking, whose duty it shall be to prescribe all forms of receipts, certificates, and records of whatsoever description necessary in the conduct of the business of public warehouses; and in providing forms for handling those products which are of general commercial character, the said commissioner shall prescribe forms answering to all usual requirements of negotiable receipts of certificates. The Commissioner of Insurance and Banking is hereby empowered and directed to make not less than one examination each year of all such public warehouses, the necessary expense of such examination or examinations to be paid by the warehouse. [Act 1913, 1st S. S., p. 95, ch. 37, § 5.]

Art. 971b. Form for cotton warehouse receipts.—The Commissioner of Insurance and Banking shall provide a uniform public warehouse receipt for cotton which shall be used by all public warehouses coming under the provisions of this Act, which said receipt shall conform in all respects to the provisions herein set out. In addition to the other provisions such receipt shall have a blank form on the back thereof, to be filled in and signed by the owner of the cotton showing whether or not such cotton is free from encumbrance or liens of any kind. [Id., § 6.]

Art. 971c. Liens on cotton to be stated in receipt; non-negotiable receipts.—If there is any encumbrance or liens of any kind on said cotton at the time of its storage the nature and amount of same shall be clearly set out and it is hereby made the duty of the public warehouseman or his authorized agent issuing the receipt, to have said blank filled in and signed by the owner of the cotton before issuing a negotiable receipt against same; provided, however, such statement need not be made if a non-negotiable receipt is desired, but in such cases the public warehouseman issuing said receipt shall write or stamp across the face thereof the words "not negotiable." [Id., § 7.]

Art. 971d. Exchange of non-negotiable for negotiable receipt.—If a person holding a non-negotiable receipt for cotton as is herein provided for, shall desire to obtain a negotiable receipt in lieu thereof, he shall return said non-negotiable receipt to the public warehouse issuing same and thereupon shall comply in every respect with the provisions of this chapter relating to negotiable re-

ceipts, and upon compliance therewith a negotiable receipt shall be issued to him in lieu of said non-negotiable receipt, and said non-negotiable receipt thereupon shall be cancelled, and the word "cancelled" plainly marked in ink across the face thereof. [Id., § 8.]

Art. 971e. False statement or concealment concerning liens.—Any person making a false statement concerning liens, mortgages, encumbrances or indebtedness or whatsoever nature against the cotton, or who shall in any particular conceal the existence of liens, mortgages, encumbrances or indebtedness of any kind that may exist against such cotton, or who shall fail to truthfully make the statements provided for by this Act, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine of one thousand dollars, or imprisonment in the penitentiary for one year, or by both such fine and imprisonment. [Id., § 9.]

Art. 972. Unlawful to issue receipt unless goods are deposited.—No public warehouse receipt shall be issued except upon the actual previous delivery of the goods in the public warehouse or on the premises, and under the control of the public warehouseman by whom it purports to be issued; and the name of the warehouse shall invariably be specified in such receipt. [Act 1901, p. 252; Act 1913, 1st S. S., p. 95, ch. 37, § 10, amending Art. 972, revised Pen. Code.]

Art. 973. When and to whom property stored shall be delivered; liability; cancellation of receipt.—On the presentation and return to the warehouseman of any public warehouse receipt issued by him and properly indorsed, and the tender of all proper warehouse charges upon the property represented by it, such property shall be delivered immediately to the holder of such receipt; but no public warehouseman who shall issue a receipt for goods shall, under any circumstances or upon any order or guarantee whatsoever, deliver the property for which receipts have been issued, until the said receipt shall have been surrendered and cancelled, except in case of lost receipts, as provided for in Section 4 [Art. 971]; and, in default of the strict compliance with the provisions of this article, he shall be held liable to the legal holder of the receipt for the full value of the property therein described, as it appeared on the day of the default, and shall, furthermore, be liable to the special penalty herein provided. Upon delivery of the goods from the warehouse, upon any receipt, such receipt shall be plainly marked in ink across its face with the words "cancelled," with the name of the person cancelling the same, and shall thereafter be void, and shall not again be put in circulation. [Act 1901, p. 252; Act 1913, 1st S. S., p. 96, ch. 37, § 11, amending Art. 973, revised Pen. Code.]

Art. 974. Shall not limit liability.—No public warehouseman shall insert in the public warehouse receipt issued by him any language limiting or modifying his liabilities or responsibilities as imposed by the laws of this State, excepting, "not accountable for leakage or depreciation," or words of like import and meaning. [Act 1901, p. 252; Act 1913, 1st S. S., p. 96, ch. 37, § 12, amending Art. 974, revised Pen. Code.]

Art. 975. Warehouse receipt negotiable unless otherwise stamped; warehouseman not to issue receipt for his own property; proviso.—The receipt issued against property stored in public warehouses, as herein provided for shall be negotiable and transferable by endorsement in blank or by special endorsement, and delivery in the same manner and to the same extent as bills of exchange and prom-

issory notes now are, without other formality; and the transferee or holder of such public warehouse receipt shall be considered and held as the actual and exclusive owner, to all intents and purposes, of the property therein described, subject only to the lien and privilege of the public warehouseman for storage and other warehouse charges; provided, however, that all such public warehouse receipts as shall have the words "not negotiable" plainly written or stamped on the face thereof, shall be exempt from the provisions of this article; and provided, further, that no public warehouseman shall issue warehouse receipts against his own property in his own warehouse; but, upon sale of such property in good faith may issue to the purchaser his public warehouse receipt in form and manner as herein provided, which issue and delivery of the receipt shall be deemed to complete the sale, and shall constitute the purchaser full owner, as aforesaid, of the property therein described. Nothing in this last clause shall be construed to exempt the issuer of said receipt for his own goods in his own public warehouse, from complying with and being subject in all respects, to all other articles of this chapter. [Act 1901, p. 252; Act 1913, 1st S. S., p. 96, ch. 37, § 13, amending art. 975 revised Pen. Code.]

Art. 976. Penalty for violation of law.—Any public warehouseman who violates any of the provisions of this law shall be deemed guilty of criminal offense, and, upon indictment and conviction thereof, shall be punished by fine in any sum not exceeding five thousand dollars, or imprisonment in the State penitentiary not exceeding two years, or by both such fine and imprisonment. [Act 1901, p. 252; Act 1913, 1st S. S., p. 96, ch. 37, § 14, amending art. 976, revised Pen. Code.]

Art. 976a. Civil liability in addition to criminal.—Any, every and all persons, aggrieved by the violations aforesaid, shall have the right to maintain an action against the person or persons, corporation or corporations, so violating any of the provisions of this law, for the recovery of damages which he or they may have sustained by reason of such violation aforesaid, before any court of competent jurisdiction, whether such person or persons so violating shall have been convicted of criminal offense under this law or not. [Act 1901, p. 252; Act 1913, 1st S. S., p. 96, ch. 37, § 15, amending art. 976, revised Pen. Code.]

Art. 977. Not applicable to private warehousemen or private warehouse receipts.—Nothing in this law shall be construed to apply to private warehouses or to the issue of receipts by their owners or managers under existing laws, or to prohibit public warehousemen from issuing such receipts as are now issued by private warehousemen under existing laws; provided, that such private warehouse receipts issued by public warehousemen shall never be written on a form or blank indicating that it is issued from a public warehouse, but shall, on the contrary, bear on its face, in large characters, the words, "not a public warehouse receipt." [Act 1901, p. 252; Act 1913, 1st S. S., p. 97, ch. 37, § 16, amending art. 977, revised Pen. Code.]

Art. 977a. Cotton and grain receipts may be issued to farmers under supervision of Board of Supervisors of Warehouses; blanks for such receipts.—That each and every person, partnership or joint stock association hereafter engaged in agricultural farming shall have the right to deposit his, her or their cotton or grain by weight or in bushels of the standard weight of the United States in any bonded warehouse or elevators under the supervision and control

of the Board of Supervisors of Warehouses under the laws of the State of Texas, which said cotton and grain, upon the deposit thereof in said bonded warehouse, shall be properly classed or classified by the keeper of said bonded warehouse and a certificate containing the weight, numbers of bales or packages of grain, and the classification thereof shall be written in said certificates, which said certificates shall be printed or lithographed by and under the supervision and direction of the Commissioner of Insurance and Banking of the State of Texas, and blanks thereof furnished to the keepers of said bonded warehouse to be furnished by him under his official signature to the depositors of cotton and grain of any kind in said bonded warehouse. [Act 1915, p. 226, ch. 145, § 1.]

Art. 977b. Same; owners may issue promissory notes on deposit of warehouse receipts in state banks; negotiability of notes.—And be it further enacted, that blank promissory notes of the face value of one, two, three, five, ten and twenty dollars each, made payable to bearer, shall be prepared in due form, properly lithographed, and be furnished by the Commissioner of Insurance and Banking to banks chartered under the laws of the State of Texas for the use of the depositors of said cotton and grain aforesaid, whereby the said depositors shall have the right to take their said certificates of their said cotton or grain to the said State bank or banks chartered by the State of Texas and deposit said certificates with said bank or banks, and they shall furnish said depositor with blank promissory notes of the face value aforesaid, or so much thereof as shall be equal to two-thirds of the value of each bale of cotton according to its classification, or to each parcel of grain, according to its classification in said certificates, which said promissory notes, when signed up by the depositors of said certificates, shall become negotiable paper as other promissory notes, and shall be a lien upon said cotton to the extent of their face value, for the purpose of aiding and securing their redemption by said bank as hereinafter provided. [Id., § 2.]

Art. 977c. Same; penalty for unlawful issuance of receipts or notes.—And be it further enacted, that any person other than the keeper and manager of the bonded warehouse herein provided for, and any person other than the owner of said certificates, who shall sign said certificates or any of said promissory notes herein provided for and put the same in circulation, shall be guilty of a felony, and shall be punished on conviction for said offense for a term of years not less than two nor more than ten years in the penitentiary of the State of Texas. [Id., § 7.]

Art. 977d. Same; contract with state banks as to compensation.—And be it further enacted, that the owners of said cotton and grain certificates shall have the right under this Act by private contract to arrange and have any State bank or banks aiding and assisting in the execution and putting in circulation said promissory notes as commercial paper and keeping a record of said certificates deposited with said bank, and the said notes issued aforesaid, such compensation as may be agreed to by the depositors of said certificates and the makers of said notes. [Id., § 8.]

Art. 977e. Same; landlord's lien not to be impaired; penalty.—And be it further enacted, that no person holding such cotton or grain certificates issued by the keepers of the bonded warehouse under this Act shall place said certificate or offer to place said certificate in any State bank or banks in this State for the purpose of obtaining the benefits of this Act in any instance where there is a

prior landlord's lien or mortgage, and any person violating this provision of this Act shall be deemed guilty of swindling, and shall be punished as provided in our penal code defining swindling. [Id., § 9.]

CHAPTER SIX

BUREAU OF COTTON STATISTICS

<p>Art. 978. "Public ginner" defined, certificate required, form of.</p> <p>979. Form of affidavit to be made.</p> <p>980. County clerk to issue and number each certificate.</p> <p>981. Duty of commissioner of agriculture.</p> <p>982. Public ginner to forward report to commissioner of agriculture.</p> <p>983. Shall open same and give out to public, when.</p> <p>984. Giving out information before time specified, penalty.</p>	<p>Art. 985. County clerk or public ginner violating any provisions hereof, penalty.</p> <p>986. Person, owner, etc., of public gin shall keep record.</p> <p>987. Each bale of cotton shall be marked and same put upon record.</p> <p>988. Buyers of cotton shall not alter or deface marks.</p> <p>989. Person, firm, corporation, etc., failing, refusing, etc., to comply with any provision hereof, penalty.</p>
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Article 978. "Public ginner" defined, certificate required, form of.—All custom ginner of seed cotton in this state are hereby declared to be public ginner. Any person or persons, firm or corporation in this state, before engaging in the business of public ginner, shall obtain from the county clerk of the county in which gin is located a certificate after the following form:

Number.....

This is to certify that.....of.....county, Texas, has this day filed affidavit required by law, of all public ginner in this state.

(Seal.)

.....
County clerk of.....county, Texas.

[Act 1907, p. 313.]

Art. 979. Form of affidavit to be made.—The form of affidavit to be made to and filed with the county clerk shall be as follows:

I,.....of.....county, Texas, do solemnly swear that I will, so long as I may operate a public gin, make and forward a true and correct report of the number of bales of cotton ginned by me to the commissioner of agriculture at Austin, as required by law. [Id., p. 313.]

Art. 980. County clerk to issue and number each certificate.—The county clerk shall number each certificate issued by him consecutively, beginning at number one; and shall immediately forward to the commissioner of agriculture the name and postoffice address to whom certificate was issued. The clerk shall issue certificates to all ginner, and shall take the affidavits as herein required without cost to ginner. [Id., p. 313.]

Art. 981. Duty of commissioner of agriculture.—The commissioner of agriculture, upon receipt of information of the issuance of a ginner's certificate from any county clerk in this state, shall immediately forward all necessary blanks to the public ginner for making official cotton report, which shall consist of the following:

Envelopes addressed to the commissioner of agriculture, Austin, Texas; and there shall be printed upon the upper left hand corner the words, "official cotton report of.....county," also blanks, to wit:

Official Cotton Report

Certificate No.....

....., 190..

Commissioner of Agriculture,
Austin, Texas.

Sir: This is to certify that I have ginned.....bales of cotton from the day of 190....., to the day of 190.....

(Signed)

[Id., p. 313.]

Art. 982. Public ginner to forward report to commissioner of agriculture.—All public gidders shall make and forward reports to the commissioner of agriculture, on the blanks furnished them, by the third of each month, stating the exact number of bales ginned by them the preceding calendar month. This report must be made by all gidders, unless they have ceased to operate, the notice of which must be forwarded to the commissioner of agriculture. These reports must be securely sealed by gidders. [Id., p. 314.]

Indictment.—Willson's Cr. Forms, 455.

Art. 983. Shall open same and give out information, when.—The commissioner of agriculture shall open, on the eighth of each month, and tabulate the official cotton reports of the various counties, in the presence of three creditable witnesses, who shall be appointed by the governor. The complete report, showing total number of bales of cotton ginned, shall be given out to the public, including the press, at eleven o'clock a. m., on the ninth of each month. [Id., p. 314.]

Art. 984. Giving out information before time specified, penalty.—If the commissioner of agriculture, his assistants, or any one connected with the opening and tabulating of these official cotton reports, or any other person, shall give out any information, as to the number of bales of cotton ginned, before the time specified by this act, shall, upon conviction, be confined in the penitentiary not less than one year nor more than three years. [Id., p. 314.]

Art. 985. County clerk or public ginner violating any provisions hereof, penalty.—All county clerks and public gidders who violate any of the provisions of this act are guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty-five nor more than two hundred dollars. [Id., p. 314.]

Art. 986. Person, owner, etc., of public gin shall keep record.—Hereafter, every person, firm, corporation or association of persons owning, controlling or operating a public cotton gin in this state, shall keep, or cause to be kept, a public record of all cotton brought to them for ginning and packing. Such record shall correctly show the amount of cotton received, date of its receipt, by whom brought to the gin and the name or names of the party or parties claiming to own the same. [Act 1901, p. 263.]

Indictment.—Willson's Cr. Forms, 456.

Art. 987. Each bale of cotton shall be marked and same put upon record.—Said ginner, after ginning and packing said cotton, shall place, or cause to be placed, on each bale of cotton, the initials of the party or parties claiming to own said cotton, under which he shall place some private ginner's mark, all of which shall be put upon record in the book before mentioned. [Id., p. 263.]

Art. 988. Buyers of cotton shall not alter or deface marks.—Hereafter, every person, firm, corporation or association of persons

who shall buy cotton in this state, shall not change, alter or deface the marks and brands on such cotton. [Id., p. 263.]

Indictment.—Willson's Cr. Forms, 459.

Art. 989. Person, firm, corporation, etc., failing, refusing, etc., to comply with any provisions hereof, penalty.—Any person, firm, corporation or association of persons failing, neglecting or refusing to comply with any of the provisions of this act shall be punished by a fine in any sum not more than twenty-five dollars. [Id., p. 263.]

CHAPTER SEVEN

FALSE WEIGHTS AND MEASURES

Art.
990. Penalty for using.
991. Definition.
992. Destruction of, on conviction.

Art.
993. Applicable to electric current, water or gas, when; penalty for violation.

Article 990. [572] Penalty for using.—If any person shall use a false balance, weight or measure in weighing or measuring anything whatever, purchased or sold by himself, or bartered, shipped or delivered by him for sale, or bartered or pledged, or given in payment, knowing the same to be false, and with intent to defraud, he shall be punished by fine not exceeding three hundred dollars.

Indictment.—Willson's Cr. Forms, 436, 437.

Art. 991. [573] Definition.—A false weight or measure is such as is not in conformity with the standard which is or may be established by a law of this state.

Art. 992. [574] Destruction of, on conviction.—When a warrant of arrest is issued in case of offenses under this chapter, the magistrate shall direct the false balances, weights or measures to be seized and kept by the sheriff until the trial of defendant; and, in case of conviction, the same shall be destroyed.

Art. 993. Applicable to electric current, water or gas, when; penalty for violation.—Whoever, intentionally, by any means or device, prevents electric current, water or gas from passing through any meter or meters belonging to a person, corporation, or company, engaged in the manufacture or sale of electricity, water or gas, for lighting, power or other purposes, furnished such person to register the current of electricity, water or gas, passing through meters, or intentionally prevents a meter from duly registering the quantity of electricity, water or gas supplied, or, in any way, interferes with its proper action or just registration, or without the consent of such person, corporation or company, intentionally diverts any electric current from any wire, or water or gas from any pipe or pipes of such person, corporation or company, or otherwise intentionally uses, or causes to be used, without the consent of such person, corporation or company, any electricity or gas manufactured, or water produced or distributed, by such person, corporation or company, or any person, corporation or company who retains possession of, or refuses to deliver, any meter or meters, lamp or lamps, or other appliances which may be, or may have been, loaned them by any person, corporation or company for the purpose of furnishing electricity, water or gas, through the same, with the intent to defraud such person, corporation or company, or, if any person, corporation or company engaged in the manufacture or sale of electricity, water, or gas for lighting, power or other purposes, shall knowingly

misread any meter or overcharge any customer for such light, water or gas furnished, shall, for every such offense, be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars. Every person, firm or corporation engaged in the business referred to in this act shall keep displayed at all times, in a conspicuous place in their office, a printed copy of this law. [Act 1905, p. 205.]

Indictment.—Willson's Cr. Forms, 462, 463.

CHAPTER SEVEN A

WEIGHT OF COTTON BALES

Art. 993a. Cotton ginners to stamp weights upon bales.	Art. 993d. Unlawful to make greater deduction for tare than shown by marks.
993b. Cotton compresses to see that marks are not defaced.	993e. Same; penalty.
993c. Separate offenses.	993f. Same; separate offenses.

Article 993a. Cotton ginners to stamp weights upon bales.—That the owners, lessees, operators or receivers of all cotton gins, in this State, shall stamp or write, upon each and every bale of cotton ginned by them, in plain figures, the weight of the bagging and ties in which the cotton is wrapped, said figures to be written or stamped with indelible ink, and shall be not less than four inches in height and three inches in width, and shall be preceded by the word, "tare," written or stamped upon the bale with indelible ink, the letters composing said word to be not less than four inches in height and three inches in width. Any person wilfully violating the provision of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than ten, nor more than one hundred dollars. [Act 1911, p. 47, ch. 34, § 1.]

Art. 993b. Cotton compressers to see that marks are not defaced.—That the owners, lessees, operators or receivers of all cotton compresses in this State, shall write or stamp upon each and every bale of cotton compressed by them, the word and figures placed upon such bale or bales of cotton by the ginner ginning the same, in compliance with Section 1 of this Act [art. 993a], in the same manner as provided for ginners in said Section 1, should such word and figures be defaced or hidden during the process of compression. Any person wilfully violating the provisions of this section, shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than ten (\$10.00) dollars, nor more than one hundred (\$100.00) dollars. [Id., § 2.]

Art. 993c. Separate offenses.—Each bale of cotton ginned and each bale of cotton compressed without having placed thereon the word and figures as provided in Sections 1 and 2, respectively, of this Act [arts. 993a, 993b], shall constitute a separate offense. [Id., § 3.]

Art. 993d. Unlawful to make greater deduction for tare than shown by marks.—It shall be unlawful for any person, firm, corporation, cotton exchange or board of trade, to make a greater deduction for tare, either from the gross weight of any bale of cotton or the price of same than is shown by the figures placed upon the bale in compliance with Section 1 of this Act [art. 993a]. [Id., § 4.]

Art. 993e. Same; penalty.—Any person, firm, corporation, cotton exchange, or board of trade, or any agent of any person, firm,

corporation, cotton exchange, or board of trade who violates the provisions of Section 4 of this Act [Art. 993d], shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine, of not less than ten nor more than one hundred dollars. [Id., § 5.]

Art. 993f. Same; separate offenses.—Each bale of cotton from which a greater deduction for tare is made, than is shown by the figures written or stamped upon same, shall constitute a separate offense. [Id., § 6.]

CHAPTER EIGHT

OF OFFENSES BY PUBLIC WEIGHERS

<p>Art. 994. Use of false balances. 995. Giving false certificate. 996. Other than public weigher shall not weigh, etc. 997. Factor, etc., shall not employ private weigher.</p>	<p>Art. 998. Person may weigh his own produce. 999. Weighing or offering to weigh for public without complying with this law, penalty.</p>
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Article 994. [575] Using false balances.—If any person is elected or appointed public weigher under the laws of this state, or, if any person whomsoever who is engaged in the business of weighing for the public, and who holds himself out to weigh for the public, shall fraudulently use any false balances, scales or instruments for weighing, or shall, in the exercise of his duty as such public weigher, or as such weigher for the public, fraudulently give the wrong weight of any article whatever weighed by him, he shall be punished by fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not to exceed one year. [Amended, Act 1901, p. 257.]

Indictment.—Willson's Cr. Forms, 438-440, 442, 445.

Art. 995. [576] Giving false certificate.—If any public weigher in this state or his deputy, or if any person whomsoever who is engaged in the business of weighing for the public, or who holds himself out to weigh for the public, shall wilfully or fraudulently certify to or sign any false weight of cotton, sugar, wool, hides, or other commodity, he shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars. [Act March 15, 1875, p. 164; amended, Act 1901, p. 257.]

Indictment.—Willson's Cr. Forms, 441, 443.

Art. 996. [577] Other than public weigher shall not weigh.—It shall not be lawful for any person other than a regularly appointed weigher, or his deputy, to weigh any cotton, wool, sugar, or hides required to be weighed, sold or offered for sale in any city having a public weigher duly qualified. Any person or persons so offending shall be deemed guilty of a misdemeanor, and, upon conviction before any court of competent jurisdiction, shall suffer a fine of five dollars for each and every bale of cotton, bale or sack of wool, hogshead or barrel of sugar, bale or loose hide, so weighed. [Act April 19, 1879, p. 116, § 7.]

See notes under art. 998, post.
See *Martin v. Johnson*, 11 Civ. App. 628, 33 S. W. 306.

Indictment.—Willson's Cr. Forms, 444.

Injunction.—The petition of a public weigher seeking to enjoin an unauthorized weigher need not allege that the weighing was not done at the request of the owner in order to entitle him to a preliminary injunction, the criminal statutes showing that it was the policy of the law to protect the public weigher, and the fees of his office and the last pronouncement of the Legislature having omitted that qualification. *Perry v. Carlisle* (Civ. App.) 151 S. W. 1155.

The public weigher of a municipality is entitled to enjoin an unauthorized

weigher who set up his establishment just outside the municipality, so as to weigh property bought and offered for sale therein. *Perry v. Carlisle* (Civ. App.) 151 S. W. 1155.

A public weigher elected in a justice precinct cannot enjoin a private weigher from carrying on his business. *Paschal v. Inman* (Sup.) 157 S. W. 1158.

Art. 997. [578] Factor, etc., shall not employ private weigher.—It shall not be lawful for any factor, commission merchant, or any other person or persons, to employ any one other than a regularly appointed and qualified public weigher, or his deputy, to weigh any cotton, wool, sugar or hides required to be weighed, sold or offered for sale in any city having a public weigher duly qualified; and any person or persons violating this provision shall be liable, at the suit of the public weigher of such city, or either of such public weighers, to damages in any sum not less than five dollars for each bale of cotton, bale or sack of wool, hogshead or barrel of sugar, or bale of hides, so unlawfully weighed, to be recovered in any court of such county having jurisdiction thereof; provided, any owner shipping any produce named in this article to any town or city having a public weigher may, by written instructions, authorize his factor, commission merchant or agent to have such produce weighed by private weighers, if he prefers so to do; and, in all such cases, the prohibitions and penalties embraced in this article and in the preceding article shall not apply. [Id., § 8.]

Art. 998. [579] Person may weigh his own produce.—Nothing in this law shall prevent any person, firm or corporation from weighing his own cotton, wool, sugar, hay, grain or pecans in person; providing that in places where there are no public weighers appointed or elected, that any person who shall weigh cotton, wool, sugar, grain, hay or pecans for compensation shall be required, before weighing such produce, to enter into a bond, with at least two good and sufficient sureties, in the sum of twenty-five hundred dollars, approved and payable as in the case of public weighers referred to in this chapter, and conditioned that he will faithfully perform the duties of his office, and turn over all property weighed by him on demand of the owner; provided, that this article shall not apply to merchant flouring mills. [Id., § 10; amended, Act 1905, p. 117.]

See *Watts v. State ex rel. Jowers*, 61 Tex. 184; *Johnson v. Martin*, 75 Tex. 33, 12 S. W. 321.

Weighing of produce by owner.—The act of April 12, 1883 (Acts Leg. 1883, p. 84) amending the act of 1879, permits private persons in cities having a public weigher to weigh cotton, when so requested by the owner thereof. *Ex parte Hunter*, 34 App. 114, 29 S. W. 482.

The owner of produce may procure any one to weigh it when he is present and acts for himself. *Martin v. Johnson*, 11 Civ. App. 628, 33 S. W. 306.

Art. 999. Weighing or offering to weigh for public without complying with this law, penalty.—Any person who shall weigh or offer to weigh any cotton, wool, sugar or hides for compensation for the public, without complying with all of the provisions of this law, shall be guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding two hundred dollars. [Act 1905, p. 117.]

Note.—Laws 1905, ch. 152, amending Laws 1901, ch. 112, making it a misdemeanor to issue merchandise checks to employes, was held unconstitutional in *Jordan v. State*, 51 App. 521, 103 S. W. 633, 11 L. R. A. (N. S.) 603, 14 Ann. Cas. 616, and was omitted from the revised penal code.

Private weighers.—A private person has the right, under the law, to keep scales for weighing in a city; to pursue the business of a private cotton weigher, and to solicit such business on private orders as he is allowed to receive. *Watts v. State ex rel. Jowers*, 61 Tex. 184.

Any person may weigh cotton, hides or wool, when requested to do so by the owner, notwithstanding there may be a public weigher in the city or town where the same is weighed. *Ex parte Hunter*, 34 App. 114, 29 S. W. 482.

CHAPTER EIGHT A
COMMERCIAL FERTILIZERS

Art.	Art.
999a. Commercial fertilizers before sale to have brand or label; what must be shown, etc.	999cc. Monthly statements by carriers; examination of carriers' books.
999aa. Statement to be filed with state chemist, copy of brand or stamp to be filed, etc.; certificate of registration; what brand or stamp may be registered; priority in registration, etc.; chemist to publish annual list.	999ccc. Statements to be mailed to state chemist after sales, etc., annual statements of sales to be submitted.
999aaa. Words "highgrade" and "standard" shall not appear upon what bags or packages; when words "low grade" must appear, etc.	999d. Fertilizer sold, etc., in violation of law liable to seizure; warrant for seizure on complaint of state chemist, etc.; hearing, condemnation and sale; sale, how advertised and made, etc.
999b. Inspection tax; tags showing payment; not applicable to certain fertilizers; fees and penalties, how disposed of; tags, how issued; attaching tags when fertilizer not registered, etc., prohibited; fiscal year, etc.	999dd. Selling, etc., offering in certain cases misdemeanor; duties of attorney general and county attorneys; injunction.
999bb. Duties and powers of state chemist; penalty for interference; analysis and samples, certificate of state chemist; evidence; bulletins, information, etc.	999ddd. Commercial fertilizer defined; certain substances exempt.
999bbb. Deficiency below guaranteed value; duties of state chemist; selling fertilizer which is below guaranteed value misdemeanor.	999e. Penalty for selling, etc., adulterated or misbranded fertilizer; when deemed misbranded or adulterated.
999c. Selling fertilizer containing forbidden materials unlawful, etc.; duty of state chemist; to issue bulletins; evidence, etc.	999ee. Sale of fertilizer in bulk in certain cases authorized.
	999eee. Penalty for deceiving, counterfeiting, etc.
	999f. Weight of bags or packages; weight, how ascertained; penalty for failure to make good deficiency, etc.
	999ff. Purchaser for use who is not dealer, etc.; may take sample for analysis; state chemist to make analysis; samples, how taken, certified, etc.; penalty for refusal to furnish certificate, etc.
	999fff. Penalty for violation of act.

Article 999a. Commercial fertilizers before sale to have brand or label; what must be shown, etc.—All corporations, firms or persons, before selling or offering for sale any commercial fertilizer for use within this State, shall brand or attach to each bag, barrel or package a plainly printed statement, showing the brand or name of said fertilizer, the net weight of the contents of the package, the name and address of the corporation, firm or person registering said fertilizer and the minimum percentages guaranteed to be present of available phosphoric acid, of nitrogen and of potash soluble in distilled water. Only such potash shall be claimed to be present as sulphate, which is in excess of the quantity required to combine with the chlorine present, less one-half per cent. In bone meal, tankage, or other similar products, the phosphoric acid shall be claimed as total phosphoric acid, unless it be desired to claim available phosphoric acid only, in which latter case the guarantee must take the form above set forth. In the case of bone meal and tankage, information showing the fineness of the product may be branded or attached to the package; provided it takes a form approved by the State Chemist. All branding or labeling must be durable and legible, and so placed and arranged as to be easily read. [Act 1899, p. 64, ch. 46, repealed; Act 1911, p. 218, ch. 109, § 1.]

Explanatory.—Act 1911, p. 223, ch. 109, § 19, repeals chapter 48, Gen. Laws 1899, and other laws in conflict, and thus supersedes Arts. 741-746, revised Penal Code. Section 20 provides that the act shall take effect Sept. 1, 1911.

Art. 999aa. Statement to be filed with state chemist; copy of brand or stamp to be filed, etc.; certificate of registration; what brand or stamp may be registered; priority in registration, etc.;

chemist to publish annual list.—All firms, corporations or persons, before selling or offering for sale any commercial fertilizer for use within this State, shall annually file with the chemist of the Texas Agricultural Experiment Station, herein termed the State Chemist, a certified statement giving the information required by Section 1 of this chapter [Art. 999a] and the true names and sources of all the ingredients used in the manufacture of the said fertilizer. If the same fertilizer is sold under a different name or names, said fact shall be stated, and the different brands which are identical shall be named. If the source of any ingredient of said fertilizer is changed, notification must be promptly furnished the State Chemist. A copy of the brand or stamp on the bag or other package or on the label attached thereto shall be filed with the State Chemist on or before delivery to the dealers, agents or consumers in this State, which brand or stamp shall be uniformly used during the fiscal year for which it is filed, but such brand or stamp shall truly set forth the data required in Section 1 of this Act, and be otherwise in accordance with the provisions of this chapter. On receipt of the certified statement above described, and the copy of the brand or stamp and after compliance with other requirements of this chapter, the State Chemist shall issue a certificate of registration for the commercial fertilizer, which shall be in force until the succeeding September first. A brand name previously registered shall not be allowed to be registered by another firm, corporation or individual, and no brand or name shall be allowed to be registered which is so nearly similar to another as to lead to uncertainty, confusion or fraud. The party whom the previous records of the State Chemist's office show to have first registered the name shall be permitted to retain it, subject, however, to appeal and hearing before the State Chemist to determine who is entitled to the brand; but the action of the State Chemist shall be without prejudice to the legal rights of the parties to the brand or trademark. No brand or name once registered shall be changed to a lower grade at any subsequent registration. The State Chemist shall publish annually a list of brands or trade-marks registered with him. [Act 1911, p. 218, ch. 109, § 2.]

Art. 999aaa. Words "high grade" and "standard" shall not appear upon what bags or packages; when words "low grade" must appear, etc.—The words "high grade" shall not appear upon any bag or other package of any complete fertilizer which complete fertilizer contains, by its guaranteed analysis, less than ten per cent available phosphoric acid, one and sixty-five one-hundredths per cent nitrogen and two per cent of potash, or a grade or analysis of equal total commercial value; the word "standard" shall not appear upon any bag or other package of any complete fertilizer which contains, by its guaranteed analysis, less than eight per cent available phosphoric acid, one and sixty-five one-hundredths per cent nitrogen and two per cent potash, or a grade or analysis of equal total commercial value; the words "high grade" shall not appear upon any bag or other package of any acid phosphate with potash, which shall contain, by its guaranteed analysis, less than thirteen per cent available phosphoric acid, and one per cent of potash, or a grade or analysis of equal total commercial value; the word "standard" shall not appear upon any bag or other package of any acid phosphate with potash which shall contain, by its guaranteed analysis, less than eleven per cent available phosphoric acid, and one per cent potash, or a grade or analysis of equal total commercial value; the words "high grade" shall not appear upon any bag or other package of any plain acid phosphate which shall contain by its guar-

anteed analysis, less than fourteen per cent available phosphoric acid; and the word "standard" shall not appear upon any bag or other package of any plain acid phosphate which shall contain by its guaranteed analysis less than twelve per cent available phosphoric acid. The word "standard" shall not appear upon any bag or other package of acid phosphate with nitrogen which shall contain, by its guaranteed analysis, less than nine per cent of available phosphoric acid and two per cent nitrogen, or a grade or analysis of equal total commercial value. It is hereby further provided that no commercial fertilizer shall be sold, offered or exposed for sale for use within this State, upon which the use of the words "high grade" or "standard" is prohibited by this Section, unless the words "low grade" is printed in two-inch letters in a conspicuous place upon the package of said commercial fertilizer. Provided, further, that no claim or guarantee for less than one per cent of phosphoric acid or of potash, or for less than a 0.82 per cent of nitrogen, shall be allowed in any commercial fertilizer. [Id., § 3.]

Art. 999b. Inspection tax; tags showing payment; not applicable to certain fertilizers; fees and penalties, how disposed of; tags, how issued; attaching tags when fertilizer not registered, etc., prohibited; fiscal year, etc.—For the purpose of defraying the expenses connected with the inspection of commercial fertilizer sold, or exposed, or offered for sale in this State, and experiments relative to the value thereof, all firms, corporations or persons engaged in the manufacture or sale of commercial fertilizers shall pay to the State Chemist an inspection tax of twenty-five cents per ton (2000 pounds) for such commercial fertilizers sold or exposed, or offered for sale in this State in order to entitle the same to inspection and delivery, and shall attach a tag furnished by the State Chemist as evidence that said tax is paid, and goods so tagged shall not be liable to any further tax. But nothing contained in this Section shall interfere with fertilizers passing through the State in transit; nor shall apply to the delivery of fertilizing materials in bulk to fertilizing factories for manufacturing purposes. The fees received by the State Chemist and all the penalties collected under this chapter shall be deposited with the treasurer of the Agricultural and Mechanical College of Texas, and shall be expended under the direction of the Board of Trustees of said College in defraying the expenses of inspecting and analyzing commercial fertilizers, the preparation of tags, and bulletins, experiments relative to the value of fertilizers, and for such other purposes as the Board of Trustees of said Agricultural and Mechanical College of Texas shall allow or direct. Firms, corporations or persons, or agents representing them, who have registered their brands in compliance with Section 2 [Art. 999aa], of this chapter, shall forward to the State Chemist a request for tax tags, stating that the said tags are to be used upon the brands of commercial fertilizers registered and sold in accordance with this chapter, and said request shall be accompanied with the inspection tax, whereupon, it shall be the duty of the State Chemist to issue tags to parties applying, who shall attach said tags to each bag, barrel or package thereof. All firms, corporations or persons are hereby forbidden to attach the tag prescribed by this Section to any bag, barrel or package of any commercial fertilizer which has not been previously registered as required in Section 2 of this chapter [Art. 999aa], and which is not in accordance with all other provisions of this chapter. No tags shall be used after the end of the fiscal year for which they are issued, and they shall not be redeemed by the State Chemist. The fiscal year shall be comprised between the dates of September first and August

thirty-first, inclusive. The State Chemist is hereby empowered to adopt a form for said tags. [Id., § 4.]

Art. 999bb. Duties and powers of state chemist; penalty for interference; analysis and samples; certificate of state chemist; evidence; bulletins, information, etc.—The State Chemist shall cause one analysis or more to be made annually of such commercial fertilizer sold or offered for sale under the provisions of this Act as may be sampled under his direction. The State Chemist, in person or by deputy, shall have power to enter into any car, warehouse, store, building, boat, vessel, steamboat, or place, supposed to contain fertilizers for the purpose of inspection or sampling, and shall have the power to take a sample for analysis, not exceeding two pounds, from any package or lot of fertilizer found within the State. Any person who opposes the entrance of said chemist or deputy, or in any way interferes with the discharge of his duty, shall be liable to a fine of not less than fifty dollars and not more than five hundred dollars. Said sample shall be drawn by means of a sampling tube of uniform diameter and at least eighteen inches long, placed in a jar or can, sealed and labeled by the inspector. Said sample shall be taken from not less than five bags, but in lots of 100 and over, from not less than 5 per cent of the entire number. All analyses shall be made by the official methods of the Association of Official Agricultural Chemists of North America. In the trial of any suit or action wherein is called in question the value or composition of any fertilizer, a certificate signed by the State Chemist and attested with his seal, setting forth the analysis made by the State Chemist, or under his direction, of the sample of said fertilizer analyzed by him under the provisions of this chapter, shall be prima facie proof that the fertilizer was of the value and consistency shown by his said analysis. And the said certificate of the State Chemist shall be admissible to evidence to the same extent as if it were his deposition taken in said action in the manner prescribed by law for the taking of depositions. The State Chemist shall issue at least one bulletin annually, setting forth the analyses of fertilizers made under the provisions of this chapter, the operations of the law, and such other information concerning violations or operations of this chapter, or otherwise pertaining to the sale of fertilizers as may be considered necessary. The State Chemist shall also investigate the composition, properties and agricultural values of fertilizers or of fertilizer materials or ingredients of fertilizers sold or offered for sale within the State of Texas, and shall publish his results as he may find. [Id., § 5.]

Art. 999bbb. Deficiency below guaranteed value; duties of state chemist; selling fertilizer which is below guaranteed value misdemeanor.—Whenever the State Chemist shall be satisfied that any lot or shipment of fertilizer is four per cent or more below the guaranteed value in plant food, it shall be his duty to assess such deficiency against the manufacturer or guarantor of the fertilizer, and require that the value of the deficiency be made good to all persons who have purchased said fertilizer; and the State Chemist may seize any fertilizer belonging to such manufacturer or guarantor if the deficiency shall not be paid within thirty days after notice to such manufacturer.

Any person, firm, or corporation who shall intentionally or knowingly sell or offer for sale any commercial fertilizer for use within this State which is materially below the guaranteed value in plant food, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty dollars nor more than two hundred dollars for the first offense, and not less than two hundred

dollars nor more than five hundred dollars for each subsequent offense, and shall refund to all purchasers of said commercial fertilizer twice the value of the deficiency in plant food. [Id., § 6.]

Art. 999c. Selling fertilizer containing forbidden materials unlawful, etc.; duty of state chemist; to issue bulletins; evidence, etc.—It shall be unlawful to sell or offer for sale, in this State, any fertilizer or fertilizing materials which contain an undue quantity of hair, or which contains leather scraps, peat, or other substances of low availability as food for plants, but in which such forbidden materials aid in making up the required or guaranteed analysis. Whenever the analysis by the State Chemist shall show the presence of any of these unlawful materials in goods registered for sale, publication shall be made in bulletins giving the name or brand of the goods and the unlawful substance contained in its composition. No manufacturer or seller of such goods shall be allowed to collect pay for the same, and if payment has been made it shall be returned by the seller to the purchaser. A copy of the bulletin containing the statement of the presence of said unlawful materials in the named goods shall be evidence in any court in this State in bar of payment and for recovery of money paid for goods so named. The presence of any forbidden material shall vitiate the whole; provided that manufacturers who desire to use any such material may do so under such regulations as the State Chemist may prescribe, if it be shown that it is available for a proper purpose. [Id., § 7.]

Art. 999cc. Monthly statements by carriers; examination of carriers' books.—It shall be lawful for the State Chemist to require the officers, agents, or managers of any railroad, steamboat or other transportation company, transporting fertilizers or fertilizing material in the State, to furnish monthly statements of the quantity of such fertilizers, with the names of the consignor and consignee and the name of brand delivered on their respective lines at any and all points within this State. And the State Chemist is hereby empowered to compel such officers, agents or managers to submit their books for examination, if found expedient so to do. [Id., § 8.]

Art. 999ccc. Statements to be mailed to state chemist after sales, etc.; annual statements of sales to be submitted.—Every firm, corporation or person who has registered fertilizers for sale within the State of Texas, shall mail to the State Chemist, on forms provided by the State Chemist, within three days of each sale, shipment or delivery, a statement showing the official name of fertilizer, the quantity and the name and address of the person to whom the fertilizer is sold, and if such fertilizer is to be used for manufacturing purposes, the fact must be so stated, and also the composition of said fertilizer. Every corporation, firm or person registered to sell fertilizers within the State of Texas according to this chapter, shall annually on the first day of May, submit to the State Chemist a statement of their sales of said fertilizer since September 1, preceding, and the State Chemist is hereby authorized to require other statements of sales, if necessary, in such form as he may prescribe. The sales or shipments of any individual, corporation, firm, or person shall not be disclosed. [Id., § 9.]

Art. 999d. Fertilizer sold, etc., in violation of law liable to seizure; warrant for seizure on complaint of state chemist, etc.; hearing, condemnation and sale; sale, how advertised and made, etc.—Any commercial fertilizer sold, offered, or exposed for sale within this State in violation of any provision of this chapter, shall be

liable to seizure at the instance of the State Chemist. Upon complaint being filed by the State Chemist, in person or by duly authorized deputy, with any county judge or justice of the peace, describing the commercial fertilizer and the place where it is believed that said commercial fertilizer is sold, offered or exposed for sale in violation of law, such county judge or justice of the peace shall issue his warrant directing and commanding the sheriff or any constable of his county to search such place, and if the law is being violated, to seize the commercial fertilizer, and it shall be the duty of the officer to whom such warrant is delivered to search the place described in the warrant and to seize all commercial fertilizer found therein which is in violation of law, and if admission into said place is refused, the officer executing said warrant is hereby authorized to force open the same. If it shall appear at the hearing before the county judge or justice of the peace who issued said writ, that the commercial fertilizer was being sold, exposed or offered for sale in violation of any provision of this chapter, said commercial fertilizer shall be condemned and delivered to an officer or agent of the State Chemist, to be sold by or under the direction of the State Chemist, and the net proceeds paid to the Treasurer of the Agricultural and Mechanical College of Texas, for the purpose of enforcing the provisions of this chapter. The sale shall be made at the court house door in the county in which the seizure is made, after thirty days' advertisement in some newspaper published in said county, or if no newspaper is published in such county, then by like advertisement in a newspaper published in the nearest county thereto having a newspaper. The advertisement shall state the name or brand of the goods, the quantity, and why seized and offered for sale. Said commercial fertilizer shall be sampled and subjected to analysis if necessary or tagged or branded and otherwise brought into compliance with the requirements of this chapter, before being sold. The State Chemist, however, may, in his discretion, release the commercial fertilizer seized or condemned, upon the payment of the required tax or charge and all cost and expense incurred in any proceeding connected with such seizure and condemnation and upon compliance with all other requirements of this chapter. [Id., § 10.]

Art. 999dd. Selling, etc., offering in certain cases misdemeanor; duties of attorney general and county attorneys; injunction.—Every firm, corporation or person who shall sell or offer for sale any commercial fertilizer without having attached thereto such labels, stamps and tags as are required by law, or who shall use the required tag a second time to avoid the payment of the tonnage charge, or who shall sell adulterated or misbranded fertilizer within the meaning of this Act, shall be guilty of a misdemeanor and upon conviction shall be fined not less than fifty nor more than two hundred dollars for each offense. It shall be the duty of the Attorney General and of the several county attorneys, when requested by the State Chemist, to institute suit to enjoin any person, firm, or corporation, resident or non-resident, from manufacturing, or selling or soliciting orders for the sale of fertilizers in this State or selling fertilizers for use in this State without complying with all the provisions of this chapter, which injunction may issue without bond or advanced cost. [Id., § 11.]

Art. 999ddd. Commercial fertilizer defined; certain substances exempt.—A commercial fertilizer is hereby defined as any material, substance or mixture, which contains or is claimed to contain more than one per cent of total phosphoric acid, or of potash, or of nitrogen, and which is used for application to the soil to promote

the growth of crops, or any substance, material or mixture, which is claimed to exert a beneficial action upon the soil or to promote the growth of crops; provided, that following substances: lime, limestone, marl, unground bones, stock-pen manure, bran-yard manure, or the excrement of any domestic animal, shall be exempt from the provisions of this chapter, in case that said manure or excrement has not been dried or manipulated or otherwise treated or is not claimed to have a value of more than four dollars a ton. [Id., § 12.]

Art. 999e. Penalty for selling, etc., adulterated or misbranded fertilizer; when deemed misbranded or adulterated.—Any person, firm or corporation manufacturing, selling or offering for sale any adulterated or misbranded commercial fertilizer for use within this State shall, upon conviction thereof, be punished by a fine of not less than twenty-five dollars or not more than two hundred dollars. A fertilizer shall be deemed to be misbranded if it carries any false or misleading statement upon or attached to the package, or if false or misleading statements concerning its agricultural value are made on the package or in any printed advertising matter issued by the corporation, firm or individual that registered said fertilizer, or if the number of net pounds set forth upon the package is not substantially correct. A fertilizer is adulterated if it contains any substance or substances injurious to the crop or to the soil, or if the guaranteed valuation exceeds the valuation of the plant food found on analysis ten per cent or more, or if any of the plant food constituents falls twenty per cent or more below the guaranteed composition. [Id., § 13.]

Art. 999ee. Sale of fertilizer in bulk in certain cases authorized.—Manufacturers, jobbers, dealers or manipulators of commercial fertilizers may sell acid phosphate or other commercial fertilizer in bulk to persons, individuals or firms who desire to purchase the same for their own use on their own land but not for sale or distribution, under rules and regulations prescribed by the State Chemist which will not be inconsistent with the provisions of this chapter; provided, that inspection tax shall be paid upon such fertilizer as provided in Section 5 [art. 999bb]. But if such bulk fertilizer is offered for sale or distribution, it must be tagged and branded and otherwise accord with the provisions of this chapter. [Id., § 14.]

Art. 999eee. Penalty for deceiving, counterfeiting, etc.—Any person, party or manufacturer who uses the fertilizer tags, bags or labels of some other person, party or manufacturer, in such a way as to deceive or tend to deceive, or who counterfeits, or uses a counterfeit, of the tax tag prescribed in this chapter, shall be subject to a fine of not less than one hundred dollars, and not more than five hundred dollars. [Id., § 15.]

Art. 999f. Weight of bags or packages; weight, how ascertained; penalty for failure to make good deficiency; etc.—All fertilizers or fertilizing materials sold or offered for sale for use within this State, shall be in bags or packages of one hundred pounds net weight, except as provided in Section 14 [art. 999ee]. The weight of fertilizers shall be ascertained by the inspectors of the State Chemist before drawing a sample, or by the purchaser within ten days of delivery to him, in the presence of at least two disinterested witnesses, one chosen by the purchaser and the other by the manufacturer, and the purchaser shall within five days notify the manufacturer to make good the deficiency, and upon failure of the manufacturer to do so within twenty days thereafter, he shall be liable to a penalty of three dollars for each sack, barrel, or package, which immedi-

ately attaches and becomes recoverable by the State, one-half of the penalty so received to be paid to the purchaser in case of a sale; provided, if any such manufacturer shall refuse, decline, or neglect to be present or to choose a witness within six days as herein provided after having been notified or requested in writing by the purchaser so to do, then he or they shall have forfeited their right to do so and the purchaser may select two witnesses who shall select a third, who shall proceed to ascertain said weight. [Id. § 16.]

Art. 999ff. Purchaser for use who is not dealer, etc., may take sample for analysis; state chemist to make analysis; samples, how taken, certified, etc.; penalty for refusal to furnish certificate, etc.— Any person not a dealer in, or agent for the sale of any fertilizer, who may purchase any commercial fertilizer for his own use within this State and not for sale, may take a sample of same for analysis, which analysis shall be made free of charge by or under the direction of the State Chemist. Said sample or samples of fertilizer shall be taken in the presence of both purchaser and seller. One cupful of the fertilizer shall be taken from the top and one cupful from the bottom of each sack, provided that there are not more than five sacks in the lot, but in lots of 10 to 100 sacks, from not less than five sacks; in lots of 100 and over, from not less than five per cent of the entire number. The samples so taken shall be intermixed upon some surface so as not to mix dirt or any other substance with the fertilizer. After thorough mixing, at least one pound of the material must be put into each of two cans or jars, one of which securely sealed and marked in such a way as to surely identify the sample and show by whom it was sent, but the name of the fertilizer or of the person from whom it was purchased need not be given, and must be forwarded by express, all charges prepaid, to the State Chemist; the other sample, securely sealed, shall be turned over to the company or agent selling same. The purchaser shall also send with the sample a certificate signed by himself and two disinterested witnesses, stating that the sender has purchased the fertilizer for his own use and not for sale and that the sample was taken in the manner prescribed in this Section, and that the sender has in his possession a certificate signed by himself and the two witnesses, giving the name of the fertilizer and manufacturer thereof as tagged or branded on the packages and will forward this certificate to the State Chemist on receipt of the analysis. Provided, however, that if the person, company or agent shall refuse, decline or neglect to witness the taking of samples, after having been requested or notified by the purchaser in writing six days before so to do, then the sample may be taken in the manner already described in the presence of two disinterested witnesses. Any person having sent a sample for analysis under the provisions of this Section, who shall, after having received the report of analysis of same, refuse to furnish the required certificate, shall thereafter forfeit the privilege of analysis of fertilizers under this Section. [Id., § 17.]

Art. 999fff. Penalty for violation of act.—Any person, corporation or firm violating any provision of this chapter for which a penalty is not otherwise provided herein, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars nor more than two hundred dollars. [Id., § 18.]

CHAPTER EIGHT B

LIVE STOCK COMMISSION MERCHANTS

Art.

999g. Livestock commission merchants defined.
 999gg. Bond of.
 999ggg. Suits on bond.

Art.

999h. New bond required, when.
 999hh. Penalty for violation of law.
 999hhh. Bond filed, where; fees.
 999i. Laws not repealed.

Article 999g. Livestock commission merchants defined.—That any person, firm or corporation pursuing or who shall pursue the business of selling livestock, cattle, cows, calves, bulls, steers, hogs, sheep, mules, horses, jacks and jennets, or any of them upon consignment for a commission or other charges, or who shall solicit consignments of live stock as a commission merchant or who shall advertise or hold himself out to be such, shall be deemed and held to be a livestock commission merchant within the meaning of this Act. [Act 1913, p. 93, ch. 49, § 1.]

Art. 999gg. Bond of.—That all livestock commission merchants be and they are hereby required to make bond each in the sum of \$10,000.00 entered into with two or more good and sufficient sureties, who are residents of this State, or some surety company duly and legally authorized to do business in this State, payable to the county judge of the county in which such livestock commission merchant resides or has his principal office, and to his successors in office, as trustees for all persons who may become entitled to the benefits of this Act, such bond to be filed in the county where such commission merchant has his principal office or place of business, in which county suits may be maintained on such bond and such bond shall be conditioned that such livestock commission merchant will faithfully and truly perform all agreements entered into with consignors with respects to receiving, handling, selling and making remittances and payments made to him, which bond shall be approved by the county clerk of the county in which such livestock commission merchant resides, or has principal office and by him, be filed and recorded. [Id., § 2.]

Art. 999ggg. Suits on bond.—That the bond provided for by the preceding section may be sued upon and recovery had thereon by any person claiming to have been damaged by a breach of its conditions; provided, that said bond shall not become void upon the first recovery thereon, but may be sued upon until the amount thereof is exhausted. That upon the exhaustion of said bond by recoveries thereon, said livestock commission merchant shall be required to make and file a new bond conditioned as provided in Section 2 [Art. 999gg] hereof. [Id., § 3.]

Art. 999h. New bond required, when.—That if it shall come to the knowledge of the said county judge or the county clerk that either or all of the sureties on said bond are, or may become insolvent, then it shall be the duty of said county judge or said county clerk to require said live stock commission merchant to enter into, execute and deliver a new bond, as herein provided for. [Id., § 3a.]

Art. 999hh. Penalty for violation of law.—That any person who shall advertise or solicit business as a livestock commission merchant, or who shall pursue in any way the occupation of a livestock commission merchant, without having made the bond or bonds as required by this Act, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not more than five thousand dollars (\$5,000), or by imprisonment in the county jail for not

less than one month and not more than twelve months, or by both such fine and imprisonment. [Id., § 4.]

Art. 999hhh. Bond filed, where; fees.—The bond herein mentioned shall be filed and kept by the county clerk of the county where filed, who shall receive the sum of fifty cents for each such bond, same to be paid by such commission merchant. [Id., § 5.]

Art. 999i. Laws not repealed.—It is expressly declared that none of the provisions of Title 57 of the Revised Civil Statutes of 1911, are affected or in anywise modified or repealed by the provisions of this Act. [Id., § 6.]

CHAPTER EIGHT C

COMMISSION MERCHANTS

Art.
999ii. Bond of.

Art.
999iii. Bond made where; suit in same county.

Article 999ii. Bond of.—Every commission merchant is hereby required to make bond in the sum of three thousand dollars, entered into with two or more good and sufficient sureties, who are residents of this State, and who shall make affidavit before some officer authorized to administer oaths, that they in their own right, over an above all exemptions, are worth the full amount of the bond they sign as sureties, payable to the county judge of each county in which such commission merchant maintains an office, and to the successors in office of such county judge as trustees for all persons who may become entitled to the benefits of this Act; conditioned that such commission merchant will faithfully and truly perform all agreements and contracts entered into with consignors for said produce, goods, wares or merchandise, that said commission merchant will promptly receive and sell such produce, goods, wares or merchandise, and will on receipt of such produce, goods, wares or merchandise class the same, and if such class as made by such commission merchant is not as high as that made and sent to him by the consignor, he (the commission merchant), will immediately notify the consignor of such fact and of the class made by him; and, as soon as sold will send to the consignor a full and complete account of sales of same, giving an itemized account thereof, and the price received, the dates of sales, and shall, within five days after said produce, goods, wares or merchandise are sold, send to the consignor the full amount received for the same, less the commission due said commission merchant under the contract of consignment, which bond shall be approved by the county judge of the county in which said commission merchant maintains an office, and by said county judge filed for record in the county clerk's office as chattel mortgages are now authorized to be filed by law; provided, that any commission merchant may be bonded under the provisions of this Act by a solvent surety company, doing business in this State, to be approved by the county judge under the provisions of this Article. [Act 1907, p. 61, § 2; Act 1913, p. 178, ch. 94, § 1, amending art. 3827, Rev. St. 1911.]

Art. 999iii. Bond made where; suit in same county.—Such bond shall be made and filed for record in each county in which such commission merchant maintains an office, and in which county suits may be maintained upon such bond by any person claiming to have been damaged by a breach of its condition; provided, that said bond shall not become void upon the first recovery thereon, but

may be sued upon until the amount thereof is exhausted; provided, however, that when said bond by suits of recovery has been reduced to the sum of fifteen hundred dollars, that said commission merchant shall be required to enter into a new bond in the sum of three thousand dollars as required in the first instance under the provisions of this Chapter; which said new bond shall be liable for all future contracts, agreements or consignments thereafter entered into by said commission merchant and consignor of such produce, cotton, sugar, goods, wares or merchandise, and upon failure of said commission merchant to give said new bond, as above required, he shall cease doing business in this State; provided any commission merchant, as herein defined, who shall engage in business as such commission merchant, without first making and filing the bond provided for in Articles 3827 and 3828, [Rev. Civ. St. 1911] shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars. [Act 1907, p. 61, § 2; Act 1913, p. 178, ch. 94, § 1, amending art. 3828, Rev. St. 1911.]

CHAPTER EIGHT D

LOAN BROKERS

<p>Art. 999j. "Loan broker" defined. 999jj. Bond required. 999jjj. Registration of bond. 999k. Separate offices. 999kk. Broker to keep register of loans. 999kkk. Public inspection of register. 999l. Loan broker to file power of at-</p>	<p>Art. torney to receive service of process. 999ll. Payment of judgments. 999lll. Penalty for violation of law. 999m. Consent of wife to security for loan. 999mm. Annual tax.</p>
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Article 999j. "Loan broker" defined.—A "loan broker" is a person, firm or corporation who pursues the business of lending money upon interest and taking as security for the payment of such loan and interest an assignment of wages, or an assignment of wages with power of attorney to collect the same or other order for unpaid chattel mortgage or bill of sale upon household or kitchen furniture. [Act 1915, p. 48, ch. 28, § 1.]

Art. 999jj. Bond required.—No person, firm or corporation shall pursue the business of a loan broker without first having given bond with at least two good and sufficient sureties or the guaranty of some solvent bonding company authorized to do business in this State, in the sum of five thousand (\$5,000) dollars, payable to the State of Texas, approved by and filed with the clerk of the County Court of the county in which such person, firm or corporation proposes to pursue said business, conditioned that such person, firm or corporation shall faithfully comply with each and every requirement of the law governing such business, and will pay to any person dealing with such loan broker any judgment that may be obtained against him. [Id., § 2.]

Art. 999jjj. Registration of bond.—The bond required by the preceding article shall be recorded and safely kept in the office of the clerk of the County Court of the county in which such loan broker pursues such business, the recording fees thereof to be paid by such loan broker, and a new bond shall be given, filed and recorded in the same manner as the first one, every twelve months during the continuance of such business. [Id., § 3.]

Art. 999k. Separate offices.—A bond shall be required and given by each loan broker for each and every separate office or place of business which he may conduct. [Id., § 4.]

Art. 999kk. Broker to keep register of loans.—Each loan broker shall keep a well-bound book in which he shall register all his transactions as a broker at the time same occurs; such registry shall show (1) the articles of property securing the loan, if the same be secured by chattel mortgage or bill of sale on household or kitchen furniture; (2) the assignment of wages, or the assignment of wages with power of attorney to collect the same, or other order for unpaid wages given as security, giving the name of the person receiving the money, and the person by whom such person is employed, or by whom it is expected that he will be employed, and in whose service it is expected that he shall earn the salary or wages; (3) the amount of money received by the borrower; (4) the amount to be received back by the loan broker, and the time in which he is to receive back such payment; (5) the rate of interest or discount agreed upon. [Id., § 5.]

Art. 999kkk. Public inspection of register.—Such books shall be kept open for inspection, and that the broker shall give to the party borrowing, a ticket showing the amount of cash actually received, and showing the amount paid back by the borrower to the loan broker on each payment, such tickets to correspond with the entry on the book of the register. [Id., § 6.]

Art. 999l. Loan broker to file power of attorney to receive service of process.—Each loan broker as defined in Section 1 of this Act [Art. 999j] engaged in doing or desiring to do business in this State shall file with the County Clerk of the county in which he or it is engaged in doing such business or desires to do such business an irrevocable power of attorney duly executed, constituting and appointing the County Judge of the county in which he or it is engaged in doing business or in which he or it desires to do business, and to his successors in office, his or its duly authorized agent and attorney in fact, for the purpose of accepting service for him or it, or being served with citation in any suit brought against him or it in any court of this State by any person, firm, company or corporation, and consenting that the service of any civil process upon such County Judge as his or its attorney for such purpose, in any suit or proceeding, shall be taken and held to be valid, waiving all claim and right to object to such service or to any error by reason of such service and such appointment, agency and power of attorney, shall by its terms and recitals provide that it shall continue and remain in force and effect so long as such loan broker continues to do business in this State and so long as it shall have outstanding any claim of any character held by any citizen, firm, company or corporation of this State or by the State of Texas against him or it, and until all claims of every character, so held by any citizen, firm, company or corporation or by the State of Texas, shall have been settled. Said power of attorney shall be signed in person by any individual loan broker and by each member of any firm, partnership or association engaged in business as a loan broker, and if such loan broker is a corporation it shall be signed by the president or vice-president and by the secretary of such corporation, and shall be attested by the seal of such corporation. Each such power of attorney shall be acknowledged before some officer authorized by the laws of this State to take acknowledgments. [Id., § 7.]

Art. 999ll. Payment of judgments.—If any judgment upon any bond given by any loan broker shall remain unpaid for sixty days after final judgment and execution thereon, it shall be unlawful for such loan broker to continue to run such business, and the same shall be punished by fine of not less than \$50.00 nor more than \$250.00, and each and every day in which such loan broker conducts

such business shall be a new and separate offense. Each and every person employed by and engaged in the conduct of such business shall be guilty of unlawfully conducting the same, if the same be conducted without a bond, or after the forfeiture of such bond as above described. [Id., § 8.]

Art. 999lll. Penalty for violation of law.—If any loan broker, or person doing business as such shall make any loan upon chattel mortgages or bill of sale upon household or kitchen furniture, or shall make any loan taking as security for the payment thereof an assignment of wages or an assignment of wages with power of attorney to collect the same, whether the same be called a loan or purchase without complying with the laws regulating loan brokers in this State, he shall be punished by a fine of not less than \$50.00 nor more than \$250.00 for each. [Id., § 10.]

Art. 999m. Consent of wife to security for loan.—Each assignment, mortgage, power of attorney to collect or other transfer of the salary or wages of a married man, and each bill of sale or chattel mortgage upon the household and kitchen furniture of a married man shall be void unless the same be made and given with the consent of the wife, and such consent shall be evidenced by the wife joining in the assignment, mortgage, power of attorney to collect or other transfer of salary or wages, and the signing of her name thereto and by her separate acknowledgment thereof, taken and certified to by a proper officer, substantially in the mode provided by law for the acknowledgment by the wife of a conveyance of the homestead. [Id., § 11.]

Art. 999mm. Annual tax.—Every loan broker shall pay an annual tax of one hundred and fifty dollars to the State of Texas for each and every place of business. [Id., § 12.]

CHAPTER EIGHT E

EMPLOYMENT AGENCIES

Art.	Art.
999mmm. License and bond; action on bond.	duty of commissioner of Labor Statistics.
999n. Shall keep register of transactions; charges for service.	999o. "Private agency for hire" defined.
999nn. Immoral occupations; false promises; inducing employ-és to leave service.	999oo. Fees and fines to be paid into state treasury; special fund.
999nnn. Penalty for violation of act;	999ooo. Disposition of fines assessed by courts.
	999p. Blank books.

Article 999mmm. License and bond; action on bond.—No person, firm or corporation in this state shall open, operate or maintain a private employment agency for hire, or where a fee is charged to either applicant for employment or for help, without first obtaining a license for the same from the Commissioner of Labor Statistics, and such license fee shall be \$25.00 (twenty-five dollars). Such license shall be of force for one year, but may be renewed from year to year upon the payment of a fee of \$25.00 (twenty-five dollars) for each renewal. Every license shall contain a designation of the city, street and number of the building in which the licensed party conducts said employment agencies. The license, together with a copy of this Act, shall be posted in a conspicuous place in each and every employment agency. The Commissioner of Labor Statistics shall require with each application for a license a good and sufficient bond in the penal sum of five hundred (\$500.00) dollars, to be approved by said commissioner, and conditioned that the obligor will not violate any of the duties, terms, conditions, provisions, or requirements

of this Act. The said Commissioner of Labor Statistics is authorized to cause an action to be brought on said bond in name of the State for any violation of any of its conditions, and may revoke, upon a full hearing, any license whenever, in his judgment, the party licensed shall have violated any of the provisions of this Act. [Act 1915, p. 163, ch. 108, § 1.]

Art. 999n. Shall keep register of transactions; charges for service.—It shall be the duty of every licensed agency to keep a register in a substantial book, in the form prescribed by the Commissioner of Labor Statistics, in which shall be entered the age, sex, nativity, trade or occupation, name and address of every applicant. Such licensed agency shall also enter in a register the name and address of every person who shall make application for help or servants, and the name and nature of the employment for which such help shall be wanted. Such register shall, at all reasonable hours, be open to the inspection and examination of the Commissioner of Labor Statistics or his deputies or inspectors. Where a registration fee is charged for filing or receiving application for employment or help, said fee shall in no case exceed the sum of two (\$2.00) dollars, for which a receipt shall be given, in which shall be stated the name of the applicant, the amount of the fee, the date, the name or character of the work or the situation to be secured. In case the said applicant shall not obtain a situation or employment through such licensed agency within one month after registration as aforesaid, then said licensed agency shall forthwith repay and return to such applicant, upon demand being made therefor, the full amount of the fee paid or delivered by said applicant to said licensed agency; provided, that such demand be made within thirty (30) days after the expiration of the period aforesaid. [Id., § 2.]

Art. 999nn. Immoral occupations; false promises; inducing employés to leave service.—No agency shall send or cause to be sent any female help or servants to any place of bad repute, house of ill fame or assignation house, or any house or place kept for immoral purposes. No such licensed agency shall publish, or cause to be published, any false information, or to make any false promise concerning or relating to work or employment to anyone who shall register for employment, and no such licensed agency shall make any false entries in the register to be kept as herein provided, and all entries in such registers shall be made in ink. Any licensed person or agency shall not by himself or itself, agent or otherwise, induce, or attempt to induce, any employé to leave his employment with a view to obtaining other employment through such agency. [Id., § 3.]

Art. 999nnn. Penalty for violation of act; duty of commissioner of Labor Statistics.—It shall be the duty of the Commissioner of Labor Statistics to enforce this Act, and when informed of any violation thereof, it shall be his duty to institute criminal proceedings for enforcement of its penalties before any court of competent jurisdiction. He may make such rules and regulations for the enforcement of this Act not inconsistent therewith, as he may deem proper. Any person convicted of a violation of any of the provisions of Sections 1, 2 and 3 [Arts. 999mmm-999nn] shall be guilty of a misdemeanor, and upon conviction in any court of competent jurisdiction shall be fined not less than fifty (\$50.00) dollars nor more than two hundred (\$200.00) dollars for each offense; provided, that any person or persons who shall send any female help or servants to any place of bad repute, house of ill fame or assignation house or any house or place kept for immoral purposes,

shall be deemed guilty of a felony, and upon conviction in any court of competent jurisdiction shall be punished by a fine of not less than one thousand (\$1,000.00) dollars nor more than five thousand (\$5,000.00) dollars, or by imprisonment in the penitentiary not less than two (2) years nor more than ten (10) years, or by both such fine and imprisonment. [Id., § 4.]

Art. 999o. "Private agency for hire" defined.—A private agency for hire is defined and interpreted to mean any person, firm or corporation engaging in the occupation of furnishing employment or help, or giving information as to where employment or help may be secured, or displaying any employment sign or bulletin, or, through the medium of any card, circular or pamphlet, offering to secure employment or help; provided, that charitable organizations not charging a fee shall not be included in said term. [Id., § 5.]

Art. 999oo. Fees and fines to be paid into state treasury; special fund.—The Commissioner of Labor Statistics shall, at the end of each month, make an itemized account of all moneys received by him from fees and fines, under the provisions of this Act, and pay the same into the State Treasury, to be held in a separate fund known as the employment agency fund, and to be used for expenses incurred in inspecting, regulating and printing blanks and books to be furnished such employment agencies by the Commissioner of Labor Statistics. The unexpended moneys remaining in the State Treasury at the end of the fiscal year shall be transferred into the school fund. [Id., § 6.]

Art. 999ooo. Disposition of fines assessed by courts.—All fines assessed by the courts for violation of Sections 1 and 2 of this Act [Arts. 999mmm, 99n] shall be paid by said court to the Commissioner of Labor Statics or his duly authorized agents. [Id., § 7.]

Art. 999p. Blank books.—The Commissioner of Labor Statistics shall furnish to each licensed employment agency blank books upon which their record shall be kept, as provided for in this Act, together with forms for receipts, etc., and all necessary blanks upon which reports shall be made to the Commissioner of Labor Statistics. [Id., § 8.]

CHAPTER EIGHT F

CONTRACTING STEVEDORES

Art.	Art.
999pp. Contracting stevedore and stevedore defined.	999qq. Bond and license in each county, etc.; suits on bond.
999ppp. License and bond; penalty.	999qqq. License, how granted.
999q. Bond.	999r. New bonds and licenses; time within which to qualify.

✓ **Article 999pp. Contracting stevedore and stevedore defined.**—A contracting stevedore, within the meaning of this Act, is any person, firm, association of persons, or corporation that contracts with any ship, agent, owners, masters, managers or captains of vessels, or with any other person or corporation, for the purpose of loading or unloading, or of having loaded or unloaded any vessel, ship or water craft; a stevedore within the meaning of this Act is any laborer who performs any of the actual labor in loading and unloading any ship, vessel or water craft whatsoever while in the service or employ of a contracting stevedore as above mentioned. [Act 1913, p. 153, ch. 82, § 1.]

Art. 999ppp. License and bond; penalty.—It shall hereafter be unlawful for any contracting stevedore to engage in the business

or pursue the occupation of loading and unloading or having loaded or unloaded by the employment of labor therefor any ship, vessel or water craft in this State without first obtaining the license and executing the bond as hereinafter provided, and any such person who pursues said occupation without first qualifying as provided by this Act shall be guilty of a misdemeanor, and on conviction shall be fined in any sum not less than one hundred nor more than five hundred dollars for each day he shall pursue such occupation or business without thus qualifying and any member of a firm or association or any manager of a corporation who come within the meaning of a contracting stevedore who shall thus offend shall be amendable [amenable] to prosecution hereunder. [Id., § 2.]

Art. 999q. Bond.—Each contracting stevedore as contemplated by this Act is hereby required to make bond in the sum of five thousand dollars, entered into with two or more good and sufficient sureties, who are residents of this State, or with any good and sufficient surety bonding Co. authorized to transact business in this State, payable to the county judge of the county in which such stevedore pursues his occupation and to his successor in office, as trustee for all persons who may become entitled to the benefits of this Act, said bond to be conditioned that said contracting stevedore will promptly on Saturday of each week pay each laborer his wages for labor performed in loading and unloading any such ship, vessel or water craft according to the scale of wages agreed upon, and that all agreements entered into with said laborers and each of them in respect to the loading and unloading of said water craft, as above mentioned, will be faithfully and truly performed, which bond shall be approved by the county clerk of the county in which said contracting stevedore is pursuing said business or occupation and by him shall be filed and recorded. [Id., § 3.]

Art. 999qq. Bond and license in each county, etc.; suits on bond.—The bond and license hereinafter provided for shall be made in each county in which said contracting stevedore pursues said occupation, in which county suits may be maintained upon such bond by any person to whom wages are due and unpaid for such labor as is hereinbefore mentioned; provided, that the same shall not become free upon the first recovery, but may be sued upon until the full amount thereof is exhausted, or suits sufficient to exhaust the bond or [are] pending, and when so exhausted said contracting stevedore shall make and file a new bond in amount and conditioned as provided for the first, and his failure so to do shall render him amendable [amenable] to prosecution as if no bond had ever been given in the first instance. [Id., § 4.]

Art. 999qqq. License, how granted.—Said contracting stevedore shall, before beginning business as before stated, file his application in writing for a license to pursue the occupation of a contracting stevedore for the county mentioned, and on approval of the bond hereinbefore provided for by the county clerk and payment of a license fee of five dollars the clerk shall grant to him a license to pursue said occupation upon such form as the county commissioners court may designate, the said license fee to be paid into the general fund of the county. [Id., § 5.]

Art. 999r. New bonds and licenses; time within which to qualify.—Said contracting stevedore shall be and he is hereby required to execute a new bond and to obtain the issuance of a new license at the expiration of each year from the former, every two years from the issuance of the former license, and all contracting steve-

doers who may be engaged in the occupation herein defined at any port, sub-port or other place where ships, vessels or water crafts are loaded or unloaded, at the time this law becomes effective, shall have thirty days from and after the going into effect of this law to qualify thereunder by executing the bond and obtaining the license as required herein. [Id., § 6.]

CHAPTER EIGHT G
PUBLIC ACCOUNTANTS

<p>Art. 999rr. State Board of Public Accountancy created.</p> <p>999rrr. Appointment and tenure of members of board.</p> <p>999s. Organization of board; rules and regulations; powers.</p> <p>999ss. Meetings of board; examinations.</p> <p>999sss. Records of board; transmission to Secretary of State.</p>	<p>Art. 999t. Qualifications of applicants for certificates.</p> <p>999tt. Certificate without examination.</p> <p>999ttt. Same.</p> <p>999u. Examination fee; annual fee.</p> <p>999uu. Revocation of certificate.</p> <p>999uuu. Penalty for violation of act.</p> <p>999vv. Misconduct by practicing Public Accountant.</p> <p>999vvv. Purpose and scope of law.</p>
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Article 999rr. State Board of Public Accountancy created.— There is hereby created a board to be known as the State Board of Public Accountancy, to be composed of five members, who shall be public accountants of good moral character and qualified citizens of the State of Texas, each of whom shall have had at least three years practical experience as a public accountant on his own account immediately preceding his appointment, during the last three years of which he shall have been so engaged in the State of Texas; the members of said board to be selected and appointed as hereinafter provided. [Act 1915, p. 184, ch. 122, § 1.]

Art. 999rrr. Appointment and tenure of members of board.— Within thirty days after this Act shall go into effect the Governor of the State of Texas shall appoint five persons qualified as provided in Section 1 of this Act [Art. 999rr], who shall constitute the State Board of Public Accountancy.

The members of the first State Board of Public Accountancy provided for herein shall be appointed for and shall serve for the term ending on the third Tuesday of January, 1917, or until their successors are appointed and qualified. On and after the third Tuesday in January, 1917, and regularly every two years thereafter, the Governor of the State of Texas shall appoint five members as successors on said board, and each and every member who may be appointed to succeed any member of the first State Board of Public Accountancy shall be a certified Public Accountant, holding a certificate as such under the provisions of this Act, and resident of Texas for at least three years preceding said appointment.

Five members of the First State Board of Public Accountancy provided for herein shall confer upon themselves the title "Certified Public Accountant," provided that each member of said board shall have filed an application for such certificate with four remaining members of said board, and, provided further, that said applicant shall meet the requirements as provided in Section 8 [Art. 999ttt]. All vacancies in said board caused by death, resignation, removal from the State, or otherwise, shall be filled by appointment of the Governor, and each special appointment shall be from the roster of certified public accountants created under this Act, and said appointee shall continue only until the expiration of the regular term for which the predecessor of such appointee would have held office. The revocation of the certificate

of any member of this board shall terminate his membership thereon, and the Governor shall fill the vacancy so caused as herein above provided. [Id., § 2.]

Art. 999s. Organization of board; rules and regulations; powers.—The members of said board shall, within thirty days after their appointment, qualify by taking the oath of office before a notary public or other officer empowered to administer oaths in the county in which each shall reside, and shall file same with the Secretary of State and receive their certificate of appointment as members of the “State Board of Public Accountancy.” At the first meeting after each biennial appointment, the board shall elect from among its members a chairman and secretary-treasurer. The board may prescribe rules, regulations and by-laws in harmony with the provisions of this law and not inconsistent with the laws of the State of Texas for its own proceedings and government and for the examination of applicants for certificates as certified public accountants; which rule shall provide that when a division on any motion occurs, at least three affirmative votes shall be necessary to the final adoption thereof. It is further provided that three members of said board shall constitute a quorum for the transaction of the business of the board.

All rules, regulations and by-laws adopted by the said board shall be filed with the office of the Secretary of State. Said board, or any member thereof, shall have the power to administer oaths for all purposes required in the discharge of its duties, and said board shall adopt a seal to be affixed to all of its official documents. [Id., § 3.]

Art. 999ss. Meetings of board; examinations.—The board shall meet within sixty days after its appointment and at least once in each year for the purpose of examining applicants for certificates as provided herein, and may meet as many times during the year as may be in its discretion advisable. Notice of all meetings shall be given at least thirty days prior to the dates selected for same by publication three consecutive times in three daily newspapers published in the three most populous cities in the State, such notice giving the time and place of meeting and stating the purpose to be for the examination of applicants for certificates as certified public accountants; provided, that the board may hold any number of meetings, and at any time, without giving notice by publication of such meetings, if a meeting be called for any other purpose than the examination of applicants for certificates. It is further provided that any applicant who has successfully passed an examination before said board upon three of the subjects required may have a re-examination upon the unsuccessful subject under the supervision of said board. Examinations by the board shall be on the following subjects: “Theory of Accounts,” “Practical Accounting,” “Auditing,” and “Commercial Law as Affecting Accountancy,” and each applicant shall be required to make a general average of at least seventy-five per cent. on all subjects, and to each person passing such examination, if he has otherwise qualified, shall be issued by the State Board of Public Accountancy a certificate as a “Certified public accountant of the State of Texas,” and the State Board of Public Accountancy shall have the power to revoke or recall any certificate issued under this Act as hereinafter provided. [Id., § 4.]

Art. 999sss. Records of board; transmission to Secretary of State.—The State Board of Public Accountancy shall preserve a record of its proceedings in a book kept for that purpose, showing

the name, age and duration of residence of each applicant, the time spent by the applicant in practice as a public accountant, or in employment in the office of the public accountant, and the year and school, if any, from which degrees were granted or in which the course of study was successfully completed by the applicant as required by law. Said register will show, also, whether applicants were rejected or licensed, and shall be prima facie evidence of all matters contained therein. The secretary of the board shall, on December 31 of each year, transmit an official copy of said register to the Secretary of State for permanent record, certified copy of which, under the hand and seal of the secretary of said board or Secretary of State, shall be admitted in evidence in any court or proceeding. [Id., § 5.]

Art. 999t. Qualifications of applicants for certificates.—No person shall be permitted to take an examination unless he be twenty-one years of age, of good moral character, a qualified citizen of the United States, and unless he shall have had one year's study and practice in accountancy or accounting work. [Id., § 6.]

Art. 999tt. Certificate without examination.—The board may, in its discretion, waive the examination and issue a certificate to any person who has received and holds a valid and unrevoked certificate as a certified public accountant issued by or under the authority of any state or territory of the United States, the District of Columbia, or who holds the equivalent of such certificate by and under the expressed legal authority of any foreign nation, providing, however, that such certificate or degree shall, in the opinion of the board, have been issued under a standard fully equivalent to that of the requirements of said board, and issued by such state or territory as may extend the same privilege to certified public accountants holding certificates from this State; provided, further, that such applicant shall have qualified as provided in Section 6 [Art. 999t]. [Id., § 7.]

Art. 999ttt. Same.—The State Board of Public Accountancy shall, upon written application therefor, waive examination of any applicant, provided said applicant shall be qualified as provided by Section 6 [Art. 999t] hereof, and shall have been practicing on his own account as a public accountant, or on the behalf of another public accountant, as a senior public accountant for not less than three years, two years of which practice shall have been within the State of Texas immediately preceding said application; provided, further, that such application is filed prior to January 1, 1916. [Id., § 8.]

Art. 999u. Examination fee; annual fee.—Each applicant for a certificate as certified public accountant shall, at the time of making application, pay to the treasurer of said board a fee of twenty-five dollars, and no application shall be considered by said board until said fee of twenty-five dollars shall have been paid. In case of failure on the part of any applicant to pass a satisfactory examination, said applicant may have the privilege of appearing at any subsequent examination conducted by said board for re-examination, upon the payment of an additional fee of ten dollars.

The holder of each certificate issued hereunder shall pay an annual fee of \$1.00 into the treasury of the State Board of Public Accountancy. The failure on the part of the holder of any certificate issued under this Act to pay this fee shall automatically cancel the privilege of using the title "Certified Public Accountant," but reinstatement may be had at any time within two years, or before the expiration of sixty days after the two years shall have elapsed,

by the payment of the fee and application in such form as may be provided by the board and the payment further of a penalty of \$2.50 for each year lapsed. [Id., § 9.]

Art. 999uu. Revocation of certificate.—The State Board of Public Accountancy shall revoke and recall any certificate issued under this Act if the holder thereof: (1) shall be convicted of a felony; (2) shall be declared by any court to have committed any fraud; or (3) shall be declared by any court or commission to be insane or otherwise incompetent; or (4) shall be held by this board to be guilty of any act or default discreditable to the profession; provided, that written notice of the cause of such contemplated action and the date of the hearing thereof by this board shall have been served upon the holder of such certificate at least fifteen days prior to such hearing, or provided that such notice of such contemplated action and the date of the hearing thereof by this board shall have been mailed to the last known address of such holder of such certificate at least twenty days prior to such hearing; and at such hearing the Attorney General of this State, or any one of his assistants, or any district attorney designated by him, may sit with the board as legal counsellor and advisor, and to prepare for any legal action that may be determined upon by the State Board of Public Accountancy. [Id., § 11.]

Art. 999uuu. Penalty for violation of act.—If any person represents himself to the public as having received a certificate as provided for in this Act, or advertises as a “Certified Public Accountant,” or uses the initials “C. P. A.,” or otherwise falsely holds himself out as being qualified under this Act, while practicing in this State, without having actually received such certificate, or it has been recalled or revoked, and he shall continue to use the initials “C. P. A.,” or shall refuse to surrender such certificate after revocation thereof, or shall otherwise violate any provisions of this Act, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined any sum not to exceed \$200.00. No audit company, incorporated or unincorporated, shall use the title “Certified Public Accountants” or the initials “C. P. A.,” and no firm or partnership shall use this title, or these initials, unless each member of said firm or partnership is a legal holder of a certificate issued under the provisions of this Act, and any violation of these provisions shall be punished by a fine not to exceed the sum of \$200.00.

The use by any person, firm or corporation of the abbreviated title “Certified Accountant,” or of the initials “C. A.,” shall be construed a violation of this Act, and shall subject such person, firm or corporation to a fine not to exceed the sum of \$200.00. [Id., § 12]

Art. 999v. Misconduct by practicing public accountant.—If any person practicing in the state of Texas as a Certified Public Accountant under this Act shall wilfully falsify any report or statement bearing upon any examination, investigation or report made by him or under his direction as such Certified Public Accountant, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$100.00 or more than \$1,000.00; provided, further, than any person convicted under this section shall forfeit and surrender the certificate of Certified Public Accountant held by him to the State Board of Public Accountancy. [Id., § 13.]

Art. 999vv. Purpose and scope of law.—Nothing herein contained shall be construed to prevent any person from being em-

ployed as an accountant in this State in either public or private practice. The purpose of this law is to provide for the examination and the issuance of a certificate, or degree, granting the privilege of the use of the title "Certified Public Accountant," and the use of the initials "C. P. A.," as indicative of the holder's fitness to serve the public as a competent and properly qualified accountant in public practice, and to prevent those who have no such certificate or degree from using such title or initials; provided, however, the use of the initials "C. P. A." or "C. A." to designate any business other than the practice of accountants or auditors is not prohibited by this Act. [Id., § 14.]

CHAPTER EIGHT H

SALE OF CORPORATE STOCK

<p>Art. 999vvv. Corporations affected by act; promotion commissions or fees. 999vvvv. Corporations affected; mining, oil, or gas companies; townsite companies. 999w. Sale of stock; filing statement; contents of statement; foreign corporation to file copy of charter; employment of experts; statement of townsite company. 999ww. Granting or refusing permit; stock previously sold; promotion fee; when permit shall not issue; bond. 999www. Misrepresentations; suit on bond; amount of recovery; successive suits; new bond; list of officers, agents, etc. 999wwww. Deposit of net proceeds of sales. 999x. Books showing sales to be</p>	<p>Art. kept; inspection by state officers. 999xx. Foreign corporations; no permit unless fifty per cent of stock subscribed; loan and insurance companies excepted. 999xxx. Foreign corporations; power of attorney to receive process. 999xxxx. Penalty for violation of law. 999y. Organization within two years; refundment to subscribers; extension of time. 999yy. Law cumulative. 999yyy. Corporations and transactions not affected by act. 999yyyy. Deposit of funds with state treasurer; examination of corporations; expenses. 999z. Definition of terms.</p>
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Article 999vvv. Corporations affected by act; promotion commissions or fees.—Every private corporation, foreign or domestic, organized for profit, which is now attempting or shall hereafter attempt to increase its capital stock, and every proposed corporation attempted to be organized which shall, directly or indirectly, through itself, its agents or employes, or through any person or association of persons, holding companies, sales companies or otherwise, or through any other agents, sell or contract to sell any stock of such corporation or proposed corporation, upon which sale or proposed sale or contract of sale any part of the proceeds derived or to be derived therefrom are used or to be used, directly or indirectly for the payment of any commission, promotion, organization fee or other expenses incident, directly or indirectly, to the sale of its shares of stock, except attorney's fees, charter fees, franchise tax, permit fees and stationery and supplies, shall be subject to the provisions of this act. [Act 1913, 1st S. S., p. 66, ch. 32, § 1.]

Art. 999vvvv. Corporations affected; mining, oil, or gas companies; townsite companies.—This act shall also apply to any mining, oil or gas corporation increasing its stock or proposed mining, oil or gas corporation attempting to sell stock in which any land or mineral or thing of value is to be procured from, in or under such land that has been or is to be placed as an asset with or in the corporation or proposed corporation, whether any promotion fee is charged or not, and to any townsite corporation or proposed townsite corporation. [Id., § 2.]

Art. 999w. Sale of stock; filing statement; contents of statement; foreign corporation to file copy of charter; employment of experts; statement of townsite company.—Before offering for sale or contracting to sell, directly or indirectly, any stock of such proposed corporation, or such increased stock of any existing corporation, or before selling any stock in any townsite corporation as provided in Section 2 [art. 999vvvv], such corporation, or those promoting or having charge of the sale of stock of any proposed corporation, shall file, under oath, in the office of the Secretary of State, where, under the law, a charter would be filed in his department, or in the office of the Commissioner of Insurance and Banking, where, under the law, a charter would be filed in his department, together with a filing fee of twenty dollars, the following documents: A statement showing in full detail the plan upon which the corporation proposes to increase its capital stock or upon which the promoters or those having charge of the sale of stock of any proposed corporation proposes to sell its stock and organize the corporation, together with a copy of all the forms of contracts, stock (or deeds, if the same shall come under Section 2 hereof) to be used by the corporation or promoters, or those having charge of the sale of stocks of any proposed corporation in connection with such stock sales. The statement shall further show the name, location and domicile of such corporation, and the names of its officers or proposed officers, if any, or promoters, and the addresses of all the parties; the amount of capital stock of any corporation already organized, the proposed increase, or the proposed capital stock of the corporation to be organized, and the price at which the stock is proposed to be sold; and the price at which the stock is proposed to be sold shall not be changed without filing with the secretary or commissioner, as the case may be, a statement of such change, which shall be subject to his approval. Any such corporation or promoters of such proposed corporation shall furnish the secretary or commissioner such other information as may be necessary or proper concerning the sale of its stock.

If it shall be a corporation organized under the laws of any other jurisdiction, it shall file with the Secretary or commissioner a copy of its charter, and such other evidence of its authority as the secretary or commissioner may require.

Said statement shall also show the commission, promotion fee and other estimated incidental expenses proposed to be charged for the organization of such proposed corporation, or the increase in the capital stock of any corporation already organized, and how the commissions or fees are to be paid.

If the corporation or proposed corporation comes under Section 2 hereof, the officers of the corporation, or the promoters of the proposed corporation shall state the facts upon which they base their estimate of the actual value of the property which is to become an asset of the corporation, and the secretary or commissioner shall require such proof as he may deem proper to establish the actual value of the property.

The secretary or commissioner shall have the right to employ such experts as he may deem necessary, and the experts shall be employed at the expense of the corporation or promoters of a proposed corporation.

No corporation proposed to be organized for the purpose of buying or selling town sites and town lots shall hereafter be granted a charter by the Secretary of State, or if a foreign corporation shall not be granted a permit to do business in the State of Texas unless the incorporators of said proposed corporation or officer of such

foreign corporation shall file with the Secretary of State each and every document, contract and all papers referred to in Section 3 of this act [this article], as well as a general statement of the plan of its proposed townsite, and a general statement of its methods of advertising same, together with a sample copy of its advertising literature, and no charter shall be granted any corporation unless after the compliance with the provisions of this act and in the judgment of the Secretary of State, such business of any proposed townsite corporation will be honestly and fairly conducted both to the corporation and to the public. And each and every corporation in this State now existing or hereafter organized desiring to engage in the sale of townsite lots or sites shall, prior to such sale, file with the Secretary of State a general plan of said proposed lots to be sold, as well as a copy of any and all proposed contracts to be made with the public in the sale thereof, and a general statement of the literature proposed to be issued, and all matter referred to in Section 3 hereof, and if in the judgment of the Secretary of State said sale will be conducted both honestly and fairly to the corporation and to the public, a permit to conduct said sale shall be granted. This provision shall not be construed to authorize the creation of any corporation for any purpose not now authorized by the laws of this State. [Id., § 3.]

Art. 999ww. Granting or refusing permit; stock previously sold; promotion fee; when permit shall not issue; bond.—The secretary or commissioner, upon the receipt of the information as provided for in Section 3, [art. 999w] shall grant or refuse such permit.

If the secretary or commissioner shall decide that the sale of stock will be fairly and honestly conducted, both to the corporation and to the public, such permit shall be granted, provided that the commissions, promotion and other incidental expenses, exclusive of the exempted expenses mentioned in Section 1 of this act [art. 999vvv] shall not be more than fifteen (15) per cent of the price at which such stock is to be sold as shown by the application or amended application.

Provided, that where any proposed corporation has already sold its stock, or a part thereof, or any part thereof has been subscribed at the time this act shall take effect, this act shall not effect stock previously sold or subscribed nor any contracts made in reference to same; but if any of the stock of said proposed corporation remains unsold or unsubscribed, said corporation shall, nevertheless, be entitled to a permit upon complying with the other conditions of this act, including the future sale or subscription of any of its stock.

The commission or promotion fee shall be paid to the agent or promoter as the stock is sold by him and paid for by the purchaser. The stock shall be considered as paid for when paid for in cash, property or labor.

No permit shall be granted unless there shall appear upon the subscription lists and contracts of such corporation or proposed corporation, in bold type, the amount of the commissions, promotion fees and other estimated expenses incident to the sale of such stock, and the interest which the officer, agent, employé or promoter selling or contracting to sell such stock has in such sale; nor shall such permit be granted until the applicants therefor have entered into a bond for not less than one thousand dollars (\$1000) nor more than one hundred thousand dollars (\$100,000), the same to be fixed by the secretary or commissioner at not more than ten per cent of the stock proposed to be issued. The said bond shall

be payable to the secretary or commissioner as the case may be, and his successor in office, conditioned that the facts set forth in the application for such permit, and the proof and statements offered to such secretary or commissioner, upon which the application is based, are true, and that they will comply with the provisions of this act in the sale of the stock of such corporation or proposed corporation. Said bond may be made with individual sureties or a surety company authorized to do business in the State of Texas, and the bond shall be approved by the secretary or commissioner. [Id., § 4.]

Art. 999www. Misrepresentations; suit on bond; amount of recovery; successive suits; new bond; list of officers, agents, etc.—Whenever any permit has been issued, the corporation or persons receiving the same shall file a list of the names of their or its authorized officers, agents and employes, and the postoffice address of each; and, in case of the change of any of its officers, agents or employes, it shall file a list of such changes with the secretary or commissioner. [Id., § 6.]

Art. 999www. Deposit of net proceeds of sales.—All moneys or other things of value collected by such corporation or the promoters of a proposed corporation, for the sale of its stock, or contract for the sale of its stock, shall be deposited by said corporation to its credit, or by the promoters of a proposed corporation, to the credit of its proposed officers or trustees, with the exception of the amount allowed for commissions, promotion fees and other incidental expenses, with a bank, bank and trust company or trust company incorporated under the laws of this State, or of the United States. [Id., § 7.]

Art. 999x. Books showing sales to be kept; inspection by state officers.—All such corporations, and the organizers or trustees of proposed corporations shall keep a set of books, which shall show the amount of money, or other things of value received by such corporation or proposed corporation, from the sale of its stock, or from contracts of sale of its stock, and such books shall show the number and amounts of stock sold or contracted to be sold, by whom sold, and to whom sold, or contracted to be sold, and the postoffice address of each. Said books shall at all times be open for inspection by the secretary or commissioner, or his duly authorized agent. [Id., § 8.]

Art. 999xx. Foreign corporations; no permit unless fifty per cent of stock subscribed; loan and insurance companies excepted.—No permit to sell stock shall ever be issued to any foreign corporation which has not at the time of making application for permit at least fifty per cent of its capital stock subscribed and paid in, providing that this shall not apply to any foreign corporation engaged exclusively in the business of lending money in this state, nor to any insurance company that is required by law to obtain a permit from the Commissioner of Insurance and Banking. [Id., § 10.]

Art. 999xxx. Foreign corporations; power of attorney to receive process.—Each foreign corporation or the promoters of any proposed foreign corporation desiring to sell or contract to sell its stock in this State shall first file with the secretary or commissioner a like power of attorney to that provided for life insurance corporations in Article 4773, Revised Civil Statutes of the State of Texas of 1911, [same article in Vernon's Sayles' Civ. St. 1914] and service may be had upon the corporation and the secretary or commissioner, as the case may be, as therein provided for, and the secretary or commissioner, as the case may be, upon receipt of such process as

is therein provided for, shall proceed as is provided for him to do in Article 4774, Revised Civil Statutes of the State of Texas of 1911 [same article in Vernon's Sayles' Civ. St. 1914] and the secretary or commissioner's acts and conduct in regard to such power of attorney, and such process shall be the same as is provided for in said Articles 4774 and 4773, and the effect, force and result of such acts shall be the same as therein provided for. [Id., § 11.]

Art. 999xxxx. Penalty for violation of law.—It shall hereafter be unlawful for any officer, agent or employé or trustee, or holding company, or sales agents, or person, or association of persons in this State to sell, or offer to sell, or contract to sell, directly or indirectly, for such concern, any stock of any corporation or proposed corporation, subject to this act, which has been, proposed to be, is now being, or may hereafter be organized for profit, without first complying with the provisions of this act, and any person so offending shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than two thousand dollars, and in addition thereto may be imprisoned in the county jail for any period not more than one year, or by both such fine and imprisonment. [Id., § 12.]

Art. 999y. Organization within two years; refundment to subscribers; extension of time.—At the expiration of two years from the granting of a permit under this act if the proposed corporation has failed to organize, then all subscribers must be refunded the amount paid to the promoter or trustee; provided, however, that the secretary or commissioner may grant an extension of time for the sale of securities. [Id., § 12a.]

Art. 999yy. Law cumulative.—This act shall be construed to be cumulative of any other law or laws of this State. [Id., § 13.]

Art. 999yyy. Corporations and transactions not affected by act.—The terms of this act shall not apply to any national bank, nor to any corporation having a charter granted under any act of the Congress of the United States, nor to any State bank, bank and trust company or trust company organized under the laws of this State, nor to any corporation organized under the Federal Reclamation Act, approved June 17, 1902, or the regulations established by the Secretary of the Department of the Interior in pursuance thereof. Nor shall the terms of this act apply to any corporation or the promoters of any corporation organized under the laws of Texas which does not sell or contract to sell its stock to more than twenty-five bona fide purchasers; provided, it does not act as the agent or trustee, holding company or sales company in the promotion of any concern which is included under the terms of this act. Nor shall this act apply to any railroad or railway company or interurban railroad or railway company, or street railroad or railway company. Nor shall this act apply to the sale of stock of a corporation by a bona fide owner of same, who had in good faith bought the same, and who in the purchase and sale of same was and is not acting directly or indirectly as promoter or agent of such corporation. Nor shall this act apply to a bona fide stock or stock broker in the sale of stock, which stock has been by such corporation sold and issued to a bona fide purchaser prior to the offering of same for sale by such broker; provided, that such purchaser or broker was not acting, directly or indirectly, as promoter of such corporation. [Id., § 14.]

Art. 999yyyy. Deposit of funds with state treasurer; examination of corporations; expenses.—All moneys collected under the terms of this act by the secretary or commissioner shall be quarter-

ly deposited by him with the State Treasurer and credited to the general fund. Whenever the secretary or commissioner shall deem it necessary to examine the books of any corporation or proposed corporation, subject to the provisions of this act, or investigate its financial condition, he shall do so at the expense of the corporation or proposed corporation under investigation, and the corporation or the agents of the corporation or proposed corporation being investigated shall pay to the secretary or commissioner, or his agent, making the investigation his actual expenses and seven dollars and fifty cents per day for such investigation, which said expenses shall be paid at the termination of such investigation by the concern investigated. [Id., § 15.]

Art. 999z. Definition of terms.—Whenever the word “secretary” is used in this act it shall be considered to mean Secretary of the State of Texas, and whenever the word “commissioner” is used in this act it shall be considered to mean Commissioner of Insurance and Banking of the State of Texas. [Id., § 16.]

CHAPTER EIGHT I

SALE OF PATENT RIGHTS

Art. 999zz. Notes to state consideration. 999zzz. Effect of statement in notes or liens.	Art. 999zzzz. Penalty for violation of act.
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Article 999zz. Notes to state consideration.—That all notes and liens given for a patent right consideration or patent right territory shall state on their face that the same were given for a patent right. [Act 1915, p. 128, ch. 76, § 1.]

Art. 999zzz. Effect of statement in notes or liens.—The aforesaid statement on the face of said notes or liens shall be notice to all subsequent purchasers of said notes or liens of all equities existing between the parties to the original transaction, and the same shall be subject to all defenses against subsequent owners and holders, that they would, if the same had remained in the hands of the original owner. [Id., § 2.]

Art. 999zzzz. Penalty for violation of act.—If anyone selling a patent or patent right territory shall take a note or lien for the purchase price of the same, contrary to the provisions of this Act, he shall be deemed guilty of a misdemeanor, and on conviction fined any sum not less than twenty-five nor more than two hundred dollars. [Id., § 3.]

CHAPTER NINE

MISCELLANEOUS OFFENSES

Art. 1000. False certificate by notary public. 1001. False declaration or protest by. 1002. Preceding articles embrace what. 1003. False declaration by master of vessel.	Art. 1004. Throwing ballast into the sea near bar, etc. 1005. Penalty. 1006. False entry in book of accounts. 1007. [Superseded.]
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Article 1000. [580] False certificate by notary public.—If any notary public shall make any false certificate as to the proof or acknowledgment of any instrument of writing relating to commerce or navigation to which, by law, he is authorized to certify, or shall make any false certificates as to the proof or acknowledgment of any letter of attorney, or other instrument of writing relating to

commerce or navigation, to which he may by law certify, he shall be punished by confinement in the penitentiary not less than two nor more than five years.

Indictment.—Willson's Cr. Forms, 446.

Art. 1001. [581] False declaration or protest by.—If any notary public shall make any false declaration or protest respecting any matter or thing relating to commerce or navigation, or to commercial instruments, where, by law, he is authorized to make such declaration or protest, he shall be punished as prescribed in the preceding article.

Indictment.—Willson's Cr. Forms, 447.

Art. 1002. [582] Preceding articles embrace, what.—The provisions of the two preceding articles are intended to embrace all acts of a notary public, done in his official capacity within the proper sphere of his duties, and which arise out of transactions respecting navigation or commerce.

Indictment.—Willson's Cr. Forms, 446, 447.

Art. 1003. [583] False declaration by master of vessel.—If any master or other officer of a vessel, with intent to defraud, shall make a false declaration or protest as to the loss or damage of any vessel or cargo, he shall be punished by confinement in the penitentiary not less than two nor more than five years.

Indictment.—Willson's Cr. Forms, 448.

Art. 1004. [584] Throwing ballast into the sea near bar, etc.—From and after the passage of this act, it shall be unlawful to throw into the sea any part of the ballast of any vessel within six miles of any bar or harbor in this state. [Act April 23, 1879, p. 153, § 2.]

Art. 1005. [585] Penalty.—If any ballast shall be thrown into the sea within the limits forbidden by this law, from any vessel, the master or officer in charge thereof at the time shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than two hundred dollars. [Id., § 2.]

Indictment.—Willson's Cr. Forms, 449.

Art. 1006. [586] False entry in book of account.—If any person, with intent to defraud, shall make, or cause to be made, any false entry in any book kept as a book of accounts, or shall, with like intent, alter, or cause to be altered, any item of an account kept or entered in such book, he shall be fined not less than one hundred nor more than one thousand dollars, or be punished by confinement in the penitentiary not less than two nor more than five years.

Offense.—The essentials of the offense are the making of a false entry and the intent to defraud. *Pope v. State* (Cr. App.) 170 S. W. 150.

Indictment.—Willson's Cr. Forms, 450, 451.

Instructions.—A charge, that if the jury believed that the alleged false entry was made by accused, but that it was correct and was a proper entry, and that it was not made with intent to defraud, he should be acquitted, is improper, because requiring the jury, as a condition to acquitting, to believe, not only that the entry was correct and proper, but that it was made without intent to defraud. *Pope v. State* (Cr. App.) 170 S. W. 150.

Questions for jury.—Accused held not entitled to a directed verdict of acquittal. *Pope v. State* (Cr. App.) 170 S. W. 150.

Art. 1007. [Superseded. See arts 999ii and 999iii, ante.]

TITLE 15

OF OFFENSES AGAINST THE PERSON

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| <p>Chap.
 1. Assault and assault and battery.
 2. Aggravated assault and battery.
 2a. Assault with prohibited weapon.
 3. Of assault with intent to commit some other offense.
 4. Of maiming, disfiguring and castration.
 4a. Hazing.
 5. False imprisonment.
 6. Offenses against minors.
 7. Of kidnaping and abduction.
 8. Rape.
 9. Abortion.
 10. Administering poisons and injurious potions.
 11. Of homicide.
 12. Of justifiable homicide.
 1. Of a public enemy.</p> | <p>Chap.
 12. Of justifiable homicide—Continued.
 2. Of a convict.
 3. By officers in the performance of a duty, and by other persons under certain circumstances.
 4. Defense of person or property.
 13. Of excusable homicide.
 14. Homicide by negligence.
 1. In the performance of a lawful act.
 2. In the performance of an unlawful act.
 15. Of manslaughter.
 16. Of murder.
 17. Of dueling.
 18. General provisions relating to homicide.</p> |
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CHAPTER ONE

ASSAULT AND ASSAULT AND BATTERY

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| <p>Art.
 1008. "Assault and battery" defined.
 1009. Intent presumed, and "injury" defined.
 1010. May be committed on person not intended.
 1011. How it may be committed.
 1012. Any means capable of injury sufficient.
 1013. "Coupled with an ability to commit" defined.</p> | <p>Art.
 1014. When violence does not amount to.
 1015. Degree of force permissible.
 1016. Verbal provocation no justification.
 1017. "Battery," how used.
 1018. Degrees of assault.
 1019. Punishment for simple assault, etc.
 1020. Abusive language an offense.
 1021. Intimidation of another.</p> |
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Article 1008. [587] "Assault and battery" defined.—The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing, in itself or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault.

Cited, *Gage v. State* (Cr. App.) 151 S. W. 565; *Ward v. State* (Cr. App.) 151 S. W. 1073; *Ely v. State* (Cr. App.) 152 S. W. 632; *McCraw v. State* (Cr. App.) 163 S. W. 967.

Offense.—Slightest degree of violence is sufficient. *Donaldson v. State*, 10 App. 307; *Ware v. State*, 24 App. 521, 7 S. W. 240. See, also, *Cromeans v. State*, 59 App. 611, 129 S. W. 1129; *Robey v. State* (Cr. App.) 163 S. W. 713.

To constitute assault and battery unlawful violence must be used upon another, and such violence must be used with the intent to injure the person upon whom it is inflicted. Unaccompanied by such intent the violence, however unlawful, does not constitute assault and battery. *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Carroll v. State*, 24 App. 366, 6 S. W. 190; *Dickenson v. State*, 24 App. 121, 5 S. W. 648; *Donaldson v. State*, 10 App. 307; *Ware v. State*, 24 App. 521, 7 S. W. 240.

Ability and an attempt or threatening movement, showing intention to commit a battery, are constituent elements. *Carroll v. State*, 24 App. 366, 6 S. W. 190; *Flournoy v. State*, 25 App. 244, 7 S. W. 865; *Lee v. State*, 34 App. 519, 31 S. W. 667.

A common assault and battery is the unlawful assaulting and beating of another; and the least touching of another willfully, or in anger is a battery; and every battery includes an assault; so that every unlawful touching of another person is an assault and battery. *Norton v. State*, 14 Tex. 387; *Johnson v. State*, 17 Tex. 515.

It is sufficient that an act be done indicating an intention to immediately commit a battery, coupled with the ability to do it. Thus the mere act of taking a gun from the rack, coupled with other indicia, will sometimes suffice. *Higginbotham v. State*, 23 Tex. 574; *Johnson v. State*, 14 App. 306.

The flourish of a knife in a threatening manner sometimes constitutes an assault. *Stockton v. State*, 25 Tex. 772.

An assault may be committed though the party announces that he has no intention to do immediate injury. The test is, was there in fact a present purpose of

doing an injury? If so, the acts will amount to an assault; otherwise they will not. *Bell v. State*, 29 Tex. 492; *Rainbolt v. State*, 34 Tex. 286; *Hill v. State*, Id. 623; *Agitone v. State*, 41 Tex. 501; *Walker v. State*, 7 App. 627.

An assault may be committed by one or more persons at the same time by the same act. *State v. Bradley*, 34 Tex. 95.

In every assault there must be an intent to injure, coupled with an act which must be at least the beginning of the attempt to injure then and not an act of preparation for some contemplated injury to be afterwards inflicted. *Johnson v. State*, 43 Tex. 576.

An assault is an attempt to commit a battery. Ability to commit a battery by violence by the means used is essential. *McKay v. State*, 44 Tex. 43.

The use of any dangerous weapon or the semblance thereof in an angry or threatening manner, with intent to alarm another, under circumstances calculated to effect that object, is an assault. *Kief v. State*, 10 App. 286.

An assault and battery does not consist of every violent act against another, but only of "an unlawful violence upon the person of another with intent to injure him," etc. *Souther v. State*, 18 App. 352.

Where one approaches another in a threatening manner and uses threatening language and gestures, it is an assault. *Brister v. State*, 40 App. 506, 51 S. W. 393.

The statutory definition follows the common law. *Evans v. State*, 25 Tex. 303.

The use of any unlawful force upon the person of another with intent to injure in an assault and battery. Two things must concur—the one physical and the other mental—the act and the intent. *Floyd v. State*, 29 App. 341, 15 S. W. 819.

An assault includes the idea of intended unlawful violence toward the person alleged to have been assaulted. In every assault there must be an intent to injure. The test is, was there in fact a present purpose of doing an injury? If so, the acts will amount to an assault; otherwise they will not. *White v. State*, 29 App. 530, 16 S. W. 340.

Defendant knocked the prosecutor down with a milk bucket; held, an assault and battery. *Marrow v. State*, 37 App. 330, 39 S. W. 944.

For defendant, after there was no danger of violence from one who had been knocked down and was being held, to kick at him was an assault. *Marrow v. State*, 37 App. 330, 39 S. W. 944.

The use of a loaded gun which was incapable of being fired because of a broken firing pin held a simple assault and not an aggravated assault with a deadly weapon. *Pearce v. State*, 37 App. 643, 40 S. W. 806.

Accused had threatened to beat prosecutor to death the first time they met again, and a few days thereafter he approached him on the highway, in an angry and threatening manner, telling him, if he had a knife, to use it, and that prosecutor was afraid to do so, and then ran his hand into his pocket, but suddenly stopped when prosecutor pointed a pistol at him. Held to constitute an assault. *Brister v. State*, 40 App. 505, 51 S. W. 393.

Drawing back or lifting the arm to strike one who could have been hit is an assault. *Western Union Telegraph Co. v. Bowdoin* (Civ. App.) 168 S. W. 1.

— **Intent.**—Intent to injure is the principal ingredient of the offense. *Berry v. State*, 30 App. 423, 17 S. W. 1080; *Floyd v. State*, 29 App. 341, 15 S. W. 819; *Young v. State*, 31 App. 24, 19 S. W. 431. See, also, *Atkins v. State*, 11 App. 8; *Dowlen v. State*, 14 App. 61.

In every assault there must be an intent to injure, coupled with an act which must at least be the beginning of the attempt to injure at once, and not a mere act of preparation for some contemplated injury that may afterward be inflicted. *Johnson v. State*, 43 Tex. 576; *Fondren v. State*, 16 App. 48; *Rutherford v. State*, 13 App. 92; and see *Bell v. State*, 29 Tex. 492; *Rainbolt v. State*, 34 Tex. 286; *Hill v. State*, Id. 623; *Agitone v. State*, 41 Tex. 501.

Accidental injury without intent to inflict pain or injury does not constitute an assault. *Atkinson v. State*, 62 App. 419, 138 S. W. 125.

Principals.—See notes under art. 74, ante.

Indictment.—Willson's Cr. Forms, 464, 465.

See, also, C. C. P. art. 470, and notes.

A battery need not be charged, if there was only an assault. *State v. Johnston*, 11 Tex. 22.

The indictment need not negative the relations and circumstances which would justify an act of violence. *State v. Stephenson*, 20 Tex. 151.

The indictment may charge an assault upon two or more persons. *State v. Bradley*, 34 Tex. 95.

Nor need it be alleged that the defendant had the ability to commit a battery. *Greenwood v. State*, 35 Tex. 587.

An indictment charging that defendant committed "and assault" instead of "an assault" held not fatally defective. *Martin v. State*, 40 Tex. 19.

An indictment charging that defendant did assault, strike and beat another with intent to injure, held sufficient as an indictment for common assault. *State v. Cass*, 41 Tex. 552.

An indictment for a simple assault need not state the instrument or means used in committing it. *State v. Hunter*, 44 Tex. 94.

It is not necessary in charging an assault that the particular acts of violence constituting the assault should be averred. The means by which the offense was committed need not be stated. *Roberson v. State*, 15 App. 317; *Martin v. State*, 40 Tex. 19. See, also, *Smith v. State*, 62 App. 281, 136 S. W. 1063.

An "intent to injure," or "unlawful violence" need not be alleged. *Milstead v. State*, 19 App. 490; *State v. Hartman*, 41 Tex. 562; *State v. Hays*, Id. 526; *State v. Allen*, 30 Tex. 59; *Evans v. State*, 25 Tex. 303; *State v. Luterloh*, 22 Tex. 210.

Where indictment charges striking with the fist, proof of a blow made with the open hand is sufficient. *Allen v. State*, 36 App. 436, 37 S. W. 738.

Where the state elects to try accused for an assault committed on a particular date, in a particular manner, it must prove that the assault was committed on that date by the means alleged. *Graham v. State*, 72 App. 9, 160 S. W. 714.

— **Inclusion in other offenses.**—Under an indictment charging an assault with intent to murder, or an aggravated assault, a conviction for a simple assault may be had. *Harrison v. State*, 10 App. 93; *Kennedy v. State*, 11 App. 73; *Bolding v. State*, 23 App. 172, 4 S. W. 579; *Davis v. State*, 20 App. 302; *Peterson v. State*, 12 App. 659; *Bittick v. State*, 40 Tex. 117; *James v. State*, 36 Tex. 645; *Gardenheir v. State*, 6 Tex. 348; *Givens v. State*, Id. 344; *Johnson v. State*, 17 Tex. 515; *Reynolds v. State*, 11 Tex. 120.

An indictment which imperfectly charges an aggravated assault may be good for a simple assault. *Nelson v. State*, 2 App. 227; *Marshall v. State*, 13 App. 492, overruling *State v. Pierce*, 26 Tex. 114. See, also, *Smith v. State*, 35 Tex. 500.

If the indictment is bad for the felony, the state can not dismiss as to the higher grade and obtain a conviction for simple assault. *Robinson v. State*, 31 Tex. 170.

The indictment may charge both the higher and lower degrees of the offense, and if bad for the higher, may be good for the lower. *State v. Bradley*, 34 Tex. 95; *Wilks v. State*, 3 App. 34.

A defendant may be punished under the same indictment for different degrees of an assault. *State v. Bradley*, 34 Tex. 95.

An indictment may be bad for an assault with intent to murder and good for a simple assault. *State v. Archer*, 34 Tex. 646; *Wilks v. State*, 3 App. 34.

Under an indictment charging defendant with an aggravated assault, a conviction could be had for simple assault. *Smith v. State*, 35 Tex. 500; *Milstead v. State*, 19 App. 490.

Where the indictment was for a felony, jurisdiction of the district court was not ousted by the fact that the conviction was for a misdemeanor included within the felony charged. *Montgomery v. State*, 4 App. 140.

Under an accusation charging aggravated assault, defendant may be convicted of simple assault. *Harrison v. State*, 10 App. 93.

— **Allegation of name.**—See notes under C. C. P. 456.

— **Variance.**—On an indictment for assault on one "Garzia," a conviction may be had on proof of an assault on one "Garcia," in the absence of proof as to the pronunciation of the letter "z" in the Mexican name "Garzia." *Rape v. State*, 34 App. 615, 31 S. W. 652.

Where an accusation particularizes the transaction, the proof must be confined to such transaction. *Herald v. State*, 37 App. 409, 35 S. W. 670.

Evidence.—Facts held insufficient to justify a conviction, *Warren v. State*, 33 Tex. 517; *Chamberlain v. State*, 2 App. 451; *Lewallen v. State*, 6 App. 475; *McConnell v. State*, 25 App. 329, 8 S. W. 275; *Jeffers v. State* (Cr. App.) 173 S. W. 1038. When the evidence is conflicting as to the first aggression, the verdict will not be disturbed. *Givens v. State*, 6 Tex. 344.

The character of the assaulted party as a quarrelsome, pugnacious man, it was held, could not be proved by the defendant, when the defense was that the assault was committed while such party was in the act of committing arson in the nighttime, and was not recognized by the defendant until the assault had been committed. *Henderson v. State*, 12 Tex. 525.

In some cases the defendant may prove the character of the injured party when in liquor. *Lewallen v. State*, 6 App. 475.

Acts which prima facie and unexplained, are undoubtedly assaults, may be shown to be, in truth, different from what they purport to be; that they are not attempts or offers to do harm, but merely annoying gestures without any accompanying purpose of mischief, or that they are merely reasonable preparations to repel anticipated violence. *Young v. State*, 7 App. 75; *Bell v. State*, 29 Tex. 492.

If the intent imputed to the accused is to injure the mind or feelings of the assaulted party, the evidence germane to the existence of such intent may well involve the character of the assailed party, and in such case would be admissible. See this case for an instance, where such evidence was held admissible. *Donaldson v. State*, 10 App. 307.

In a prosecution for an assault, defendant proposed to prove that it was the custom and practice of himself and associates to denounce each other in violent and abusive language, sometimes flourishing deadly weapons and indulging in threats, when in fact such conduct was merely matter of jest, and accompanied by no actual intention of committing violence. Held, that such evidence was properly rejected. *Hawkins v. State*, 17 App. 593, 50 Am. Rep. 123.

A verdict of guilty of simple assault is amply supported by evidence of an attempt to commit a battery with an open knife, which was prevented only by the interference of bystanders. *Yawn v. State*, 37 App. 205, 38 S. W. 785, 39 S. W. 105.

On trial for an assault, evidence of previous threats made by defendant against the person assaulted is admissible. *Bolton v. State* (Cr. App.) 39 S. W. 672. But evidence of trouble between prosecutor and others is inadmissible.—Id.

When a party who interposes to prevent a battery upon the person assaulted, and defendant in turn assaults him, evidence of such assault is admissible to show the animus of defendant. *McCray v. State*, 38 App. 609, 44 S. W. 170.

Evidence held to sustain a conviction. *Reynolds v. State*, 63 App. 270, 139 S. W. 977.

Charge.—See notes to C. C. P. art. 735.

Evidence held not to raise issue of simple assault. *Vivian v. State* (Cr. App.) 152 S. W. 895; *Jones v. State* (Cr. App.) 167 S. W. 1110; *Raleigh v. State* (Cr. App.) 168 S. W. 1050.

Where accused approached prosecutor in a threatening manner, with the intent to assault him, challenging him to defend himself with a knife, and was stopped

before he got close enough to commit a battery by prosecutor pointing a pistol at him, a request to charge that accused had not committed an assault because there had been no present ability to commit a battery, was properly refused. *Brister v. State*, 40 App. 505, 51 S. W. 393.

Facts held to require a charge on simple assault. *Smith v. State*, 61 App. 349, 135 S. W. 152.

One is not entitled to a charge on simple assault, in that he only used his hands and feet, where he helped one who was using a knife. *Cukierski v. State* (Cr. App.) 153 S. W. 313.

Definition of an assault is incomplete without a definition of a battery. *Perkins Bros. Co. v. Anderson* (Civ. App.) 155 S. W. 556.

Where the evidence showed beyond doubt that serious bodily injury was inflicted, the court properly refused to charge on simple assault. *Solis v. State* (Cr. App.) 174 S. W. 343.

Art. 1009. [588] Intent presumed, and "injury" defined.—When an injury is caused by violence to the person, the intent to injure is presumed; and it rests with the person inflicting the injury to show the accident or innocent intention. The injury intended may be either bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind.

Presumptions and burden of proof.—See arts. 51 and 52, ante, and notes.

When an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show that it was due to accident or innocent intention. *McConnell v. State*, 25 App. 329, 8 S. W. 275; *McKay v. State*, 44 Tex. 43; *Atkins v. State*, 11 App. 8.

The intent to injure will be presumed when an injury has been inflicted, but when no injury has been inflicted, the intent must be proved. *Ware v. State*, 24 App. 521, 7 S. W. 240; *McConnell v. State*, 25 App. 329, 8 S. W. 275. See, also, *Ward v. State* (Cr. App.) 151 S. W. 1073; *Robey v. State* (Cr. App.) 163 S. W. 713.

The presumption is not conclusive, but merely casts the burden on defendant to show accident or innocent intent. *Floyd v. State*, 29 App. 341, 15 S. W. 819.

Where one uses violence upon another and produces an injury, the burden is upon him to show that his act was innocent and without intent to injure. *Thompson v. State* (Cr. App.) 89 S. W. 1081.

It is improper to charge in assault and battery cases, that intent to injure will be presumed, when no physical injury has been inflicted, except in cases of assault of an indecent character by an adult upon a female. In case of assault by one man upon another, where no injury has been inflicted, the intent to injure must be proved as any other fact. *Tubbs v. State*, 50 App. 143, 95 S. W. 113.

The presumption that injury was intended arises from violence, but that presumption may be rebutted. *Perkins v. State*, 62 App. 508, 138 S. W. 133.

— **Charge.**—Charge held more favorable to defendant than the law. *Williams v. State*, 4 App. 255.

An instruction held erroneous as assuming that an injury was done prosecutrix, whereas the evidence rendered it doubtful whether her feelings were injured. *Floyd v. State*, 29 App. 341, 15 S. W. 819.

The giving of an instruction embracing this article held proper though prosecutrix did not testify to any disagreeable emotion, where it appeared that defendant admitted her virtue and she immediately complained after the insult. *Young v. State*, 31 App. 24, 19 S. W. 431.

Where the violence is slight, the charge as to intent to injure must be given, but where the injury is obvious, no such need be given. *Brown v. State*, 42 App. 417, 60 S. W. 549, 96 Am. St. Rep. 806. See, also, *Stripling v. State*, 47 App. 117, 80 S. W. 377.

Where the State's proof tends to show an assault without violence, the court must instruct the jury there must be established an intent to injure on the part of person making the assault and it is not proper to charge that the intent to injure is presumed, and accused must show innocent intention. *Lee v. State*, 47 App. 612, 85 S. W. 799.

Where accused claims that the injuries were accidental, and there is evidence that he caused the injuries, an instruction that, when an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show accident or innocent intention, is proper. *Yates v. State* (Cr. App.) 152 S. W. 1064.

Argument.—Reading section held not attack on defendant's failure to testify. *Jacobs v. State*, 37 App. 428, 35 S. W. 978.

Art. 1010. [589] May be committed on person not intended.—An assault, or an assault and battery, may be committed, though the person actually injured thereby was not the person intended to be injured.

Accidental injury.—If, in a difficulty he brought on, accused, in an effort to strike an antagonist, accidentally strikes and injures a third party, he is guilty of assault and battery on the latter. *Powell v. State*, 32 App. 230, 22 S. W. 677.

However, if in the justifiable self-defense of himself, the accused unintentionally injured a bystander, he would be guilty of no offense. *Powell v. State*, 32 App. 230, 22 S. W. 677; *Plummer v. State*, 4 App. 310, 30 Am. Rep. 165; *Clark v. State*, 19 App. 495.

To warrant a conviction for accidentally striking another when correcting a child, evidence must show the correction immoderate. *Turner v. State*, 35 App. 369, 33 S. W. 972.

The accused may make any defense, mitigation, or extenuation that could have been offered if he had shot the person intended. *Vining v. State* (Cr. App.) 146 S. W. 909.

Art. 1011. [590] How it may be committed.—An assault, or assault and battery, may be committed by the use of any part of the body of the person committing the offense, as of the hand, foot, head, or by the use of any inanimate object, as a stick, knife, or anything else capable of inflicting the slightest injury, or by the use of any animate object, as by throwing one person against another, or driving a horse or other animal against the person.

Cited, *Ward v. State* (Cr. App.) 151 S. W. 1073.

Art. 1012. [591] Any means capable of injury sufficient.—Any means used by the person assaulting, as by spitting in the face or otherwise, which is capable of inflicting an injury, comes within the definition of an assault, or an assault and battery, as the case may be.

Art. 1013. [592] "Coupled with ability to commit" defined.—By the terms, "coupled with an ability to commit," as used in article 1008 is meant—

1. That the person making the assault must be in such a position that, if not prevented, he may inflict a battery upon the person assailed.

2. That he must be within such distance of the person so assailed as to make it within his power to commit the battery by the use of the means with which he attempts it.

3. It follows that one who is, at the time of making an attempt to commit a battery, under such restraint as to deprive him of the power to act, or who is at so great a distance from the person assailed as that he can not reach his person by the use of the means with which he makes the attempt, is not guilty of an assault. But the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, and under circumstances calculated to effect that object, comes within the meaning of an assault.

Cited, *Vivian v. State* (Cr. App.) 152 S. W. 895.

Ability to commit.—If there be question of the ability to commit battery, it should go to the jury under instruction. *Boles v. State*, 18 App. 422.

An assault can only be committed when the act is coupled with the ability to commit a battery. For instance, the parties being too far separated for the accused to commit violence with the means used, there was no assault. *Marshall v. State*, 34 App. 22, 36 S. W. 1062.

That defendant was restrained before he made battery is no defense. *Goss v. State* (Cr. App.) 40 S. W. 725.

Use of weapon with intent to alarm.—An assault with a gun which cannot be fired is only a simple assault. *Pearce v. State*, 37 App. 643, 40 S. W. 806 (overruling *McCullough v. State*, 24 App. 128, 5 S. W. 839; *Blackwell v. State*, 33 App. 278, 26 S. W. 397, 32 S. W. 128).

Defendant used a gun, that was loaded but could not be fired, for the purpose of alarming the injured person, held a simple assault. *Pearce v. State*, 37 App. 643, 40 S. W. 806.

If the weapon as used was calculated to alarm, it is immaterial that it did not, in fact, alarm the party threatened. *Coker v. State*, 22 App. 20, 2 S. W. 615. And see further *Johnson v. State*, 19 App. 545; *Atterberry v. State*, 33 App. 88, 25 S. W. 125; *Smith v. State*, 62 App. 281, 136 S. W. 1063.

One who curses and points a fire arm at another, who flees, is guilty of an assault. *Myers v. State*, 72 App. 630, 163 S. W. 432. See, also, *King v. State*, 61 App. 427, 135 S. W. 136.

Pointing a gun or pistol at a person, within carrying distance of the weapon, with intent to injure such person, is an assault, unless it appear that the weapon was unloaded; and the burden of proving that it was unloaded is on the defendant. *Forrest v. State*, 3 App. 232; *Crow v. State*, 41 Tex. 468; *Caldwell v. State*, 5 Tex. 20; *Burton v. State*, 3 App. 408, 30 Am. Rep. 146.

Under the last clause of subdivision 3 of this article, if a dangerous weapon is used in a threatening manner, with intent to alarm, and under circumstances calculated to effect that object, the ability to commit battery is not necessary to constitute assault. *Kief v. State*, 10 App. 286; *Trimble v. State*, 57 App. 439, 125 S. W. 41.

Presenting a fire-arm in a condition for immediate use accompanied by an avowal of an intention to kill the party assaulted, is an assault. *Johnson v. State*, 19 App. 545.

The use of the weapon must be unlawful, which necessarily implies aggression, and the facts must show a present unlawful purpose to alarm another. If the weapon is used in lawful self-defense, it does not constitute assault. *White v. State*, 29 App. 530, 16 S. W. 340.

Where defendant, armed with a knife, advanced in an angry and threatening manner with intent to alarm the injured party, he was guilty of an assault. *Atterberry v. State*, 33 App. 88, 25 S. W. 125.

It is error to charge that it made no difference whether defendant had a weapon or not, if he made a threatening gesture. *Nelson v. State* (Cr. App.) 57 S. W. 645.

If a party has no weapon or semblance thereof, he cannot be guilty, under subdivision 3 of this article. *Nelson v. State* (Cr. App.) 57 S. W. 645.

Where one presents a pistol at the breast of another and snaps it, he is guilty of an assault with intent to murder. The burden is on the defendant to prove that the pistol is unloaded if such is the fact. The court is not bound to submit the issue to the jury whether the pistol was loaded or not simply because it does not fire. *Bedford v. State*, 44 App. 97, 69 S. W. 158.

The use simply of animate or inanimate objects for the purpose of alarming another does not under our statute constitute an assault. *Barnes v. State* (Cr. App.) 72 S. W. 169.

To constitute an assault by alarming a person, the thing done must first be unlawful, and must be done in an angry or threatening manner, and with intent to alarm; but there may be an intent to alarm which is not unlawful, and one may compel trespassers on his premises to leave them, and the means used to accomplish that purpose, if not intended to bring about injury, cannot become an assault. *Trimble v. State*, 57 App. 429, 125 S. W. 40.

Where accused threatened to kill and snapped a pistol which could not be fired, the issue of aggravated assault should have been submitted. *Oliver v. State*, 60 App. 62, 131 S. W. 215.

Firing a gun to frighten another is a simple assault. *Drake v. State*, 62 App. 130, 136 S. W. 1064.

Where one intending to commit an assault with his fists, is so confused by a blow that he uses a knife without knowing what he is doing, he may be convicted of simple assault. *Brewer v. State* (Cr. App.) 153 S. W. 622.

Indictment.—Willson's Cr. Forms, 465.

Evidence.—On trial for aggravated assault, when the evidence shows that defendant made an assault with a knife and was prevented from committing a battery; held, the evidence is amply sufficient to support a verdict for simple assault. *Yawn v. State*, 37 App. 205, 38 S. W. 785, 39 S. W. 105.

Evidence held insufficient to authorize a conviction of any character of assault other than that named in subdivision 3. *McCullough v. State*, 24 App. 128, 5 S. W. 839.

Charge.—A court is not required to charge that "an unloaded pistol is not a deadly weapon," or that "a pistol without a cap is not a deadly weapon," these being matters about which the jury are supposed to possess competent knowledge without information from the court. *Flournoy v. State*, 16 Tex. 31.

Where the testimony tended strongly to show that the alleged injured party was beyond the reach of danger from the means used, the charge should have explained the statutory meaning of "coupled with an ability to commit" the assault. *Boles v. State*, 18 App. 422.

The definition of an assault is incomplete without a definition of a battery. *Perkins Bros. Co. v. Anderson* (Civ. App.) 155 S. W. 556.

One who compels another to make an apology by threatening him with a knife, is not entitled to the submission of the issue whether there was an intent to injure. *Yelton v. State* (Cr. App.) 170 S. W. 318.

Decisions under original article.—Before this article was revised, it was held that mere threatening gestures and accompanying words did not constitute an assault, unless coupled with an ability to commit battery, no matter what the intention was. *McKay v. State*, 44 Tex. 43; *Smith v. State*, 32 Tex. 593; *Spears v. State*, 2 App. 244; *Jarnigan v. State*, 6 App. 465.

Art. 1014. [593] When violence does not amount to.—Violence used to the person does not amount to an assault or battery in the following cases:

1. In the exercise of the right of moderate restraint or correction given by law to the parent over the child, the guardian over the ward, the master over his apprentice, the teacher over the scholar.

Cited, *Cromeans v. State*, 59 App. 611, 129 S. W. 1129.

2. For the preservation of order in a meeting for religious, political or other lawful purposes.

3. The preservation of the peace, or to prevent the commission of offenses.

4. In preventing or interrupting an intrusion upon the lawful possession of property.

Cited, *S. H. Kress & Co. v. Lawrence* (Civ. App.) 162 S. W. 448.

5. In making a lawful arrest and detaining the party arrested, in obedience to the lawful order of a magistrate or court, and in overcoming resistance to such lawful order.

6. In self-defense or in defense of another against unlawful violence offered to his person or property.

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| <p style="text-align: center;">Subd. 1</p> <ol style="list-style-type: none"> 1. Test of liability in general. 2. Parent and child. 3. Master and servant. 4. Teacher and pupil. 5. Burden of proof. <p style="text-align: center;">Subd. 2</p> <ol style="list-style-type: none"> 6. Force permissible. <p style="text-align: center;">Subd. 4</p> <ol style="list-style-type: none"> 7. Defense of property. <p style="text-align: center;">Subd. 5</p> <ol style="list-style-type: none"> 8. Arrest. | <p style="text-align: center;">Subd. 6</p> <ol style="list-style-type: none"> 9. Self-defense. 10. ——— Charge. 11. Defense of another. 12. Homicide in self-defense or in defense of another. 13. Prevention of offences by act of private person. 14. Evidence of threats against accused, and character of person assaulted. 15. Indictment. |
|---|---|

SUBD. 1

1. **Test of liability in general.**—The true issue in prosecutions of this character, when the relationship is established, is, "Was the correction moderate?" not whether the instrument was unusual and calculated to inflict serious injuries, nor that the chastisement was done in a cruel or vindictive manner. *Stanfield v. State*, 43 Tex. 167.

2. **Parent and child.**—A stepfather stands in loco parentis to the stepchild, and may exercise this right. *Gorman v. State*, 42 Tex. 221; *Turner v. State*, 35 App. 369, 33 S. W. 972.

This provision applies only to the actual, and not to a mere conventional, relationship of parent and child. *Davis v. State*, 6 App. 133.

The right of moderate restraint applies not only to the parent, but also to a person who stands in loco parentis. Thus a brother of a fifteen year old girl, who provided her with board, lodging, clothing, and schooling, might be considered as standing in loco parentis to her. *Snowden v. State*, 12 App. 105, 41 Am. Rep. 667.

Defendant, while inflicting punishment upon his step-daughter, accidentally struck his wife; held, that in order to sustain a conviction for an assault upon his wife the evidence must show that he was chastising the child in an immoderate or unlawful manner. *Turner v. State*, 35 App. 369, 33 S. W. 972.

3. **Master and servant.**—A master has no right to chastise his servant. *Davis v. State*, 6 App. 133.

4. **Teacher and pupil.**—The teacher is clothed with discretionary authority to punish refractory pupils, and is not liable for its exercise, unless in an excessive or malicious manner. *Stephens v. State*, 44 App. 67, 68 S. W. 281, citing *Dowlen v. State*, 14 App. 61; *Hutton v. State*, 23 App. 386, 5 S. W. 122, 59 Am. Rep. 776, and *Kinnard v. State*, 35 App. 276, 33 S. W. 234, 60 Am. St. Rep. 47.

And see further, *Bolding v. State*, 23 App. 172, 4 S. W. 579; *Stanfield v. State*, 43 Tex. 167.

In all such cases the law presumes, from the relation of the parties, an entire absence of any criminal intent to injure, and it does not devolve upon the defendant to show accident or innocent intention, unless it be shown that the force used was excessive. Whether the violence used was moderate or excessive, must necessarily depend upon the age, sex, condition, and disposition of the pupil, with all the attending circumstances. *Dowlen v. State*, 14 App. 61; *Stanfield v. State*, 43 Tex. 167.

The teacher can use only that degree of violence necessary to restrain or correct the pupil. *Dowlen v. State*, 14 App. 61.

Evidence held to show that the injured person was a child and to sustain a conviction. *Bell v. State*, 18 App. 53, 51 Am. Rep. 293.

Case held immoderate punishment of pupil by teacher, see *Whitley v. State*, 33 App. 172, 25 S. W. 1072.

Evidence held insufficient to sustain the conviction of a teacher for simple assault. *Stephens v. State*, 44 App. 67, 68 S. W. 281.

The punishment must be moderate though the pupil is not subdued. *Whitley v. State*, 33 App. 172, 25 S. W. 1072.

Evidence to show that an assault made by a teacher upon his pupil was so severe as to draw blood is admissible. *Kinnard v. State*, 35 App. 276, 33 S. W. 234, 60 Am. St. Rep. 47. Also, evidence of teacher's intention. *Id.*

A teacher is not liable for unusual consequences resulting from an abnormal condition of the pupil's blood. *Ely v. State* (Cr. App.) 152 S. W. 631.

5. **Burden of proof.**—See notes under art. 52, ante, and art. 785, C. C. P.

SUBD. 2

6. **Force permissible.**—Only the force necessary to the purpose is permissible under this subdivision of the article; excessive force is punishable. *Rasberry v. State*, 1 App. 664.

SUBD. 4

7. Defense of property.—When one is guilty of improper conduct in a private house, the owner has the right to use sufficient force to eject him if he refuses to leave when requested. *Hinton v. State*, 24 Tex. 454; *McCrary v. State*, 38 App. 609, 44 S. W. 170.

An assault committed by one in possession of property who resists its taking without warrant of law, using no more force than is necessary, is justifiable. *Yarborough v. State* (Cr. App.) 147 S. W. 272. See, also, *Lassiter v. State* (Cr. App.) 163 S. W. 710.

A party cannot justify an assault committed in attempting to take forcible possession of a house belonging to him. He cannot even use his title to the house in mitigation of the offense. *Terrell v. State*, 37 Tex. 442.

Aggravated assault cannot be justified upon the ground that the house was the property of defendant and the assault was committed in an effort to take possession of it, nor can title be invoked to mitigate the offense. *Terrell v. State*, 37 Tex. 442. Defense of one's own habitation is a right only limited in extent by the same rules which govern in the defense of the person. *Richardson v. State*, 7 App. 486.

Force necessarily used to defend one's own property from violence, is not assault. *Souther v. State*, 18 App. 352.

A person may defend against an assault on his property, using the means at hand. *Lilly v. State*, 20 App. 1.

One who is in lawful possession of property has the right, as against a trespasser to arm himself for his protection, and go to where the trespass is being committed and request such person to leave; and if the trespasser refuses to go, he can insist upon his going and use all reasonable means to compel him to leave, using no more force than is reasonably necessary. And if under such circumstances he is himself attacked he can meet force with force. *Vann v. State*, 43 App. 244, 64 S. W. 244.

The defendant's theory of the case should be submitted. *Robey v. State* (Cr. App.) 163 S. W. 713.

SUBD. 5

8. Arrest.—Legal arrest by an officer being resisted, he may resort to such force as is necessary, but no more, to overcome the resistance and accomplish the arrest. If the officer exceeds such force, he is guilty of an offense. *Beaverts v. State*, 4 App. 175, citing *Skidmore v. State*, 43 Tex. 93; *Skidmore v. State*, 2 App. 20. And see, also, *Giroux v. State*, 40 Tex. 97; *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944; *Rasberry v. State*, 1 App. 665; *Owen v. State*, 58 App. 261, 125 S. W. 405.

While an officer has the right to use necessary force to complete a legal arrest, he may not kill his prisoner to prevent his attempted escape. *Caldwell v. State*, 41 Tex. 86. And see *Miers v. State*, 34 App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705; *Tiner v. State*, 44 Tex. 128.

A peace officer has the right to summon assistance to his aid in the discharge of his duty. *Owen v. State*, 58 App. 261, 125 S. W. 405.

SUBD. 6

9. Self-defense.—As to actual and apparent danger, see *Phipps v. State*, 34 App. 608, 31 S. W. 657; s. c., 34 App. 560, 31 S. W. 397; *Garner v. State*, 34 App. 356, 30 S. W. 782; *Law v. State*, 34 App. 79, 29 S. W. 160; *Smith v. State*, 33 App. 513, 27 S. W. 137; *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941; *Williford v. State*, 36 App. 414, 37 S. W. 761; *Pinson v. State*, 50 App. 234, 96 S. W. 23; *Crenshaw v. State*, 48 App. 77, 85 S. W. 1147; *Martin v. State*, 71 App. 521, 160 S. W. 968.

See, also, *Priest v. State* (Cr. App.) 34 S. W. 611; *Evans v. State*, 57 App. 174, 122 S. W. 392.

The right of self-defense is limited only by what reasonably appears to the person exercising it to defendant to be dangerous at the time, viewed only from his standpoint. *Aycock v. State*, 55 App. 142, 115 S. W. 590; *Jones v. State*, 50 App. 194, 95 S. W. 1044; *Newcomb v. State*, 49 App. 550, 95 S. W. 1048; *Brownlee v. State*, 48 App. 408, 87 S. W. 1153; *Beard v. State*, 47 App. 50, 81 S. W. 33, 122 Am. St. Rep. 672.

See, also, *Black v. State* (Cr. App.) 145 S. W. 944; *Darnell v. State*, 58 App. 535, 126 S. W. 1122; *Cooley v. State* (Cr. App.) 165 S. W. 192.

And further, on the right of self-defense, see *West v. State*, 2 App. 460; *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389; *Blake v. State*, 3 App. 581; *May v. State*, 6 App. 191; *Hobbs v. State*, 16 App. 517; *Good v. State*, 18 App. 39; *Hawthorne v. State*, 28 App. 212, 12 S. W. 603; *Downey v. State*, 33 App. 330, 26 S. W. 627; *Rhea v. State*, 37 App. 138, 38 S. W. 1012.

As to imperfect right of self-defense, see, also, *Cheatham v. State*, 57 App. 442, 125 S. W. 565; *Corley v. State* (Cr. App.) 155 S. W. 227.

One attacked by several is justified in acting on the hostile demonstrations of any one of them. *Black v. State* (Cr. App.) 145 S. W. 944.

See, also, *Recen v. State*, 58 App. 457, 126 S. W. 577.

One who wrongfully goes on the premises of another to take property without warrant of law, cannot claim to have acted in self-defense. *Yarborough v. State* (Cr. App.) 147 S. W. 270; *Yarborough v. State* (Cr. App.) 147 S. W. 272.

One may act upon a reasonable apprehension of danger. *Munden v. State*, 37 Tex. 353; *Moore v. State*, 15 App. 1.

Though defendant's purpose in entering prosecutor's house was unlawful, where he abandoned such purpose, and sought to escape from the house before being pursued by prosecutor, he may resist prosecutor's pursuit and assault by force, and plead self-defense. *Cox v. State*, 57 App. 427, 123 S. W. 696, 26 L. R. A. (N. S.) 621, 136 Am. St. Rep. 992.

One has the right to defend himself if assaulted by an arresting officer, and this right is not abridged by a knowledge that the officer has a warrant. *Owen v. State*, 58 App. 261, 125 S. W. 405.

Since the right of self-defense of one on trial for assault with intent to murder must be determined by the facts known to him, testimony of a state's witness that prior to the difficulty he told prosecutor that accused was enraged against him, and that he (prosecutor) ought to be prepared for any emergency, was inadmissible; accused not knowing of the conversation. *Dowell v. State*, 58 App. 482, 126 S. W. 871.

Where prosecutor had threatened accused charged with assault with intent to murder, and at the time of the assault prosecutor did some act manifesting an intent to execute the threat or unlawfully assaulted accused, or did acts producing in the mind of accused a reasonable apprehension of an assault or of death or serious bodily injury, and accused committed the assault charged to protect himself from such danger or apparent danger, the assault was justifiable self-defense. *Darnell v. State*, 58 App. 585, 126 S. W. 1122.

In a prosecution for assault with intent to murder, where it appeared that the prosecuting witnesses had formed a conspiracy to kill defendants, and had come to town for that express purpose, and that one of the prosecuting witnesses had advanced to provoke the difficulty, defendants, if believing that an attack was imminent, could, in their own protection, assail all of the prosecuting witnesses, though some of them had not made any overt act or fired any guns, for the act of one conspirator is that of another, and the law of conspiracy is not changed because invoked by one accused of crime. *Black v. State* (Cr. App.) 145 S. W. 944.

If accused had reason to believe that prosecuting witness had poisoned his chickens, he could ask him if he had done so, without forfeiting his perfect right of self-defense, if then assaulted, provided he did not intend to bring on a difficulty in asking the questions. *Parish v. State* (Cr. App.) 153 S. W. 327.

A party, who has voluntarily agreed to fight, cannot successfully plead self-defense in a prosecution for assault with intent to kill. *Brewer v. State* (Cr. App.) 153 S. W. 622.

While one illegally arrested may use all necessary force to effect his release, he cannot justify a malicious assault on the arresting officer made for other reasons, merely because he was illegally arrested. *Nickerson v. State* (Cr. App.) 154 S. W. 992.

One cannot justify assaulting an arresting officer by reason of being struck by him because of an insulting epithet. *Nickerson v. State* (Cr. App.) 154 S. W. 992.

The question whether the person assaulted, who admitted trouble with another some months before, was at that time armed with a pistol, is immaterial on the issue of accused's plea that he acted in self-defense because the witness was armed. *Evans v. State* (Cr. App.) 172 S. W. 795.

10. — Charge.—See notes to C. C. P. art. 735.

Charge held proper. *Hogue v. State* (Cr. App.) 146 S. W. 905; *Noland v. State*, 63 App. 275, 140 S. W. 100; *Yarborough v. State* (Cr. App.) 147 S. W. 270; *Yarborough v. State* (Cr. App.) 147 S. W. 272; *Foster v. State* (Cr. App.) 148 S. W. 583; *Simms v. State* (Cr. App.) 148 S. W. 786; *Russell v. State*, 71 App. 86, 158 S. W. 546.

On provoking difficulty and charge thereon, see *Rogers v. State*, 71 App. 271, 159 S. W. 44; *Barrego v. State*, 61 App. 625, 136 S. W. 41; *Walker v. State*, 63 App. 499, 140 S. W. 455; *Sanchez v. State*, 70 App. 24, 156 S. W. 218; *Shoemaker v. State*, 71 App. 445, 160 S. W. 356; *Martin v. State*, 71 App. 521, 160 S. W. 968; *Stoner v. State*, 72 App. 482, 162 S. W. 836.

Facts held not to require charge on self-defense. *Martin v. State*, 71 App. 521, 160 S. W. 968; *Ulun v. State* (Cr. App.) 32 S. W. 699; *Teel v. State*, 63 App. 460, 140 S. W. 340; *Davis v. State*, 63 App. 484, 141 S. W. 93; *Yarborough v. State* (Cr. App.) 147 S. W. 272; *Waters v. State* (Cr. App.) 148 S. W. 796.

Facts held to require charge on self-defense. *Fisher v. State* (Cr. App.) 168 S. W. 528; *Culp v. State*, 58 App. 74, 124 S. W. 946; *Prater v. State*, 60 App. 88, 131 S. W. 325; *Shoemaker v. State*, 71 App. 445, 160 S. W. 356; *Lassiter v. State* (Cr. App.) 163 S. W. 710.

In a proper case, the law of self-defense must be given. *Edwards v. State*, 5 App. 593; *Coons v. State* (Cr. App.) 151 S. W. 820; *Martin v. State*, 71 App. 521, 160 S. W. 968. Even though the assault is upon an officer having the defendant in custody. *Goodman v. State*, 4 App. 349.

For charge unduly limiting the right of self-defense, see, also, *Parish v. State* (Cr. App.) 153 S. W. 327; *Kelton v. State*, 71 App. 491, 160 S. W. 342.

If portions of the evidence tend to show that the assailed attempted to strike with a stick, the charge must not restrict the right of self-defense to actual striking. *McFarlin v. State*, 41 Tex. 23.

Charge held insufficient, *Carter v. State*, 28 App. 355, 13 S. W. 147.

Charge held objectionable in form in that the unlearned juror might be unable to grasp, retain, and properly apply the different circumstances, conditions, and contingencies upon which the rights of defendant were predicated—all of which are contained in a single paragraph. *Williams v. State*, 30 App. 429, 17 S. W. 1071.

It appeared that the injured party fired the first shot, when defendant rising up drew his pistol and said: "If that's your game here's at you," and fired; held, this did not constitute mutual combat, and a charge on mutual combat predicated upon these facts is erroneous. *Waldon v. State*, 34 App. 92, 29 S. W. 273.

The court in charging on self-defense, further charged on provoking difficulty, but there was no evidence to support this phase of case and such a charge was necessarily prejudicial to defendant's rights. *Thomas v. State*, 34 App. 481, 31 S. W. 170.

On trial for an assault and battery, where the danger if any is patent and real, it is not error to refuse a charge on apparent danger. *Thompson v. State*, 35 App. 352, 33 S. W. 871; *Moore v. State*, 31 App. 234, 20 S. W. 563; *Dyer v. State*, 47 App. 253, 83 S. W. 192, distinguishing *Hjeronymous v. State*, 46 App. 157, 79 S. W. 313, and *McVey v. State* (Cr. App.) 81 S. W. 740.

Where defendant claims no assault has been committed, he can not complain of a refusal to instruct on self-defense. *Clark v. State* (Cr. App.) 35 S. W. 149.

Refusal to charge that defendant might act on the danger as it appeared to him, is erroneous. *Harris v. State*, 37 App. 454, 36 S. W. 263.

The court charged that if defendant sought a meeting with the injured party with the intent to raise a difficulty, he could not avail himself of self-defense; but if he sought the injured party with no intent to raise a difficulty, his right of self-defense would be perfect; held, no error. *Rhea v. State*, 37 App. 138, 38 S. W. 1012.

Charge on abandonment of difficulty held justified by the facts. *McCray v. State*, 38 App. 609, 44 S. W. 170.

It is error to charge on self-defense where evidence does not raise the issue. *Mattison v. State*, 54 App. 514, 114 S. W. 824.

On charge in a case of assault on a person assisting an arresting officer, see *Owen v. State*, 58 App. 261, 125 S. W. 405.

For charge held inapplicable to facts, see *Little v. State*, 61 App. 197, 135 S. W. 119.

Charge held properly refused. *Barrego v. State*, 61 App. 625, 136 S. W. 41.

A charge limiting accused's right to use force to such force as was reasonably necessary for his own protection held error. *Comegys v. State*, 62 App. 231, 137 S. W. 349.

Evidence held not to raise the issue of self-defense separate from that of threats so as to require a distinct charge on self-defense. *Bussey v. State* (Cr. App.) 153 S. W. 873.

A charge on the right to defend against a robbery is not objectionable for using the words "force and violence" instead of the phrase "by assault and putting in fear of their lives or bodily injury." *Wilson v. State*, 70 App. 627, 158 S. W. 512.

A charge on excessive force held improper. *Shoemaker v. State*, 71 App. 445, 160 S. W. 356.

On a trial for aggravated assault, requested instructions given by the court held to fairly submit the defense of self-defense. *Yates v. State*, 72 App. 279, 162 S. W. 499.

Charge held erroneous as placing on defendant the burden of proving self-defense, and as submitting to the jury whether he used greater force than necessary, as it appeared to them at the time of the trial, instead of as it reasonably appeared to defendant at the time of the assault. *Knox v. State* (Cr. App.) 167 S. W. 729.

Accused is entitled to have self-defense submitted from his standpoint. *Fisher v. State* (Cr. App.) 168 S. W. 528.

In a prosecution for assault with intent to murder, where accused claimed that he acted in self-defense, believing he was in imminent danger, but there was no evidence of any threats before the altercation which led to the assault, a charge that, if the words or acts of the prosecuting witness created in the mind of accused reasonable apprehension of imminent danger, then he had the right to defend himself in such a manner as seemed reasonably necessary, and that he was not bound to retreat to avoid the necessity of assaulting his assailant, is a sufficient presentation of the right of self-defense as raised by the evidence, which only showed that the prosecuting witness got down from his wagon and reached towards his pocket, where accused believed he had a knife. *Nesbitt v. State* (Cr. App.) 171 S. W. 1126.

11. **Defense of another.**—One who interposes in defense of the life or person of another assumes the same responsibilities to the law that rest upon such other, and is entitled to the same justification. For full discussion of the subject, see *Guffee v. State*, 8 App. 187; *Kendall v. State*, Id., 569; *Dyson v. State*, 14 App. 454; *Reyons v. State*, 33 App. 143, 25 S. W. 786, 47 Am. St. Rep. 25; *Terrell v. State*, 53 App. 604, 111 S. W. 152. See, also, *Little v. State*, 61 App. 197, 135 S. W. 119.

The evidence showing that defendant assaulted a person after the latter had thrown a missile at a third person, and while in the act of reaching for another stone, a charge that if the assault on said third person was over, and defendant cut the assailant out of revenge, he would not be justifiable, is erroneous. *Horton v. State* (Cr. App.) 34 S. W. 612.

The right covers all phases of an attack. *Smith v. State*, 61 App. 349, 135 S. W. 152.

One present with another who is the object of a deadly attack may defend the one assaulted though he himself is not attacked. *Black v. State* (Cr. App.) 145 S. W. 944.

12. **Homicide in self-defense or in defense of another.**—See arts. 1104-1110 and notes thereunder.

13. **Prevention of offenses by act of private person.**—See C. C. P. arts. 110-116 and notes thereunder.

14. **Evidence of threats against accused, and character of person assaulted.**—See notes under art. 1143.

15. **Indictment.**—Willson's Cr. Forms, 465.

Art. 1015. [594] Degree of force permissible.—In all the cases mentioned in the preceding article, where violence is permitted to

effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose.

Force permissible.—In all cases of self-defense the means must be proportioned to the aggression. *Stockton v. State*, 25 Tex. 772; *Burch v. State*, 43 Tex. 376; *Cotton v. State*, 4 Tex. 260; *Hobbs v. State*, 16 App. 517; *Hawthorne v. State*, 28 App. 212, 12 S. W. 603; *Miller v. State*, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836; *Patterson v. State*, 49 App. 613, 95 S. W. 129.

See, also, *Rasberry v. State*, 1 App. 665; *Skidmore v. State*, 2 App. 20; *May v. State*, 6 Tex. App. 191; *Dunnaway v. State*, 72 App. 617, 163 S. W. 426; *Robey v. State* (Cr. App.) 163 S. W. 713.

Whether the degree of force used was necessary or excessive, is a question which must be determined from the facts of each particular case as the law does not furnish the measure. *Souther v. State*, 18 App. 352; *Stanfield v. State*, 43 Tex. 167.

Defendant, in the fight, used a brass motor key; the assaulted party used a walking stick, and there was some conflict as to who was the aggressor; held, that defendant ought to have been allowed to prove the size and appearance of the stick used by the injured party. *Law v. State*, 34 App. 79, 29 S. W. 160.

Defendant, on going to a hospital, turned over his 6 year old child to one to be taken care of until he was able to leave the hospital and care for the child, and was arrested on a charge of vagrancy, and sued out a writ of habeas corpus, and obtained an agreement whereby such person was to keep the child until the charge was disposed of. The charge was dismissed on agreement that defendant would not interfere with the child's custody until it was determined whether he was entitled thereto. Held, that on the refusal of the one in possession to surrender the child and in attempting to get possession of the child, he had no right to strike the person in possession. *Carrel v. State* (Cr. App.) 178 S. W. 331.

Art. 1016. [595] Verbal provocation no justification.—No verbal provocation justifies an assault and battery, but insulting and abusive words may be given in evidence in mitigation of the punishment affixed to the offense.

Insulting words.—Grossly insulting words may mitigate punishment, but not justify assault or reduce the offense. *Timon v. State*, 34 App. 363, 30 S. W. 808; *White v. State*, 23 App. 154, 3 S. W. 714; *Cartwright v. State*, 14 App. 486.

See, also, *Boone v. State*, 31 Tex. 557; *Griffin v. State*, 57 App. 280, 122 S. W. 553.

Defamatory language used about a female inmate of defendant's household is not admissible as a justification, but may be admitted in mitigation of exemplary damages for the assault. *Parham v. Langford*, 43 Civ. App. 31, 93 S. W. 526.

Art. 1017. [596] "Battery," how used.—The word "battery" is used in this Code in the same sense as "assault and battery."

Battery.—Assault is included in every battery. *Norton v. State*, 14 Tex. 387; *Johnson v. State*, 17 Tex. 515; *Dool v. State* (Cr. App.) 150 S. W. 626.

Art. 1018. [597] Degrees of assault.—An assault is either a simple assault, an aggravated assault, or an assault with intent to commit some other offense.

Aggravated assault.—Any circumstances of aggravation in the manner or character of the assault or battery, by which it exceeds the incidents or consequences of a common assault or battery, will render the assault of an aggravated nature. *Norton v. State*, 14 Tex. 387.

The use of a worn-out pocket knife will suffice, *Weaver v. State*, 24 Tex. 387. If an officer strikes his prisoner over the head with a pistol, except in his own necessary defense, he commits the offense. *Skidmore v. State*, 43 Tex. 93; s. c., 2 App. 20.

If the transaction is a mutual combat on equal terms, no undue advantage being taken or sought, though fought with bludgeons, the offense is aggravated assault; if the defendant took an undue advantage, it might be of a higher grade. *King v. State*, 4 App. 54, 30 Am. Rep. 160; *Wilson v. State*, 4 App. 637; *Bingham v. State*, 6 App. 169.

Aggravated assault and battery necessarily includes simple assault and battery. One cannot be heard to complain of conviction of the latter on proof sufficient to establish the former. *Foster v. State*, 25 App. 543, 8 S. W. 664.

Evidence to show the commission of a battery is admissible in a trial for aggravated assault. *Dool v. State* (Cr. App.) 150 S. W. 626.

One charged with an aggravated assault may be convicted of a simple assault if the facts justify such finding. *Yelton v. State* (Cr. App.) 170 S. W. 318.

Art. 1019. [598] Punishment for simple assault.—The punishment for a simple assault, or for assault and battery, unattended with circumstances of aggravation, shall be a fine of not less than five nor more than twenty-five dollars.

Penalty changed in revising (1879), the former penalty being a fine not exceeding \$100.

Meaning of terms.—The terms "simple assault" and "assault and battery" are used synonymously, and the latter term does not include an aggravated assault. *Foster v. State*, 27 Tex. 236.

Plural assaults.—A single difficulty may embrace plural assaults, and a conviction may be had for each. *State v. Eradley*, 34 Tex. 95; *Samuels v. State*, 25 App. 537, 8 S. W. 656; *Ashton v. State*, 31 App. 482, 21 S. W. 48.

Art. 1020. [599] Abusive language an offense.—If any person shall, in the presence or hearing of another, curse or abuse such person, or use any violently abusive language to such person, concerning him or any of his female relatives, under circumstances reasonably calculated to provoke a breach of the peace, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum not less than five nor more than one hundred dollars. [Act March 8, 1887, pp. 13, 14.]

Cited, *Presley v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 145 S. W. 669.

Offense.—The fact that the prosecuting witness was trespassing on the land of defendant's mother was no defense under this article, though it might be considered as a mitigating circumstance in fixing the punishment. *Deaton v. State*, 53 App. 393, 110 S. W. 69, 70.

That a cursing and abuse of females occurred in the house of accused will not excuse the offense. *Bumgarner v. State*, 64 App. 165, 142 S. W. 4.

Abusive language towards accused does not justify the offense although it may mitigate the penalty. *Easter v. State*, 71 App. 370, 160 S. W. 74.

Indictment or information.—*Willson's Cr. Forms*, 236.

The information should allege that the language was used in the presence or hearing of the injured party. *Elkins v. State*, 26 App. 220, 9 S. W. 491.

And see, also, *Foreman v. State*, 31 App. 477, 20 S. W. 1109; *Menasco v. State*, 32 App. 582, 25 S. W. 422; *Secker v. State*, 28 App. 479, 13 S. W. 774.

If an information alleges that defendant, in the presence and hearing of another, did curse and abuse such person, under circumstances reasonably calculated to provoke a breach of the peace, it is sufficient. *Foreman v. State*, 31 App. 477, 20 S. W. 1109. *Elkins v. State*, 26 App. 220, 9 S. W. 491, so far as it intimates a different rule, is overruled. *Id.*

If the indictment presents two phases of abusive language, if the evidence sustains either, the conviction is proper. *Wilborne v. State* (Cr. App.) 66 S. W. 559.

An information which uses the words "in a manner" calculated to provoke a breach of the peace, instead of "under circumstances," etc., is sufficient. The words used are tantamount to those employed by the statute. *Trezevant v. State*, 47 App. 502, 84 S. W. 828.

Art. 1021. [600] Intimidation of another.—Any person who shall, by threatening words, or by acts of violence or intimidation, prevent or attempt to prevent another from engaging or remaining in or from performing the duties of any lawful employment, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine of not less than twenty-five nor more than five hundred dollars, or by confinement not less than one nor more than six months in the county jail. [*Id.*, p. 13.]

Offense.—An owner of animals, who by threatened use of violence takes them from one who had taken them up for depredating on his crop, does not violate this article. *Franklin v. State*, 61 App. 235, 134 S. W. 702.

Indictment or information.—Information must set out the nature of "lawful employment." *Luter v. State*, 32 App. 69, 22 S. W. 140.

Indictment held not defective for failure to set out the threatening words, or state the specific acts of violence. *Diggs v. State*, 64 App. 122, 141 S. W. 100.

Evidence and charge.—The court should direct an acquittal when the prosecutor's title is doubtful. *Boyd v. State*, 28 App. 524, 13 S. W. 864.

As to evidence to sustain charge, see *Diggs v. State*, 64 App. 122, 141 S. W. 100.

CHAPTER TWO

AGGRAVATED ASSAULT AND BATTERY

Art.	Art.
1022. Definition.	1024. Punishment.
1023. Aggravation may be of different degrees.	

Article 1022. [601] Definition.—An assault or battery becomes aggravated when committed under any of the following circumstances:

1. When committed upon an officer in the lawful discharge of the duties of his office, if it was known or declared to the offender that the person assaulted was an officer discharging an official duty.

2. When committed in a court of justice, or in any place of religious worship, or in any place where persons are assembled for the purpose of innocent amusement.

3. When the person committing the offense goes into the house of a private family and is there guilty of an assault and battery.

4. When committed by a person of robust health or strength upon one who is aged or decrepit.

5. When committed by an adult male upon the person of a female or child, or by an adult female upon the person of a child.

6. When the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault or battery with a whip or cowhide.

7. When a serious bodily injury is inflicted upon the person assaulted.

8. When committed with deadly weapons under circumstances not amounting to an intent to murder or maim.

9. When committed with premeditated design, and by the use of means calculated to inflict great bodily injury.

10. When committed by any person or persons in disguise.

In General	
1. Offense.	38. — Assault on child.
2. — Principals.	39. Punishment.
3. — Indictment and information.	Subd. 6
4. — Variance.	40. Offense.
5. — Inclusion in other offenses.	41. Evidence.
6. Evidence.	42. Information.
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8. Review.	43. Offense.
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21. Offense.	59. — Deadly weapon.
22. — "Adult" and "child."	60. — Weapons or means used as evidence of intent.
23. Consent.	61. Charge.
24. — Assault on female.	62. Self-defense.
25. — Assault by female.	Subd. 9
26. — Assault by husband on wife.	63. Offense.
27. — Assault by parent on child.	64. Indictment.
28. Indictment.	65. Evidence.
29. — Assault on female.	66. Charge.
30. — Assault on child.	Subd. 10
31. — Variance.	67. Offense.
32. Evidence.	68. Officers.
33. — Assault on wife.	69. Indictment.
34. — Assault on female.	70. — Pleading and proof.
35. — Assault by parent.	71. Evidence.
36. Charge.	72. Charge.
37. — Assault on female.	

IN GENERAL

1. Offense.—An intent to injure is not a necessary element of the offense. *Cromwell v. State*, 60 App. 183, 131 S. W. 595.

2. — Principals.—See notes under art. 78, ante.

3. — Indictment and information.—*Willson's Cr. Forms*, 466-475.

The indictment need not charge in words that the assault is aggravated, but may set out the particular facts and circumstances which constitute the offense. *Pinson v. State*, 23 Tex. 579; *Meier v. State*, 10 App. 39.

The intent to injure need not be averred. *Bronson v. State*, 2 App. 46; *Ferguson v. State*, 4 App. 156; *Milstead v. State*, 19 App. 490; ante, art. 588.

An indictment for aggravated assault held not defective, though it did not allege that the assault was with intent to injure or in an attempt to commit a battery coupled with an intention and ability to commit same or that the gun was loaded. *Foreest v. State*, 3 App. 232.

An indictment held insufficient to support a conviction for an aggravated assault and battery or for any higher grade of offense than a simple assault and battery. *Flynn v. State*, 8 App. 368.

It should set out the facts or ground constituting the aggravation. *Meier v. State*, 10 App. 39; *Flynn v. State*, 8 App. 368; *Williamson v. State*, 5 App. 485; *Lacoume v. State* (Cr. App.) 143 S. W. 626.

Indictments for aggravated assault should allege some of the particular acts or circumstances which are necessary to constitute the offense. *Allen v. State*, 13 App. 28.

To charge that the defendant "did make an aggravated assault," upon a person, naming such person, without stating the fact or ground of aggravation, is insufficient. *Marshall v. State*, 13 App. 492; *Allen v. State*, Id. 23; *Key v. State*, 12 App. 506; *Browning v. State*, 2 App. 47. But such an indictment will be good for a simple assault. *Marshall v. State*, 13 App. 492; *Nelson v. State*, 2 App. 227, overruling *State v. Pierce*, 26 Tex. 114.

4. — **Variance.**—The circumstances of aggravation must be proved as alleged, not other circumstances. *Pinson v. State*, 23 Tex. 579; *McGrew v. State*, 19 App. 302; *Stevens v. State*, 27 App. 461, 11 S. W. 459.

Under an indictment charging an aggravated assault with a knife, conviction for an assault with a stick cannot be had. *Herald v. State*, 37 App. 409, 35 S. W. 670.

5. — **Inclusion in other offenses.**—Conviction of simple assault under indictment charging aggravated assault, see article 1003.

Under an indictment for assault with intent to murder defendant could be convicted of aggravated assault and battery. *James v. State*, 36 Tex. 645.

Under an indictment charging assault with intent to murder, a conviction may be had for an aggravated assault. *Henderson v. State*, 2 App. 88; *Davis v. State*, 20 App. 302; *Moore v. State*, 7 App. 14.

Under an indictment charging murder, defendant may be convicted of aggravated assault and battery. *Green v. State*, 8 App. 71.

A defendant indicted for an assault with intent to murder may be convicted of an aggravated assault. *Bolding v. State*, 23 App. 172, 4 S. W. 579; *Davis v. State*, 20 App. 302. And, also, when indicted for an assault with intent to rape. *Brown v. State*, 7 App. 569.

Conviction for aggravated assault may be had under indictment for assault to murder, though the indictment does not charge the circumstances of aggravation. *Bolding v. State*, 23 App. 172, 4 S. W. 579.

A conviction of aggravated assault and battery may be had under an indictment for murder in the second degree, which charges defendant with killing the deceased "by striking, beating, bruising, and wounding him with a stick," independently of the article providing that murder shall include all assaults. *Bean v. State*, 25 App. 346, 8 S. W. 278.

Where an assault is made with a deadly weapon, under circumstances insufficient to justify a conviction of assault to murder, a submission of the issue of aggravated assault is proper. *Blackwell v. State*, 33 App. 278, 26 S. W. 397, 32 S. W. 128.

It is not necessary to allege the manner by which an aggravated assault was committed; a conviction being permissible under an indictment in the usual form charging assault with intent to murder. *Wimberley v. State*, 60 App. 65, 130 S. W. 1002.

6. **Evidence.**—Evidence held sufficient, see *Brown v. State*, 16 Tex. 122; *Moorings v. State*, 42 Tex. 85; *Young v. State*, 44 Tex. 98; *Rasberry v. State*, 1 App. 664; *Dunman v. State*, Id. 593; *Skidmore v. State*, 2 App. 20; *Coney v. State*, Id. 62; *Bingham v. State*, 6 App. 169; *Cato v. State*, 4 App. 87; *Johnson v. State*, 7 App. 210; *Atkins v. State*, 11 App. 8; *Jones v. State*, 12 App. 156; *McMahon v. State*, 16 App. 357; *Bell v. State*, 18 App. 53, 51 Am. Rep. 293; *Coker v. State*, 22 App. 20, 2 S. W. 615; *Robertson v. State* (Cr. App.) 29 S. W. 478; *Scott v. State* (Cr. App.) 29 S. W. 386; *Thompson v. State* (Cr. App.) 30 S. W. 667; *Waechter v. State*, 34 App. 297, 30 S. W. 444, 800; *Lee v. State*, 34 App. 519, 31 S. W. 667; *McDade v. State* (Cr. App.) 33 S. W. 125.

A continuance sought to get testimony of words of provocation used prior to an aggravated assault held properly denied. *Boone v. State*, 31 Tex. 557.

Evidence held insufficient, see *Chamberlain v. State*, 2 App. 451; *Young v. State*, 7 App. 75; *Pease v. State*, 13 App. 18; *Osborne v. State*, 14 App. 225; *Hall v. State*, 16 App. 6, 49 Am. Rep. 824; *McGrew v. State*, 19 App. 302; *Metcalf v. State*, 21 App. 174, 17 S. W. 142; *Peterson v. State*, 21 App. 485, 1 S. W. 521; *George v. State*, 21 App. 315, 17 S. W. 351; *Hutton v. State*, 23 App. 386, 5 S. W. 122, 59 Am. Rep. 776; *Flournoy v. State*, 25 App. 244, 7 S. W. 865; *Lee v. State*, 34 App. 519, 31 S. W. 667.

Cross-examination of prosecuting witness relative to threats to poison accused, made subsequent to the commission of the alleged assault held properly excluded where no predicate had been laid therefor. *Booker v. State*, 4 App. 564.

Where the prosecuting witness testified on cross-examination that the county attorney induced her to make affidavit against defendant, evidence rebutting and contradicting this statement was properly admitted. *Gonzales v. State*, 16 App. 152.

It is sufficient ground for the postponement of a trial for aggravated assault that a witness, by whom defendant expects to prove that threats of personal violence had been made against him by the alleged assaulted party, is absent, as such

threats, if the issue is self-defense, and the evidence is in conflict as to who began the difficulty, are material. *Tankersley v. State*, 31 App. 595, 21 S. W. 767.

The testimony of the prosecuting witness, on a trial for assault with intent to murder, that he was robbed during the assault, is admissible as a part of the res gestæ. *Richards v. State*, 34 App. 277, 30 S. W. 229.

Where, on a prosecution for assault with intent to murder, it appeared that the assault was made with a stick, the defendant was entitled to a continuance because of the absence, caused by sickness, of a witness by whom he expected to prove that the stick was not a deadly weapon. *Richards v. State*, 34 App. 277, 30 S. W. 229.

Evidence that two or three days after the assault the prosecuting witness bore marks of the whipping he had received held not too remote. *Caples v. State* (Cr. App.) 155 S. W. 267.

The exclusion of an almanac showing there was no moon on the night in question was proper, where the prosecutor testified that he recognized the parties by the light of a match struck by one of them. *Caples v. State* (Cr. App.) 155 S. W. 267.

Evidence as to whether defendant had a bottle of whisky in his store, or had in fact taken a drink or two, without any contention that the assault occurred in the store, or that he was intoxicated at the time, was inadmissible. *Hodges v. State* (Cr. App.) 166 S. W. 512.

7. Charge.—See C. C. P. art. 735.

Where the defendant is charged with an assault with intent to murder, and convicted of an aggravated assault, the omission to give in charge the elements of murder is immaterial. *Haynes v. State*, 2 App. 84.

The charge must be confined to the particular ground, or grounds, of aggravation alleged in the indictment. *Kouns v. State*, 3 App. 13; *Stanfield v. State*, 43 Tex. 167; *Ferguson v. State*, 4 App. 156; *McGregor v. State*, Id. 599; *Coney v. State*, 43 Tex. 414; *Williams v. State*, 8 App. 367; *Kennedy v. State*, 9 App. 399; *Hunt v. State*, Id. 404; *Reid v. State*, Id. 472; *Clubb v. State*, 14 App. 192.

A charge which substantially directs the jury that they must convict the defendant of either an aggravated, or a simple assault, leaving them no option to acquit, is erroneous. *Kennedy v. State*, 9 App. 399.

"If you believe that an offense has been committed you may find the defendant guilty," etc., was held to be erroneous, because it did not require the jury to believe that the defendant, and none other, committed the offense. *Reid v. State*, 9 App. 472.

Where the evidence demands it, it is error to refuse to instruct that the defendant may be convicted of a simple assault. *Key v. State*, 12 App. 506.

Where the evidence is clear and sufficient that the defendant is guilty of an aggravated assault, a charge upon simple assault need not be given. *Jackson v. State*, 25 Tex. Supp. 229; *Chambers v. State*, 42 Tex. 254.

The refusal of an instruction that defendant could not be convicted of an aggravated assault unless the jury found that he attempted to use violence toward the person of prosecutrix with intent to injure her person held error. *Floyd v. State*, 29 App. 341, 15 S. W. 819.

Under an indictment for assault with intent to murder, the court, in submitting aggravated assault, may submit either ground that may be developed by the evidence directly growing out of the assault charged, including assault by an adult male on a female. *Lofton v. State*, 59 App. 270, 128 S. W. 384.

Where, on a trial for aggravated assault, accused relied on self-defense, and the facts called for a charge on excessive force after the danger had passed, the court should submit in separate instructions the law of self-defense and the law of excessive force. *Aycock v. State*, 133 S. W. 683.

8. Review.—A person convicted of a simple assault under charge of aggravated assault can not be heard to complain that evidence tended to support the charge for higher degree. *Foster v. State*, 25 App. 543, 8 S. W. 664.

9. Conviction of assault and battery in case of homicide in sudden passion not with deadly weapon.—See art. 1149 and notes.

SUBD. 2

10. Offense.—An assault committed in a court room is ipso facto an aggravated assault. *Milstead v. State*, 19 App. 490.

It is an offense to assault a justice of the peace. *Milstead v. State*, 19 App. 490. It is not necessary that the assault be committed within the very walls of the building used for religious worship. *Pollock v. State*, 60 App. 265, 131 S. W. 1094.

11. Indictment.—An allegation that the assault was made "in a court of justice, then and there being in session," is sufficient. *State v. Murrah*, 25 Tex. 753; *State v. Hunter*, 44 Tex. 552; *Milstead v. State*, 19 App. 490; *Blackwell v. State*, 30 App. 416, 17 S. W. 1061; *State v. Hunter*, 44 Tex. 94.

It need not aver that the court was then in session, or specify the court. *Milstead v. State*, 19 App. 490; *State v. Hunter*, 44 Tex. 94; *State v. Murrah*, 25 Tex. 759.

An intent to injure or unlawful violence need not be alleged especially when the transaction as set out imports illegality. *Milstead v. State*, 19 App. 490.

Indictment held good for an aggravated assault where it alleged that the assault was committed in a court of justice. *Milstead v. State*, 19 App. 490.

Use of "at" for "in" referring to the school house used for religious worship, held not to invalidate the information. *Blackwell v. State*, 30 App. 416, 17 S. W. 1061. Compare *Pederson v. State*, 21 App. 485, 1 S. W. 521.

12. — Variance.—The evidence disclosed that the assault was on a minister in a congregation assembled for religious worship under a brush arbor, a few

steps from the school-house. Held, that the evidence sufficiently corresponded to the allegations, and did not constitute a variance. *Blackwell v. State*, 30 App. 416, 17 S. W. 1061.

13. **Evidence.**—Exclusion of evidence of defendant's reputation, if error, held harmless where defendant admitted the offense and the disturbing of religious worship as charged. *Blackwell v. State*, 30 App. 416, 17 S. W. 1061.

14. **Instructions.**—See notes to C. C. P. art. 735.

In a prosecution for an assault with intent to murder, where the real issue was as to the existence of the intent at the time of the assault, it was error to instruct that, if the state had not made a case of assault with intent to murder, the jury might inquire whether it was an aggravated assault, and, if they found the same was committed in a court of justice, to find defendant guilty of an aggravated assault, since the jury might well have thought therefrom that no other circumstance except an assault "in a court of justice" would reduce the crime to an aggravated assault. *Mathis v. State*, 39 App. 549, 47 S. W. 464.

SUBD. 3

15. **Offense.**—Where the assault occurred in the house of defendant's father, in the common sitting room of the family, and the defendant at the time was an occupant of said house, and a member of the family, it was held that this ground of aggravation did not apply. *Hall v. State*, 16 App. 6, 49 Am. Rep. 824.

This article does not refer to those occupying a private residence, one of whom disturbs the others, but was enacted to protect such occupants from being disturbed by others. *McIver v. State*, 34 App. 214, 29 S. W. 1083 (following *Hall v. State*, 16 App. 6, 49 Am. Rep. 824).

To constitute aggravated assault the party charged must go into the house of a private family and must there commit not only an assault but a battery also. *Pederson v. State*, 21 App. 485, 1 S. W. 521.

16. **Indictment.**—The indictment must allege that the house was that of "a private family." *State v. Cass*, 41 Tex. 552.

An allegation that defendant "went into the residence of H. G., and did then and there assault, strike, and beat the said H. G., with intent to injure," is insufficient, except for simple assault. There should be an additional averment that G. had a family. *State v. Cass*, 41 Tex. 552.

It must allege that accused did go into the house and there commit the assault. To allege that he committed the assault at such house is insufficient. The indictment must also allege that a battery was committed. *Pederson v. State*, 21 App. 485, 1 S. W. 521.

17. **Evidence.**—Exclusion of evidence to show defendant's innocent purpose in going into the house held error. *Burns v. State*, 23 App. 641, 5 S. W. 140.

Facts held to authorize conviction. *Ward v. State* (Cr. App.) 151 S. W. 1073.

18. **Charge.**—See notes to C. C. P. art. 735.

Accused cannot complain of an instruction permitting a verdict of guilty of simple assault, on the ground that the evidence clearly showed an aggravated assault. *Garrett v. State*, 61 App. 514, 135 S. W. 532.

In a trial for aggravated assault claimed to have been committed by accused forcing the door to a house to which prosecuting witness fled, it was error to refuse to instruct that, to convict of the offense charged, it was essential that accused intended to do unlawful violence or some injury, and that if he used violence to enter the house for a lawful purpose, using no more force than was necessary, and without intending to injure prosecuting witness, he should be acquitted. It was also error to refuse to instruct that no amount of constraint, sense of shame, or other disagreeable emotion caused by words alone would authorize a conviction. It was also error to refuse to instruct that, though accused caused the door to strike prosecuting witness, unless it caused physical pain, an intent to injure would not be presumed, and that the burden of proving such intent was on the state. *Atkinson v. State*, 138 S. W. 125.

SUBD. 4

19. **Offense.**—A person fifty years of age, having one arm disabled, was held to be "decrepit." *Bowden v. State*, 2 App. 56.

A "decrepit person" is one so disabled by mental or physical weakness, as to be practically helpless in a personal conflict with a person of ordinary health and strength. Decrepitude may exist without age. *Hall v. State*, 16 App. 6, 49 Am. Rep. 824.

One who, in a difficulty produced by himself, accidentally struck a decrepit person is guilty of aggravated assault. *Powell v. State*, 32 App. 230, 22 S. W. 677. And see *Bowden v. State*, 2 App. 56.

Where decedent's widow testified that her husband was 5 feet 11 inches tall, weighed 147 pounds, was "real stout," and about 60 years of age, the court erred in charging that, if deceased was aged and decrepit, that would furnish a basis for a conviction of aggravated assault; the word "decrepit," as used in Pen. Code 1895, art. 601, declaring an assault aggravated if made on a decrepit person, meaning one who is disabled, incapable, or incompetent, from either physical or mental weakness or defects, so as to render him comparatively helpless in a personal conflict with one possessed of ordinary health and strength, and not merely a person broken down with age, and wasted or worn with infirmities of old age, etc. *Little v. State*, 61 App. 197, 135 S. W. 119.

20. **Charge.**—See notes to Code Cr. Proc. art. 735.

Charge should direct the jury to the question of the guilt in view of the physical condition of the parties. *Darnell v. State*, 58 App. 585, 126 S. W. 1122.

SUBD. 5

Cited, *Foster v. State*, 25 App. 543, 8 S. W. 664.

21. **Offense.**—Forcible resistance to a release of stock that has been illegally taken, will constitute an assault. *Cox v. State* (Cr. App.) 34 S. W. 754.

There is no law abridging an adult's right to self-defense when attacked by a minor or child. *Latham v. State*, 39 App. 472, 46 S. W. 638.

In a prosecution for aggravated assault on a girl nine years old, a note written by defendant and given to the child did not constitute an assault, but, being of an affectionate character, might be read and considered in determining whether the subsequent acts of defendant amounted to an indecent fondling of the child's person. *St. John v. State* (Cr. App.) 178 S. W. 360.

22. — **"Adult" and "child."**—*Henkel v. State*, 27 App. 510, 11 S. W. 671; *Wilman v. State*, 63 App. 623, 141 S. W. 110.

"Child" is not synonymous with "minor." *McGregor v. State*, 4 App. 599; *Allen v. State*, 7 App. 298.

An "adult" person is one who has attained the full age of twenty-one years. *Schenault v. State*, 10 App. 410; *George v. State*, 11 App. 95; *Hall v. State*, 16 App. 6; 49 Am. Rep. 824.

A child is a young person, as contradistinguished from a person whose age implies settled habits and discretion. When applied to a boy it means a male not above the age of fourteen years, and when applied to a girl, it means a female not above the age of twelve years. *Bell v. State*, 18 App. 53, 51 Am. Rep. 293.

Any assault on a female is an aggravated one. *Carmicle v. State* (Cr. App.) 172 S. W. 238.

See, also, *White v. State* (Cr. App.) 151 S. W. 826.

23. **Consent.**—In a prosecution for aggravated assault upon a girl nine years of age, her consent was immaterial as being too young to consent to the fondling of her person in an indecent manner. *St. John v. State* (Cr. App.) 178 S. W. 360.

24. — **Assault on female.**—An adult male, who assaulted a female, in attempting to eject her from premises owned by him, is guilty of an aggravated assault, and the title to the premises is no protection to him, and not admissible in evidence for him. *Terrell v. State*, 37 Tex. 442.

Violent and indecent familiarity with an adult male with the person of a female, against her will, is an aggravated assault. *Veal v. State*, 8 App. 474; *Pfefferling v. State*, 40 Tex. 486; *Curry v. State*, 4 App. 574; *Ridout v. State*, 6 App. 249; *Sanford v. State*, 12 App. 196.

But not when such familiarity is with the consent of the female. *Atkins v. State*, 11 App. 8; *Crawford v. State*, 21 App. 454, 1 S. W. 446.

A male minor held capable of committing this offense. *George v. State*, 11 App. 95.

Indecent familiarity on a female's person, without her consent, by an adult male, is aggravated assault. *Gill v. State*, 48 App. 39, 85 S. W. 1062; *Miller v. State* (Cr. App.) 150 S. W. 635.

Where the female is a child, such indecent familiarity is aggravated assault, with or without consent. *Knight v. State*, 48 App. 41, 85 S. W. 1067; *Rogers v. State*, 40 App. 355, 50 S. W. 338; *Hill v. State*, 37 App. 279, 38 S. W. 987, 39 S. W. 666, 66 Am. St. Rep. 803.

See, also, *Scott v. State* (Cr. App.) 166 S. W. 729.

If the male be not an adult, the offense is simple assault. *Miller v. State* (Cr. App.) 150 S. W. 635.

Intentionally driving a wagon against a buggy driven by a female, whereby she is thrown out and injured, is an aggravated assault. *Carmicle v. State* (Cr. App.) 172 S. W. 238.

25. — **Assault by female.**—An assault by one female upon another is not necessarily aggravated, and in such case an adult male who was present and consenting to a simple assault by one female upon another is not guilty of an aggravated assault. *Colquitt v. State*, 34 Tex. 550.

If an adult male procures one female to assault another, and is present when the assault is made, he is guilty of an aggravated assault. *Dunman v. State*, 1 App. 593.

A female who acts with an adult male in committing an assault on another female is, under the doctrine of principal offenders, guilty of an aggravated assault. *Kemp v. State*, 25 App. 589, 8 S. W. 804.

26. — **Assault by husband on wife.**—A husband has the right to defend against an assault by his wife as far as may be necessary to protect himself. *Leonard v. State*, 27 App. 186, 11 S. W. 112; *Kelton v. State*, 71 App. 491, 160 S. W. 342.

The husband cannot inflict corporal punishment on the wife. *Gorman v. State*, 42 Tex. 221.

The husband is guilty of an aggravated assault and battery if he chastises his wife. *Owen v. State*, 7 App. 329; *Jones v. State*, 12 App. 156.

Striking her over the head with a stick is an aggravated assault. *Jordan v. State* (Cr. App.) 146 S. W. 881.

He cannot use force in obtaining possession of children. *Dool v. State* (Cr. App.) 150 S. W. 626.

27. — **Assault by parent on child.**—See art. 1014 (1) and notes thereunder.

In a prosecution of a father for assault on his daughter, one witness testified that on July 4th he heard screams at defendant's house; that immediately thereafter the daughter came to his house, and complained of the assault. A witness for defendant testified that on the same day he heard the daughter threaten to knock defendant's head off with an ax. A physician testified that he treated the

daughter on July 15th. Held, that the evidence was sufficient to show that the assault was committed on July 4th. *Waechter v. State*, 34 App. 297, 30 S. W. 444, 800.

Where defendant, while chastising his stepdaughter, accidentally struck another, it must be shown, in order to his conviction for assault and battery for such striking, that his chastisement of the girl was immoderate, as, occupying a parental relation towards her, the presumption is that her punishment was lawful. *Turner v. State*, 35 App. 369, 33 S. W. 972.

A father has the right to moderately chastise his minor son, without being guilty of an assault. *Thompson v. State*, 46 App. 412, 80 S. W. 623.

Where a father whipped his infant child without intent to take her life, and the whipping was not cruel, he was guilty of aggravated assault only. *Betts v. State*, 60 App. 631, 133 S. W. 251.

The accused should be acquitted if the jury have a reasonable doubt whether the punishment was excessive. *Wilman v. State*, 63 App. 623, 141 S. W. 110.

28. **Indictment.**—The indictment must allege the name of the party injured or that it is to the grand jurors unknown. *Rutherford v. State*, 13 App. 92.

Where indictment charges an assault made with a piece of "scantling," evidence that it was made with a scantling, a picket, or a pole is sufficient. *Holliday v. State*, 35 App. 133, 32 S. W. 538.

It is not necessary to allege the name of another person who acted as principal with defendant. *Webb v. State*, 36 App. 41, 35 S. W. 380.

A part of a count charging intent is not an essential averment. *Berry v. State* (Cr. App.) 40 S. W. 984.

And further as to indictment, see *Blackburn v. State*, 39 Tex. 153; *Bell v. State*, 25 Tex. 574.

29. — **Assault on female.**—When the ground is that the assaulting party was an adult male, and the assaulted party a female, the indictment must so allege. The allegation must be that the defendant was an "adult male." *Collins v. State*, 5 App. 38; *Griffin v. State*, 12 App. 423; *Lawson v. State*, 13 App. 83.

It need only allege that the accused is "an adult male," and the person assaulted "a female." *Collins v. State*, 5 App. 38; but describing the injured female as "the wife of T. B." is fatally defective. *Ranch v. State*, 5 App. 363.

Where the assault charged is one made by an adult male upon a female, it must be proved that the defendant at the time of the assault was twenty-one years of age. *George v. State*, 11 App. 95; *Andrews v. State*, 13 App. 343; *Henkel v. State*, 27 App. 510, 11 S. W. 671.

On trial for an aggravated assault committed by an adult male upon a female, the means used may be proven though not alleged. *Duke v. State*, 35 App. 283, 33 S. W. 349.

An information charging that defendant, "a male person," committed an assault upon a female with intent to have unlawful sexual intercourse with her is sufficient to charge an aggravated assault. *Price v. State*, 35 App. 501, 34 S. W. 622.

An information which charges that defendant, an adult male, committed an assault upon a female, naming her, is sufficient. *Webb v. State*, 36 App. 41, 35 S. W. 380.

When an indictment charges an aggravated assault by an adult male upon a female, the age of the female may be proven whether alleged or not. *Hill v. State*, 37 App. 279, 38 S. W. 987, 39 S. W. 666, 66 Am. St. Rep. 803.

An information charging that accused, an adult, committed an aggravated assault includes a simple assault on proof that she was not an adult. *Ely v. State* (Cr. App.) 152 S. W. 631.

Indictment held to allege that accused was an adult male when offense was committed. *Wilson v. State*, 71 App. 547, 160 S. W. 454.

30. — **Assault on child.**—An information for an aggravated assault to the effect that the assault was committed by an adult male, upon a child, with switches, is sufficient. The State would be confined in her proof to the means alleged. *Kinnard v. State*, 35 App. 276, 33 S. W. 234, 60 Am. St. Rep. 47.

31. — **Variance.**—In a prosecution for aggravated assault, the grounds of aggravation being an assault by an adult male on a female, evidence of the means used in making the assault is admissible, though the information does not set forth the means. *Duke v. State*, 35 App. 283, 33 S. W. 349.

32. **Evidence.**—Evidence held to sustain conviction. *Cuellar v. State* (Cr. App.) 154 S. W. 228; *Inglen v. State*, 36 App. 472, 37 S. W. 861; *Patton v. State*, 58 App. 231, 125 S. W. 24; *Perkins v. State* (Cr. App.) 144 S. W. 241; *Grantland v. State* (Cr. App.) 146 S. W. 196; *Jordan v. State* (Cr. App.) 146 S. W. 881; *Yarborough v. State* (Cr. App.) 147 S. W. 272.

Where any question arises as to the name of the person on whom the indictment alleges that the injury was inflicted, the fact should be submitted to the jury and it is competent to show in support of the allegation that the person was as well known by the name used in the indictment as by any other. *Bell v. State*, 25 Tex. 574.

Evidence held insufficient to authorize a conviction of aggravated assault where the information alleged that defendant was an adult and there was no proof thereof. *Robinson v. State*, 25 App. 111, 7 S. W. 531.

Proof that defendant was a man is sufficient evidence that he was an adult male. *Holliday v. State*, 35 App. 133, 32 S. W. 538.

Presumption of intent follows proof of actual injury, and imposes countervailing burden on the defendant, but such presumption does not obtain if injury be not shown. *Stripling v. State*, 47 App. 117, 80 S. W. 376, overruling *Floyd v. State*, 29 App. 341, 15 S. W. 819, and following *Young v. State*, 31 App. 24, 19 S. W. 431.

Evidence that defendant had lived in a vicinity for 25 years is sufficient to show that he was an adult. *Stone v. State*, 57 App. 321, 123 S. W. 582.

Evidence held to raise an issue whether accused consented to an assault by others, as affecting his responsibility. *Johnson v. State*, 59 App. 263, 128 S. W. 614.

33. — **Assault on wife.**—Evidence held to sustain the conviction of a husband for an aggravated assault on his wife though she used the first force. *Hunes v. State*, 12 App. 156.

Under a charge of aggravated assault by the husband upon the wife, evidence that he had been previously married and divorced is inadmissible. *Webb v. State*, 36 App. 41, 35 S. W. 380.

On trial of defendant for aggravated assault upon his wife, it is admissible to prove that he induced another man to get in bed with her, and to try to have carnal intercourse with her, in order to get a divorce. *Webb v. State*, 36 App. 41, 35 S. W. 380.

An assault by a husband upon a wife cannot be proved by a judgment of divorce granted upon the ground of his assault. *Dunagain v. State*, 38 App. 614, 44 S. W. 148.

Evidence held not to sustain a judgment of conviction for assaulting accused's wife. *Kelton v. State*, 71 App. 491, 160 S. W. 342.

In a prosecution for aggravated assault on a girl nine years old, evidence held insufficient to show indecent fondling of her person by defendant. *St. John v. State* (Cr. App.) 178 S. W. 360.

34. — **Assault on female.**—Evidence held sufficient to show defendant an adult male and injured party a female. *Pilcher v. State*, 32 App. 557, 25 S. W. 24; *Johnson v. State*, 59 App. 263, 128 S. W. 614.

The sex of the parties need not be proved directly. Thus, where, the parties being in court, the defendant was spoken of in the evidence as "a man who wore whiskers" and "kept a hotel," and the party assaulted was called "Nancy" and referred to in the evidence as "she," it was held that this was sufficient proof of the sex of the parties. *Tracy v. State*, 44 Tex. 9. So where it was proved that the defendant was a man—a presiding elder—a preacher, and that the female was a wife and mother. *Veal v. State*, 8 App. 474. See, also, *Davis v. State*, 6 App. 133; *Gaston v. State*, 11 App. 143. But see, also, *Hall v. State*, 16 App. 6, 49 Am. Rep. 824, for evidence held insufficient to show that the defendant was an adult male. Where the charge was an assault upon a child, and on the trial the witnesses all referred to and called the assaulted party "a boy," it was held that this was sufficient proof that such assaulted party was a child. *Bell v. State*, 18 App. 53, 51 Am. Rep. 293. In such a case the statements of a child made two or three nights after the assault as to his physical condition, were held to be inadmissible in evidence. *Dowlen v. State*, 14 App. 61.

It is not competent for the state to put in evidence complaints made by the injured female immediately after the assault, unless they come within the rule of *res gestæ*. *Veal v. State*, 8 App. 474.

While, in order to warrant a conviction of aggravated assault by an adult male upon a female, it must be shown that defendant was at least 21 years old, yet, where he was spoken of on the trial as "a man," and "a railroad hand," and no question was raised below as to his age, nor suggested by the facts in evidence, the judgment will not be reversed for want of specific proof of the fact. *Henkel v. State*, 27 App. 510, 11 S. W. 671.

In a prosecution for assault, where defendant offers evidence to prove that the assaulted person stated that she did not know who committed the assault the state, to corroborate her testimony, may prove that she stated soon after the assault that defendant was one of the persons who committed the assault. *Duke v. State*, 35 App. 283, 33 S. W. 349.

The declarations of the prosecutrix, in order to be admissible, must be part of the *res gestæ*. *Price v. State*, 35 App. 501, 34 S. W. 622.

Evidence as to the appearance and condition of a female when first seen after the assault had been committed is admissible. *Id.*

An assault cannot be proved by statements of the person alleged to be assaulted, where she denies the assault on the trial. *Dunagain v. State*, 38 App. 614, 44 S. W. 148.

In a prosecution for an assault on a female child, evidence of similar assaults on other occasions is admissible to show intent. *Rogers v. State*, 40 App. 355, 50 S. W. 338.

It cannot be presumed that the accused was an adult. *White v. State* (Cr. App.) 151 S. W. 826.

Evidence in a prosecution for assault to rape held to sustain a conviction for aggravated assault. *Vivian v. State* (Cr. App.) 152 S. W. 895.

35. — **Assault by parent.**—In a trial for assault, evidence that, immediately after the offense, the complaining witness went to B.'s home, a short distance away, and voluntarily told him that her father had pushed her out of the house, and then kicked her, was admissible as a part of the *res gestæ*. *Waechter v. State*, 34 App. 297, 30 S. W. 444, 800.

In a prosecution of accused for inflicting corporal punishment on her female child, between two and three years old, which resulted in its death, circumstantial evidence held sufficient to sustain a conviction of aggravated assault. *Earnest v. State* (Cr. App.) 152 S. W. 638.

36. **Charge.**—See notes to C. C. P., art. 735.

Facts held to require a charge on accidental assault. *Owens v. State*, 62 App. 129, 136 S. W. 1057. But, see *Jordan v. State* (Cr. App.) 146 S. W. 881.

Evidence held to require a charge that, if there was reasonable doubt as to whether or not the child was over 14, accused must be acquitted. *Wilman v. State*, 63 App. 623, 141 S. W. 110.

Defendant's theory should be presented to the jury. *McGill v. State*, 71 App. 443, 160 S. W. 353.

37. — **Assault on female.**—When there is no controversy as to the sex of the parties to an aggravated assault the charge may assume their sex as alleged. *Davis v. State*, 6 App. 133.

In a prosecution for assault with intent to rape held that failure to instruct on assault and aggravated assault with or without a request was error. *Hemanus v. State*, 7 App. 372.

Where the assault charged was upon a female, and the proof was that she was fifteen years old, and lived with the defendant, who was her brother, and who furnished her with board, lodging, clothing, and schooling, it was held that the court should have charged the parental right of correction. *Snowden v. State*, 12 App. 105, 41 Am. Rep. 667.

When on a charge of assault with intent to rape, evidence shows violent and indecent familiarity, court should charge the law of aggravated assault. *Shields v. State*, 32 App. 498, 23 S. W. 893. See, also, *Alexander v. State*, 58 App. 621, 137 S. W. 189.

The evidence showed that defendant took the injured party by the arm and made an indecent proposal to her, but did nothing further; held, the court should have, at the request of defendant, instructed the jury that if defendant had probable ground to believe and did believe that such taking hold of injured party's arm would not be objected to by her, and that he did not intend to injure her, they should acquit him. *Shields v. State*, 39 App. 15, 44 S. W. 844.

On a trial for an aggravated assault by an adult male upon a female, an instruction that "before you can find the defendant guilty as charged in the information you must believe beyond a reasonable doubt that the acts done by the defendant at the time of the commission of the assault were acts of preparation on the part of defendant to have illicit, unlawful, and improper connection; that is, that unlawful handling of the privates, or attempt to handle the privates, of the alleged injured party, with the party assaulted"—is erroneous, for vagueness. *Bradford v. State*, 25 App. 723, 9 S. W. 46.

In a prosecution for assault with intent to rape, where the evidence makes an issue as to whether defendant intended to use force, it is error not to submit to the jury the law of aggravated assault and battery. *Shields v. State*, 32 App. 498, 23 S. W. 893.

The court instructed the jury that if they believed from the evidence that the defendant, an adult male, did commit an assault, etc. This charge was objected to because it assumed defendant to be an adult male; held, the objection was not well taken. *Holliday v. State*, 35 App. 133, 32 S. W. 538.

On a trial for aggravated assault, the state's evidence was that defendant caught a girl eight years old, and held her between his legs; that she tried to get loose; that he used improper language, and exposed his person. Held, that the evidence warranted a charge, in the language of the statute, that, when an injury is caused by violence to the person, the intent to injure is presumed, and it rests on the one inflicting the injury to show accident or innocent intention, where the main charge required the jury to find beyond a reasonable doubt that defendant intended to injure the girl. *Hill v. State*, 37 App. 279, 38 S. W. 987, 39 S. W. 666, 66 Am. St. Rep. 803.

It is proper to charge in a prosecution for aggravated assault on a child eight years old that if defendant indecently or violently fondled her person, with intent to injure her, they must find defendant guilty, without requiring the act to be done without the consent of the child. *Hill v. State*, 37 App. 279, 38 S. W. 987, 39 S. W. 666, 66 Am. St. Rep. 803.

In an information charging defendant with "an aggravated assault" was an allegation that he intended, by the use of means employed by him on the person of a female, to have carnal intercourse with her. Held that, part of the count charging intent not being an essential averment, a refusal to charge that such intent must exist is not error. *Berry v. State* (Cr. App.) 40 S. W. 984.

In a prosecution for an assault on a female child, an instruction to find defendant guilty, if he indecently handled the child, does not injure defendant by failing to state that the assault must be made with intent to injure the child. *Rogers v. State*, 40 App. 355, 50 S. W. 338.

In a prosecution for an assault on a female child, an instruction that, when an injury is caused by violence to the person, the intent is presumed, and defendant must show the accident, or innocence of the intention, is not erroneous as stating, as a matter of law, that injury had resulted from defendant's act. *Rogers v. State*, 40 App. 355, 50 S. W. 338.

An instruction that the injury intended may be a sense of shame, following an instruction that the intent is presumed where an injury is caused by violence to the person, is not prejudicial, as being an undue repetition. *Rogers v. State*, 40 App. 355, 50 S. W. 338.

Where accused was referred to throughout the trial as a male adult, and his mother testified that he was 27 years of age, it was proper to instruct that, if the jury believed beyond a reasonable doubt that the defendant committed the assault, he would be guilty. *Robinson v. State* (Cr. App.) 145 S. W. 345.

For correct charge in a case of assault on a female, see *Pittcock v. State* (Cr. App.) 163 S. W. 971.

38. — **Assault on child.**—Giving of an instruction to convict defendant if he chastised his ward with an unusual instrument calculated to inflict serious injuries held error as making the instrument the test of guilt. *Stanfield v. State*, 43 Tex. 167.

39. **Punishment.**—A fine of \$500, and 12 months' imprisonment in a county jail, for an assault committed on complainant by defendant by seizing her sleeve

and jerking her nearly to the ground, tearing off the sleeve (these facts being in dispute), is excessive. *Robinson v. State*, 25 App. 111, 7 S. W. 531.

On conviction of an aggravated assault on a married woman held that a verdict assessing a penalty of three hundred dollars fine and six months' imprisonment was not excessive. *Young v. State*, 31 App. 24, 19 S. W. 431.

SUBD. 6

40. Offense.—A male person under twenty-one years of age may commit an aggravated assault and battery upon a female by using violent familiarity upon her person, without her consent, with intent to have improper connection with her. *George v. State*, 11 App. 95.

A male is guilty of an aggravated assault by feeling the private parts of a chaste female against her will; this clause not limiting the character of the assault to the use of whip or cowhide. *Slawson v. State*, 39 App. 176, 45 S. W. 575, 73 Am. St. Rep. 914.

An assault with switches or sticks is aggravated; the statute including all assaults where whipping is administered. *Caples v. State* (Cr. App.) 155 S. W. 267.

41. Evidence.—Evidence held to support a conviction notwithstanding evidence of self-defense. *Yates v. State*, 72 App. 279, 162 S. W. 499.

42. Information.—An information under said subdivision referring to defendant by the pronoun "his," and to the person assaulted by the pronoun "her," and referring to her vagina, makes it sufficiently clear that defendant was a male, and that he assaulted a female. *Slawson v. State*, 39 App. 176, 45 S. W. 575, 73 Am. St. Rep. 914.

SUBD. 7

Cited, *Kinslow v. State* (Cr. App.) 147 S. W. 249.

43. Offense.—Whenever there are such circumstances of aggravation attending the commission of the offense, as the use of bludgeons, missiles, weapons, or instruments of any kind capable of inflicting injury beyond what may ordinarily be inflicted by a blow with the fist and used in such manner as to be likely to inflict such injury, and especially where so used as to cause a wounding, the offense must be deemed to be an aggravated assault. *Norton v. State*, 14 Tex. 387.

An assault committed by striking with a pistol is, under the law of Texas (Pen. Code, arts. 46, 496), simple assault, notwithstanding the person assaulted was wounded by the accidental discharge of the pistol used in the assault, unless it is shown that a pistol was, when used in such a manner, a deadly weapon; or that by means of such use of it serious bodily injury had been inflicted, or that the assault was committed with premeditated design and by the use of means calculated to inflict great bodily injury. *Pierce v. State*, 21 App. 540, 1 S. W. 463; *Jenkins v. State*, 30 App. 379, 17 S. W. 938; *Stephenson v. State*, 33 App. 162, 25 S. W. 784; *Melton v. State*, 30 App. 273, 17 S. W. 257.

"Serious bodily injury" is such as gives rise to apprehension—an injury which is attended with danger. Biting off a small portion of the rim of the ear, it was held, was not inflicting serious bodily injury. *George v. State*, 21 App. 315, 17 S. W. 351; *Halsell v. State*, 29 App. 22, 18 S. W. 418.

To make the throwing of a hot coffee pot on a person an aggravated assault, it must have been thrown so as to make it a deadly weapon, or it must have inflicted serious bodily injury. *Clark v. State*, 63 App. 579, 140 S. W. 779; *Bagley v. State* (Cr. App.) 150 S. W. 773; *Shelton v. State* (Cr. App.) 150 S. W. 940.

44. Indictment.—"Striking and beating with a pistol in a manner calculated to inflict serious bodily pain and injury" does not per se constitute an aggravated assault. If, as used, the pistol was a deadly weapon, or if the assault was made with premeditated design, the assault would be an aggravated one; but, in the absence of both these allegations, the indictment charges a simple assault only. *Miles v. State*, 23 App. 410, 5 S. W. 250.

An indictment held sufficient to charge aggravated assault and battery under this subdivision. *Bean v. State*, 25 App. 346, 8 S. W. 278.

Where the indictment alleges the assault made with a deadly weapon, also, that serious bodily injury was inflicted, proof of either allegation will sustain a conviction. *Whitten v. State* (Cr. App.) 28 S. W. 474.

Indictment held sufficient. *Bagley v. State* (Cr. App.) 150 S. W. 773.

The injury and not the means is the criterion by which the aggravation is determined. *Hyde v. State* (Cr. App.) 168 S. W. 535.

45. — Election between counts.—See notes under C. C. P., art. 481.

46. — Pleading and proof.—Where an indictment charges that an assault was aggravated, first, because serious bodily injury was inflicted; second, because the offense was committed upon a female by an adult male,—proof of the latter fact alone is sufficient. *Waechter v. State*, 34 App. 297, 30 S. W. 444, 800.

Serious bodily injury, relied on in a prosecution for aggravated assault, is supported by proof that the injuries inflicted on the assaulted stiffened one of his fingers. *Branch v. State*, 35 App. 304, 33 S. W. 356.

47. Evidence.—The assaulted party having testified that he was unable to go about, evidence that the day after the assault he was in front of accused's house and invited him to fight, was improperly excluded. *Parish v. State* (Cr. App.) 153 S. W. 327.

A physician having testified that he would not state the wound was such as might probably result in death, his testimony, showing the bullet did inflict serious bodily injury, was admissible. *Singleton v. State* (Cr. App.) 167 S. W. 46.

48. — Sufficiency.—Evidence held to sustain a conviction. *Rowlett v. State* (Cr. App.) 147 S. W. 599; *Fulkerson v. State*, 57 App. 80, 121 S. W. 1111; *Bagley v. State* (Cr. App.) 150 S. W. 773; *Nickerson v. State* (Cr. App.) 154 S. W. 992.

Facts held insufficient to sustain conviction. *Russell v. State*, 71 App. 86, 158 S. W. 546.

49. — **Serious injury.**—Serious injury not shown. *Miller v. State*, 59 App. 249, 128 S. W. 117; *Parish v. State* (Cr. App.) 153 S. W. 327.

A dislocation of complaining witness' shoulder inflicted by defendant while forcibly putting him out of a door in the post office, which hurt a great deal, required a sling for several weeks, and continued to hurt at trial six months later, which had been put in place while complainant was under anesthetics, and which, while not necessarily permanent, would expose the joint to greater chance of a subsequent dislocation, was a serious injury. *Robey v. State* (Cr. App.) 163 S. W. 713.

50. **Charge.**—See notes to C. C. P. art. 735.

Facts held not to require a charge on aggravated assault. *Bussey v. State*, 71 App. 612, 160 S. W. 697; *Spiller v. State* (Cr. App.) 150 S. W. 1164.

Charge on intent to injure held sufficient. *Johnson v. State*, 71 App. 610, 160 S. W. 702; *Robey v. State* (Cr. App.) 163 S. W. 713.

Where injury was almost fatal, a proper charge on defendant's ability to inflict the injury can not prejudice him. *De Los Santos v. State* (Cr. App.) 31 S. W. 395.

It is not necessary to submit the issue of simple assault in a homicide case where the jugular vein was cut, causing death. *Kinslow v. State* (Cr. App.) 147 S. W. 249.

SUBD. 8

51. **Offense.**—*Hunt v. State*, 6 App. 664; *Johnson v. State*, 70 App. 294, 156 S. W. 1164.

Where the evidence showed that the fight was provoked by defendant and it was not shown that it was necessary to his defense that he should use a knife which, though not very formidable, was a dangerous weapon capable of inflicting a serious wound and of endangering the life of the person on whom it was used, the jury was justified in finding him guilty of aggravated assault in the use of the knife. *Weaver v. State*, 24 Tex. 387.

On trial for an assault with intent to murder, where an assault with a deadly weapon is shown, but the intent to kill is not shown, the offense would be an aggravated assault. *Moore alias Neal v. State*, 33 App. 306, 26 S. W. 403.

The use of a loaded gun, incapable of being fired because of a broken firing pin, held a simple assault and not an aggravated assault with a deadly weapon. *Pearce v. State*, 37 App. 643, 40 S. W. 806.

An unlawful assault with a deadly weapon, not in self-defense, is aggravated assault. *Hamilton v. State*, 60 App. 258, 131 S. W. 1127.

Where accused, after ordering out of his store, one, who was his enemy, got his shotgun and pointed it at him, but did not fire it, or use it to strike with, and inflicted no injury, the acts of accused amounted to no more than simple assault. *Shuffield v. State*, 62 App. 556, 138 S. W. 402.

To make the throwing of hot coffee on a person an aggravated assault, it must have been done so as to make it a deadly weapon, or it must have inflicted serious bodily injury. *Clark v. State*, 63 App. 579, 140 S. W. 779.

A person shooting another is guilty of assault, unless done by accident or unintentionally; the grade of the offense depending on whether he acted with malice, and intended to kill. *Vining v. State* (Cr. App.) 146 S. W. 909.

Where a person threw a stick at another with no intention of killing him, and which was not what would usually be considered a deadly weapon, he would be guilty of an aggravated assault only. *Harris v. State* (Cr. App.) 148 S. W. 1071.

Shooting to frighten or to inflict injury without killing is an aggravated assault. *Young v. State* (Cr. App.) 151 S. W. 1046.

One who curses and points a gun at another, who flees, the gun not being fired, is guilty of aggravated assault. *Myers v. State*, 72 App. 630, 163 S. W. 432.

52. **Deadly weapon.**—A "deadly weapon" is one which, in the manner used, is likely to produce death, or serious bodily injury. *Skidmore v. State*, 43 Tex. 93; *Kouns v. State*, 3 App. 13; *McReynolds v. State*, 4 App. 327; *Johnson v. State*, 70 App. 294, 156 S. W. 1164; *Harris v. State*, 72 App. 491, 162 S. W. 1150.

A fire-arm is not necessarily a deadly weapon. Whether or not in the particular case it was a deadly weapon must depend upon its size, or the manner of its use. *Skidmore v. State*, 43 Tex. 94; *Key v. State*, 12 App. 506; *Shadle v. State*, 34 Tex. 572; *State v. Franklin*, 36 Tex. 155; *Hunt v. State*, 6 App. 663.

A chair is not necessarily a deadly weapon. *Kouns v. State*, 3 App. 13. Nor is "a black jack pole used as a fence rail." *Wilson v. State*, 15 App. 150.

When assault was made with a pistol it must be shown in what manner the pistol was used. *Stephenson v. State*, 33 App. 162, 25 S. W. 784.

"An instrument calculated and likely to produce death or serious bodily injury from the manner in which it is used," is a proper definition of a deadly weapon. *Hardy v. State*, 36 App. 400, 37 S. W. 434.

Whether a weapon is a deadly weapon can be proved by its size and character and the manner in which it was used. *Hardy v. State*, 36 App. 400, 37 S. W. 434.

A deadly weapon is one which, from the manner used, is calculated to produce death or serious bodily injury. *Wilson v. State*, 37 App. 156, 38 S. W. 1013.

An assault with an ordinary saw is not an "assault with a deadly weapon," where the injuries inflicted are very slight. *Fisher v. State* (Cr. App.) 151 S. W. 544.

A weapon may or may not be deadly according to its size and the manner of its use. *Smith v. State*, 61 App. 349, 135 S. W. 152; *Fisher v. State* (Cr. App.) 151 S. W. 544.

53. — **Elements of manslaughter as reducing assault with intent to murder to aggravated assault.**—See arts. 1128-1138 and notes thereunder.

54. **Distinct offenses.**—A conviction for engaging in an "affray" does not bar a prosecution for "aggravated assault" under a plea of former jeopardy, nor does the doctrine of carving apply. *McCraw v. State* (Cr. App.) 163 S. W. 967.

55. Indictment and Information.—See notes under the two preceding subdivisions.

An allegation that the assault was committed with a pistol, and that the defendant did shoot at the assaulted party, with intent to kill, sufficiently charges an aggravated assault. It is not necessary to allege that the assault was unlawful. *State v. Lutterloh*, 22 Tex. 210.

An information charging that defendant "did make an aggravated assault and battery * * * and * * * with brass knuckles * * * did strike, beat, wound" held insufficient to charge aggravated assault or more than a simple assault. *Wilks v. State*, 3 App. 34.

It is not necessary to allege that the fire-arm used was loaded, or that the assaulted party was within carrying distance of the weapon. *Burton v. State*, 3 App. 408, 30 Am. Rep. 146; *Rainbolt v. State*, 34 Tex. 286.

It need not allege that the assault was committed under "circumstances not amounting to an intent to murder or maim." *Brown v. State*, 2 App. 61; *Hunt v. State*, 6 App. 663; *State v. Franklin*, 36 Tex. 155.

The indictment must allege that the weapon with which the assault was committed, was a "deadly" one. To allege that the assault was committed with a pistol without alleging that the pistol was a deadly weapon is insufficient. *Key v. State*, 12 App. 506; *Miles v. State*, 23 App. 410, 5 S. W. 250; *Williamson v. State*, 5 App. 485.

Information held to charge an offense. *Dunn v. State*, 71 App. 89, 158 S. W. 300.

Intent to injure need not be alleged. *Yelton v. State* (Cr. App.) 170 S. W. 318.

56. — Election between counts.—See notes under C. C. P. art. 481.

57. — Variance.—If the assault is alleged to have been committed with a specific weapon, it must be so proved. *McGee v. State*, 5 App. 492.

Where an indictment charged an assault with intent to murder with a bowie knife, and the evidence showed an assault with a butcher knife, that there was no variance. *Hernandez v. State*, 32 App. 271, 22 S. W. 972.

An information charging an assault committed with a knife, is not supported by evidence of an assault committed with a stick. *Herald v. State*, 37 App. 409, 35 S. W. 670.

58. Evidence.—Facts held to sustain a verdict of guilty. *Noland v. State*, 63 App. 275, 140 S. W. 100; *Simpson v. State* (Cr. App.) 33 S. W. 1078; *Black v. State* (Cr. App.) 143 S. W. 932; *Waller v. State* (Cr. App.) 145 S. W. 921.

Evidence that defendant seized a gun during the fight with a knife held admissible as part of the res gestæ, but not to establish an assault with the gun. *Weaver v. State*, 24 Tex. 387.

If the assault was with a fire-arm, the state need not prove it was loaded; if unloaded the burden is upon the defendant to prove it. *Crow v. State*, 41 Tex. 468; *Caldwell v. State*, 5 Tex. 18.

The locality and character of the wounds inflicted is competent evidence to prove that the weapon used was a deadly one, and may be sufficient. *Briggs v. State*, 6 App. 144.

Proof by the defendant that the assaulted party had a weapon which he did not attempt to use, is inadmissible. *Briggs v. State*, 6 App. 144.

If the charge is that the assault was committed with a deadly weapon, it must be proved that the weapon was deadly when used in the manner in which it was used, or attempted to be used. *Wilson v. State*, 15 App. 150; *Hilliard v. State*, 17 App. 210; *Hunt v. State*, 6 App. 663; *Key v. State*, 12 App. 506; *McGrew v. State*, 19 App. 302.

Conviction for aggravated assault with deadly weapon will be set aside when there is no evidence to show that the knife used was a deadly weapon. *Willson v. State*, 34 App. 64, 29 S. W. 41.

There was no proof as to the size of the knife, and a physician who examined the wounds testified that they were not dangerous; held, the evidence was insufficient to support the verdict. *Willson v. State*, 34 App. 64, 29 S. W. 41.

The proof showing that the assault was committed with a pistol, used as a bludgeon, the size and weight of the pistol must be shown. *Branch v. State*, 35 App. 304, 33 S. W. 356.

The prosecutor found defendant and a woman in a thicket; evidence tending to show that prosecutor was in the habit of spying upon persons was inadmissible. *Parker v. State* (Cr. App.) 34 S. W. 265.

The state of defendant's feeling may be shown. *Decker v. State*, 58 App. 159, 124 S. W. 912.

Where defendant had testified that he wanted to settle the matters in controversy with complainant and had offered to do so, evidence in rebuttal that witness, prior to the difficulty, went to see accused and tried to induce him to settle the difference, was admissible. *Decker v. State*, 58 App. 159, 124 S. W. 912.

If accused waylaid prosecutor and shot him without killing him at a time his mind was incapable of cool reflection on first meeting prosecutor after being informed of insults to a female relative, he was guilty of aggravated assault. *Cheatham v. State*, 57 App. 442, 125 S. W. 565.

Where accused cut prosecutor's throat, and made a gash five inches long around his neck, and one three inches long across his cheek, and cut his coat and vest, he was guilty of aggravated assault, if of anything, without reference to whether he acted in the heat of passion. *Wimberley v. State*, 60 App. 65, 130 S. W. 1002.

A conviction held unauthorized. *Maxwell v. State* (Cr. App.) 145 S. W. 1190.

Evidence of an agreement between the accused and his brother to beat up a person other than the one assaulted, held improperly admitted. *Larue v. State* (Cr. App.) 146 S. W. 194.

In a prosecution for assault to kill, where it appeared that the assault was made with a dirk, the blade being 5½ inches long from guard to the point, sharp on both edges, and about three-fourths of an inch in width, tapering to a point, and a dangerous wound was made under the shoulder blade puncturing the lung tissue, the issue of simple assault was not presented. *Hogue v. State* (Cr. App.) 146 S. W. 905.

If accused provoked a difficulty with G., with no intention of killing him, and after being knocked down by G. formed an intention to kill, he was only guilty of aggravated assault, if his mind was rendered incapable of cool reflection by G.'s blows. *Solis v. State* (Cr. App.) 174 S. W. 343.

If accused, when he "hollered" as he approached G., intended to bring on trouble with G., but had no intention of killing him, his attack on G., after G. had knocked him down, was no graver offense than aggravated assault. *Solis v. State* (Cr. App.) 174 S. W. 343.

59. — **Deadly weapon.**—Evidence that defendant struck a person with a "good-sized walking-stick made of bois d'arc, and loaded;" that it was a "fair-sized walking-stick;" that the last blow was over the eye, and stunned the assaulted person; that the blow "cut the skin;" and that blood was wiped from the forehead,—is sufficient to convict of assault with a deadly weapon, or of an assault inflicting serious bodily injury. *Stevens v. State*, 27 App. 461, 11 S. W. 459.

In a prosecution for assault with a deadly weapon, the prosecuting witness testified that defendant cut him "three times in the back." The physician who attended the witness testified that the wounds were not serious, and looked as though they had been made with a penknife. Defendant testified that he cut the witness with his knife. There was no evidence as to the character of the knife. Held, that the evidence failed to show that the knife was a deadly weapon. *Wilson v. State*, 34 App. 64, 29 S. W. 41.

On a prosecution for aggravated assault with a deadly weapon, where it appears that the weapon was a pistol used as a bludgeon, the weight and size of the pistol must be shown to determine whether it is, as so used, a deadly weapon. *Branch v. State*, 35 App. 304, 33 S. W. 356.

Evidence held to justify a finding that accused, when he assaulted complainant, used a dangerous weapon. *Decker v. State*, 58 App. 159, 124 S. W. 912.

In a prosecution for an assault to murder, evidence held to justify a finding that the weapon used was a deadly weapon, so as to warrant a conviction of aggravated assault. *Teasley v. State*, 150 S. W. 784.

Evidence held to sustain a finding that the knife used was a deadly weapon. *Johnson v. State*, 70 App. 294, 156 S. W. 1164.

Evidence held insufficient to show that the knife used was a deadly weapon. *Burleson v. State* (Cr. App.) 164 S. W. 851.

60. — **Weapons or means used as evidence of intent.**—See art. 1147, post and notes.

61. **Charge.**—See notes to C. C. P. art. 735.

Facts held to require a charge on aggravated assault. *Cukierski v. State* (Cr. App.) 153 S. W. 313; *Leigh v. State* (Cr. App.) 145 S. W. 920; *Earnest v. State* (Cr. App.) 152 S. W. 638; *Jones v. State* (Cr. App.) 153 S. W. 310; *Mitchell v. State*, 71 App. 254, 158 S. W. 812.

Facts held not to require a charge on aggravated assault. *Gray v. State* (Cr. App.) 144 S. W. 283; *Crutchfield v. State* (Cr. App.) 152 S. W. 1053.

On the trial of B, charged with an aggravated assault on C, there was evidence that C was attempting to strike B with a stout walking stick at the time B stabbed him with a pocketknife. Held, that it was error to charge "if you believe that B stabbed C without C striking him with the stick, you will find him guilty of an aggravated assault." *McFarlin v. State*, 41 Tex. 23.

Where the assault charged was with a pistol, the jury propounded to the court the question, "Is a pistol a deadly weapon, the size not known, and not known whether empty or loaded?" The court answered, "A pistol is a deadly weapon." Held, error. *Skidmore v. State*, 43 Tex. 94.

The jury should be instructed as to the meaning of the phrase "deadly weapon," where it charged that the assault is committed with such a weapon. *Kouns v. State*, 3 App. 13.

And see on charge, *Dillard v. State*, 31 App. 67, 19 S. W. 895.

On trial of assault with intent to murder, where the evidence tends to show an aggravated assault, the court should submit that issue to the jury. *Goode v. State*, 32 App. 505, 24 S. W. 102.

Where a deadly weapon is used with the intention of alarming another the court should instruct on that phase of the case. *Blackwell v. State*, 33 App. 278, 26 S. W. 397, 32 S. W. 128.

On trial for assault with intent to murder where there is a conflict in the evidence as to defendant's intent to kill, the court should submit the law of aggravated assault. *Moore v. State*, 33 App. 351, 26 S. W. 404.

On trial for an assault with intent to murder where a deadly weapon was used but the evidence fails to establish the intent the court should charge the law on aggravated assault. *Moore v. State*, 33 App. 351, 26 S. W. 404; *Blackwell v. State*, 33 App. 278, 26 S. W. 397, 32 S. W. 128; *Moore alias Neal v. State*, 33 App. 306, 26 S. W. 403.

Where the defense was that the defendant fired the shots with intent to alarm and the evidence tended to support this theory the court should have charged the law in regard to aggravated assault. *Moore alias Neal v. State*, 33 App. 306, 26 S. W. 403.

A charge stating two grounds of aggravated assault and to convict if defendant committed an aggravated assault does not authorize a conviction on any other than the grounds stated. *Russell v. State*, 35 App. 8, 29 S. W. 43.

Defendant cut his wife's throat with a razor and ran after her and tried to cut her again; held, a charge on aggravated assault was properly refused. *Halliburton v. State*, 34 App. 410, 31 S. W. 297.

It appearing that defendant used his pistol only as a club the court should have defined deadly weapon. *Lawson v. State* (Cr. App.) 32 S. W. 895.

On evidence of an assault with a knife, it is not error to charge on the use of a dangerous weapon. *Ellison v. State* (Cr. App.) 34 S. W. 945.

The evidence showed the assault to have been made with a breast yoke, which inflicted but slight injury, and then defendant picked up a rock with which he might have killed the injured party; but after striking one lick threw the rock down and left; held, the court should have charged an aggravated assault. *Smith v. State*, 36 App. 569, 38 S. W. 167.

On trial for assault with intent to murder, failure to instruct as to aggravated assault and battery is error, where the weapons used in committing the assault were a breast yoke and a rock. *Smith v. State*, 36 App. 569, 38 S. W. 167.

Defendant testified that he did not intend to kill the assaulted party, but the testimony of all the other witnesses and the physical facts were against him; held, no error to refuse a special charge raising the question of aggravated assault. *Schmeischer v. State*, 36 App. 461, 37 S. W. 864, 38 S. W. 355.

But see dissenting opinion of Davidson, Judge. *Id.*

A charge that a deadly weapon is one which, from the manner used, is calculated to produce death, "or serious bodily injury," is not erroneous, on the ground that the weapon, as used, must be capable of producing death, where the evidence shows that the assault was with a shotgun, and a witness testifies that the gun, as loaded, and at the distance defendant was from the prosecutor, was a deadly weapon. *Wilson v. State*, 37 App. 156, 38 S. W. 1013.

The evidence showed that if defendant did not provoke the difficulty, he willingly engaged in the fight; held, that he could not complain of the charge of the court on aggravated assault. *Wilson v. State*, 37 App. 156, 38 S. W. 1013.

On trial for an assault with intent to murder, when the evidence shows either such an assault or self-defense, the court is not required to charge an aggravated assault. *Barnes v. State*, 39 App. 184, 45 S. W. 495.

When an assault is made with a deadly weapon, but it is doubtful as to whether or not defendant intended to kill the injured party, the court should instruct the jury that if they have a reasonable doubt as to such intention they will only find defendant guilty of an aggravated assault. *Mathis v. State*, 39 App. 549, 47 S. W. 464.

See this case for facts which called for a charge upon aggravated assault upon grounds stated in subdivisions 7 and 8 of this article. *Henderson v. State*, 55 App. 15, 115 S. W. 45.

In a prosecution for assault to murder, there was evidence that the person assaulted brought on the difficulty, threw a rock at accused, and then pulled a pistol and threatened to kill him. Held, that this evidence necessitated a charge as to the law of aggravated assault, on the theory that the difficulty was begun by the prosecuting witness. *Heath v. State*, 57 App. 59, 121 S. W. 862.

Where, on a trial for assault with intent to murder, no motive was shown for the shooting, and the parties were strangers, and the testimony raised the issue of an attack on accused by prosecutor and his associates suddenly, unexpectedly, and in the darkness, resulting in the infliction of serious wounds on accused, the court must submit the issue of aggravated assault. *Reeen v. State*, 58 App. 457, 126 S. W. 577.

Evidence in a prosecution for assault with intent to murder held to raise the issue of aggravated assault. *Furgerson v. State*, 58 App. 431, 126 S. W. 594.

Where, in a prosecution for murder, the character of wound inflicted by accused who stabbed deceased, the latter's prostrated condition immediately following the stabbing, the depth of the wound, and all, clearly showed the weapon used was deadly, there was no issue of aggravated assault in the case, and the court did not err in not charging thereon. *Joseph v. State*, 59 App. 82, 127 S. W. 171.

A pistol used as a firearm is per se a "deadly weapon," and it is unnecessary to define the term. *Lofton v. State*, 59 App. 270, 128 S. W. 384.

Where there was evidence that the difficulty between accused and prosecutor arose from the fact that prosecutor owed accused money, and the state showed that accused was the aggressor, and without excuse cut prosecutor with a penknife with a blade two or three inches long, and accused raised the issue of self-defense, and there was no evidence as to whether the wound was serious or not, the court erred in not submitting the issue of aggravated assault, though the facts did not call for a charge of aggravated assault on account of passion arising from adequate cause. *Armstrong v. State*, 60 App. 316, 131 S. W. 1074.

In a prosecution for assault with intent to murder, there was evidence that the defendant, after a dispute with the prosecuting witness over payment for an article bought at the witness' store, said, "I will pay you, but I will see you again," and that the defendant, leaving the store, returned in a short time, and from a position behind a telephone pole shot and wounded the witness. The witness ran into the store, and defendant followed him, and shot and wounded him again, and witness then hid in the store, while the defendant shot once or twice more. This evidence, and evidence to identify the defendant, was corroborated. Held, that the court's refusal to submit the case to the jury, with an instruction upon aggravated assault, was not error. *Harding v. State*, 60 App. 327, 131 S. W. 1092.

In a prosecution for aggravated assault, submitted to the jury on an instruction as to assault with a deadly weapon, it appeared from the evidence that the assault was committed and the wounds of the prosecuting witness made with a wooden stick about 2½ or 3 feet long, measuring about 1½ inches in diameter at the larger end and about three-quarters of an inch at the smaller end, and weighing from three-quarters of a pound to 1½ pounds. A physician testified that he examined the wounds shortly after the alleged assault, and found some blood clots

under the scalp, a wound upon the jaw, and bruises on the shoulder, which might have been made with a stick, and which he dressed; the witness not stating whether the wounds were serious or not. Held, that the evidence was insufficient to warrant an instruction upon assault with a deadly weapon. *Hamilton v. State*, 60 App. 258, 131 S. W. 1127.

Defendant, an adult male, was charged with assaulting a boy 13 years of age and stabbing him with a sword for running between the line of a Knights of Pythias funeral procession. An examination of the boy disclosed a small punctured wound one-fourth to half an inch deep on his thigh and about half an inch long, which seemed to have been caused by a sharp pointed instrument. Defendant denied that he struck the boy, and disclaimed any purpose or intent to do so, nor was there any motive or evidence of any intention on the defendant's part to kill the boy. Held, that the court erred in failing to submit aggravated assault, under Pen. Code 1895, art. 1031, declaring that, when an assault is committed with a deadly weapon under circumstances not amounting to an intent to murder or maim, the offense is "aggravated assault." *Malone v. State*, 60 App. 509, 132 S. W. 769.

The jury should be instructed on cooling time. *Leggett v. State*, 62 App. 99, 136 S. W. 784.

Where the case was submitted on the issues of assault to murder and aggravated assault, the court should, especially in connection with a charge on cooling time, have instructed as to blows inflicted by prosecutor on defendant, with a chair bottom and rail, causing pain and bloodshed, authorizing a conviction of the lesser offense, though such blows were inflicted an hour before the parties again met, when defendant shot prosecutor. *Leggett v. State*, 62 App. 99, 136 S. W. 784.

The evidence of the state in a prosecution for an assault with intent to kill tended to show a dispute between the parties growing out of a game of craps; that defendant shot directly at one of the state's witnesses under such circumstances as to show that he did so with intent to kill, and that of the defendant that the shot was accidental, and that he did not shoot at or intend to shoot or kill the witness, nor shoot in self-defense, and that he used his pistol with the intention of defending himself if it became necessary, as he believed that the witnesses intended to assault him. Held, that an instruction upon aggravated assault was necessary. *Davis v. State*, 63 App. 484, 141 S. W. 93.

Evidence on a trial for homicide held not to require the submission of aggravated assault. *Carver v. State* (Cr. App.) 148 S. W. 746.

In a prosecution for homicide, where a witness testified that, on exclamation by the wife of deceased that men standing by had let that man kill her husband, he went out to where deceased was lying on the ground, and that defendant stood over him with an ax, and struck him on the head, and where defendant himself testified that he picked up an ax and struck deceased with it three times, knocking him down at the first blow, a charge on aggravated assault defining a deadly weapon was not called for. *Penton v. State* (Cr. App.) 149 S. W. 190.

Where, in a prosecution for aggravated assault by striking prosecutor with a rock, there was no evidence that the injuries were serious or of an aggravated nature, an instruction defining aggravated assault as one from which serious bodily injury results, or committed with a deadly weapon under circumstances not amounting to intent to murder or maim, or committed with a premeditated design and by the use of means calculated to effect great bodily injury, and charging that, if defendant committed an aggravated assault by then and there assaulting and cutting prosecutor with a knife, as alleged in the information, he should have been found guilty, etc., was erroneous. *Shelton v. State* (Cr. App.) 150 S. W. 940.

Charge held too restrictive. *Young v. State* (Cr. App.) 151 S. W. 1046.

Where defendant stabbed deceased in the stomach only once with an ordinary pocket knife and there was no testimony showing directly that it was a deadly weapon, defendant having testified that he had no idea of killing deceased, but, being greatly frightened at the way deceased came at him, struck him once with the knife in order to defend himself, it was error to refuse to charge on aggravated assault. *Hysaw v. State* (Cr. App.) 155 S. W. 941.

The killing of another with a weapon not likely to produce death is only aggravated assault in the absence of evidence showing a design to kill, consequently in a homicide case, where the court properly charged the jury that, if the hammer used in the offense was not an instrument likely to produce death, it cannot be presumed that death was intended, a further instruction on aggravated assault was necessary. *Beaupre v. State*, 70 App. 19, 156 S. W. 625.

Evidence, in a prosecution for assault with intent to kill, held to make it a jury question whether the fights theretofore had between the parties were sufficient to constitute adequate cause, so as to reduce the offense to aggravated assault. *Luttrell v. State*, 70 App. 183, 157 S. W. 157.

It was not error to refuse to charge the law of aggravated assault, where defendant procured a pistol and went to the other's house, and a shooting affray immediately followed. *Rogers v. State*, 71 App. 271, 159 S. W. 44.

Where the evidence in a homicide case tended to show that the knife used was 8 or 8½ inches long, and had been sharpened while in accused's possession shortly before the killing, and was used with such force as to sever decedent's watch chain, put gaps in the knife, and drive part of the chain into his abdomen and that the knife went six inches across the abdomen, until it struck and cut off two ribs, and then went downward an inch and a half and that a second wound was inflicted inside the bowels before the knife was withdrawn, a requested charge on aggravated or simple assault was properly refused; the evidence indicating a design to kill. *Ward v. State*, 70 App. 393, 159 S. W. 272.

On a trial for assault with intent to murder, where the state's evidence showed a deliberate and wilful assault with a shotgun within a distance of only 12 to 15 feet, while accused testified that he shot solely in self-defense and did not testify

that he did not intend to kill the party assaulted, the court properly refused to submit aggravated assault under Pen. Code 1911, art. 1022, subd. 7, providing that an assault becomes aggravated when a serious bodily injury is inflicted upon the person assaulted, or subdivision 8, providing that an assault is aggravated when committed with deadly weapons, under circumstances not amounting to an intention to murder or maim, since the evidence showed an assault with a deadly weapon in such a way as to show an intention to kill. *Bussey v. State*, 71 App. 612, 160 S. W. 697.

On a trial for assault to murder, accused's testimony that, as he was walking down the street with a pistol in his hand just after killing a man, some one called, "Look out," that as he turned he saw approaching a person whom he knew to be an officer, and that the officer was attempting to draw a pistol, whereupon he fired, though it raised the issue of self-defense, did not justify the submission of aggravated assault. *Lamb v. State* (Cr. App.) 168 S. W. 534.

Where the state's evidence presented only the question of murder, and the defendant's evidence raised only the question of manslaughter and accidental killing, the court properly refused to instruct on aggravated assault. *Walker v. State* (Cr. App.) 169 S. W. 1156.

Where the injuries inflicted by accused result in death, the issues of assault with intent to murder or aggravated assault do not arise and should not be submitted. *Francis v. State* (Cr. App.) 170 S. W. 779.

On a trial for assault to murder, the court, in charging on self-defense, should have told the jury that if accused provoked the difficulty, with no intention of killing, and was assaulted by the prosecuting witness, and driven to the necessity of cutting as a matter of self-preservation, he would be guilty of no higher offense than aggravated assault, if the blows and assault caused such pain as to produce anger, rage, or fear to an extent rendering his mind incapable of cool reflection, as the statute provides that a blow causing pain is "adequate cause." *Solis v. State* (Cr. App.) 174 S. W. 343.

Defendant was tried for assault with intent to commit murder, and the court charged that "an assault becomes aggravated when committed with a deadly weapon under circumstances not amounting to an intent to murder or maim," and that, if there was a reasonable doubt as to the defendant's intent to murder or maim, the defendant was guilty of no higher offense than aggravated assault. Held, that the use of the word "maim," in conjunction with murder, had a tendency to confuse the jury, for if it was believed that defendant's intent was not to murder, but to maim, the jury would have been obliged to convict, and hence the instructions taken together were reversible error. *Cooper v. State*, 132 S. W. 355.

62. **Self-defense.**—See notes under art. 1014 ante.

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63. **Offense.**—An assault is not necessarily aggravated because committed by the use of means calculated to inflict great bodily injury. It must also be committed with premeditated design. *Pinson v. State*, 23 Tex. 579.

An aggravated assault under this subdivision may be committed with the fists. *Keley v. State*, 12 App. 245.

An assault committed with premeditated design, but without the specific intent to kill, and by the use of means calculated to inflict great bodily injury, is an "aggravated assault." *Armstrong v. State*, 60 App. 316, 131 S. W. 1074.

Where one intending to use his fists, is so confused by a blow that he uses a knife without knowing what he is doing, he is not guilty of aggravated assault, but may be convicted of simple assault. *Brewer v. State* (Cr. App.) 153 S. W. 622.

The assault must be committed with a fixed purpose, and not upon a rash impulse, but the real injury is not material, except as showing that the means were calculated to inflict serious injury. *Hodges v. State* (Cr. App.) 166 S. W. 512.

Where accused struck complaining witness on being called a liar by him, and witness fell, fracturing his skull, it was insufficient to support a conviction of aggravated assault. *Calvert v. State* (Cr. App.) 170 S. W. 744.

But see *Little v. State*, 61 App. 197, 135 S. W. 119.

64. **Indictment.**—Conviction under this clause may be had under indictment for assault with intent to murder or rape. *Givens v. State*, 6 Tex. 344; *Gardenehr v. State*, Id. 348; *Johnson v. State*, 17 Tex. 565; *Blackwell v. State*, 33 App. 278, 26 S. W. 397, 32 S. W. 128.

An indictment under this subdivision is not duplicitous because it alleges that the assault was committed with a deadly weapon. *Coney v. State*, 2 App. 62.

65. **Evidence.**—The assaulted party may testify as to the ownership of the locus of the assault. *Tucker v. State*, 6 App. 251.

Evidence held to sustain conviction. *Johnson v. State*, 59 App. 425, 128 S. W. 1123.

And further as evidence, see *Pinson v. State*, 23 Tex. 579; *Briggs v. State*, 6 App. 144; *McGrew v. State*, 19 App. 302; *Stevens v. State*, 27 App. 461, 11 S. W. 459; *Chambers v. State*, 42 Tex. 254; *Skidmore v. State*, 43 Tex. 93; *Wilson v. State*, 15 App. 150; *Wilson v. State*, 34 App. 64, 29 S. W. 41; *Parrish v. State*, 32 App. 583, 25 S. W. 420.

66. **Charge.**—See notes to C. C. P. art. 735.

An instruction that if defendant, on or about the date specified, and within two years prior to the filing of the information, did commit an assault on prosecutor with premeditated design, that is, preconceived in his mind prior to such assault, and the assault was committed by means calculated to inflict great bodily injury on prosecutor, the jury should find him guilty of aggravated assault, was erroneous, for failure to require that the premeditation must have existed in the mind of accused at the time of the assault, especially in view of evidence that an

unfriendly state of feeling had existed between the parties for a considerable time. *Decker v. State*, 124 S. W. 912.

As to necessity of charge upon reasonable doubt, as between two degrees, see *Hodges v. State* (Cr. App.) 166 S. W. 512.

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67. Offense.—Where a breach of peace justifies an officer in making an arrest, and the person attempted to be arrested, while within striking distance and having a carving knife in his hand, raises the knife in a striking position and orders the officer to stand back, he is guilty of an assault. *Stockton v. State*, 25 Tex. 773.

The assaulted person and the officer by whom he was summoned as a posse having attempted to arrest defendant for the theft without a warrant, the arrest was illegal, and defendant was justified in striking the injured person with his whip, to compel him to release defendant's horse. *Massie v. State*, 27 App. 617, 11 S. W. 638.

The invalidity of a warrant can not be pleaded if unknown to accused when he committed the assault. *Graham v. State*, 29 App. 31, 13 S. W. 1013.

It is no offense to resist arrest by one who is neither a de jure nor a de facto officer. *Brown v. State*, 43 App. 411, 66 S. W. 547.

It must appear that the party assaulted was an officer in the actual discharge of his duties, and that the assault was made as an interruption of his duty. *Jeanes v. State*, 60 App. 440, 132 S. W. 352.

One arrested without a warrant for an offense not committed in the officer's presence, has a right to relieve himself of the restraint, and in doing so is not guilty of assault. *Williams v. State*, 64 App. 491, 142 S. W. 899.

The fact that an officer thinks that a writ entitles him to take property under it will not increase his rights. If the writ is void he is a trespasser. *Lassiter v. State* (Cr. App.) 163 S. W. 710.

68. Officers.—Peace officers are designated by C. C. P. art. 43.

The term "officer," includes all persons legally authorized to perform public duties. *Sanner v. State*, 2 App. 458.

A policeman is a peace officer. *Sanner v. State*, 2 App. 458.

69. Indictment.—The indictment must allege that it was known or declared to the defendant that the person assaulted was an officer discharging an official duty. *State v. Coffey*, 41 Tex. 46; *Johnson v. State*, 26 Tex. 117; *Bristow v. State*, 36 App. 379, 37 S. W. 326.

Under an indictment for assault upon a peace officer conviction may be had for simple assault. *Jay v. State*, 41 App. 451, 55 S. W. 336.

An allegation that defendant made an assault upon an officer while in the discharge of his official duty is sufficient. *Dilliard v. State*, 62 App. 321, 137 S. W. 356.

70. — Pleading and proof.—Evidence that the person assaulted was a peace officer and that when assaulted he was arresting defendant held admissible though the indictment did not allege these facts. *Hodges v. State*, 6 App. 615.

71. Evidence.—Evidence held insufficient to sustain a conviction of assaulting an officer. *Franklin v. State*, 27 App. 136, 11 S. W. 35.

On a prosecution for aggravated assault, the injury being inflicted when the assaulted person was in the act of arresting defendant for theft of cattle, testimony of a witness that another had told him that defendant was the person who drove the cattle from her pasture is inadmissible, as hearsay. *Massie v. State*, 27 App. 617, 11 S. W. 638.

The officer having arrested accused's father, the circumstances of the arrest were admissible. *Marsden v. State*, 59 App. 36, 126 S. W. 1160.

Evidence held to justify a conviction. *Ligon v. State*, 59 App. 274, 128 S. W. 620.

Evidence held to show that the officer was not in the performance of his duty. *Jeanes v. State*, 60 App. 440, 132 S. W. 352.

Conversation of which accused had no information is irrelevant. *Walker v. State*, 63 App. 499, 140 S. W. 455.

72. Charge.—See notes to Code Cr. Proc. art. 735.

Facts held to require charge on aggravated assault. *Sanchez v. State*, 70 App. 24, 156 S. W. 218.

Art. 1023. [602] Aggravation may be of different degrees.—The circumstances of aggravation, mentioned in the preceding article, are of different degrees, and the jury are to consider these circumstances in forming their verdict and assessing the punishment. [Act Nov. 6, 1871.]

Art. 1024. [603] Punishment.—The punishment for an aggravated assault or battery shall be a fine not less than twenty-five nor more than one thousand dollars, or imprisonment in the county jail not less than one month nor more than two years, or by both such fine and imprisonment.

Historical.—The penalty formerly was a fine not less than \$100 nor more than \$1,000, and the jury might add imprisonment in the county jail not exceeding two years.

Punishment.—A fine of \$500 and confinement in the county jail for twelve months, held excessive in view of the evidence. *Robinson v. State*, 25 App. 111, 7 S. W. 531.

Grossly insulting words will not justify or reduce aggravated to simple assault, though they may mitigate the punishment. *Timon v. State*, 34 App. 363, 30 S. W. 808.

A verdict imposing a fine of \$500 and imprisonment for fifteen months held not excessive under the circumstances. *Inglen v. State*, 36 App. 472, 37 S. W. 861. "Month." means a solar month or thirty days, and not a calendar or lunar month. *McKinney v. State*, 43 App. 387, 66 S. W. 769.

A fine of \$200 and 12 months in jail held not excessive. *Cuellar v. State* (Cr. App.) 154 S. W. 228.

A fine of \$500 and two years' imprisonment in the county jail held not excessive. *Jobe v. State* (Cr. App.) 173 S. W. 1025.

— **Charge.**—It is fundamental error to mistake the penalty in the charge. *Bostic v. State*, 22 App. 136, 2 S. W. 538; *Gardenhire v. State*, 18 App. 565; *Howard v. State*, Id. 348; *Veal v. State*, 8 App. 474.

A charge which fails to instruct that both such fine and imprisonment may be imposed is erroneous. *Graham v. State*, 29 App. 31, 13 S. W. 1013; *Moody v. State*, 30 App. 422, 18 S. W. 94.

A charge of the court which erroneously states the maximum of the fine assessable, is cause for reversal. *Blackwell v. State*, 30 App. 416, 17 S. W. 1061.

The court charged: "If you find the defendant guilty the form of your verdict will be, 'We the jury find the defendant E. B. guilty as charged at a fine of \$500,—filling in the amount.'" Held erroneous as well as inconsistent. It is for the jury and not the court to assess the fine within statutory limits. *Blackwell v. State*, 30 App. 416, 17 S. W. 1061.

Verdict.—See C. C. P. art. 763 et seq. and notes thereunder.

On trial of aggravated assault the verdict was: "We the jury find the defendant guilty and assess his fine \$10." Held, the verdict is indefinite and insufficient. *Hays v. State*, 33 App. 546, 28 S. W. 203.

Where the offense charged consists of degrees, the jury should state in their verdict the degree in which they find the accused guilty; and where the information charged aggravated assault, and the verdict read: "We, the jury, find the defendant guilty, and assess his fine at ten dollars,"—it is too indefinite to form the basis of a judgment. *Hays v. State*, 33 App. 546, 28 S. W. 203.

Under an indictment for aggravated assault, jury found defendant guilty and assessed his punishment at fine that might apply to either simple or aggravated assault; held, not reversible. *Pearce v. State*, 37 App. 643, 40 S. W. 806.

Under indictment for aggravated assault and verdict is fine of \$25, it should state whether it is for aggravated or simple assault. *Lee v. State*, 41 App. 557, 55 S. W. 814.

CHAPTER TWO A

ASSAULT WITH PROHIBITED WEAPON

Art.
1024a. The offense defined.

Art.
1024b. Purpose and scope of act.

Article 1024a. The offense defined.—That if any person shall wilfully commit an assault or an assault and battery upon another with a pistol, dirk, dagger, slung shot, sword cane, spear or knuckles made of any metal or made of any hard substance, bowie knife, or any knife manufactured or sold for the purpose of offense or defense, while the same is being carried unlawfully by the person committing said assault, he shall be deemed guilty of an assault with a prohibited weapon and upon conviction shall be punished by a fine not to exceed two thousand dollars or by imprisonment in the county jail not to exceed two years, or by confinement in the penitentiary for not more than five years. [Act 1913, p. 237, ch. 114, § 1.]

Indictment.—An indictment for assault which merely states that the weapon used was unlawfully carried without alleging the facts which made the carrying unlawful, is insufficient. *Denton v. State* (Cr. App.) 172 S. W. 796.

Art. 1024b. Purpose and scope of act.—The above shall not be construed to in any manner affect Article 475 of the Revised Penal Code of 1911 relating to unlawfully carrying arms, but shall be cumulative thereof and is intended to create the offense of assault with prohibited weapons and prescribing penalty thereof. [Id., § 2.]

CHAPTER THREE

OF ASSAULTS WITH INTENT TO COMMIT SOME OTHER OFFENSE

Art.		Art.	
1025.	Assault with intent to maim.	1029.	With intent to rape.
1026.	With intent to murder.	1030.	With intent to rob.
1027.	"Bowie knife" and "dagger" de-	1031.	In attempt at burglary.
	finied.	1032.	Ingredients of the offense.
1028.	Test on trial.		

Article 1025. [604] Assault with intent to maim.—If any person shall assault another with intent to commit the offense of maiming, disfiguring or castration, he shall be punished by fine not exceeding one thousand dollars, or by imprisonment in the penitentiary not less than two nor more than five years; and, if such assault be made by a person or persons in disguise, the penalty shall be double. [Act Nov. 6, 1871, p. 20.]

Cited, *Cole v. State*, 62 App. 270, 138 S. W. 109.

Indictment.—Willson's Cr. Forms, 476.

A charge of maiming and disfiguring carries with it a charge of assault with intent to maim and disfigure. *Pool v. State*, 59 App. 482, 129 S. W. 1135.

Art. 1026. [605] With intent to murder.—If any person shall assault another with intent to murder, he shall be punished by confinement in the penitentiary not less than two nor more than fifteen years; if the assault be made with a bowie knife or dagger, or in disguise, or by laying in wait, or by shooting into a private residence, the punishment shall be double. [Id., amended, Act 1903, p. 160.]

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| 1. Offense. | 15. Evidence. |
| 2. ——— Intent. | 16. ——— Intent and motive. |
| 3. ——— Malice. | 17. ——— Weapons or means used evi- |
| 4. ——— Grade of assault. | dence of intent. |
| 5. ——— Murder defined. | 18. ——— Circumstances reducing grade |
| 6. ——— Accidents. | of offense. |
| 7. ——— Insanity and intoxication as | 19. ——— Threats against accused, and |
| defense. | character of person assaulted. |
| 8. ——— Self-defense. | 20. ——— Sufficiency. |
| 9. Principals. | 21. Charge. |
| 10. Indictment. | 22. ——— Intent and malice. |
| 11. ——— Intent and malice. | 23. ——— Grade of assault. |
| 12. ——— Means or instrument used. | 24. ——— Definition of terms. |
| 13. ——— Issues, proof and variance. | 25. ——— Penalty. |
| 14. ——— Conviction of offense included | 26. Verdict. |
| in charge. | 27. Punishment. |

1. Offense.—To establish this offense the evidence must show that had the death of the assaulted party resulted from the assault the homicide would have been murder. *State v. Kellough*, 32 Tex. 74; *Yanez v. State*, 20 Tex. 656; *Stapp v. State*, 3 App. 138; *Wilson v. State*, 4 App. 637; *Stevens v. State*, 38 App. 550, 43 S. W. 1005; *Williams v. State*, 57 App. 492, 123 S. W. 1110; *Darnell v. State*, 58 App. 585, 126 S. W. 1122.

To constitute an assault with intent to murder, there must be an unlawful violence, a specific intent to kill, and the act must be prompted by malice. *Ponton v. State*, 35 App. 597, 34 S. W. 950; *Chatman v. State*, 40 App. 278, 50 S. W. 396; *Young v. State* (Cr. App.) 151 S. W. 1046.

If the assault is voluntary, committed with deliberate design, and with an instrument capable of producing death, in such manner as evidences an intention to take life, and there are no extenuating circumstances, it is an assault with intent to murder. *Yanez v. State*, 20 Tex. 656.

Administering poison, with malicious intent is not an assault with intent to murder. It is a different and more heinous offense. *Garnet v. State*, 1 App. 605, 28 Am. Rep. 425.

Where A. and B. agree to fight with knives, and, proceeding to the place agreed upon, A. strikes B. with his knife, and B. draws a pistol and shoots A. and continues to shoot at him while he is retreating, B. is guilty of an assault with intent to murder. *King v. State*, 4 App. 54, 30 Am. Rep. 160.

If the defendant attempted to shoot the assaulted party with intent to kill him, and in such attempt was actuated by malice aforethought, and under circumstances which, if the death of the assaulted party had resulted, the homicide would have been murder; but was prevented by any cause from effecting his purpose, he would be guilty of an assault with intent to murder. *Miller v. State*, 15 App. 125.

A person intending to commit murder and using a deadly weapon in such a

manner that his intent is apparent, can not afterward, by abandoning any further attempt, lessen the effect of his previous acts. *Watts v. State*, 30 App. 533, 17 S. W. 1092.

Two prisoners attempted to make their escape, one of them trying to cut the jailer's throat, with a razor, and in the scuffle the other one secured the jailer's pistol and made him go inside the cell; held, they were both guilty of an assault with intent to murder. *Thompson v. State*, 37 App. 448, 36 S. W. 265.

Defendant standing by took part with the aggressor in a fight and shot at the injured party; held, if the shot had been fatal the crime would have been murder, and not manslaughter, hence the assault was assault with intent to murder. *Schrimsher v. State*, 36 App. 461, 37 S. W. 864, 38 S. W. 355.

One who calls another a liar, and picks up his gun, is not conclusively guilty of an assault with intent to murder. *Stevens v. State*, 38 App. 550, 43 S. W. 1005.

If, when one accused of assault to murder shot, assailed was out of range, there was no assault. *Jackson v. State*, 54 App. 605, 114 S. W. 136.

It is not conclusive that an assault was not with intent to murder because it was from a rash and inconsiderate impulse, and the assailant did not follow up his victim, though there was nothing to prevent. *Duncan v. State*, 55 App. 168, 115 S. W. 837.

If accused placed a child, to which his sister-in-law had just given birth, in an exposed position near his house, without any intent to kill it, but to hide his sister-in-law's shame and his own paternity of it until it could be carried away, he would not be guilty of assault to murder, but of some lesser degree of assault, if of anything. *Martin v. State*, 57 App. 264, 122 S. W. 558.

Where accused waylaid prosecutor and shot him without killing him when his mind was capable of cool reflection, and his mind was cool, he was guilty of assault with intent to murder. *Cheatham v. State*, 57 App. 442, 125 S. W. 565.

Accused is guilty of assault with intent to murder, and not of aggravated assault, where, if the assaulted party had died, accused would have been guilty of murder. *Edwards v. State*, 58 App. 342, 125 S. W. 894.

To shoot at another is not necessarily an assault with intent to murder. *Cooper v. State*, 60 App. 411, 132 S. W. 355.

A hatchet in the hands of a strong man is a "dangerous weapon." *Stanton v. State* (Cr. App.) 151 S. W. 808.

Where one intending to commit an assault with his fists, is so confused by a blow that he uses a knife without knowing what he is doing, he is not guilty of assault with intent to murder but may be convicted of simple assault. *Brewer v. State* (Cr. App.) 153 S. W. 622.

Where accused fired a 32-caliber rifle and wounded a person from 75 to 100 yards away, he was guilty of some grade of assault. *Catlett v. State* (Cr. App.) 169 S. W. 673.

Where accused applied opprobrious epithets to G., and, after G. had knocked him down, attacked G., he was guilty of assault to murder, if he applied such epithets with the intention of provoking a difficulty and killing G. *Solis v. State* (Cr. App.) 174 S. W. 343.

2. — **Intent.**—The evidence must show a specific intent to kill the person assaulted. *Jobe v. State*, 1 App. 183.

The specific intent to kill is an indispensable element of assault to murder. *Davidson v. State*, 22 App. 372, 3 S. W. 662; *Downes v. State*, 22 App. 393, 3 S. W. 242; *McCullough v. State*, 24 App. 128, 5 S. W. 839; *Lehman v. State* 26 App. 322, 9 S. W. 610; *Coleman v. State*, 28 App. 173, 12 S. W. 590; *Carter v. State*, 28 App. 355, 13 S. W. 147; *English v. State*, 28 App. 500, 13 S. W. 775; *Walton v. State*, 29 App. 163, 15 S. W. 646.

For an assault to be one to murder, there must be a specific intent to take life. *Leigh v. State* (Cr. App.) 145 S. W. 920.

In a prosecution for assault to murder, the reason why accused was armed at the time of the shooting is immaterial, where prosecutor committed the first overt act, and accused shot in what he believed was self-defense. *Clark v. State* (Cr. App.) 177 S. W. 84.

3. — **Malice.**—Malice is as much an ingredient of this offense as it is of murder. *Hodges v. State*, 3 App. 470; *Daniels v. State*, 4 App. 429; *Garza v. State*, 11 App. 345; *Babb v. State*, 12 App. 491; *Caruthers v. State*, 13 App. 339.

Malice is that condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which condition is inferred from acts done, or words spoken. *Harris v. State*, 8 App. 90; *McKinney v. State*, Id. 626; *Bramlette v. State*, 21 App. 611, 2 S. W. 765, 57 Am. Rep. 622. See, also, *Crook v. State*, 27 App. 198, 11 S. W. 444; *Boyd v. State*, 28 App. 137, 12 S. W. 737; *Gallaher v. State*, 28 App. 247, 12 S. W. 1087; *Ainsworth v. State*, 29 App. 599, 16 S. W. 652; *Callahan v. State*, 30 App. 275, 17 S. W. 257.

Express or implied malice supports a charge of assault to murder. *Jackson v. State*, 54 App. 605, 114 S. W. 136.

Where one intentionally, wilfully, without justification or excuse, and while his mind was cool enough to realize the nature of his acts, shot another with intent to kill, he was actuated by "malice." *Williams v. State*, 61 App. 589, 135 S. W. 552.

4. — **Grade of assault.**—Aggravated assaults generally, see notes to art. 1022 ante.

Elements of manslaughter as determining grade of offense, see notes to arts. 1128-1138, post.

Conviction when offense, of different degree is charged, see C. C. P. arts. 771, 772.

5. — **Murder defined.**—See art. 1140.

6. — **Accidents.**—See notes under art. 48 ante.

7. — **Insanity and intoxication as defense.**—See arts. 39-41, and notes.
 8. — **Self-defense.**—See notes under art. 1014 and arts. 1104-1110.
 9. **Principals.**—See notes under art. 74 ante.
 10. **Indictment.**—Willson's Cr. Forms, 477. See, also, C. C. P. art. 447, et seq., and notes.

The same particularity is not required in charging this offense as is required in charging murder. *State v. Croft*, 15 Tex. 576; *State v. Jennings*, 35 Tex. 503; *State v. Wall*, Id. 484; *Morris v. State*, 13 App. 65.

The state can not enter a nolle prosequi for the felony on a defective indictment and proceed only for the lesser offense, after exceptions are overruled. *Robinson v. State*, 31 Tex. 170.

It may charge an assault on two persons with intent to murder one. *State v. Simpson*, 32 Tex. 98; or both. *State v. Bradley*, 34 Tex. 95.

For one insufficient except for simple assault, see *State v. Archer*, 34 Tex. 646.

For indictments held to be good, see *State v. Peters*, 36 Tex. 325; *James v. State*, Id. 645; *Bittick v. State*, 40 Tex. 117; *State v. Walker*, Id. 485; *Mayfield v. State*, 44 Tex. 59; *State v. Jennings*, 35 Tex. 503; *Warfield v. State*, Id. 736; *Meredith v. State*, 40 Tex. 480; *Crane v. State*, 41 Tex. 494; *Johnson v. State*, 1 App. 130; *Montgomery v. State*, 4 App. 140; *Gordon v. State*, 23 App. 219, 4 S. W. 883.

A slight mistake in the name of the injured party at the conclusion of the indictment is immaterial, if referred to as "the said." *Hart v. State*, 38 Tex. 382.

"Did commit and assault" will answer, in the absence of special exception. *Martin v. State*, 40 Tex. 19.

To allege that the intent was to "kill and murder" is not bad. The words "kill and" may be rejected as surplusage. *Meredith v. State*, 40 Tex. 480.

Although they may constitute a charge for aggravated assault. *Young v. State*, 44 Tex. 98; *State v. Bradley*, 34 Tex. 95.

Unnecessary allegations may be rejected. *Johnson v. State*, 1 App. 130.

Assault to "kill" is not an offense against the law—the charge must be assault with intent to murder. *Lockwood v. State*, 1 App. 749.

For indictments held bad, see *Jones v. State*, 21 App. 349, 17 S. W. 424; *Bartlett v. State*, Id. 500, 2 S. W. 829.

Form No. 357 of Willson's Cr. Forms, for this offense, is approved in *Bartlett v. State*, 21 App. 500, 2 S. W. 829, and *Williams v. State*, Id. 256, 17 S. W. 624.

To an indictment for assault with intent to murder it was objected that it was insufficient because it failed to allege that the pistol used in the commission of the offense was charged, and that it failed to allege otherwise the present ability of the accused to inflict an injury. Held, that the objection is unsound; such allegations not being necessary to the sufficiency of an indictment for assault to murder. *Bradberry v. State*, 22 App. 273, 2 S. W. 592.

Where an indictment charged an assault with intent to commit murder on two persons, and it appeared that there were two assaults, each on one of the persons, a motion to compel the state to elect on which assault it would rely should have been granted. *Scott v. State*, 46 App. 305, 81 S. W. 950.

To allege that accused, with malice aforethought, did unlawfully assault a certain person "with intent to kill and murder" him, is sufficient. *Garza v. State* (Cr. App.) 145 S. W. 590.

11. — **Intent and malice.**—It need not allege "of his malice aforethought," *State v. Jennings*, 35 Tex. 503; *Martin v. State*, 40 Tex. 19; *Lyons v. State*, 9 App. 636; *Gordon v. State*, 23 App. 219, 4 S. W. 883; *Mills v. State*, 13 App. 487.

The intent to murder must be alleged. *State v. Johnston*, 11 Tex. 22; *State v. Nations*, 31 Tex. 561; *Bartlett v. State*, 21 App. 500, 2 S. W. 829.

The word "feloniously" is not necessary. *Posey v. State*, 32 Tex. 476; *Prim v. State*, 32 Tex. 157.

The phrase, "feloniously, unlawfully, wilfully, and with malice aforethought," in connection with the assault, need not be repeated in connection with the intent. *Stewart v. State*, 4 App. 519.

The indictment must allege expressly whom the defendant intended to kill. It can not be inferred that he intended to kill the person alleged to have been assaulted. *Wimberly v. State*, 7 App. 328; *State v. Nations*, 31 Tex. 561.

Intent with malice aforethought to kill is equivalent to intent to murder. *Smith v. State*, 31 App. 33, 19 S. W. 546.

An indictment alleging that defendant "with malice aforethought," made an assault upon another with intent "to kill" him, sufficiently charges such an assault as, had death resulted, would have been murder, and is not objectionable on the ground that it charges the assault to have been made with intent "to kill" instead of with intent "to murder." *Smith v. State*, 31 App. 33, 19 S. W. 546.

An indictment charging an assault with intent to murder two persons is not duplicitous. *Scott v. State*, 46 App. 305, 81 S. W. 950.

12. — **Means or instrument used.**—It is not necessary to state the instrument or means used in making the assault. The weapon need not be named, or the manner in which it was used or attempted to be used, or that the defendant was in "carrying distance of the assaulted party." *State v. Croft*, 15 Tex. 575; *State v. Peters*, 36 Tex. 325; *James v. State*, Id. 645; *State v. Killough*, 32 Tex. 78; *Bittick v. State*, 40 Tex. 117; *Martin v. State*, Id. 19; *Mayfield v. State*, 44 Tex. 59; *Nash v. State*, 2 App. 362; *Hines v. State*, 3 App. 483; *Montgomery v. State*, 4 App. 140; *Payne v. State*, 5 App. 35; *Davis v. State*, 20 App. 302; *Price v. State*, 22 App. 110, 2 S. W. 622; *Douglass v. State*, 26 App. 109, 9 S. W. 489, 3 Am. St. Rep. 459; *Mathis v. State*, 39 App. 549, 47 S. W. 464; *Lacoume v. State* (Cr. App.) 143 S. W. 626.

A gun need not be alleged as a deadly weapon, if it is averred that it was charged with gunpowder and bullets, and was discharged at the person. *State v. Rutherford*, 13 Tex. 24.

An indictment for intent to murder need not state the instrument or means made use of by the assailant, to effectuate the murderous intent. *State v. Croft*, 15 Tex. 575.

But it should show that the gun was charged, or that the accused had a present ability to commit a battery. *Robinson v. State*, 31 Tex. 170.

Allegations as to the kind of weapon used and the specific circumstances of the act held not to vitiate the indictment even if unnecessary. *State v. Killough*, 32 Tex. 74.

An indictment for assault with intent to murder need not allege the instrument or means used. *Bittick v. State*, 40 Tex. 117.

It may charge that defendant shot the pistol in and upon the injured party, instead of the bullets. *Crane v. State*, 41 Tex. 494.

Indictment need not allege the weapon used. *Payne v. State*, 5 App. 35.

Where the assault is committed with bowie knife or dagger or in disguise, double punishment can not be inflicted unless the means be alleged. *Garcia v. State*, 19 App. 389.

13. — **Issues, proof and variance.**—The attempted use of another weapon than the one alleged may be proved but where the indictment charged that the assault was with a knife, proof that it was with a gun did not sustain the charge. *Weaver v. State*, 24 Tex. 387.

If the assault is charged to have been made on William R. Rathburn, and the evidence shows only that it was upon a man by the name of Rathburn, the verdict will be set aside. *Hardin v. State*, 26 Tex. 113.

It may allege that defendant "shot," instead of "assaulted;" and because he missed, makes no variance. *Carr v. State*, 41 Tex. 543.

Evidence of the official character of the party assaulted is admissible though not alleged. *Hodges v. State*, 6 App. 615.

Evidence of circumstances constituting aggravated assault is admissible. *Moore v. State*, 7 App. 14.

The indictment need not allege all of the parties who participated in the assault in order to admit evidence that a party not on trial and not named in the indictment committed the offense, while the accused was present aiding and abetting in its commission. *Mills v. State*, 13 App. 487.

There is no material variance when the instrument alleged and that proved are of the same nature and character, and capable of inflicting the same kind of wound. A charge of an assault with a gun is sustained by proof that a pistol was used. *Douglass v. State*, 25 App. 109, 9 S. W. 489, 8 Am. St. Rep. 459.

Where indictment alleged assault committed with a bowie knife and evidence showed it to have been committed with a butcher knife, held, no variance. *Hernandez v. State*, 32 App. 271, 22 S. W. 972.

Where an indictment charges an assault with intent to murder two persons, the fact that it appears that the assault was by different acts, though in the same transaction, does not amount to a variance defeating the prosecution. *Scott v. State*, 46 App. 305, 81 S. W. 950.

In a prosecution for assault with intent to murder, leading and suggestive questions should be excluded, referring to the identification of the assaulted party, whose name was not proved, nor any testimony offered that she was named as alleged. *Brown v. State*, 53 App. 303, 109 S. W. 188.

14. — **Conviction of offense included in charge.**—See C. C. P. arts. 771, 772 and notes.

Conviction of aggravated assault under indictment charging assault with intent to murder, see article 1022, ante.

Assault with intent to murder includes an aggravated assault, an aggravated assault and battery, a simple assault, and a simple assault and battery, and a conviction may be had for either of those minor offenses under an indictment charging an assault with intent to murder. *Bolding v. State*, 23 App. 172, 4 S. W. 579; *Davis v. State*, 20 App. 302; *Jones v. State*, 21 App. 349, 17 S. W. 424; *Peterson v. State*, 12 App. 650; *Garcia v. State*, 19 App. 389; *Henderson v. State*, 2 App. 89; *Bittick v. State*, 40 Tex. 117; *James v. State*, 36 Tex. 645; *Gardenheir v. State*, 6 Tex. 348; *Givens v. State*, Id. 344; *Johnson v. State*, 17 Tex. 515; *Reynolds v. State*, 11 Tex. 120; *Montgomery v. State*, 4 App. 140; *Moore v. State*, 7 App. 14; *Posey v. State*, 32 Tex. 476; *Waddill v. State*, 33 Tex. 343; *Henderson v. State*, 2 App. 88.

Conviction of lower degrees may be had under indictment charging higher, but such conviction will not bar prosecution for murder, if the assaulted party dies. *State v. Archer*, 34 Tex. 646; *James v. State*, 36 Tex. 645.

Under an indictment for assault with intent to murder a conviction can not be had for unlawfully carrying arms. *Thomas v. State*, 40 Tex. 36.

Indictment for the higher offense includes assaults to commit inferior grades of the offense. *Stapp v. State*, 3 App. 138.

The verdict may be for assault with intent to murder, on an indictment for murder. *Stapp v. State*, 3 App. 138.

A conviction for this offense may be had under an indictment for murder. *Morgan v. State*, 16 App. 593; *Peterson v. State*, 12 App. 650; *Stapp v. State*, 3 App. 138.

An indictment for robbery will not support a conviction of assault with intent to murder. *Munson v. State*, 21 App. 329, 17 S. W. 251.

Defendant may be convicted of an assault with intent to murder under a charge of burglary with intent to commit murder. *Hammers v. State*, 29 App. 445, 16 S. W. 99.

15. **Evidence.**—See notes under C. C. P. art. 783 et seq.

The opinion of a witness as to the deadly character of a tumbler, is not admissible; but where the witness testified that he caught the arm of the assailed as he seized a tumbler, he may state why he did so. *Thomas v. State*, 40 Tex. 36.

In a trial for assault with intent to murder, it was held not competent for the defendant to prove that an indictment was then pending against the alleged assaulted party for an assault with intent to murder him, the defendant. *McGuire v. State*, 10 App. 125.

On a trial for assault with intent to murder, where the character of the weapon has already been fully shown by competent evidence, it is not reversible error to allow a witness to state that, if armed with such a weapon, he would not be "afraid to tackle any man." *Ashton v. State*, 31 App. 479, 21 S. W. 47.

The burden of showing the pistol unloaded was on defendant. *Bedford v. State*, 44 App. 97, 69 S. W. 158.

In a prosecution for assault with intent to murder, evidence that some months before the commission of the alleged crime defendant had accidentally discharged a gun so near prosecuting witness as to burn his face with the powder was immaterial. *Goebel v. State*, 45 App. 415, 76 S. W. 460.

A policeman ordered negroes, of whom accused was one, away from a pool-room, and while doing so, kicked one of them, who was going into the room. In a difficulty arising thereafter between accused and the policeman, the policeman was shot. Held, in a prosecution for the offense, that it was not prejudicial error to exclude the testimony of the negro who was kicked, and others, that he was doing nothing at the time, since it was more of an opinion than a fact. *Williams v. State*, 54 App. 642, 114 S. W. 802.

Testimony of the prosecuting witness that, shortly before an assault on him, there was a message delivered to him from accused, who was outside the house, was not inadmissible as hearsay or as testimony of a conversation in accused's absence, where the witness was not allowed to state the subject-matter of the message. *Henderson v. State*, 55 App. 15, 115 S. W. 45.

In a prosecution for shooting a man and wife while in bed, with intent to murder them, where the testimony showed that shots of different sizes were found in the bed clothing as well as in the bodies of the injured persons, testimony was admissible to show that a battered piece of lead was found on the bedclothes the morning after the shooting, though it was not shown that it touched either of the injured persons, nor that it was fired from accused's gun, nor that he had any connection with it. *Pemberton v. State*, 55 App. 464, 117 S. W. 837.

A conversation between defendant and another, concerning a woman, held inadmissible. *Rushing v. State*, 62 App. 309, 137 S. W. 372.

In a prosecution for assault with intent to kill, it appeared that defendant, when a peace officer attempted to arrest him as he was riding in a wagon, shot at the officer, and when arrested there was a pistol in the wagon, and cartridges which fitted the pistol were found on defendant's person, and that the cartridges had soft-nosed bullets which had been split and something put into them. Held, that evidence of these facts was admissible. *Ricen v. State*, 63 App. 89, 138 S. W. 403.

Where it appeared that the two defendants engaged in a shooting affray with four others who they claimed had conspired to kill them, evidence as to the reason why one of these four who had come to town heavily armed went to the bank near defendants' place of business is inadmissible where it did not appear that defendants knew of such reason. *Black v. State* (Cr. App.) 145 S. W. 944.

Witnesses may state for what purpose accused said he wanted a gun when he attempted to borrow it. *Anderson v. State* (Cr. App.) 148 S. W. 802.

Evidence of what took place between accused and prosecutor the day after the difficulty is properly excluded. *Williams v. State* (Cr. App.) 150 S. W. 185.

Evidence that after the difficulty defendants' cousin disappeared and that two horses disappeared at the same time held inadmissible. *Maldonado v. State*, 70 App. 205, 156 S. W. 647.

Testimony of assaulted party as to effects of wounds held admissible. *Luttrell v. State*, 70 App. 183, 157 S. W. 157.

As to reputation of the third person accompanying prosecuting witness, see *Wilson v. State*, 70 App. 627, 158 S. W. 512.

Evidence of the finding of a pistol, shells and bullets held admissible. *Forester v. State* (Cr. App.) 163 S. W. 87.

The evidence sought to be elicited by defendant, charged with firing at S. from ambush, that 20 years before, shortly after the killing of C., with which S. was charged, S. was fired at from ambush by C.'s brother, was too remote in time. *Thompson v. State* (Cr. App.) 178 S. W. 1192.

16. — **Intent and motive.**—Statements by accused in the nature of threats are admissible. *Brewer v. State* (Cr. App.) 153 S. W. 622; *Rhodes v. State* (Cr. App.) 153 S. W. 128; *Martin v. State*, 71 App. 52, 160 S. W. 968. See, also, *Dowell v. State*, 58 App. 482, 126 S. W. 871.

Evidence of former trouble between the parties is admissible to show intent or motive. *Martin v. State*, 41 App. 242, 53 S. W. 850; *Carr v. State*, 41 Tex. 543; *Luttrell v. State*, 70 App. 183, 157 S. W. 157.

The declarations of the assaulted party, made after the difficulty, are, ordinarily, incompetent. *Meredith v. State*, 40 Tex. 480.

The statements of the defendant about the difficulty are not admissible in his behalf unless they come within the rule of *res gestæ*. *Johnson v. State*, 1 App. 130. But see *Taliaferro v. State*, 40 Tex. 523.

Declarations of the injured party held admissible as showing animus. *Black v. State*, 8 App. 329.

On the trial of a husband for an assault with intent to murder his wife, the testimony of the wife tended to show that he assaulted her because he found an unknown man with her two days prior to the assault. Under the peculiar circumstances of the case, it was held that the defendant should have been permitted to prove that twenty days previous to the assault she had been surprised in an act of criminal intercourse with said unknown man, and that defendant, at the time he assaulted her, was apprised of that fact. *Greta v. State*, 10 App. 36.

The defendant was a watchman at a railroad freight depot, and in the nighttime fired upon and wounded two persons passing near the depot. Held, that as tending to throw light upon defendant's motive in shooting, and in mitigation, if not justification of the act, he was entitled to prove that there had been a great deal of car-breaking, and stealing from the cars at night at said depot a short time previous to the shooting. *Hobbs v. State*, 16 App. 517.

Testimony of the assaulted party and his wife and daughter is competent to prove the conduct of defendant prior to the assault. *Moore v. State*, 31 App. 234, 20 S. W. 563. See same case further on evidence.

Antecedent menaces, quarrels, and grudges may be proved to show malice. *Sullivan v. State*, 31 App. 486, 20 S. W. 927, 37 Am. St. Rep. 826.

Previous assaults, outrages, threats, and acts of cruel and ill treatment toward his wife, extending back over a period of several years, is proper and legitimate evidence to meet defendant's theory of temporary insanity produced by the recent use of intoxicants, as well as to show malice, motive, ill-will, and intent on his part in making the assault on her. *Hall v. State*, 31 App. 565, 21 S. W. 368.

For language used by defendant held admissible to show that he was fatally bent on mischief, see *Wiseman v. State*, 32 App. 454, 24 S. W. 413.

Evidence of an assault on the father of the prosecuting witness held admissible to show malice. *Denson v. State* (Cr. App.) 35 S. W. 150.

On a trial for assault alleged to have been committed with a knife, a piece of iron, and a sharp instrument to the grand jurors unknown, the court admitted evidence that defendant also used an ax handle, but instructed the jury that in order to convict they must find that he committed the assault with one of the weapons alleged in the indictment; held, no error. *Foster v. State*, 39 App. 399, 46 S. W. 231.

Previous assault may be proved to show animus and motive, and if there have been several so close together as to be *res gestæ*, they may all be proved. *Hamilton v. State*, 41 App. 644, 56 S. W. 927.

Where previous assaults cannot be considered for any other purpose than to show motive, court need not limit the testimony in his charge. *Hamilton v. State*, 41 App. 644, 56 S. W. 928.

Where, in a prosecution for assault with intent to kill, it was shown that both defendant and prosecutrix lived on F.'s farm, and worked for him, and that the assault was occasioned by defendant's jealousy of prosecutrix, arising from F.'s attentions to her, evidence that F. whipped people on the farm, and made them do as he pleased, was inadmissible to show a motive for the assault, or to show the relationship which defendant bore to F. or to prosecutrix. *Barnard v. State*, 45 App. 67, 73 S. W. 957.

In a prosecution for assault with intent to kill, in which it was the theory of the state that defendant had attempted to kill prosecuting witness in order to conceal a theft by defendant of certain money which had been taken by some one some time before from the house of prosecuting witness at which defendant stayed, evidence that defendant had, during the time the sheriff was investigating as to who took the money, advised him to obtain a search warrant and search the premises was improperly excluded, because tending to rebut the state's theory of motive. *Goebel v. State*, 45 App. 415, 76 S. W. 460.

Evidence as to the meaning of a common expression used in games is admissible. *Davis v. State*, 63 App. 484, 141 S. W. 93.

The assaulted party's statement that she did not believe that defendant intended to hurt her is a mere opinion, and not admissible. *Rhodes v. State* (Cr. App.) 153 S. W. 128.

Evidence that prior to the stabbing defendant sought to secure a pistol held competent to show animus and intent. *Brewer v. State* (Cr. App.) 153 S. W. 622.

Evidence of the details of a dispute over an account held properly admitted. *Brewer v. State* (Cr. App.) 153 S. W. 622.

Testimony as to the condition of the ground where the assault occurred, the tracks, etc., found there, held admissible to show whether the persons at this point were waiting for the person assaulted. *Wilson v. State* (Cr. App.) 154 S. W. 1015.

Evidence that the parties were paying attentions to a woman held admissible on the question of motive. *Irving v. State*, 70 App. 222, 156 S. W. 641.

Matter not shown to have entered into the difficulty is inadmissible to show motive. *Maldonado v. State*, 70 App. 205, 156 S. W. 647.

A statement by accused that he was going to kill a red-headed, freckled-face s— of a b—, is inadmissible, where there is no evidence pointing the threat towards the assaulted party. *Wade v. State* (Cr. App.) 172 S. W. 215.

17. — **Weapons or means used evidence of intent.**—See art. 1147, post, and notes.

18. — **Circumstances reducing grade of offense.**—Testimony held competent on issue of manslaughter. *Wadlington v. State*, 19 App. 266.

Where the homicide was not committed in the perpetration of a felony, and the circumstances do not show a cruel or evil disposition on the part of defendant, the intent to kill cannot, as a matter of law be inferred from a killing with a stick four feet long and two inches in diameter. *Fitch v. State*, 37 App. 500, 36 S. W. 584.

To permit the state to show that accused called on complaining witness' wife held error. *Comegys v. State*, 62 App. 231, 137 S. W. 349.

A petition for a divorce, filed by accused held properly excluded. *Martinez v. State* (Cr. App.) 153 S. W. 886.

In a prosecution for assault with intent to murder, alleged to have grown out of misconduct by prosecutor concerning defendant's wife, evidence that a year prior to the difficulty defendant filed a suit for divorce was inadmissible. *Daniels v. State*, 71 App. 662, 160 S. W. 707.

19. — **Threats against accused, and character of person assaulted.**—See art. 1143 and notes.

In a prosecution for assault with intent to kill a policeman, accused claimed that he was fired upon by one whom he thought to be another with whom he had had a difficulty, and fired back, hitting the policeman. Held, that it was not prejudicial error to refuse to permit accused to testify that such other person was a man of dangerous character, since, the danger being real rather than apparent, it was immaterial what his character was. *Williams v. State*, 54 App. 642, 114 S. W. 802.

20. — **Sufficiency.**—Evidence held sufficient to sustain conviction. *Yanez v. State*, 20 Tex. 656; *Meredith v. State*, 40 Tex. 480; *Rideus v. State*, 41 Tex. 199; *Crane v. State*, Id. 494; *Carr v. State*, Id. 543; *Young v. State*, 44 Tex. 98; *Pugh v. State*, 2 App. 539; *Stapp v. State*, 3 App. 138; *King v. State*, 4 App. 54, 30 Am. Rep. 160; *Collins v. State*, 6 App. 72; *Ferguson v. State*, Id. 504; *Jones v. State*, 13 App. 1; *Meyers v. State*, 14 App. 35; *Johnson v. State*, Id. 306; *Taylor v. State*, 17 App. 46; *Slaughter v. State*, 34 App. 81, 29 S. W. 161; *Trevino v. State*, 27 App. 372, 11 S. W. 447; *Wood v. State*, 27 App. 393, 11 S. W. 449; *Barton v. State*, 34 App. 613, 31 S. W. 671; *Drennan v. State*, 53 App. 311, 109 S. W. 1099; *Williams v. State*, 54 App. 642, 114 S. W. 802; *Pemberton v. State*, 55 App. 464, 117 S. W. 837; *Nelson v. State*, 57 App. 339, 123 S. W. 132; *Williams v. State*, 57 App. 492, 123 S. W. 1110; *Williams v. State*, 58 App. 284, 124 S. W. 916; *Edwards v. State*, 58 App. 342, 125 S. W. 894; *Kuykendall v. State*, 60 App. 254, 131 S. W. 1099; *Jenkins v. State*, 60 App. 465, 132 S. W. 133; *Sellers v. State*, 61 App. 140, 134 S. W. 348; *Mosley v. State*, 61 App. 294, 135 S. W. 148; *York v. State*, 64 App. 153, 142 S. W. 8; *Waller v. State* (Cr. App.) 145 S. W. 921; *Simms v. State* (Cr. App.) 148 S. W. 786; *Pettis v. State* (Cr. App.) 150 S. W. 790; *Stanton v. State* (Cr. App.) 151 S. W. 808; *Luttrell v. State*, 70 App. 183, 157 S. W. 157; *Rogers v. State*, 71 App. 271, 159 S. W. 44; *Martin v. State*, 71 App. 521, 160 S. W. 968; *Simmons v. State* (Cr. App.) 164 S. W. 843; *McGrew v. State* (Cr. App.) 172 S. W. 234.

Evidence held insufficient see *McGuire v. State*, 43 Tex. 210; *Burch v. State*, Id. 376; *Roseborough v. State*, Id. 570; *Jobe v. State*, 1 App. 183; *Ewing v. State*, 4 App. 417; *Black v. State*, 8 App. 329; *Rutherford v. State*, 13 App. 92; *Garcia v. State*, 23 App. 712, 5 S. W. 186; *Thompson v. State* (Cr. App.) 30 S. W. 667; *Barton v. State* (Cr. App.) 31 S. W. 671; *Patrick v. State* (Cr. App.) 33 S. W. 352; *Martinez v. State*, 35 App. 336, 33 S. W. 970; *Clifton v. State*, 39 App. 619, 47 S. W. 642; *Nalley v. State*, 51 App. 58, 100 S. W. 385; *Sanchez v. State*, 70 App. 24, 156 S. W. 218.

A conviction can not be sustained upon circumstantial testimony, when it appears that positive is not inaccessible. *Porter v. State*, 1 App. 395.

Where it was proved that the defendant, while drunk, shot at a friend and missed him, the material question for the jury to determine was, whether he shot intending to hit, or whether the act was done in a spirit of drunken bravado. *Walker v. State*, 7 App. 627.

It is only necessary to prove that the instrument used was capable of producing death in the manner in which it was used. *Givens v. State*, 35 App. 563, 34 S. W. 626.

Evidence showing the assault to have been committed with a bois d'arc stick, three or four feet long, and about one and a half inches in diameter, held sufficient on the question of deadly weapon. *Franklin v. State*, 37 App. 113, 38 S. W. 802, 1016.

See opinion for facts adduced on trial for assault with intent to murder upon which the court should have instructed the jury to return a verdict of not guilty. *Clifton v. State*, 39 App. 619, 47 S. W. 642.

Evidence held to warrant an instruction on assault to kill. *Cukierski v. State* (Cr. App.) 153 S. W. 313.

Evidence held to require the submission of the question whether the discharge of a pistol was accidental. *Maldonado v. State*, 70 App. 205, 156 S. W. 647.

Evidence held to authorize the submission of the question of assault with intent to kill. *Luttrell v. State*, 70 App. 183, 157 S. W. 157.

Where following a quarrel with another, defendant procured a pistol, and went to the other's house, whereupon both began shooting, there being no evidence that defendant went to adjust the difficulty, an instruction that, if the crime would have been manslaughter had death occurred, defendant could not be found guilty of assault to murder was uncalled for by the evidence. *Rogers v. State*, 71 App. 271, 159 S. W. 44.

Evidence held to justify a finding of assault to murder by shooting under circumstances showing a reckless disregard of human life. *Catlett v. State* (Cr. App.) 169 S. W. 673.

21. **Charge.**—See notes under C. C. P. art. 735 et seq.

Charge held erroneous because leaving out of view certain essential principles as applicable to the particular facts. *Thomas v. State*, 40 Tex. 36.

When there is no evidence that defendant provoked the difficulty, the charge must not assume, even remotely or inferentially, that he did. *Thomas v. State*, 40 Tex. 36.

Whether a weapon, as used, was dangerous to life, is a question for the jury. *Sheffield v. State*, 1 App. 640.

The charge need not be as specific as in murder. *Daniels v. State*, 4 App. 429.

A husband on trial for an assault with intent to murder his wife, testified that the cut was purely accidental and was done in trying to push her out of the way to get to her paramour. The court instructed the jury that if they believed he cut her accidentally, in trying to kill her paramour, they should acquit him; held correct. *Pena v. State*, 38 App. 333, 42 S. W. 991.

An assault and a specific intent to kill are elements which must concur to constitute the offense of assault with intent to murder. Charge of the court, there-

fore, which in defining the offense extended the intent to "do such serious bodily injury as would probably end in death," constitutes fundamental error. *Lehman v. State*, 26 App. 322, 9 S. W. 610.

Charge held correct. *Wagner v. State*, 35 App. 255, 33 S. W. 124; *McMillan v. State*, 35 App. 370, 33 S. W. 970; *Cole v. State*, 35 App. 384, 33 S. W. 968.

The defendant was charged with an assault committed upon his wife, the evidence showed that he and his wife were in a room together. The defendant testified that his pistol discharged accidentally. The court instructed the jury that if they had a reasonable doubt as to whether the pistol was discharged accidentally, they would acquit the defendant; held, correct. *Wagner v. State*, 35 App. 255, 33 S. W. 124.

On a trial for an assault with intent to murder, the court instructed the jury: (1) If the defendant cut and wounded the injured party with a knife, such act would be an assault. (2) If such assault was made wilfully, intentionally, and without lawful justification or excuse, then the same would be made upon what the law terms malice. (3) If said assault in addition to being made with malice, was made with the specific intention to kill by use of such knife, then such act was an assault with intent to murder; held, error. (1) The cutting must have been unlawful. (2) The definition of malice is incorrect, but the defendant might under passion have wilfully, intentionally and without legal justification committed the assault, and yet it would have been without malice. (3) The court apparently assumed facts which should have been left for the jury to determine. *Ponton v. State*, 35 App. 597, 34 S. W. 950.

The court instructed the jury: "If you are satisfied from the evidence, beyond a reasonable doubt, that the defendant, without legal justification or excuse, cut R. with a knife and that the knife was a deadly weapon, as above defined, and that defendant so cut said R. not through sudden impulse, passion or resentment, fear or terror; but did so with intent then and there to kill him, and with malice aforethought, as above explained, then you will find him guilty of an assault with intent to murder, etc.;" held, this charge was sufficient. *Williams v. State*, 38 App. 144, 41 S. W. 626.

The court instructed the jury that if defendant voluntarily discharged his gun into the house, with the intent to kill any person who might be in the way of the shot, this would include an intent to kill the injured party; held, correct. *Darity v. State*, 38 App. 546, 43 S. W. 982.

Where, in a prosecution for assault with intent to murder, there was no fact or combination of facts which constituted adequate cause for defendant's shooting the person assailed, who, the evidence showed, was retreating and seeking to avoid a difficulty at the time the shot was fired, an instruction that any combination of circumstances capable of creating sudden passion, etc., rendering the mind incapable of cool reflection for a time, may be adequate cause, and whether such adequate cause existed was for the jury to determine, but that insulting words or gestures, unaccompanied by violence, would not constitute adequate cause, was not prejudicial to defendant. *Jowell v. State*, 44 App. 328, 71 S. W. 286.

In a prosecution for assault with intent to murder, an instruction that, if defendant's mind was aroused by prosecutrix shooting at him, this would be adequate cause, was a sufficient instruction on adequate cause, since to shoot at a person with a pistol would not as a matter of law constitute adequate cause, as defined by Pen. Code 1895, art. 702. *Lofton v. State*, 128 S. W. 384.

Defendant and his wife had had trouble, and defendant had taken the children to his father's home. The wife had gone there with an officer to take them away. Defendant, who was a young man of very weak mind, came up with a gun in his hand, ran between his wife and children, placed the gun between his wife, on one side, and children, on the other, and fired. He could have killed his wife if he had tried. Held to raise an issue whether the shot was not fired merely to frighten the wife, and it was error, in charging on aggravated assault, not to present that phase of the case to the jury. *Angel v. State*, 45 App. 135, 74 S. W. 553.

In a criminal prosecution, one of the defenses raised was insanity. It appeared that defendant was a young man of very weak mind. Held error to charge the jury "that the question for your determination is not whether defendant is a man of weak mind or strong mind," etc.; the charge being on the weight of the evidence, and having a tendency to withdraw from the jury the question as to the weakness of defendant's mind. *Angel v. State*, 45 App. 135, 74 S. W. 553.

Where, on a prosecution for assault with intent to commit murder, it appeared that defendant and another were shooting at others who returned the fire, the arms being deadly weapons from the commencement of the shooting, and it was a question which of the parties commenced the shooting, it was error to instruct on excessive force on the part of one attacked. *Scott v. State*, 46 App. 305, 81 S. W. 950.

An instruction using the words "under the immediate influence of sudden passion," etc., held not erroneous as limiting the defense, and leading the jury to believe that the passion must have arisen when defendant met the prosecutor. *Jones v. State*, 47 App. 515, 85 S. W. 5.

Evidence held not to authorize an instruction on justification in the protection of defendant's person against any unlawful attack other than one of intent to murder or inflict serious bodily injury. *Floyd v. State*, 52 App. 103, 105 S. W. 791.

In a trial for assault with intent to murder, it was not reversible error to fail to instruct on reasonable doubt as applied to the grade of offense raised by the evidence, where the court instructed that if the jury believed beyond a reasonable doubt that accused was guilty of an assault, but had reasonable doubt whether the assault was with malice aforethought with intent to murder, he should be acquitted, and the jury should then consider whether he was guilty of aggravated assault, or was justified in his acts; that every accused person is presumed to

be innocent until his guilt is established beyond reasonable doubt; and that if the jury had reasonable doubt as to accused's guilt he should be acquitted. *Bryant v. State*, 54 App. 65, 111 S. W. 1009.

An instruction that, if one accused of assault to murder shot, but the jury believed or had reasonable doubt that assailed was out of range, accused should be acquitted, was not erroneous as placing the burden on accused to show that assailed was out of range. *Jackson v. State*, 54 App. 605, 114 S. W. 136.

An instruction that, if the jury believe beyond reasonable doubt that accused unlawfully assaulted another with a deadly weapon, but that through sudden passion induced by adequate cause his mind was incapable of cool reflection, he was guilty of aggravated assault, was not erroneous as placing the burden on accused to show facts reducing the character of the assault, and as requiring the jury to find those facts beyond reasonable doubt. *Jackson v. State*, 54 App. 605, 114 S. W. 136.

An instruction that, if the jury believed or had reasonable doubt that one accused of assault to murder shot with no intention of inflicting injury, he should be acquitted, was not erroneous as shifting the burden of proof to accused. *Jackson v. State*, 54 App. 605, 114 S. W. 136.

Where accused seeks to justify an assault because of threatened attack by the use of means calculated to produce death or serious bodily injury, it is the better practice to charge the provision that, when a homicide takes place to prevent murder, etc., if the means used by the person attempting or committing the murder are such as would have been calculated to produce that result, it will be presumed that the person using them designed to inflict the injury. *Henderson v. State*, 55 App. 15, 115 S. W. 45.

It was not error, in a prosecution for assault with intent to murder, to refuse to charge on self-defense, where the evidence did not raise the issue. *McDonald v. State*, 55 App. 208, 116 S. W. 47.

Where no issue of aggravated assault was raised, a charge that if accused, with a knife, which was a deadly weapon, with malice aforethought, assaulted prosecuting witness with intent to kill and murder her, and if the assault, if any, was not made under the immediate influence of sudden passion produced by an adequate cause, he was guilty, was not objectionable as failing to clearly present the issue of accused's mental condition and confining the jury to a determination of whether the passion was such as anger, rage, and sudden resentment or terror, the court having properly charged on insanity, and was not erroneous, it simply quoting the statute and giving accused the benefit of the doctrine of aggravated assault. *McDonald v. State*, 55 App. 208, 116 S. W. 47.

An objection to a charge on adequate cause that, if adequate cause existed, the offense would be reduced to aggravated or simple assault, and accused was not given the benefit of a reasonable doubt on that proposition, would not raise the question that the charge did not copy the statute. *McDonald v. State*, 55 App. 208, 116 S. W. 47.

Accused could not complain of a charge that any condition or circumstance capable of creating, and which does create, sudden rage, etc., rendering the mind at the time incapable of cool reflection, whether accompanied by bodily pain or not, may be adequate cause, on the ground that it did not follow the statute defining adequate cause to be such as would commonly produce a degree of anger, rage, or resentment in a person of ordinary temper, since the charge was broader than the statute. *McDonald v. State*, 55 App. 208, 116 S. W. 47.

Where, the evidence raises other issues than assault to murder and self-defense, the court should limit malice aforethought and assault to murder by the extenuating circumstances proved. *Sanchez v. State*, 70 App. 24, 156 S. W. 218.

It is error to give a charge authorizing a conviction of defendants if either made the assault with intent to kill. *Maldonado v. State*, 70 App. 205, 156 S. W. 647.

The charge must conform to the indictment. *Brailford v. State*, 71 App. 113, 158 S. W. 541.

Where the injuries result in death, the issue of assault with intent to murder does not arise and should not be submitted. *Francis v. State* (Cr. App.) 170 S. W. 779.

Where all the evidence showed conclusively that defendant's wife died from injuries received at his hands, the court did not err in refusing to submit to the jury the issue of assault with intent to murder. *Paschal v. State* (Cr. App.) 174 S. W. 1057.

Accused was not prejudiced by an instruction that it is not enough that the assaulting party believed himself in danger, unless the circumstances are such that the jury can say he had a reasonable ground for such belief, where the court further charged in the same connection that the law guarantees the right to act on apparent danger, and that in judging thereof the law requires the jury to view the danger from defendant's standpoint, and to consider all the circumstances surrounding defendant at the time of the difficulty, though the jury may believe that in fact no real danger existed, and if, at that time, it reasonably appeared to defendant that the prosecutor was about to attack him, defendant would be guilty of no offense. *Decker v. State*, 124 S. W. 912.

The evidence tended to show that but two or three minutes elapsed between the second assault by prosecutor on accused and the third difficulty, in which accused inflicted the injury relied on; and that in the second difficulty prosecutor knocked accused down, and was beating him about the head and face when he was taken off. Held that, in a prosecution for assault to murder, it was error not to charge on the question of cooling time. *Luttrel v. State*, 143 S. W. 628.

In a prosecution for assault with intent to kill, an instruction that if defendant stabbed prosecutor, but that prior thereto prosecutor, by his conduct, caused

defendant to believe that he was in danger, and that prosecutor was about to draw a knife and throw bricks at defendant, but that the circumstances were not sufficient to warrant a belief on the part of defendant that he was in danger of death or serious bodily harm, but that the conduct of prosecutor aroused in him a sudden passion, anger, rage, or resentment, and under the influence thereof he cut prosecutor, his offense would be aggravated assault, was not erroneous, as requiring the jury to find more than one thing to constitute an adequate cause. *Scott v. State*, 143 S. W. 610.

An instruction on self-defense, on a trial of assault with intent to murder, that if from the acts of prosecutor, or from his words coupled with his acts, there was created in the mind of accused a reasonable apprehension that he was in danger of losing his life or of suffering serious bodily harm at the hands of prosecutor, accused could defend himself from danger, or apparent danger, as it reasonably appeared to him at the time, viewed from his standpoint, etc., fairly represented the issue. *Smith v. State*, 143 S. W. 643.

An instruction in a prosecution for assault with intent to kill, that if the jury believed that the accused was guilty of an assault, but had a reasonable doubt whether the assault was upon malice aforethought with intent to murder, then they should acquit him of that offense, and should consider whether he was guilty of an aggravated assault, did not eliminate from the jury's consideration the issue of self-defense. *Luttrell v. State*, 157 S. W. 157.

In a trial for assault, an instruction on self-defense, stated in general terms, is sufficient, in the absence of request for a more specific instruction. *Hoyle v. State*, 137 S. W. 355.

A charge held erroneous as being more burdensome than the law, in that it blends the law of self-defense with the law of threats, and requires, to justify the assault, an affirmative finding that the assaulted party made a movement with his hand as if to draw a weapon and used threatening language toward defendant, which would cause him to have a reasonable apprehension of serious bodily injury, or that the assaulted party was about to carry out the threats. *Graves v. State*, 124 S. W. 676.

22. — **Intent and malice.**—The exact issue of the defendant's intention must be submitted in charge, when there may be conflicting theories as to the act, and not be assumed inferentially by the court. See instances. *Agitone v. State*, 41 Tex. 501; *Walker v. State*, 7 App. 627.

From the use of an instrument likely to produce death, such purpose may be presumed; but this is a presumption of fact, and it is error to charge it as a presumption of law. *Agitone v. State*, 41 Tex. 501.

The intent is an essential ingredient of the offense and a material inquiry for the jury, under appropriate instructions as to malice and murder. *Anderson v. State*, 1 App. 730; *Lockwood v. State*, Id. 749; *Agitone v. State*, 41 Tex. 501; *Walker v. State*, 7 App. 627.

The court must charge that to constitute the offense there must have existed in the mind of the defendant at the time of committing the assault, a specific intent to kill the person assaulted. *Pruitt v. State*, 20 App. 129; *Davis v. State*, 15 App. 475; *White v. State*, 13 App. 259; *Gillespie v. State*, Id. 415; *Jobe v. State*, 1 App. 183; *Crook v. State*, 27 App. 198, 11 S. W. 444; *Boyd v. State*, 28 App. 137, 12 S. W. 737; *Gallaher v. State*, 28 App. 247, 12 S. W. 1087; *Ainsworth v. State*, 29 App. 599, 16 S. W. 652; *Callahan v. State*, 30 App. 275, 17 S. W. 257; *Moody v. State*, 30 App. 422, 18 S. W. 94.

An essential element of this offense is the specific intent to kill, and it must be embraced in the court's charge to the jury. *Hightower v. State*, 56 App. 248, 119 S. W. 691, 133 Am. St. Rep. 966.

The court instructed the jury that to constitute an assault with intent to murder, two things must concur: first, an assault, and second, a specific intent to kill; held, error, but in this case not reversible because in another portion of the charge he correctly charged upon malice and applied it to the case. *White v. State*, 34 App. 153, 29 S. W. 1094.

Where on trial for assault with intent to murder defendant was convicted of aggravated assault, error in charge on intent will not be reversible. *Thompson v. State* (Cr. App.) 30 S. W. 667.

A charge which defines assault and malice aforethought, and requires a finding beyond a reasonable doubt that the accused made an assault with malice aforethought and intent to kill, is ordinarily sufficient. *Luttrell v. State*, 70 App. 183, 157 S. W. 157.

The court must charge that the offense is not committed unless malice is proved, so that had death resulted it would have been murder. *Daniels v. State*, 71 App. 662, 160 S. W. 707.

In a prosecution for assault with intent to kill, there was evidence that prosecutor and accused had been friendly before the difficulty, and so far as either knew there was no animosity against the other. Accused did not attack prosecutor with a knife until the latter had struck him with a post auger, when defendant knocked off the blow and the auger came down on the head of his younger brother. Accused further testified that he could have cut prosecutor to pieces if he had desired to, but that he did not want to kill him at all, but only wanted him to drop the auger. Held, that the court should have charged that, although defendant cut prosecutor with a knife, yet, if he did so without a predetermined intent to kill, but only to disarm him and to defend himself against an attack by prosecutor with the auger, defendant could not be convicted of assault to murder. *Scott v. State*, 131 S. W. 1072.

An instruction, in a trial for murder, that if the defendant was committing an unlawful assault upon the deceased with a gun without any intention to kill him and caused the death of deceased by shooting, when there was no apparent dan-

ger of causing death and no intent to murder, he was guilty of negligent homicide in the second degree, sufficiently presents the issue of whether defendant had the intent to kill. *Ford v. State*, 142 S. W. 6.

23. — **Grade of assault.**—See notes under arts. 1003 and 1022, ante, and arts. 1128-1138.

In a proper case the law of aggravated assault should be charged. *Marshall v. State*, 40 Tex. 200; *Taliaferro v. State*, 40 Tex. 523; *Collins v. State*, 6 App. 72. See, also, *Daniels v. State*, 71 App. 662, 160 S. W. 707.

If the blow was struck in a sudden melee, the distinction between murder and manslaughter must be charged. *Williams v. State*, 43 Tex. 382.

When the court charges as to the law of manslaughter, but fails to instruct as to what the verdict should be in case the killing would have been manslaughter, it is an erroneous charge. *Hodges v. State*, 3 App. 470.

When the facts demand a charge submitting the issue of aggravated assault, it is not necessary that the definition of manslaughter be given if the law of aggravated assault is otherwise adequately explained. *Wilson v. State*, 4 App. 637. Contra this doctrine, *Spivey v. State*, 30 App. 343, 17 S. W. 546.

The law of manslaughter or aggravated assault need not and should not be charged, when the facts do not raise the issue. *Anderson v. State*, 15 App. 447; *Hines v. State*, 3 App. 484; *Sims v. State*, 4 App. 144; *Winn v. State*, 5 App. 621; *Carr v. State*, 41 Tex. 544.

Where the court instructed the jury, "if defendant provoked the difficulty in order to have a pretext to kill C., or do him some serious bodily harm," etc., held, that since the intent to "do serious bodily harm" will not constitute assault with intent to murder, the charge was erroneous and calculated to mislead, in that it did not go further and instruct that if the intent was to do serious bodily harm and not murder, the offense would be aggravated assault, and not assault with intent to murder. *Williams v. State*, 30 App. 429, 17 S. W. 1071.

For test as to whether charge should be given on lesser degree of offense, see *Sowel v. State*, 32 App. 482, 24 S. W. 504.

On trial for assault with intent to murder, where there was evidence that defendant had been struck by the prosecuting witness in the house of the latter, and left the house, immediately followed by the prosecuting witness, who carried a pistol, and pointed it at defendant, and that defendant turned and shot him, the whole having taken place in a short space of time, it was error for the court to fail to charge on aggravated assault. *Slaughter v. State*, 34 App. 81, 29 S. W. 161.

On trial for assault with intent to murder, failure to instruct as to aggravated assault and battery is error, where the weapons used in committing the assault were a breast yoke and a rock. *Smith v. State*, 36 App. 569, 38 S. W. 167.

It is error for the charge to make the circumstances convict of assault with intent to murder, when facts charged in other portions of the charge make only aggravated assault. *Brown v. State* (Cr. App.) 53 S. W. 640.

In a prosecution for assault with intent to murder, it appeared that accused fired but one shot, at close range; there being nothing to prevent him from hitting the prosecuting witness. Accused denied that he fired at the witness. Held, that it was error to fail to charge on aggravated assault. *Cubine v. State*, 44 App. 596, 73 S. W. 396.

On a trial for assault with intent to murder, where the prosecutor had ejected from his house the accused, who went off some distance, and, after getting a pistol, returned and commenced firing on the prosecutor, and where the evidence also raised the issue of aggravated assault, it was error to instruct on the law of provoking the difficulty, since it might tend to procure a conviction of the higher grade of the offense on trial. *Ross v. State*, 46 App. 451, 80 S. W. 1004.

In a prosecution for assault with intent to murder, where defendant's testimony showed that he acted in self-defense because prosecutor was about to attack him with a dirk or knife, and that he did not shoot with intent to hurt or kill prosecutor, but merely to scare him away, the court should have charged on aggravated and simple assault. *Pastrana v. State*, 48 App. 224, 87 S. W. 347.

Where, on a prosecution for assault with intent to murder, there was evidence tending to show a lesser degree than such crime, and defendant entered a plea of guilty, it was the duty of the court to instruct on the lesser degree. *Jackson v. State*, 48 App. 373, 88 S. W. 239.

Failure to instruct on aggravated assault held error. *Floyd v. State*, 52 App. 103, 105 S. W. 791.

Evidence held not sufficient to justify a charge submitting the theory of aggravated assault by means of a deadly weapon. *Barnes v. State*, 52 App. 407, 107 S. W. 823.

Where the weapon used by defendant was not of a deadly character, nor the injury inflicted of a serious nature, then simple assault was an issue in the case, and the jury should have been instructed thereon. *Barnes v. State*, 52 App. 407, 107 S. W. 823.

In a prosecution for assault with intent to kill, where the evidence of prosecuting witness was that the assault was deliberate and unprovoked, and accused testified that he did not attack such witness, there was nothing justifying the submission of a lesser degree of unlawful assault. *Colbert v. State*, 52 App. 486, 107 S. W. 1115.

An instruction submitting the issue of aggravated assault held erroneous where it confined such issue to the question of passion arising for adequate cause, and did not state that if there was no specific intent to kill and serious bodily injury, or if the assault was committed with a deadly weapon under the circumstances not amounting to an intent to murder, accused would be guilty only of aggravated assault. *Henderson v. State*, 55 App. 15, 115 S. W. 45.

Under an indictment for this offense, the court, in submitting aggravated assault, may submit either ground that may be developed by the evidence directly grow-

ing out of the assault charged, including assault by an adult male on a female, though not specifically alleged in the indictment. *Lofton v. State*, 59 App. 270, 128 S. W. 384.

24. — **Definition of terms.**—It is not necessary to explain the distinction between express and implied malice, as the existence of either kind of malice will be sufficient to constitute this offense. *Anderson v. State*, 1 App. 731; *Wilson v. State*, 4 App. 637; *Stapp v. State*, 3 App. 138.

It must explain the term malice. *Smith v. State*, 1 App. 517; *Anderson v. State*, Id. 731; *Williams v. State*, 3 App. 316; *Hodges v. State*, Id. 470; *Ewing v. State*, 4 App. 417; *Wilson v. State*, Id. 637; *Johnson v. State*, Id. 598; *Daniels v. State*, Id. 429; *Caruthers v. State*, 13 App. 339; *Hayes v. State*, 14 App. 330; *Anderson v. State*, 1 App. 730; *Hines v. State*, 3 App. 484.

It must define an "assault" and "murder," not in statutory terms, but sufficiently to inform the jury of the elements of the offense. *Smith v. State*, 1 App. 516.

Ordinarily the charge should inform the jury what is murder, and what facts constitute that offense. *Lockwood v. State*, 1 App. 750; *Haynes v. State*, 2 App. 84.

In a proper case the charge should define the term "deadly weapon." *Kouns v. State*, 3 App. 13.

It should define or explain what an assault is. *Campbell v. State*, 9 App. 147; *Driskill v. State*, 22 App. 60, 2 S. W. 622.

A charge that, "malice is when one with a sedate and deliberate mind and formed design kills another, and such killing is murder," held, erroneous, inasmuch as killing, to constitute murder, must have been committed unlawfully, and under circumstances which do not excuse or justify the act. *Pickens v. State*, 13 App. 353.

For an inadequate and incorrect definition of malice, see *Hayes v. State*, 14 App. 330.

The court instructed the jury that if they believed from the evidence that defendant, with malice aforethought, made an assault upon the injured party by shooting him with a gun, with the intent to kill him, etc.; and properly defined malice; held, that it was not necessary under this instruction to define murder. *Grayson v. State*, 35 App. 629, 34 S. W. 961.

An instrument calculated to produce death or serious bodily injury, is a deadly weapon. *Hardy v. State*, 36 App. 400, 37 S. W. 434.

"Malice" held sufficiently defined. *Williams v. State*, 61 App. 589, 135 S. W. 552.

Where defendant shot at another with a pistol, it was unnecessary to define the term "assault." *Williams v. State*, 61 App. 589, 135 S. W. 552.

In a case of serious bodily injury, the failure to properly define "deadly weapon" is not reversible. *Hughes v. State*, 62 App. 288, 136 S. W. 1068.

Where, on a trial of an accomplice to an assault with intent to murder, the court defined malice aforethought, and charged that there could be no murder without malice, a charge that if accused, before the commission of the assault by a third person, wilfully and of his malice aforethought advised or encouraged the third person to murder prosecutor, or if accused "promised any reward or favor to" the third person to murder prosecutor, he was guilty, was not objectionable for failing to repeat the words "malice aforethought" in submitting the issue of promising reward and favor to the third person. *Vails v. State*, 128 S. W. 1117.

25. — **Penalty.**—The charge must instruct correctly as to the penalty. *Howard v. State*, 18 App. 348.

On a trial for assault with intent to murder where the accused was convicted of said offense, held, a misstatement by the court as to the penalty for the lesser offense of aggravated assault is harmless. *Bell v. State*, 31 App. 521, 21 S. W. 259.

An instruction that the penalty be fixed at not less than 2 nor more than 7 years, after the penalty had been changed to not less than 2 nor more than 15 years could not have injured defendant. *Leal v. State*, 46 App. 334, 81 S. W. 961.

26. **Verdict.**—See notes under C. C. P. art. 763 et seq.

A verdict "guilty of an attempt to commit an assault" is bad. *White v. State*, 22 Tex. 608.

"We, the jury, find the defendant guilty of an assault with intent to kill," etc., is not a good verdict. *Long v. State*, 34 Tex. 566; *Sheffield v. State*, 1 App. 640.

"Guilty of an assault with attempt to murder" was held sufficient. *Hart v. State*, 38 Tex. 382.

It is not essential that the verdict should name the offense of which it finds the defendant guilty. A general verdict of "guilty as charged in the indictment," and assessing the punishment is sufficient. *Henderson v. State*, 5 App. 134; *Nettles v. State*, Id. 386. See, also, *Pierce v. State*, Austin term, April 20, 1875 (unreported).

A verdict of guilty of assault with intent to "murder" is not insufficient to sustain a conviction of assault with intent to murder, where it is clear that the jury intended to so convict. *Bryant v. State*, 54 App. 65, 111 S. W. 1009.

27. **Punishment.**—Murder, and an assault with intent to murder, are not offenses of the same nature within the meaning of art. 1619 of this Code. *Long v. State*, 36 Tex. 6.

The sentence should be indeterminate, and, if made for a given term of years, will be reformed on appeal. *Bell v. State* (Cr. App.) 169 S. W. 1150.

Art. 1027. [606] "Bowie-knife" and "dagger" defined.—A "bowie-knife" or "dagger," as the terms are here and elsewhere used, means any knife intended to be worn upon the person, which

is capable of inflicting death and not commonly known as a pocket-knife.

Indictment.—Willson's Cr. Forms, 477.
See notes under art. 1026 ante.

Art. 1028. [607] Test on trial.—Whenever it appears, upon a trial for assault with intent to murder, that the offense would have been murder had death resulted therefrom, the person committing such assault is deemed to have done the same with that intent.

Intent as element.—See notes under § 1026 ante.

In order to constitute the offense of an assault with intent to murder, two things must concur: (1) An assault; and (2) a specific intent to kill. Without a simultaneous concurrence of these two constituent elements, there can be no assault with intent to murder. No other intent save the specific one to kill, will be sufficient. If the intent is to maim, rob, rape, or other than kill, it will not be an assault with intent to murder. The intent may be to kill under circumstances which, if death ensued, it would not be murder. Such intent would not constitute the specific intent required in the offense. The preceding article of the Code is applicable only where there exists the specific intent to kill. It is not applicable in any case where such intent does not exist. It simply prescribes a test by which to determine whether there was an offense, and if so, what offense; but in thus affording a test does not dispense with the very gist of the offense, that is, a specific intent to kill. *White v. State*, 13 App. 259; *Harrill v. State*, Id. 374; *Gillespie v. State*, Id. 415; *Courtney v. State*, Id. 502; *Davis v. State*, 15 App. 475; *Pruitt v. State*, 20 App. 129; *Long v. State*, 36 Tex. 6; *Carter v. State*, 28 App. 355, 13 S. W. 147.

Art. 1029. [608] With intent to rape.—If any person shall assault a woman with intent to commit the offense of rape, he shall be punished by confinement in the penitentiary for any term of years not less than two. [Amend. 1895, p. 104.]

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| 1. Offense. | 10. — Intent. |
| 2. — Female under age of consent. | 11. — Other acts, and transactions. |
| 3. — Attempt. | 12. — Character of female. |
| 4. Principals. | 13. — Age of female. |
| 5. Rape defined. | 14. — Physical condition, complaints and declarations of female. |
| 6. Indictment. | 15. — Sufficiency. |
| 7. — Included offenses. | 16. Charge. |
| 8. — Variance. | 17. — Grade of assault. |
| 9. Evidence. | |

1. **Offense.**—*Milton v. State*, 23 App. 204, 4 S. W. 574. See, also, *Ford v. State* (Cr. App.) 53 S. W. 847.

The force used, or attempted to be used, must be such as might reasonably be supposed sufficient to overcome resistance, considering the relative strength of the parties, and other circumstances of the case. *Saddler v. State*, 12 App. 194; *Brown v. State*, 27 App. 330, 11 S. W. 412; *Walton v. State*, 29 App. 163, 15 S. W. 646; *Mooney v. State*, 29 App. 257, 15 S. W. 724; *Rhea v. State*, 30 App. 483, 17 S. W. 931; *Duckett v. State* (Cr. App.) 150 S. W. 1177; post, art. 1064.

When used with reference to a human being, the word "female" is synonymous, interchangeable with, equivalent to, and means "a woman." *Gibson v. State*, 17 App. 577.

Violent or indecent familiarity with the person of a female, with no intent to force her, is only an aggravated assault. *Pefferling v. State*, 40 Tex. 486; *Thompson v. State*, 43 Tex. 583; *Curry v. State*, 4 App. 574; *Veal v. State*, 8 App. 474.

Slipping into a room of a female at night, with nothing on but a shirt, and pulling her bedclothes, may constitute the offense. *Dibrell v. State*, 3 App. 456.

The assault must be committed with the specific intent to rape. No other intent will suffice. Thus an assault with intent to have an improper connection with a woman, but without the use of force, and not without the consent of the woman, would not be an assault with intent to rape. *Thomas v. State*, 16 App. 535; *Curry v. State*, 4 App. 574; *Pefferling v. State*, 40 Tex. 486; *Sanford v. State*, 12 App. 196; *Irving v. State*, 9 App. 66; *McGee v. State*, 21 App. 670, 2 S. W. 890; *Jones v. State*, 18 App. 485; *Walton v. State*, 29 App. 163, 15 S. W. 646; *Veal v. State*, 8 App. 474; *Thompson v. State*, 43 Tex. 583; *Robertson v. State*, 30 App. 498, 17 S. W. 1068; *Power v. State*, 30 App. 662, 18 S. W. 552.

This offense is constituted by the use of any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an ability to have carnal knowledge of a woman by force, without her consent. *Jones v. State*, 18 App. 485.

To warrant a conviction under an indictment for an assault and battery with intent to commit rape, the state must prove the actual or attempted use of force. Fraud and threats have no part in such an offense. Pen. Code Tex. arts. 525, 526, 530. *Burney v. State*, 21 App. 565, 1 S. W. 458.

This offense can only be committed by means of force or attempted force. It can not be committed by threats or fraud. *Milton v. State*, 23 App. 204, 4 S. W. 574; *Burney v. State*, 21 App. 565, 1 S. W. 458; *Taylor v. State*, 22 App. 529, 3 S. W. 753, 58 Am. Rep. 656.

Assault to rape is constituted by the existence of facts which bring the offense within the definition of an assault, coupled with an intention to commit rape; and such an assault can only be committed by means of force or attempted force.

Carroll v. State, 24 App. 366, 6 S. W. 190. See, also, Shields v. State, 32 App. 498, 23 S. W. 893; Passmore v. State, 29 App. 241, 15 S. W. 286; Milton v. State, 23 App. 204, 4 S. W. 574.

Essential that there be an intention to commit the entire crime of rape. Walton v. State, 29 App. 163, 15 S. W. 646.

The assault must be accompanied with the specific intention to rape; with the specific intention to have carnal knowledge of the woman; to have carnal knowledge of the woman without her consent; to have carnal knowledge of the woman by force; to have carnal knowledge of the woman without her consent, and by the use of such force as is sufficient to overcome such resistance as the woman should make. Shields v. State, 32 App. 498, 23 S. W. 893; Passmore v. State, 29 App. 241, 15 S. W. 286.

On trial for assault with intent to commit rape, where it appeared that, after making an indecent proposal to the prosecutrix, defendant took hold of her, and tried to push her down, and she then pushed him away, and escaped, it was error to refuse an instruction that, to find defendant guilty, the jury must believe that, when he took hold of the prosecutrix, he intended to gratify his passion notwithstanding her resistance. Porter v. State, 33 App. 355, 26 S. W. 626.

Assault with intent to rape is established where evidence shows that accused intended, if necessary, to force compliance with his desires. Dockery v. State, 35 App. 487, 34 S. W. 281.

The offense of assault with intent to commit rape is established where the evidence shows beyond a reasonable doubt that accused intended, if it became necessary, to force compliance with his desires regardless of any resistance made by his victim. Dockery v. State, 35 App. 487, 34 S. W. 281.

It must be shown that defendant used such force as would make him guilty of rape had he succeeded. McAdoo v. State, 35 App. 603, 34 S. W. 955, 60 Am. St. Rep. 61.

Pen. Code 1895, art. 1064, defining force as applied to the crime of rape does not limit the rule that, in order to convict for assault with intent to commit rape, the evidence must show, not only an assault, but that defendant intended to have carnal knowledge of the woman, and "to use all his power," notwithstanding any resistance on her part. McCullough v. State (Cr. App.) 47 S. W. 990.

An assault with intent to rape apprehends an intent on the part of defendant to use sufficient force to overcome the utmost resistance. Clark v. State, 39 App. 152, 45 S. W. 696; *Id.* (Cr. App.) 51 S. W. 1120.

Where the evidence was that defendant entered room of prosecutrix while she was asleep, pulled up her gown and placed his hand upon her privates, when she awoke, it does not sustain charge of assault with intent to rape. Ford v. State (Cr. App.) 53 S. W. 847.

To constitute an assault with intent to rape by force, the consent of the female must be wanting, and the assault by accused must be such as to show a purpose to have intercourse with the female despite her resistance. Cotton v. State (Cr. App.) 105 S. W. 185.

If accused seized and assaulted prosecutrix with intent to have sexual intercourse with her, the crime of assault with intent to rape became complete the moment the assault was actually made, though accused afterwards abandoned the intent to have intercourse with prosecutrix. Ross v. State, 60 App. 547, 132 S. W. 793.

Before one can be convicted of assault with intent to commit rape, it must be found that he had the specific intent to have sexual intercourse with prosecutrix, and a finding that he placed his hands on the girl with her consent with no intention to rape her is no offense. Collins v. State (Cr. App.) 148 S. W. 1065.

One assaulting a female with intent to rape her is guilty although he voluntarily abandons the assault. Duckett v. State (Cr. App.) 150 S. W. 1177.

That prosecutrix was a woman of loose virtue is no defense. Taff v. State (Cr. App.) 155 S. W. 214.

2. — **Female under age of consent.**—An attempt to have carnal knowledge of one under the age of consent, though with her consent, is an assault with intent to rape. Callison v. State, 37 App. 211, 39 S. W. 300; Mayo v. State, 7 App. 342; Moore v. State, 20 App. 275; Croomes v. State, 40 App. 672, 51 S. W. 924, 53 S. W. 882 (overruling Hardin v. State, 39 App. 426, 46 S. W. 803); Allen v. State, 36 App. 381, 37 S. W. 429; Blair v. State (Cr. App.) 60 S. W. 880; Gage v. State (Cr. App.) 151 S. W. 565; Brown v. State (Cr. App.) 176 S. W. 50.

Under this article one may be convicted of assault with intent to rape a child under 15 years old, though she consented to sexual intercourse, and no force was used, in view of articles 1063, and 1064, and the Code defining an assault as any unlawful violence on the person of another. Croomes v. State, 40 App. 672, 51 S. W. 924, 53 S. W. 882.

Proof that defendant laid violent hands on the child and made all necessary preparations for intercourse with her was sufficient. Alexander v. State, 58 App. 621, 127 S. W. 189.

When the female is under the age of consent she cannot consent to the use of unlawful violence so as to prevent the act from amounting to an assault with intent to rape. Cromeans v. State, 59 App. 611, 129 S. W. 1129.

Assault with intent to rape a female under age of consent defined. Cromeans v. State, 59 App. 611, 129 S. W. 1129.

Touching a girl with the intent of having sexual intercourse was an assault, where she was incapable of giving her consent thereto, and the intent to have such intercourse is an intent to injure. Altman v. Eckerman (Cr. App.) 132 S. W. 523.

One unlawfully handling a female under the age of consent may be guilty of assault with intent to rape, though not intending to forcibly ravish her. Hightower v. State (Cr. App.) 143 S. W. 1168.

3. — Attempt.—See art. 1070 and notes.

In an attempt to rape, the age of the assaulted female has nothing to do with the question; it is mainly a question as to intended use of force. *Warren v. State*, 38 App. 152, 41 S. W. 635.

We have no law declaring that "an attempt to commit rape is an offense." Art. 1070, post, authorizes the penalty provided in this article where, in a rape case, it appears that the accused attempted the rape though he failed to accomplish it. *Warren v. State*, 38 App. 152, 41 S. W. 635. And see *Taylor v. State*, 44 App. 153, 69 S. W. 149.

The offense of attempt to rape is distinct and separate from the offense of assault to commit rape. *Shockley v. State*, 71 App. 475, 160 S. W. 452.

4. Principals.—See notes under art. 74, ante.

5. Rape defined.—See art. 1063.

6. Indictment.—Willson's Cr. Forms, 478.

Indictment held to be sufficient. *Greenlee v. State*, 4 App. 345; *Smith v. State*, 41 Tex. 352; *Gibson v. State*, 17 Tex. App. 574; *Lights v. State*, 21 App. 308, 17 S. W. 428.

The word "ravish" or "ravished" is the essential word in all indictments for rape or for assault with intent to rape; it is indispensable. It means all that is necessary to a charge of rape, and imports not only violence on the part of the man but resistance and want of consent on the part of the woman; and where that word is used in an indictment for rape, it is but repetition to allege that the defendant carnally knew the woman forcibly and against her will. *Gibson v. State*, 17 App. 577.

It may use the word "attempt" instead of "intent," and it is not necessary to allege that the accused is a male, and that the female was alive and in being, *Greenlee v. State*, 4 App. 345. See, also, *Fowler v. State* (Cr. App.) 148 S. W. 576.

It need not allege that the assaulted party was a woman or female, if that fact appears from all that is stated in the indictment, but it is better to make the direct allegation of the fact. See indictment held sufficient. *Battle v. State*, 4 App. 595, 30 Am. Rep. 169; *Jones v. State*, 18 App. 485.

Indictment held bad. *Hewitt v. State*, 15 App. 80.

Where the assaulted party is alleged to be a "female," this is equivalent to alleging her to be a "woman" and is sufficient. But if the assault was upon a "female under the age of ten years" the indictment should so allege. See an indictment held to be sufficient. *Gibson v. State*, 17 App. 574. In the case last cited it is said that the word "ravish" or "ravished" is essential in all indictments for rape, or for assault with intent to rape. But this expression seems to be in conflict with all the other decisions, and with later decisions of the same court with reference to this offense. If the word "ravish" or "ravished" is used, however, it implies force, and the want of consent of the assaulted party. *Davis v. State*, 42 Tex. 226; *Williams v. State*, 1 App. 90, 28 Am. Rep. 399; *Mayo v. State*, 7 App. 342; *Hewitt v. State*, 15 App. 80.

Where the assault is upon a female under the age of ten years, it is unnecessary to allege the means by which the rape was intended to be accomplished, or that it was without the consent of the female. In such case these allegations should not be made. *Moore v. State*, 20 App. 275.

When the indictment does not allege that the female assaulted was under the age of consent, the state must prove that the assault was made without her consent and with intent to commit rape by force, although it be shown that she was under said age. *Moore v. State*, 20 App. 275; *Mosely v. State*, 9 App. 137.

An indictment for an assault with intent to rape a girl under fifteen years of age must allege that she was not the wife of defendant. *Edwards v. State*, 37 App. 242, 38 S. W. 996, 39 S. W. 368; *Dudley v. State*, 37 App. 543, 40 S. W. 269.

It is proper to join in an indictment a count charging an assault with intent to rape and one charging an attempt to rape. *Reagan v. State*, 28 App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

The indictment for assault with intent to rape closed with the words, "by then and there, without the consent of the said Mrs. L., attempting by force, threats and fraud, to have carnal knowledge of her, the said Mrs. L.," held, that such allegations did not vitiate the indictment. *Oxsheer v. State*, 38 App. 499, 43 S. W. 335.

An indictment alleging that defendant did make an assault on, and attempt to ravish, N., held insufficient to charge an attempt to rape; art. 1070 excluding the question of assault in an attempt to rape. *Taylor v. State*, 44 App. 153, 69 S. W. 149.

An indictment averring that defendant did make an assault on and attempt to ravish N. charges an assault with intent to rape; the word "attempt" being equivalent to charging an intent. *Id.*

An indictment alleging that accused made an assault on a person named, a female under the age of 15 years and not the wife of accused, and that accused had carnal knowledge of the female, is not defective for failing to allege that accused is a male person, and for failing to aver whether the rape was committed with or without the female's consent. *Taylor v. State*, 50 App. 362, 97 S. W. 94, 123 Am. St. Rep. 844.

Indictment charging an assault with intent to "ravish," held not defective for failure to allege want of consent and intent to commit rape by force. *Alexander v. State*, 58 App. 621, 127 S. W. 189.

In an indictment for attempt to commit rape, the character of force necessary to be charged is the same as that required in the ordinary rape by force. *Wyvias v. State* (Cr. App.) 142 S. W. 585.

An indictment for an attempt to commit rape on a female, under the age of 15 years which fails to charge that the attempt was made by force or threat or fraud, is insufficient. *Wyvias v. State* (Cr. App.) 142 S. W. 585.

An indictment for an attempt to commit rape on a female under the age of 15 years must show an intent to use force which might reasonably be supposed to be sufficient to overcome all resistance. *Wyvias v. State* (Cr. App.) 142 S. W. 585.

Allegations of force, threats, or fraud are not necessary where the girl is under the age of consent. *Collins v. State* (Cr. App.) 148 S. W. 1065.

An indictment alleging that accused made an assault upon a woman with the intent by force, threats, and fraud, without her consent, to commit rape upon her, by then and there attempting to ravish her, charges the offense of assault with intent to commit rape and not an attempt to commit rape, notwithstanding the unnecessary allegations charging an attempt. *Shockley v. State*, 71 App. 475, 160 S. W. 452.

Where an indictment clearly charged the offense of assault with intent to commit rape, the inclusion of unnecessary allegations charging an attempt does not render it uncertain or subject to motion to quash as they can be disregarded as surplusage. *Shockley v. State*, 71 App. 475, 160 S. W. 452.

7. — Included offenses.—Under an indictment for this offense a conviction may be had for an aggravated or a simple assault. *Brown v. State*, 7 App. 569; *Curry v. State*, 4 App. 574. But not for an attempt to commit rape. *Milton v. State*, 23 App. 204, 4 S. W. 574; *Taylor v. State*, 22 App. 529, 3 S. W. 753, 58 Am. Rep. 656; *Burney v. State*, 21 App. 565, 1 S. W. 458; *Brown v. State*, 7 App. 569; *Williams v. State*, 1 App. 90, 28 Am. Rep. 399.

See, also, *O'Bryan v. State*, 27 App. 330, 11 S. W. 443; *Massey v. State*, 29 App. 159, 15 S. W. 601; *Passmore v. State*, 29 App. 241, 15 S. W. 286.

8. — Variance.—Where an indictment charged an assault with intent to murder with a bowie knife, and the evidence showed an assault with a butcher knife, there was no variance. *Hernandez v. State*, 32 App. 271, 22 S. W. 972.

In a prosecution for an assault with intent to rape upon "Dorothy Cohen," where her mother testified that her name was "Dorothy," and it appeared that she went by that name, the fact that she spelled it "Dorthea" did not present a variance. *Brown v. State* (Cr. App.) 176 S. W. 50.

9. Evidence.—See notes under C. C. P. art. 783 et seq.

It is error to admit, as original evidence, the fact that prosecutrix identified defendant as her assailant. If her testimony were attacked this might be done to support her. *Clark v. State*, 39 App. 160, 45 S. W. 696.

Statements by the prosecuting witness three-quarters of an hour after reaching home after the assault are not admissible as *res gestae*. *Caudle v. State*, 34 App. 26, 28 S. W. 810.

Statements by the prosecuting witness, in regard to the details of the assault, made after the assault, are admissible only in support of her veracity, and not as original evidence. *Caudle v. State*, 34 App. 26, 28 S. W. 810.

On the trial it was not error to admit the testimony of physicians to the fact that defendant was afflicted with a venereal disease a few days before the alleged assault on the prosecutrix. *Allen v. State*, 36 App. 381, 37 S. W. 429.

When defendant has testified in his own behalf, he may, on cross-examination, be asked if he has not been previously indicted for assault with intent to rape. *Clark v. State*, 38 App. 30, 40 S. W. 992.

See opinion for experiments made for defendant after the alleged transaction, which were held admissible in corroboration of defendant's testimony. *Id.*

A witness was asked whether prosecutrix made any reply when the sheriff asked her to be certain whether defendant was her assailant, to which the witness responded that prosecutrix made no reply, and evidence was then admitted in rebuttal to show that prosecutrix fainted before defendant was taken out of the room, whereby she was unable to respond to the sheriff. Held, that the testimony as to prosecutrix fainting was prejudicial error; the identity of the assailant being one of the questions in issue. *Turman v. State*, 50 App. 7, 95 S. W. 533.

Where it appearing that prosecutrix broke away from her assailant and ran, it was proper to admit evidence that after she had run about 200 yards she fainted. *Turman v. State*, 50 App. 7, 95 S. W. 533.

It was not error to permit a witness to testify that the house of witness where the crime was committed was closed when witness left it in the morning, though such testimony might suggest that the accused had committed burglary. *Turman v. State*, 50 App. 7, 95 S. W. 533.

Where the court excluded a letter written by prosecutrix to her father 10 days after the assault, on the ground that it contained statements that were improper to go to the jury, the error in permitting prosecutrix to testify that the letter was with reference to the assault was not prejudicial to accused. *Warren v. State*, 54 App. 443, 114 S. W. 380.

Where the theory of the state was that accused and prosecutrix were engaged to be married, and prosecutrix testified that she left home with accused on the night of the assault believing that he would take her to a designated town, and there marry her, and accused claimed that the prosecutrix left home with him for an immoral purpose, and sought to cover up her immoral conduct, a letter written by accused to prosecutrix some months before indicating the existence of an engagement to marry was admissible as corroborative of prosecutrix. *Warren v. State*, 54 App. 443, 114 S. W. 380.

The testimony of prosecutrix that on accused coming to her house after the commission of the offense, and inviting her to a party, she asked him to leave, was admissible. *Warren v. State*, 54 App. 443, 114 S. W. 380.

Where the theory of the state was that prosecutrix left home with accused, believing that they would go to a designated town and there marry, while accused claimed that the prosecutrix consented to go with him for an immoral purpose, evidence of the conduct of the prosecutrix on leaving home with accused was admissible. *Warren v. State*, 54 App. 443, 114 S. W. 380.

Defendant held entitled to show the use of persuasion to induce the girl to testify against him. *Liles v. State*, 58 App. 310, 125 S. W. 921.

Evidence that shortly after the alleged assault prosecutrix had been pleasant and agreeable toward defendant is admissible. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

On a trial for assaulting a female under the age of 15 years with intent to rape, evidence that accused was a preacher and that the church where the family of prosecutrix attended and were members was one of his appointments was properly admitted to show why accused knew prosecutrix and how long. *Love v. State* (Cr. App.) 150 S. W. 920.

10. — **Intent.**—The burden of proof to show the criminal intent is upon the state, and evidence showing a mere possibility of the existence of such intent is insufficient. *House v. State*, 9 App. 567; *Robertson v. State*, 30 App. 498, 17 S. W. 1068.

To authorize a conviction the proof must show specific intent. *Thomas v. State*, 16 App. 535.

Defendant has a right to testify as to his intention (following *Berry v. State*, 30 App. 423, 17 S. W. 1080). *Lewallen v. State*, 33 App. 412, 26 S. W. 832.

Where prosecutrix testified that defendant pursued her, finally overtook her, drew a loaded pistol, and pointing it at her, demanded that she submit to his desires, and upon her refusal he left her, an instruction that defendant could not be convicted unless the jury found that he not only committed the assault, but that it was committed with the specific intention of having carnal intercourse with her by force, if necessary, regardless of any resistance made by her, should have been given. *Caddell v. State*, 44 App. 213, 70 S. W. 91.

To establish an assault with intent to rape by force, a specific intent to rape must be established, and the evidence must show more than the possibility of such intent. *Cotton v. State*, 52 App. 55, 105 S. W. 185.

Evidence as to what was said and done on the day the offense was alleged to have been committed held admissible. *Grimes v. State*, 64 App. 64, 141 S. W. 261.

The testimony of prosecutrix that defendant told her to take her pants down, and she would not do so, but he took hold of her and took the pants off, that she tried to keep him from doing so, but could not, and that he unbuttoned his pants, took out his privates, and pressed her to him, etc., when a woman interfered, was admissible on the issue of intent. *Brown v. State* (Cr. App.) 176 S. W. 50.

In such prosecution, the length of time the prosecuting witness had been acquainted with the woman who interfered was admissible. *Brown v. State* (Cr. App.) 176 S. W. 50.

11. — **Other acts, and transactions.**—Testimony as to other acts and transactions than the one alleged is admissible for the purpose of corroborating the testimony as to the particular act. *Callison v. State*, 37 App. 211, 39 S. W. 300.

Where the girl is more than 15 years of age, evidence of prior attempts is inadmissible. *Crimes v. State*, 64 App. 64, 141 S. W. 261.

12. — **Character of female.**—General reputation of the female held admissible on the question of want of consent but not to show justification. Favors v. State, 20 Tex. App. 155; *Lawson v. State*, 17 Tex. App. 292.

Evidence of the prosecutrix's reputation for chastity is admissible. *Shields v. State*, 32 App. 498, 23 S. W. 893.

When force has been proven beyond question, evidence of the injured female's reputation is worse than idle. *Steinke v. State*, 33 App. 65, 24 S. W. 909, 25 S. W. 287.

Where accused assailed the reputation of prosecutrix for virtue, the state was properly permitted to show her general reputation for virtue and chastity prior to the alleged offense. *Warren v. State*, 54 App. 443, 114 S. W. 380.

Where all the evidence showed that prosecutrix did not assent to the attempted act, and there was nothing to justify accused in believing that she would consent, evidence as to her general reputation for chastity was not admissible. *Ross v. State*, 60 App. 547, 132 S. W. 793.

The admission of evidence as to prosecutrix's reputation for chastity in a rape prosecution is limited to her general reputation and to acts of illicit intercourse with accused alone, so that, in a prosecution for assault with intent to rape, testimony that prosecutrix had at various times had intercourse with another, and that accused had been informed thereof, was not admissible. *Ross v. State*, 60 App. 547, 132 S. W. 793.

13. — **Age of female.**—An allegation of the age of the female being descriptive and material must be proven though the state attempts to abandon such allegation. *Mosely v. State*, 9 Tex. App. 137.

Exclusion of depositions of the girl's parents taken by defendant showing when she was born held error. *Caples v. State* (Cr. App.) 167 S. W. 730.

14. — **Physical condition, complaints and declarations of female.**—It is a rule of evidence that "it is relevant to prove any circumstance which tends to make the proposition at issue more or less improbable." Under this rule, the condition of an under-garment of the alleged injured female on the first evening and second morning after the alleged rape was properly admitted in evidence. The objection that the examination of the garment was too remote in point of time, goes to the weight rather than the competency of the evidence. *Grimmett v. State*, 22 App. 36, 2 S. W. 631, 58 Am. Rep. 630.

The mother of the alleged injured female was permitted to testify for the state, to the particulars of the complaint made to her by such party on the morning after the night of the alleged assault. Held, error. Such evidence is admissible only when the statements of the alleged injured party are within the rule of *res gestæ*. *McGee v. State*, 21 App. 670, 2 S. W. 890.

The appearance, condition of clothing and marks of violence upon prosecutrix,

shortly after the alleged assault, are admissible evidence; but statements made by her when not *res gestæ* are not admissible. (Following *Fefferling v. State*, 40 Tex. 487.) *Caudle v. State*, 34 App. 26, 28 S. W. 810.

Complaints made by the prosecutrix are admissible for the purpose of showing that she was or was not dissatisfied, owing to the length of time and surrounding circumstances, etc. *Sentell v. State*, 34 App. 260, 30 S. W. 226.

When the details, narrated by the prosecutrix, are a part of the *res gestæ*, the name of the defendant may be proven by proving her statements in that regard. *Id.*

On a prosecution for assault with intent to rape, it was proper for the state to show the condition of prosecutrix on the night of the day on which the crime was committed. *Turman v. State*, 50 App. 7, 95 S. W. 533.

Accused sought a continuance because of the absence of witnesses by whom he claimed he could prove that he was at the place of one of them some time before the crime, and at the place of the other some time after, and that he did not have such clothing as described by prosecutrix. Held, that the testimony was not material; it appearing that accused was near enough at either place to the place of the crime to have been at such places as alleged, and yet have been present at the commission of the crime, and it not appearing what opportunity the witnesses had had of knowing the character of accused's clothing. *Turman v. State*, 50 App. 7, 95 S. W. 533.

An application for a continuance because of the absence of a witness who would testify that he met a person wearing clothing similar to the clothing described by the prosecutrix as that worn by her assailant, about two miles from the scene of the crime and going toward that place, was properly denied for immateriality of the testimony. *Turman v. State*, 50 App. 7, 95 S. W. 533.

Failure of prosecutrix to make outcry is a circumstance against the state's case. But the state may show why she made no outcry. *Warren v. State*, 54 App. 443, 114 S. W. 380.

If she is asked what is the matter and then makes her complaint, it is admissible. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

Evidence that the prosecutrix was crying when she made complaint is admissible. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

Where accused has impeached prosecutrix, testimony of complaints by prosecutrix and of her condition immediately after the assault is admissible. *Rogers v. State* (Cr. App.) 143 S. W. 631.

On a trial for assaulting a girl eight years old with intent to rape while on her way to school in the morning, evidence that on reaching home that evening she complained to her parents was competent. *Duckett v. State* (Cr. App.) 150 S. W. 1177.

Testimony of prosecutrix that after the assault she ran and told a certain person all about it and asked her what she should do, and that they phoned the sheriff and officer for help, all in a few minutes after the alleged assault, was admissible as a part of prosecutrix's complaint. *Fuller v. State* (Cr. App.) 154 S. W. 1021.

Such evidence was also admissible as a part of an outcry or complaint. *Fuller v. State* (Cr. App.) 154 S. W. 1021.

Evidence of the condition of the dress of prosecutrix and her appearance when reaching home, about two hours after the assault, is admissible. *Calyon v. State* (Cr. App.) 174 S. W. 591.

15. — **Sufficiency.**—Evidence held insufficient. *Ellenburg v. State*, 36 App. 139, 35 S. W. 989; *Caldwell v. State*, 14 Tex. Cr. 171; *Johnson v. State*, 17 Tex. App. 565; *Mathews v. State*, 34 App. 479, 31 S. W. 381; *Dockery v. State*, 35 App. 487, 34 S. W. 281; *Pless v. State*, 23 App. 73, 3 S. W. 576; *Carroll v. State*, 24 App. 366, 6 S. W. 190; *Passmore v. State*, 29 App. 241, 15 S. W. 286; *Shepard v. State*, 34 App. 35, 28 S. W. 816; *Marshall v. State*, 34 App. 22, 36 S. W. 1062; *Allen v. State*, 36 App. 381, 37 S. W. 429; *Laco v. State* (Cr. App.) 38 S. W. 176; *Tittle v. State* (Cr. App.) 38 S. W. 202; *Clark v. State*, 39 App. 153, 45 S. W. 696; *Hancock v. State* (Cr. App.) 47 S. W. 465; *Draper v. State* (Cr. App.) 57 S. W. 655; *Cotton v. State* (Cr. App.) 105 S. W. 185; *Collins v. State*, 52 App. 455, 107 S. W. 852; *Cromeans v. State*, 59 App. 611, 129 S. W. 1129; *Blair v. State*, 60 App. 363, 132 S. W. 358; *Wyvlas v. State*, 64 App. 236, 142 S. W. 585; *Love v. State* (Cr. App.) 150 S. W. 920; *Duckett v. State* (Cr. App.) 150 S. W. 1177.

Evidence held to sustain conviction. *Yawn v. State*, 37 App. 205, 38 S. W. 785, 39 S. W. 105; *Edwards v. State*, 37 App. 242, 38 S. W. 996, 39 S. W. 368; *Dibrell v. State*, 3 App. 456; *Doyle v. State*, 5 App. 442; *Grimmett v. State*, 22 App. 36, 2 S. W. 631, 58 Am. Rep. 630; *Stout v. State*, *Id.* 339, 3 S. W. 231; *House v. State*, 9 App. 53; *Sanford v. State*, 12 App. 196; *Peterson v. State*, 14 App. 162; *Thomas v. State*, 16 App. 535; *Johnson v. State*, 17 App. 565; *Jones v. State*, 18 App. 485; *Moore v. State*, 20 App. 275; *Pless v. State*, 23 App. 73, 3 S. W. 576; *Stout v. State*, 22 App. 339, 3 S. W. 231; *Bourland v. State*, 49 App. 197, 93 S. W. 115; *White v. State*, 60 App. 559, 132 S. W. 790; *Ross v. State*, 60 App. 547, 132 S. W. 793; *Conger v. State*, 63 App. 312, 140 S. W. 1112; *Rogers v. State* (Cr. App.) 143 S. W. 631; *McWhirter v. State* (Cr. App.) 146 S. W. 189; *Fowler v. State* (Cr. App.) 148 S. W. 576; *Collins v. State* (Cr. App.) 148 S. W. 1065; *Love v. State* (Cr. App.) 150 S. W. 920; *Duckett v. State* (Cr. App.) 150 S. W. 1177; *Calyon v. State* (Cr. App.) 174 S. W. 591; *Allen v. State* (Cr. App.) 177 S. W. 88.

Evidence held insufficient where it did not show the intent. *Jones v. State*, 18 App. 485; *Thomas v. State*, 16 App. 535; *Robertson v. State*, 30 Tex. App. 498, 17 S. W. 1068.

Evidence held insufficient where it showed consent. *Moore v. State*, 20 App. 275.

A conviction for assault with intent to rape is not supported by evidence showing an attempt to rape by fraud. *Milton v. State*, 23 App. 204, 4 S. W. 574.

Where prosecutrix testified as to the number of times she was assaulted, and the manner thereof, without contradiction, and that she told her mother and brother of the first assault, which testimony both mother and brother denied, and the sheriff who arrested defendant testified to finding him in hiding, and that defendant asked what it took to constitute rape and made other incriminating remarks, and the testimony of prosecutrix was corroborated, the verdict of conviction will not be disturbed. *Shepard v. State*, 34 App. 35, 28 S. W. 816.

Evidence that defendant, while on horse-back, struck the prosecutrix with a whip, and made an insulting proposition to her, but did not get off the horse, though he might have done so, or use any other force, will not sustain a conviction of assault with intent to rape. *Mathews v. State*, 34 App. 479, 31 S. W. 381.

16. Charge.—See notes to C. C. P. art. 735.

The charge should define rape or its constituents. *Fulcher v. State*, 41 Tex. 233.

The charge should define an assault. *Hemanus v. State*, 7 App. 372.

The court should not instruct that when the assault has been proved, it rests with defendant to show accident or innocent intention. *Thomas v. State*, 16 App. 535; *Jones v. State*, 13 App. 1; *Curry v. State*, 4 App. 574.

Unless an issue of limitation of the offense be raised by the evidence, the charge may omit to instruct in regard thereto. Unlike the offense of rape, this offense is not barred until the lapse of three years after its commission. *Moore v. State*, 20 App. 275.

The court should instruct the jury that there must have existed in the mind of the defendant, at the time of the alleged assault, a specific intent to commit rape by force. *Burney v. State*, 21 App. 565, 1 S. W. 458; *McGee v. State*, Id. 670, 2 S. W. 890; *Irving v. State*, 9 App. 66.

The court should instruct the jury as to the character of the force necessary to constitute the crime. *Brown v. State*, 27 App. 330, 11 S. W. 412. *Shields v. State*, 32 App. 498, 23 S. W. 893.

If defendant is a minor, the court should instruct the jury that if they believed the accused assaulted the prosecutrix but did not intend to use the degree of force necessary to overcome resistance, they should find him guilty of simple assault. *Porter v. State*, 33 App. 385, 26 S. W. 626.

It was error to refuse to charge that if the jury did not believe that, under the circumstances, defendant intended to have carnal knowledge of the prosecutrix, notwithstanding her resistance, they might find defendant guilty of simple assault, but not of assault to rape. *Porter v. State*, 33 App. 385, 26 S. W. 626.

Where a man is prosecuted for an attempt to carnally know a child of tender years, that the effort to penetrate the private parts of the prosecutrix with his male organ is evidenced only by the irritation of the parts of the child, testified to by her mother and physicians, and by the fact that defendant communicated to her a venereal disease, does not entitle defendant to a charge on circumstantial evidence. *Allen v. State*, 36 App. 429, 37 S. W. 429.

It is error to charge that, as a matter of law, the uncorroborated testimony of a prosecutrix in a case of assault with intent to rape is sufficient to convict. *Cox v. State* (Cr. App.) 44 S. W. 157.

It is not error to fail to instruct that the prosecutrix must be shown to have resisted with all her power when the proof shows that her resistance was successful. *Barnett v. State*, 42 App. 302, 62 S. W. 766.

Refusal of instruction on proof required as to want of consent and on presumption as to consent held error in view of the evidence. *Perez v. State*, 48 App. 225, 87 S. W. 350.

In a prosecution for assault with intent to rape, where accused admitted his presence with the girl, there was no necessity for a charge on alibi. *Herbert v. State*, 49 App. 72, 90 S. W. 633.

In a prosecution for assault with intent to rape, it is not proper to prove more than one act, and where more than one act is proved without objection, it is the duty of the court to limit the consideration of the jury to one specific act. *Henderson v. State*, 49 App. 511, 93 S. W. 550.

In a prosecution for assault with intent to rape, where the court in defining assault added that the injury intended might be either bodily pain, constraint, or sense of shame, or other disagreeable emotion of the mind, this was error, unless the evidence suggested aggravated assault. *Henderson v. State*, 49 App. 511, 93 S. W. 550.

Where, on a trial for rape on a female 11 years of age, there was evidence indicating that the offense was committed by the consent of the prosecutrix and circumstances showing lack of penetration, an instruction on assault with intent to commit rape, that the injury intended might be either bodily pain, constraint, or sense of shame, or other disagreeable emotion of the mind, was not erroneous. *Taylor v. State*, 50 App. 362, 97 S. W. 94, 123 Am. St. Rep. 844.

Where, on a trial for rape on a female 11 years of age, the prosecutrix testified that accused raped her, and the evidence indicated that it was done with her consent, and circumstances showed a lack of penetration, it was proper to charge an assault with intent to rape. *Taylor v. State*, 50 App. 362, 97 S. W. 94, 123 Am. St. Rep. 844.

Where the jury might find from the evidence that the assault was made to recover a ring which defendant had given the prosecutrix, the court erred in refusing to charge that if the jury should so find, and the prosecutrix screamed only to prevent defendant getting possession of the ring, or if they should have a reasonable doubt as to such matters, it would be their duty to acquit defendant. *Freeman v. State*, 52 App. 500, 107 S. W. 1127.

Where there was evidence of acts of illicit intercourse between defendant and the prosecutrix, tending to show that the assault was made for the purpose of having intercourse with her with her consent, and evidence showing that the as-

sault was made only to secure from the prosecutrix a ring which defendant had previously given her, it was error to refuse to submit the issue of aggravated assault. *Freeman v. State*, 52 App. 500, 107 S. W. 1127.

It was error to charge that testimony of illicit intercourse between defendant and prosecutrix and of the latter's reputation for virtue was admitted, not in justification, but on the issues of the credibility of prosecutrix as a witness, and as to whether it was necessary that she should be forced to the embraces of defendant, since evidence impeaching the general reputation of a prosecutrix for chastity is always admissible, to raise a presumption of her consent, and as bearing upon defendant's intent. *Freeman v. State*, 52 App. 500, 107 S. W. 1127.

Where the indictment alleged assault by force, threats, and fraud, and the proof excluded any question of fraud, and presented mainly an assault to rape by force, held that a charge that rape is the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud, or the carnal knowledge of a woman so mentally diseased as to have no will to oppose the act, or the carnal knowledge of a female under the age of 15 years, while including matters having no relation to the offense charged in the indictment or the evidence adduced, was not prejudicial in view of the other instructions given. *Railsback v. State*, 53 App. 542, 110 S. W. 916.

Such charge is not objectionable by the omission of the word "will." *Conger v. State*, 63 App. 312, 140 S. W. 1112.

Charge held not objectionable as authorizing a conviction where the injury intended is merely constraint or a sense of shame. *Conger v. State*, 63 App. 312, 140 S. W. 1112.

An instruction that if defendant assaulted prosecutrix, then under the age of 15 years, by putting his hands and arms around her, and fondling her with the specific intent to have carnal knowledge of her, without defining the word "assault," fully presented the issues. *Collins v. State* (Cr. App.) 148 S. W. 1065.

Charge held to have correctly covered every phase of the case. *Duckett v. State* (Cr. App.) 150 S. W. 1177.

A request to charge that accused was not guilty unless the assault was made with specific intent to have carnal knowledge without consent, held covered by the charge given. *Blair v. State* (Cr. App.) 170 S. W. 779.

In a prosecution for assaulting a female under the age of 15 years with intent to rape, an instruction requiring the jury to find, to justify a conviction, that accused used the kind of force necessary to place prosecutrix in the position and attitude in which the act of sexual intercourse could have been performed with her, is properly refused. *Love v. State*, 150 S. W. 920.

In a prosecution for assault with intent to rape, where the evidence showed that after a struggle defendant abandoned his efforts, it was not error, after the court had charged on the theory of the state that such assault was made with the specific intent to commit rape by force and the defendant's theory traversing this contention, to refuse a special instruction that if the jury believed the defendant had formed the intention of committing the assault, but that before it was made he had abandoned the former intent, he would not be guilty. *Stewart v. State*, 133 S. W. 1051.

17. — **Grade of assault.**—See notes to Penal Code art. 1022, subd. 5, and C. C. P. art. 735.

The court should charge the law of aggravated assault when the evidence raises that issue. *McGee v. State*, 21 App. 670, 2 S. W. 890.

When there is evidence of violent and indecent familiarity with the person of the prosecutrix without her consent, the court should charge the law of aggravated assault. *Shields v. State*, 32 App. 498, 23 S. W. 893.

Prosecutrix testified that defendant requested her to have sexual intercourse with him, but she refused, and that he then threw her on the floor several times, and tried to tear her clothes. No marks of violence were shown to have been made on her, and she testified that she screamed only once or twice during the half an hour tussle, though several people lived near by. Held, that it was error to refuse to charge as to aggravated assault, where defendant denied any assault, since defendant may not have entertained the intent at the time to accomplish his purpose at all hazards. *McCullough v. State* (Cr. App.) 47 S. W. 990.

Where the testimony of prosecutrix showed that the unquestioned purpose of accused was to have carnal intercourse, while he denied that he made the attempt at all, no charge on aggravated assault was necessary. *Herbert v. State*, 49 App. 72, 90 S. W. 653.

The evidence raised the issue of aggravated assault and battery, requiring the court to charge thereon. *Taylor v. State*, 50 App. 362, 97 S. W. 94, 123 Am. St. Rep. 844.

One indicted for assault with intent to commit rape and convicted of aggravated assault cannot complain of the failure to require a finding as to the offense charged, where the issue of an aggravated assault was the only one submitted. *Halsell v. State*, 53 App. 510, 110 S. W. 441.

Art. 1030. [609] With intent to rob.—If any person shall assault another with the intent to commit the offense of robbery, he shall be punished by confinement in the penitentiary not less than two nor more than ten years. [Act Feb. 12, 1858, p. 495.]

Cited, *Evans v. State* (Cr. App.) 148 S. W. 573.

Robbery defined.—See arts. 1327 and 1328, post.

Intoxication as defense.—See art. 41 and notes.

Principals.—See notes under art. 74, ante.

Offense.—Where defendant, while walking in the evening with prosecutor and his companion, who were strangers to him, stepped out in front of them, presented a gun, and ordered them to "Halt! Throw up your hands!" and, on prosecutor and his companion taking flight, shot after them, such facts established an assault committed with the specific intent to rob. *Long v. State*, 47 App. 296, 83 S. W. 384.

Indictment.—Willson's Cr. Forms, 480, 481, 932.

It is not necessary to allege specifically that the assault was made with the intent to appropriate the property of the injured party to his own use. It is a sufficient allegation of intent to allege that the assault was made with "intent to rob." *Morris v. State*, 13 App. 65.

The indictment need not describe the property which defendant intended to take or allege that he intended to deprive the owner of some of the value thereof. *Crumes v. State*, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853.

The word "attempt" is more comprehensive than the word "intent," and when used in an indictment for assault with intent to rob, it sufficiently charges the intent. *Runnells v. State*, 34 App. 431, 30 S. W. 1065. See also *Atkinson v. State*, 34 App. 424, 30 S. W. 1064.

And further on indictment, see *Clark v. State*, 41 App. 641, 56 S. W. 621.

Evidence.—Testimony to the effect that witness had intrusted money and business to defendant, and that she would still be willing to trust him, is inadmissible. *Anglely v. State*, 35 App. 427, 34 S. W. 116.

Testimony of a witness that he saw, on the day the robbery was committed, two men answering the description of defendant and his co-defendant, in the vicinity of the robbery, is admissible. *Id.*

Two persons were charged in separate indictments for the same offense, and the evidence shows a peculiar track made by one; held, admissible against both. *Id.*

Also when it was shown that one of the parties had a red handkerchief, it was competent to show that the red handkerchief was found in defendant's co-defendant's pocket. *Id.*

Evidence that the assaulted party had no money is inadmissible unless defendant proposes to prove that he knew that the assaulted party had no money. *Id.*

Evidence by a police officer that he found a pistol in the street where the assault occurred the morning after the assault is admissible. *Wingate v. State* (Cr. App.) 152 S. W. 1078.

— **Sufficiency.**—Evidence held to sustain conviction. *Hernandez v. State*, 60 App. 382, 131 S. W. 1091; *Scott v. State*, 12 App. 31; *Williams v. State*, 37 App. 147, 38 S. W. 202; *Wingate v. State* (Cr. App.) 152 S. W. 1078; *Drysdale v. State*, 70 App. 273, 156 S. W. 685.

Evidence held insufficient, see *Robertson v. State*, 10 App. 602; *Sanders v. State*, 53 App. 613, 111 S. W. 157.

Charge.—Where defendant "held up" prosecutor and his companion with a gun in the evening, and, on their taking to flight, shot at them, he was not entitled to a charge on aggravated assault in a prosecution for assault with intent to rob. *Long v. State*, 47 App. 296, 83 S. W. 384.

Art. 1031. [610] In attempt at burglary.—If any person, in attempting to commit burglary, shall assault another, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [*Id.*, p. 171.]

Indictment.—Willson's Cr. Forms, 482.

Art. 1032. [611] Ingredients of the offense.—An assault with intent to commit any other offense is constituted by the existence of the facts which bring the offense within the definition of an assault, coupled with an intention to commit such other offense, as of maiming, murder, rape or robbery.

Offense.—One who tried to detach a shirt stud, but was prevented, held not guilty of assault with intent to rob. *Walters v. State*, 56 App. 10, 118 S. W. 543.

"Assault," defined. *Cromeans v. State*, 59 App. 611, 129 S. W. 1129.

An assault to commit another offense is an assault that is intended to be or is in its nature the procuring or instrumental means of accomplishing or carrying out the completed act. *Cromeans v. State*, 59 App. 611, 129 S. W. 1129.

Assault with intent to rape female under age of consent defined. *Cromeans v. State*, 59 App. 611, 129 S. W. 1129.

Indictment.—The proper construction, with reference to an indictment, of the preceding article is, that it is only necessary in charging an assault with intent to commit some other offense, to allege an assault, coupled with an intention to commit such other offense, naming it, without alleging the constituent elements of such other offense. Wherever the offense is defined, as is the case in murder, rape, robbery, etc., in charging assaults with intent to commit these offenses, it is only necessary to charge the assault, and the intent to commit the offense, naming such offense. *Morris v. State*, 13 App. 65; *Martin v. State*, 40 Tex. 19; *Bittick v. State*, 40 Tex. 117; *Long v. State*, 10 App. 186; *State v. Croft*, 15 Tex. 575; *Lights v. State*, 21 App. 308, 17 S. W. 428. But see *Hewitt v. State*, 15 App. 80.

CHAPTER FOUR

OF MAIMING, DISFIGURING AND CASTRATION

Art.	Art.
1033. "Maiming" defined.	1036. Punishment.
1034. Punishment.	1037. "Castration" defined.
1035. "Disfiguring" defined.	1038. Punishment.

Article 1033. [612] "Maiming" defined.—To maim is to wilfully and maliciously cut off or otherwise deprive a person of the hand, arm, finger, toe, foot, leg, nose or ear; to put out an eye or in any way to deprive a person of any other member of his body.

Offense.—A willful act is one committed with an evil intent, with legal malice, without reasonable ground for believing the act to be lawful, and without legal justification. A malicious act is one committed in a state of mind which shows a heart regardless of social duty, and fatally bent on mischief; a wrongful act, intentionally done without legal justification or excuse. *Bowers v. State*, 24 App. 542, 7 S. W. 247, 5 Am. St. Rep. 901; *Key v. State*, 71 App. 642, 161 S. W. 121.

The under lip is a member of the body, but not being specifically designated as such in the statute, its being so is a question of fact for the jury, under proper instruction, and must not be assumed in the charge. Biting off a portion of it is not necessarily maiming, but the jury should determine whether it was so injured as to substantially deprive the party of the lip at the time. If such an injury was inflicted the offense of maiming is complete, though the member was put back to its proper place and afterward grew there. *Slattery v. State*, 41 Tex. 619.

To constitute the offense of maiming, the act must be both willful and malicious. *Bowers v. State*, 24 App. 542, 7 S. W. 247, 5 Am. St. Rep. 901.

Biting off a portion of a member of a person's body does not necessarily constitute maiming. In all such cases the jury should be left, under proper instructions, to determine whether or not the injury was such as substantially to deprive the injured party of the member. *Bowers v. State*, 24 App. 542, 7 S. W. 247, 5 Am. St. Rep. 901.

A front tooth is a "member of the body." When the evidence describes the tooth as a "corner tooth," a question of fact for the determination of the jury is raised, i. e., whether the tooth was or was not a "front tooth." *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488.

"Maiming" is to deprive a person of some member of his body. *Cooper v. State*, 60 App. 411, 132 S. W. 355.

The injury must be done wilfully and maliciously, and, if it arises from a sudden attack without premeditated design, the offense is not maiming. *Key v. State*, 71 App. 642, 161 S. W. 121.

The whole member need not be detached, but a severance of only a small part, which does not disfigure the person and can only be discovered by close examination, is not an offense. *Key v. State*, 71 App. 642, 161 S. W. 121.

If a maiming occurred under the immediate influence of sudden passion aroused by adequate cause, such as an assault, the issue of simple assault by accused would not be in the case, though accused only intended to commit a simple assault. *Key v. State*, 71 App. 642, 161 S. W. 121.

Indictment.—Willson's Cr. Forms, 483.

An indictment which, otherwise correct, charges the defendant with wilfully and maliciously shooting off the toe of another, is sufficient to charge this offense. Indictment for this offense will not sustain a conviction for assault to murder. *Davis v. State*, 22 App. 45, 2 S. W. 630.

A charge of maiming and disfiguring carries with it a charge of assault with intent to maim and disfigure. *Pool v. State*, 59 App. 482, 129 S. W. 1135.

Evidence.—Evidence held sufficient to support conviction. *Davis v. State*, 22 App. 45, 2 S. W. 630.

See the statement of the case for evidence which, tending to show that the act of the accused was neither wilfully nor maliciously done within the legal significance of those terms, was erroneously excluded by the trial court, such evidence being competent upon the question of intent. *Bowers v. State*, 24 App. 542, 7 S. W. 247, 5 Am. St. Rep. 901.

Charge.—The charge should explain the terms "wilfully" and "maliciously." *Davis v. State*, 22 App. 45, 2 S. W. 630; *Bowers v. State*, 24 App. 542, 7 S. W. 247, 5 Am. St. Rep. 901.

An instruction assuming that the under lip was a member of the body and determining as a matter of law that biting off only a portion of the under lip would be tantamount to biting off the whole of the under lip, held erroneous as invading the province of the jury. *Slattery v. State*, 41 Tex. 619.

Art. 1034. [613] Punishment.—If any person shall commit the offense of maiming, he shall be punished by confinement in the penitentiary not less than two nor more than ten years. [Act Feb. 12, 1858, p. 171.]

Art. 1035. [614] "Disfiguring" defined.—To disfigure is to wilfully and maliciously place any mark, by means of a knife or other instrument, upon the face or other part of the person.

Offense.—The word "instrument" includes any means by which one may disfigure, such as carbolic acid. *Lee v. State* (Cr. App.) 148 S. W. 567, 40 L. R. A. (N. S.) 1132.

Indictment.—Willson's Cr. Forms, 484.

A charge of maiming and disfiguring carries with it a charge of assault with intent to maim and disfigure. *Pool v. State*, 59 App. 482, 129 S. W. 1135.

Evidence.—Evidence held to justify a conviction of disfiguring by throwing carbolic acid. *Lee v. State* (Cr. App.) 148 S. W. 567, 40 L. R. A. (N. S.) 1132.

Art. 1036. [615] Punishment.—If any person shall disfigure another, he shall be punished by confinement in the penitentiary not less than two nor more than five years, or by fine not exceeding two thousand dollars.

Indictment.—Willson's Cr. Forms, 484.

Art. 1037. [616] "Castration" defined.—To castrate is to wilfully and maliciously deprive any person of either or both, or any part of either or both of the testicles.

Indictment.—Willson's Cr. Forms, 485.

Art. 1038. [617] Punishment.—If any person shall commit the offense of castration, he shall be punished by confinement in the penitentiary not less than five nor more than fifteen years.

Indictment.—Willson's Cr. Forms, 485.

CHAPTER FOUR A

HAZING

Art.	Art.
1038a. Offense defined.	1038d. Penalty imposed on teachers and
1038b. Teachers and school officers shall not encourage or permit hazing.	school officers.
	1038e. Other laws not affected.
1038c. Penalty imposed on students.	1038f. Repeal.

Article 1038a. Offense defined.—That it shall be unlawful for any student of the University of Texas, of the A. & M. College of Texas, of any normal school of Texas, or of any other State educational institution of this State, to engage in what is commonly known and recognized as hazing, or to encourage, aid or assist any other person thus offending.

For the purpose of making plain what is meant herein by "hazing," same is defined as follows:

(a) Any willful act by any one student alone or acting with others, directed against any other student of such educational institution, done for the purpose of submitting such student made the subject of the attack committed, to indignity or humiliation, without his consent.

(b) Any willful act of any one student alone, or acting with others, directed against any other student of such educational institution, done for the purpose of intimidating such student attacked by threatening such student with social or other ostracism, or of submitting such student to ignominy, shame, or disgrace among his fellow students, and acts calculated to produce such results.

(c) Any willful act of any one student alone, or acting with others, directed against any other student of such educational institution, done for the purpose of humbling, or that is reasonably calculated to humble the pride, stifle the ambition, or blight the courage of such student attacked, or to discourage any such student from longer remaining in such educational institution or to reasonably cause him to leave such institution rather than submit to such acts.

(d) Any willful act by any one student alone, or acting with oth-

ers, in striking, beating, bruising or maiming; or seriously offering, threatening, or attempting to strike, beat, bruise, or maim, or to do or seriously offer, threaten, or attempt to do physical violence to any student of any such educational institution, or any assault upon any such students made for the purpose of committing any of the acts, or producing any of the results to such student as defined in subdivisions (a), (b), or (c) of this Section. [Act 1913, p. 239, ch. 117, § 1.]

Art. 1038b. Teachers and school officers shall not encourage or permit hazing.—It shall be unlawful for any teacher, instructor, member of any faculty, or any officer or director, or a member of any governing board of any of such educational institutions to knowingly permit, encourage, aid, or assist any student in committing the offense of hazing, or to willfully acquiesce in the commission of such offense, or to fail to promptly report his knowledge or any reasonable information within his knowledge of the presence and practice of having [hazing] in the institution in which he may be serving, to the executive head or governing board of such institution, and any act of omission or commission shall be deemed “hazing” under the provisions of this Act. [Id., § 2.]

Art. 1038c. Penalty imposed on students.—Any student of any of the said State educational institutions of this State who shall commit the offense of hazing, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine of not less than twenty-five dollars nor more than two hundred and fifty dollars, or shall be confined in the county jail for not less than ten days nor more than three months, or by both such fine and imprisonment. [Id., § 3.]

Art. 1038d. Penalty imposed on teachers and school officers.—Any teacher, instructor, or member of any faculty, or officer or director of any such educational institution who shall commit the offense of hazing shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars or not more than five hundred dollars, or shall be imprisoned in the county jail for a period of not less than thirty days or not more than six months or by both such fine and imprisonment, and in addition thereto, shall be immediately discharged and removed from his then position or office in such institution, and shall thereafter be ineligible to reinstatement or re-employment as teacher, instructor, member of faculty, officer, or director in any such State Educational institution for a period of three years. [Id., § 4.]

Art. 1038e. Other laws not affected.—It is especially provided in this Act that nothing herein shall be construed as in any manner affecting or repealing any of the laws of this State respecting homicide, or murder of any degree, manslaughter, assault with intent to murder, or aggravated assault. [Id., § 5.]

Art. 1038f. Repeal.—That all laws and parts of laws in conflict herewith, as hereinafter [hereinbefore] especially provided, be and the same are hereby in all things repealed. [Id., § 6.]

CHAPTER FIVE

FALSE IMPRISONMENT

<p>Art. 1039. “False imprisonment” defined. 1040. Assault of violence, same as in assault and battery. 1041. What impediment necessary. 1042. Threat, effect of. 1043. What detention is not.</p>	<p>Art. 1044. Punishment. 1045. Detention after discharge on habeas corpus. 1046. Refusal to allow consultation with counsel.</p>
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Article 1039. [618] "False imprisonment" defined.—False imprisonment is the wilfull detention of another against his consent, and where it is not expressly authorized by law, whether such detention be effected by an assault, by actual violence to the person, by threats or by any other means which restrains the party so detained from removing from one place to another as he may see proper.

Arrest without warrant.—See C. C. P., arts. 259-264.

Offense.—It is a sufficient imprisonment to stop a man from going in any direction he may think proper, and it is not necessary that he be detained in any particular spot, so he is prevented from moving from place to place, or in the direction he wishes to go. *Woods v. State*, 3 App. 204; *Harkins v. State*, 6 App. 452; *Herring v. State*, 3 App. 108; *Maner v. State*, 8 App. 361; *Staples v. State*, 14 App. 136.

The posse comitatus is protected by the officer's warrant, although he is not personally present, and the guilt or innocence of the party arrested is immaterial; but the rule is different with a mere volunteer. *Kirbie v. State*, 5 App. 60.

The gravaman of this offense consists in the wilfull detention of another against his consent, and where it is not expressly authorized by law. *Maner v. State*, 8 App. 361. It is the wilfull and unauthorized detention of another against his consent, whether such detention be accomplished by actual violence, or by force of threats. *Herring v. State*, 3 App. 108; *Woods v. State*, Id. 204. See, also, *Johnson v. State* (Cr. App.) 167 S. W. 733; *Staples v. State*, 14 App. 136.

Unavoidable delay of a peace officer in taking bail for a prisoner is not false imprisonment. *Cargill v. State*, 8 App. 431.

Nor is a reasonable delay, and confinement in a calaboose when necessary. *Beville v. State*, 16 App. 70.

Indictment.—Willson's Cr. Forms, 486-488.

See, also, C. C. P., art. 470 and notes.

The indictment must allege the detention to have been without lawful authority, and the conclusion "contrary to the statute," etc., will not supply the omission of such allegation. *Redfield v. State*, 24 Tex. 133.

Indictment charging false imprisonment by means of threats held good. *Herring v. State*, 3 App. 108.

It must allege the mode in which the detention was effected,—as by actual violence, assault, threats, or the like,—but need not further particularize it. And if threats be the mode alleged, it need not be averred that they were seriously made, or of such a character as to operate on the person threatened, or to inspire him with a just fear of injury to his person, reputation, or property. *Maner v. State*, 8 App. 361; *Staples v. State*, 14 App. 136.

Evidence.—The state makes a prima facie case by proving the imprisonment for imprisonment is presumed to be unlawful. It devolves upon the defendant to show that it was lawful. *Kirbie v. State*, 5 App. 60.

The decision just cited is expressly qualified in a subsequent case, where it is held that the defendant, in mitigation of the penalty, was entitled to prove that he arrested the injured party, believing, and having reason to believe, that such party was guilty of crime; and that legal proceedings for crime had been instituted against him, and the nature of such proceedings. This evidence was not admissible in justification, but in mitigation of the offense. C. C. P. arts. 259 to 264 inclusive, prescribes all the circumstances which justify an arrest without warrant, and under other circumstances than these an arrest without warrant is illegal. The fact that the defendant, when he made the arrest, was accompanied by, and acted in concert with an officer, in such case, affords no justification. *Staples v. State*, 14 App. 136.

Evidence held insufficient. *Boyd v. State*, 11 App. 80; *McClure v. State*, 26 App. 102, 9 S. W. 353.

When the alleged detention was by means of threats, it need not be proved that the threats were express, or that the injured party made any effort to escape the detention. *Herring v. State*, 3 App. 108; *Woods v. State*, Id. 204.

Evidence held to support conviction. *Herring v. State*, 3 App. 108; *Woods v. State*, Id. 204; *Harkins v. State*, 6 App. 452; *Giroux v. State*, 40 Tex. 97.

Evidence to prove menaces made by the injured party while he was detained by the accused, is not admissible. *Harkins v. State*, 6 App. 452.

The authority to make an arrest need not be shown to be express. If, from all the circumstances, the law would authorize the arrest, by a fair construction, defendant would not be guilty, because the power was not expressly given. *Beville v. State*, 16 App. 70.

As to evidence, see, also, *Walker v. State*, 45 App. 443, 8 S. W. 647; *Smythe v. State*, 51 App. 408, 103 S. W. 899.

Charge.—It was error to instruct the jury that the punishment must be both fine and imprisonment. *Redfield v. State*, 24 Tex. 133.

For a correct charge as to what constitutes detention, see *Woods v. State*, 3 App. 204.

For a correct charge as to the rights of a person summoned by an officer to assist in an arrest, see *Kirbie v. State*, 5 App. 60.

It was held error to charge that an officer's authority, in order to justify an arrest, must be express. *Beville v. State*, 16 App. 70.

For a state of facts on which the court should have given a requested charge to the effect that where the alleged injured party was attempting to release by force a person whom the defendant, as city marshal, had arrested for being drunk

on the streets and disturbing the peace, the defendant had the right, without warrant, to arrest such alleged injured party, also, and confine him in jail. *Moseley v. State*, 23 App. 409, 4 S. W. 907.

For erroneous refusal of charge, see *McClure v. State*, 26 App. 102, 9 S. W. 353.

Art. 1040. [619] Assault of violence same as in assault and battery.—The assault of violence may be such as is spoken of in defining the offense of assault and battery.

Art. 1041. [620] What impediment necessary.—The impediment must be such as is in its nature calculated to detain the person and from which he can not by ordinary means relieve himself. [P. C., 514.]

Art. 1042. [621] Threat, effect of.—The threat must be such as is calculated to operate upon the person threatened and inspire a just fear of some injury to his person, reputation or property, or to the person, reputation or property of another; and the jury are to consider the age, sex, condition, disposition or health of the person threatened in determining whether the threat was sufficient to intimidate and prevent such person from moving beyond the bounds in which he was detained.

Indictment.—Willson's Cr. Forms, 487.

Art. 1043. [622] What detention is not.—It is not an offense to detain a person in the cases and for the object mentioned in article 1014 as justifying the use of force, but, whenever it is assumed as a justification that such circumstances existed, it must be shown also that the detention was necessary to effect any of the objects set forth in said article.

Justification for arrest.—See notes under art. 1039, ante.

Arrest and detention for theft held not justified. *S. H. Kress & Co. v. Lawrence* (Cr. App.) 162 S. W. 448.

Art. 1044. [623] Punishment.—Any person who shall be guilty of the offense of false imprisonment shall be fined not exceeding five hundred dollars, and may be confined in the county jail not exceeding one year.

Mitigation of punishment.—Evidence that defendant made the illegal arrest because the person arrested had stabbed another recently, held admissible in mitigation of penalty. *Staples v. State*, 14 Tex. App. 136.

Discretion of jury.—An instruction requiring the jury to inflict punishment of both fine and imprisonment if they found defendant guilty of false imprisonment, held erroneous; the question whether they will impose imprisonment or not resting within their discretion. *Redfield v. State*, 24 Tex. 133.

Art. 1045. [624] Detention after discharge on habeas corpus.—If any officer or other person shall hold or detain in any manner any one who has been ordered to be discharged by any court or judge, upon the hearing of a writ of habeas corpus, he shall suffer double the punishment prescribed in the preceding article.

Art. 1046. [625] Refusal to allow consultation with counsel.—If any officer or other person having the custody of a prisoner in this state shall wilfully prevent such prisoner from consulting or communicating with counsel, or from obtaining the advice or services of counsel in the protection or prosecution of his legal rights, he shall be punished by imprisonment in the county jail not less than sixty days nor more than six months, and by fine not exceeding one thousand dollars. [Act Nov. 15, 1864, p. 15.]

Consultation with counsel.—In this case it was held that the refusal to allow counsel of one charged with incest to interrogate the girl was violative of the right to confer with counsel. *Hamilton v. State* (Cr. App.) 153 S. W. 331.

Indictment.—Willson's Cr. Forms, 488, 489.

CHAPTER SIX
OFFENSES AGAINST MINORS

Art.		Art.	
1047.	Enticing minor from legal custody.	1050c.	Same; permitting inspection of premises.
1048.	Sell, etc., pistol, dirk, etc., to minor.	1050d.	Repeal.
1049.	Sell, etc., cigarette or tobacco to minor.	1051, 1052.	[Repealed.]
1050.	Employment in dangerous or immoral occupation.	1053.	Permitting minor to remain in pool room, etc.
1050a.	Same; permitting inspection of premises.	1054.	Selling or giving intoxicating liquor to minor.
1050b.	Employment in quarries or mines.	1055.	Encouraging, contributing, etc., to the delinquency or dependency of child.

Article 1047. [625a] Enticing minors from legal custody.—Any person in this state who shall knowingly entice or decoy any minor in the state away from the custody of his parent or guardian, or person standing in the stead of such parent or guardian, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by fine not less than twenty-five nor more than two hundred dollars. In all cases where charitable and benevolent institutions have established homes for dependent orphans of their deceased members, and the person legally entitled to the guardianship of such orphans surrenders them to such homes for support, maintenance and education, such institutions, under their agencies, rules and regulations, shall have and exercise over such orphans all the rights of natural guardians, as standing in the place of their parents. [Acts of 1893, p. 114.]

Offense.—In order to constitute this offense it is necessary that the minor be knowingly decoyed or enticed from the parent. *Cummings v. State*, 36 App. 398, 37 S. W. 435.

The evidence showed that the minor, a boy nineteen years old, had been hiring out and working for himself for several years, and he testified that he left home of his own accord and was not enticed or persuaded by defendant; held, the evidence was entirely insufficient to support the verdict. *Id.*

Giving moral and active assent to the minor leaving home is not sufficient. *Cockrell v. State*, 71 App. 543, 160 S. W. 343, 48 L. R. A. (N. S.) 1001.

Indictment.—Willson's Cr. Forms, 490.

Evidence.—Evidence held insufficient to support conviction. *Cockrell v. State*, 71 App. 543, 160 S. W. 343, 48 L. R. A. (N. S.) 1001.

Art. 1048. Sell, etc., pistol, dirk, etc., to minor.—If any person in this state shall knowingly sell, give or barter, or cause to be sold, given or bartered, to any minor, any pistol, dirk, dagger, slung-shot, sword-cane, spear or knuckles made of any metal or hard substance, bowie knife or any other knife manufactured or sold for the purpose of offense or defense, without the written consent of the parent or guardian of such minor, or of some one standing in lieu thereof, he shall be punished by fine of not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than ten nor more than thirty days, or by both such fine and imprisonment. And during the time of such imprisonment such offender may be put to work upon any public work in the county in which such offense is committed. [Act 1897, p. 221.]

Indictment.—Willson's Cr. Forms, 245.

Art. 1049. Sell, etc., cigarette or tobacco to minor.—Any person who shall sell, give or barter, or cause to be sold, given or bartered, to any person under the age of sixteen years, or knowingly sell to any other person for delivering to such minor, without the written consent of the parent or guardian of such minor, any cigarette or tobacco in any of its forms, shall be fined not less than ten nor more than one hundred dollars. [Act 1899, p. 237.]

Indictment.—Willson's Cr. Forms, 313.

Art. 1050. Employment in dangerous or immoral occupations.—Any person, or any agent, or any employé of any person, firm or corporation who shall hereafter employ any child under the age of fifteen years to labor in or about any manufacturing or other establishment using dangerous machinery, or about the machinery in any mill or factory, or in any distillery, brewery, or to labor in any capacity in the manufacture of goods for immoral purposes, or where their health may be impaired or morals debased, or shall send any such child to any disorderly house, bawdy house, or assignation house, or having the control of such child, shall permit him or her to go to any such house, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty dollars nor more than two hundred dollars, and each day the provisions of this Act are violated shall constitute a separate offense. [Act 1903, p. 40, ch. 28, repealed; Act 1911, p. 75, ch. 46, § 1, superseding art. 1050, revised Pen. Code.]

Indictment.—Willson's Cr. Forms, 331.

Art. 1050a. Same; Permitting inspection of premises.—Such person, firm or corporation, or any agent thereof, shall give free access at all times to the Commissioner of Labor Statistics of the State of Texas, and his deputies, for the inspection of their premises and of the methods employed, to insure compliance with the provisions of the foregoing Section. [Act 1911, p. 76, ch. 46, § 1a.]

Art. 1050b. Employment in quarries or mines.—Any person, agent, or any employé of any person, firm or corporation, who shall hereafter employ any child under the age of 17 years to labor in or about any quarry or mine shall be punished as provided for in Section 1 of this Act [art. 1050]. [Id., § 2.]

Art. 1050c. Same; permitting inspection of premises.—Such person, firm or corporation, or any agent thereof, shall give, free access at all time to the Commissioner of Labor Statistics of the State of Texas, and his deputies, for the inspection of their premises and of the methods employed, to insure compliance with the provisions of the foregoing Section [art. 1050b]. [Id., § 2a.]

Art. 1050d. Repeal.—Chapter 28 of the General Laws of the Twenty-eighth Legislature, Regular Session, being "An Act to regulate the employment of children in factories, mills, mines, breweries, manufacturing establishments and other establishments using machinery, and to provide penalties for the violation of the same," be and the same is hereby, expressly repealed, and any and all laws and parts of laws in conflict with this Act, be and the same are hereby repealed. [Id., § 3.]

Arts. 1051, 1052. [Repealed. See arts. 1050–1050d].

Cited, *Ætna Life Ins. Co. v. Tyler Box Lumber Mfg. Co.* (Civ. App.) 149 S. W. 233.

Indictment.—Willson's Cr. Forms, 332, 333.

Art. 1053. Permitting minor to remain in pool room, etc.—If any owner, lessee or manager of any billiard hall, pool hall, ten pin alley or bowling alley, or any employé therein, whether intoxicating liquors are sold in such place or not, shall permit any person under the age of twenty-one years to enter such place of business and remain therein for any length of time, without the consent of the parent of such minor, or some one standing in their place and stead, or shall permit any person under twenty-one years of age to play billiards or pool, or roll on any ten pin or bowling alley in such place of business without the consent of the parent of such minor, or some one standing in their place and stead, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined

in any sum not less than twenty dollars nor more than one hundred dollars. [Act 1897, ch. 154, § 1; Act 1905, p. 105.]

Offense.—One is guilty under this law if he permits a minor to play pool in premises which he has rented, whether he knows that he is a minor or not. *Rainbolt v. State*, 49 App. 427, 93 S. W. 737.

Indictment.—Willson's Cr. Forms, 300-303.

Evidence.—Accused has a right to show as a defense that he acted in good faith and on a mistake of fact as to the parent's consent. *Simpson v. State*, 58 App. 253, 125 S. W. 398.

Evidence held to sustain a conviction. *Stark v. State*, 71 App. 560, 160 S. W. 454.

Art. 1054. Selling or giving intoxicating liquor to minor.—Any person who shall knowingly sell or give or deliver, or cause to be sold, given or delivered, or be in any way interested in the sale, gift or delivery of any spirituous, vinous, malt or intoxicating liquors to any person under the age of twenty-one years without the written consent of the parent or guardian of such person who is under the age of twenty-one years, shall be guilty of a misdemeanor, and shall be fined therefor not less than twenty-five nor more than one hundred dollars; and any person who is agent for or employed by any express company or other common carrier, or who, as agent for or employé of any other person, firm or corporation, delivers or causes to be delivered any spirituous, vinous or intoxicating liquors to any other person under the age of twenty-one years, whether consigned to such person or some other person, without the written consent of the parent or guardian of such minor or person under the age of twenty-one years, shall be guilty of a misdemeanor, and shall be punished, upon conviction therefor, by a fine of not less than twenty-five nor more than one hundred dollars. [Act 1909, p. 119.]

Explanatory.—The revisers of the Penal Code, when they inserted Acts 1909, p. 119, and expanded the language so as to include "sales" in addition to "gifts" and "deliveries" of liquor, seem to have overlooked the later act passed at the first extra session of the 1909 legislature (Acts 1909, p. 307, § 19). This later act affixes a different penalty to the act of a retail liquor dealer in selling, giving, or delivering intoxicating liquor to a minor. The later act was included in the revision as art. 622, ante. The revisers again carried Acts 1909, p. 119, into the Penal Code as art. 593, but in its original form.

Offense.—This article applies to all persons other than licensed retail liquor dealers and express companies and common carriers. Art. 593 applies to express companies and carriers, and art. 622 applies to retail liquor dealers. *Talley v. State* (Cr. App.) 147 S. W. 255.

It is unlawful to give a minor intoxicating liquor in local option territory, as well as elsewhere, without the parent's consent. *Hogan v. State* (Cr. App.) 147 S. W. 601.

The sale is not made "knowingly" where the minor has the appearance of a man of age, and represents himself as being over 21. *Williams v. State* (Cr. App.) 145 S. W. 612.

Indictment.—Willson's Cr. Forms, 310.

Finding defendant guilty of an offense different from that for which he had been indicted is error. *Williams v. State* (Cr. App.) 145 S. W. 612.

Indictment held sufficient. *Andrada v. State* (Cr. App.) 152 S. W. 910.

Evidence.—Knowledge of minority may be proved by circumstantial evidence. *Hogan v. State* (Cr. App.) 147 S. W. 601.

Evidence held to sustain conviction. *Hogan v. State* (Cr. App.) 147 S. W. 601.

Testimony of minor as to the sales is admissible. *Andrada v. State* (Cr. App.) 152 S. W. 910.

Charge.—For charge held to go beyond information, see *Walker v. State*, 57 App. 172, 122 S. W. 395.

Art. 1055. Encouraging, contributing, etc., to the delinquency or dependency of child.—In all cases where any child shall be a "delinquent child" or a "neglected or dependent child," as defined in the statutes of this state, the parent or parents, legal guardian or persons having the custody of such child, or any person responsible for, or who, by any act, encourages, causes or contributes to the delinquency or dependency of such child, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not to exceed one thousand dollars, or by imprisonment in the county jail for any period not exceeding one

year, or by both such fine and imprisonment. The court may impose conditions on any person found guilty under this law, and, so long as such person shall comply therewith to the satisfaction of the court, the judgment imposed may be suspended. [Act 1907, p. 209.]

Habeas corpus.—The statute for proceeding against infants as delinquent children does not create a criminal offense, so that a judgment on a trial under it is not appealable, but any remedy is by habeas corpus. *Mills v. State* (Cr. App.) 177 S. W. 492.

CHAPTER SEVEN

OF KIDNAPING AND ABDUCTION

Art.	Art.
1056. "Kidnaping" defined.	1059. "Abduction" defined.
1057. Punishment.	1060. Of female under fourteen.
1058. If person kidnaped be actually removed.	1061. Offense complete, when.
	1062. Punishment.

Article 1056. [626] "Kidnaping" defined.—When any person is falsely imprisoned for the purpose of being removed from the state, or if a minor under the age of seventeen years, for the purpose of being concealed or taken from the lawful possession of a parent or guardian, such false imprisonment is "kidnaping." If the person kidnaped be under the age of fifteen years, it is not necessary that there should be force in order to constitute the offense of kidnaping. [Act Feb. 12, 1858, pp. 171-2.]

Offense.—When defendant took female under mistake as to her age, and she went with him willingly, there is no offense. *Mason v. State*, 29 App. 24, 14 S. W. 71. There must be a wilful detention of a person, without such person's consent, and without authority of law. *Castillo v. State*, 29 App. 127, 14 S. W. 1011.

Where female goes with defendant of her own accord, and testimony shows defendant believed her to be over seventeen years old, it is neither kidnaping nor abduction. *Mason v. State*, 29 App. 24, 14 S. W. 71; *Castillo v. State*, 29 App. 127, 14 S. W. 1011.

To constitute the offense of "kidnaping," the detention must be against the consent of the person detained, and the fact that the statute provides that, if the person kidnaped is a female under 15 years of age, force is not an essential element of the offense, does not dispense with her non-consent. *Castillo v. State*, 29 App. 127, 14 S. W. 1011; *Olivarez v. Same* (App.) 14 S. W. 1012.

— **At common law.**—Kidnaping as defined at common law is the forcible abduction and conveying away of a man, woman or child from their own country and sending them to another. *Click v. State*, 3 Tex. 282.

To constitute the crime of kidnaping at common law, it was essential that the asportation or conveying away be against the will and without the consent of the party injured and without any lawful warrant or authority therefor. *Click v. State*, 3 Tex. 282.

Indictment.—Willson's Cr. Forms, 491, 492.

See, also, C. C. P. art. 470, and notes.

As to indictment for kidnaping at common law, see *Click v. State*, 3 Tex. 282.

Evidence.—The prosecuting witness testified that she was only 13, and under the prescribed age, at the time of the alleged offense; but it was shown that she told defendant before the alleged offense that she was 18, and above the required age, and that she had given birth to a child. All the other evidence tended strongly to show that she was a well-developed young woman at the time in question. Held that, the evidence being clear that she consented to go with defendant, a conviction could not be sustained. *Mason v. State*, 29 App. 24, 14 S. W. 71.

Evidence that defendant delivered the person arrested to soldiers, who placed him in jail, is admissible. *Nunuz v. State*, 70 App. 481, 156 S. W. 933.

A witness may state that he saw defendants when they had the person in charge, though the witness did not see the actual capture. *Nunuz v. State*, 70 App. 481, 156 S. W. 933.

Prosecution of persons wrongfully brought into state.—See notes to C. C. P. art. 1101.

Art. 1057. [627] Punishment.—The punishment for kidnaping shall be imprisonment in the penitentiary not less than two nor more than five years, or fine not exceeding two thousand dollars.

Art. 1058. [628] If person kidnaped be actually removed.—If the person so falsely imprisoned be actually removed out of the state, the punishment shall be imprisonment in the penitentiary not less than two nor more than ten years.

Indictment.—Willson's Cr. Forms, 491.

Art. 1059. [629] "Abduction" defined.—"Abduction" is the false imprisonment of a woman with intent to force her into a marriage or for the purpose of prostitution.

Indictment.—Willson's Cr. Forms, 493-495.

Art. 1060. [630] Of female under fourteen.—If a female under the age of fourteen be taken for the purpose of marriage or prostitution from her parent, guardian or other person having the legal charge of her, it is abduction, whether she consent or not, and although a marriage afterward take place between the parties.

Offense.—The offense is committed if the man takes a girl under 14 from her parents to have intercourse with her individually. *Lopez v. State*, 70 App. 71, 156 S. W. 217.

And the offense is committed though the girl is merely taken from her parents without having intercourse with her. *Lopez v. State*, 70 App. 71, 156 S. W. 217.

A girl under fourteen could not be an accomplice. *Mason v. State*, 29 App. 24, 14 S. W. 71.

If the person kidnapped be a female under the age of 15 years, force is not necessary to abduction. *Castillo v. State*, 29 App. 127, 14 S. W. 1011.

Indictment.—Willson's Cr. Forms, 493-495.

Evidence.—Evidence held insufficient to warrant a finding that the girl was under 14 at the time of the abduction. *Lopez v. State*, 70 App. 71, 156 S. W. 217.

Art. 1061. [631] Offense complete, when.—The offense of abduction is complete if the female be detained as long as twelve hours, though she may afterwards be relieved from such detention without marriage or prostitution.

Indictment.—Willson's Cr. Forms, 493-495.

Art. 1062. [632] Punishment.—Any person who shall be guilty of abduction shall be punished by fine not exceeding two thousand dollars. If, by reason of such abduction, a woman be forced into marriage, the punishment shall be confinement in the penitentiary not less than two nor more than five years; and, if by reason of such abduction, a woman be prostituted, the punishment shall be confinement in the penitentiary not less than three nor more than twenty years. [Act Feb. 12, 1858, p. 172.]

Indictment.—Willson's Cr. Forms, 493, 494.

CHAPTER EIGHT

RAPE

Art.		Art.	
1063.	"Rape" defined.	1068.	Defendant must be over fourteen.
1064.	Definition of "force."	1069.	Punishment.
1065.	What threat sufficient.	1070.	Conviction may be had for attempt.
1066.	"Fraud" defined.		
1067.	Penetration only need be proved.		

Article 1063. [633] "Rape" defined.—Rape is the carnal knowledge of a woman without her consent, obtained by force, threats or fraud, or the carnal knowledge of a woman other than the wife of the person having such carnal knowledge with or without consent, and with or without use of force, threats or fraud, such woman being so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, the person having carnal knowledge of her knowing her to be so mentally diseased; or the carnal knowledge of a female under the age of fifteen years, other than the wife of the person, with or without her consent, and with or without the use or force, threats or fraud. [Amended by Act April 13, 1891, p. 96; amend. 1895, p. 79.]

Cited, *Murff v. State* (Cr. App.) 172 S. W. 238.

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| 1. Validity of law. | 5. — Female under age of consent. |
| 2. Offense. | 6. — Female as accomplice. |
| 3. — Force. | 7. Limitations. |
| 4. — Capacity to consent. | 8. Indictment. |

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| 9. — Female under age of consent. | 27. — Documentary evidence and best and secondary evidence. |
| 10. — Fraud. | 28. — Articles connected with commission of offense and physical conditions about locus in quo. |
| 11. — Joinder of counts and election between counts. | 29. — Expert testimony. |
| 12. — Issues and proof. | 30. — Confessions of accused. |
| 13. Election between acts. | 31. — Presumptions and burden of proof. |
| 14. Continuance. | 32. — Sufficiency in general. |
| 15. Competency of witness. | 33. — Corroboration of female. |
| 16. Evidence. | 34. — Reasonable doubt. |
| 17. — Consent. | 35. — Examination and impeachment of witnesses. |
| 18. — Intent. | 36. Charge. |
| 19. — Character of female. | 37. Improper argument of prosecuting attorney. |
| 20. — Age of female. | 38. Verdict. |
| 21. — Character of accused. | 39. New trial. |
| 22. — Other offenses. | 40. Civil liability. |
| 23. — Identity of accused. | |
| 24. — Incriminating circumstances. | |
| 25. — Res gestæ and hearsay. | |
| 26. — Female's condition, complaints and declarations. | |

1. **Validity of law.**—This article, as amended by acts of 1891, is constitutional. *Nichols v. State*, 32 App. 391, 23 S. W. 680.

2. **Offense.**—For definition, see *Taylor v. State*, 24 App. 299, 6 S. W. 42; *Tomlin v. State*, 25 App. 676, 8 S. W. 931; *Johnson v. State*, 27 App. 163, 11 S. W. 106; *Brown v. State*, 27 App. 330, 11 S. W. 412; *Wood v. State*, 28 App. 61, 12 S. W. 405; *Reagan v. State*, 28 App. 227, 12 S. W. 601, 19 Am. St. Rep. 833; *Walton v. State*, 29 App. 163, 15 S. W. 646; *Mooney v. State*, 29 App. 257, 15 S. W. 724; *Lincecum v. State*, 29 App. 328, 15 S. W. 818, 25 Am. St. Rep. 727; *Rhea v. State*, 30 App. 483, 17 S. W. 931; *Rodgers v. State*, 30 App. 510, 17 S. W. 1077; *Cromeans v. State*, 59 App. 611, 129 S. W. 1129.

3. — **Force.**—See notes under art. 1064 for definition of force.

Force is a necessary element where the female is above the age of consent. *Cromeans v. State*, 59 App. 611, 129 S. W. 1129.

4. — **Capacity to consent.**—In *Baldwin v. State*, 15 App. 275, it was said that the Code did not recognize mental incapacity. See *Rodriguez v. State*, 20 App. 542. This law was again amended by the acts of 1895 raising the age of consent to fifteen years.

As to mental incapacity, see *Caruth v. State* (Cr. App.) 25 S. W. 778; *Lopez v. State*, 30 App. 487, 17 S. W. 1058, 28 Am. St. Rep. 935; *Ellis v. State*, 33 App. 86, 24 S. W. 894.

Consent defeats the charge of rape, where the party is capable of giving consent. *Altman v. Eckerman* (Civ. App.) 132 S. W. 523.

5. — **Female under age of consent.**—It is rape for one to have carnal knowledge of a female under the age of consent not his wife, with or without her consent and with or without the use of force, threats or fraud. *Croomes v. State*, 40 App. 680, 51 S. W. 924, 53 S. W. 882; *Exon v. State* (Cr. App.) 33 S. W. 336; *Cromeans v. State*, 59 App. 611, 129 S. W. 1129; *Altman v. Eckerman* (Civ. App.) 132 S. W. 523; *Whitehead v. State*, 61 App. 558, 137 S. W. 356; *Kinch v. State*, 70 App. 649, 156 S. W. 649; *Turner v. State*, 72 App. 649, 163 S. W. 705; *Scott v. State* (Cr. App.) 166 S. W. 729. See, also, *Gage v. State* (Cr. App.) 151 S. W. 565.

Intercourse with other men is no defense. *Shoemaker v. State*, 58 App. 518, 126 S. W. 887; *Foreman v. State*, 61 App. 56, 134 S. W. 229.

The fact that the prosecutrix made no outcry, she being under age of consent, is not fatal to a conviction. *Hamilton v. State*, 36 App. 372, 37 S. W. 431.

When the female is under eleven years of age the defense of the existence of a common law marriage between the parties is untenable. *Hardy v. State*, 37 App. 55, 38 S. W. 615.

Every act of carnal intercourse with a girl under fifteen years of age is a separate offense, and conviction for one is not a bar to prosecution of another. *Griffey v. State* (Cr. App.) 56 S. W. 52.

Representations of the child to accused as to her age are immaterial. *Zachary v. State*, 57 App. 179, 122 S. W. 263.

It is no defense that defendant in good faith believed prosecutrix was over 15 years. *Pilgrim v. State*, 59 App. 231, 128 S. W. 128. See, also, *Martin v. State* (Cr. App.) 165 S. W. 579.

No presumption of common-law marriage where female is under 15. *Wofford v. State*, 60 App. 624, 132 S. W. 929.

"Common-law marriage" defined. *Wofford v. State*, 60 App. 624, 132 S. W. 929.

6. — **Female as accomplice.**—See notes under art. 79.

A female under age of consent, though she give her consent to the intercourse, is not an accomplice. *Hamilton v. State*, 36 App. 372, 37 S. W. 431.

A female under fifteen years of age with whom one has carnal intercourse cannot be an accomplice in a prosecution for rape, based on such intercourse. *Danley v. State* (Cr. App.) 71 S. W. 959.

7. **Limitations.**—See C. C. P. arts. 226, 228 and notes.

8. **Indictment.**—Willson's Cr. Forms, 478, 496, 497, 626.

See, also, C. C. P. art. 447 et seq. and notes.

The indictment may charge that the rape was effected by all three of the means named in the statute, force, threats, and fraud, the charge being made conjunctively. *Sharp v. State*, 15 App. 171; *Lawson v. State*, 17 App. 292; *Cooper v. State*, 22 App. 419, 3 S. W. 334; *Nicholas v. State*, 23 App. 317, 5 S. W. 239.

An indictment for rape on a female under 15 years of age must allege that she

is other than the wife of accused. *Rice v. State*, 37 App. 36, 38 S. W. 801; *Bice v. State*, 37 App. 38, 38 S. W. 803; *Edwards v. State*, 37 App. 242, 38 S. W. 996, 39 S. W. 368. See, also, *Dudley v. State*, 37 App. 543, 40 S. W. 269.

If the prosecutrix is over 15 years the indictment need not allege that she was not his wife. *Caidenas v. State* (Cr. App.) 40 S. W. 980. See *Belcher v. State* (Cr. App.) 44 S. W. 519.

The word "felonious" need not be used in the indictment. *Robertson v. State*, 31 Tex. 36.

"Female" and "woman" are synonymous, and the indictment may allege that the party ravished was a "female," although the statute uses the word "woman." *Robertson v. State*, 31 Tex. 36; *Gibson v. State*, 17 App. 574.

The words "rape" and "ravish" can not be used interchangeably, the word "ravish" being the proper and indispensable one to use in charging this offense. The word "ravish" implies both force and the want of consent of the woman, but the word "rape" does not. *Davis v. State*, 42 Tex. 226; *Lewitt v. State*, 15 App. 80; *Gibson v. State*, 17 App. 574; *Mayo v. State*, 7 App. 342; *Williams v. State*, 1 App. 90, 28 Am. Rep. 399. See *Robertson v. State*, 31 Tex. 36; *Jones v. State*, 18 App. 485; *Alexander v. State*, 58 App. 621, 127 S. W. 189.

Indictment held to be good. *Williams v. State*, 1 App. 90; *O'Rourke v. State*, 8 App. 70; *Cornelius v. State*, 13 App. 349; *Sharp v. State*, 15 App. 171.

Indictment alleging that without the consent and against the will of the female defendant did "violently and feloniously rape, ravish, and carnally know her," held, sufficient. *Walling v. State*, 7 App. 625. See, also, *Gutierrez v. State*, 44 Tex. 587.

To charge a rape by force there must be an allegation that the accused obtained the carnal knowledge by force and that he ravished the female. *Elschlep v. State*, 11 App. 301.

The indictment need not allege that the accused was an adult male, nor that he was over the age of fourteen years when the offense was committed. *Word v. State*, 12 App. 175; *Cornelius v. State*, 13 App. 349; *Davis v. State*, 42 Tex. 226.

It is not essential that the indictment should allege the character of the force, or specify the threats used to accomplish the rape. It is sufficient to charge in general terms that the rape was accomplished by force, or by threats, or by fraud, or by all those means together. *Cooper v. State*, 22 App. 419, 3 S. W. 334.

Where the offense is committed upon a woman, the indictment need not allege that she was over the age of consent, but where it was committed upon a female under that age the indictment must so allege. It is questionable whether these two classes of rape can be joined in the same count in an indictment. *Nicholas v. State*, 23 App. 317, 5 S. W. 239.

Indictment for ravishing woman so mentally diseased as to have no will to oppose the act need not allege want of consent. *Caruth v. State* (Cr. App.) 25 S. W. 778.

The indictment charged that defendant did "ravish and have carnal," with the prosecutrix; held, the word ravish is equivalent to the words carnal intercourse, and the indictment was sufficient. *Fields v. State*, 39 App. 488, 46 S. W. 814.

Further as to indictment, see *Thompson v. State*, 33 App. 472, 26 S. W. 987; *Owens v. State*, 35 App. 345, 33 S. W. 875; *Brinster v. State*, 12 App. 612; *Wiggins v. State*, 47 App. 338, 84 S. W. 821; *Altman v. Eckerman* (Civ. App.) 132 S. W. 523.

9. — **Female under age of consent.**—Where the female is alleged to be under the age of consent, allegations of force, threats, or fraud, or the want of the female's consent, are unnecessary and should not be made. *Davis v. State*, 42 Tex. 226; *Moore v. State*, 20 App. 275. See, also, *Nicholas v. State*, 23 App. 317, 5 S. W. 239.

As to rape of girl under fifteen, see, also, *Gutierrez v. State*, 44 Tex. 587; *Moseley v. State*, 9 App. 137; *Mayo v. State*, 7 App. 342; *Gibson v. State*, 17 App. 574; *Rodgers v. State*, 30 App. 510, 17 S. W. 1077.

10. — **Fraud.**—Indictment charging fraud in impersonating the prosecutrix husband must allege that prosecutrix was a married woman, and not the wife of defendant, and it is better to allege the husband's name. *Payne v. State*, 38 App. 494, 43 S. W. 515, 70 Am. St. Rep. 757. But in *Franklin v. State*, 34 App. 203, 29 S. W. 1088, it was held that an indictment for an attempt to commit rape upon a married woman by personating her husband need not allege husband's name.

11. — **Joinder of counts and election between counts.**—See C. C. P. art. 481 and notes.

12. — **Issues and proof.**—When the indictment alleges the offense to have been committed by force, proof that it was committed on a female under age with her consent is insufficient and will not support a conviction. *Jenkins v. State*, 34 App. 201, 29 S. W. 1078; *Banton v. State*, 53 App. 251, 109 S. W. 159; *Moore v. State*, 20 App. 275; *Nicholas v. State*, 23 App. 317, 5 S. W. 239.

A charge of rape by force is not supported by evidence of a rape by threats or fraud. *Williams v. State*, 1 App. 90, 28 Am. Rep. 399; *Milton v. State*, 23 App. 204, 4 S. W. 574.

Where the indictment charged a rape by force evidence that defendant commanded silence on pain of death was admissible on the issue of consent. *Bass v. State*, 16 App. 62.

Where it is alleged that force, threats, or fraud were used in accomplishing a rape upon a female alleged to be under the age of consent it was held to be no variance to prove that she was over that age; that the allegation as to her age was surplusage and could be disregarded. *Nicholas v. State*, 23 App. 317, 5 S. W. 239.

Under an indictment for rape of a girl under fifteen years of age charged to have been committed on a certain date, evidence of acts of intercourse between

the parties had on other days is admissible. *Hamilton v. State*, 36 App. 372, 37 S. W. 431.

Mental condition of prosecutrix may be shown as bearing on want of consent, even though indictment does not charge that she was mentally capable of giving consent. *Segrest v. State* (Cr. App.) 57 S. W. 845.

Evidence of other acts of carnal intercourse than the one alleged is admissible, and the court need not limit the same. *Cooksey v. State* (Cr. App.) 58 S. W. 104.

While an indictment for rape on a female under the age of consent need not allege force, where force is alleged it must be proved. *Cromeans v. State*, 59 App. 611, 129 S. W. 1129.

In a trial for raping a child under 14 years of age, the state could show all the facts attending the offense, including force used, though the indictment did not charge force. *Hutcherson v. State*, 62 App. 1, 136 S. W. 53.

It is not necessary, in a statutory rape case under an indictment charging that the defendant "did then and there ravish and have carnal knowledge" of the prosecutrix, to show force. *Vaughn v. State*, 62 App. 24, 136 S. W. 476.

13. Election between acts.—See notes under art. 431 C. C. P.; *Sharp v. State*, 15 App. 171; *Nicholas v. State*, 5 S. W. 239; *Thompson v. State*, 33 App. 472, 26 S. W. 987.

The state must elect upon which of several instances of intercourse it will rely. *Bader v. State*, 57 App. 293, 122 S. W. 555; *Batchelor v. State*, 41 App. 501, 55 S. W. 491, 96 Am. St. Rep. 791.

Where state elects between acts of intercourse the jury should be restricted to the act chosen. *Stone v. State*, 45 App. 91, 73 S. W. 956.

14. Continuance.—See C. C. P. arts. 603-609 and notes thereunder.

15. Competency of witness.—See C. C. P. art. 788.

16. Evidence.—See C. C. P. art. 783 et seq., and notes.

It is not permissible to prove that accused is a married man. *Smith v. State* (Cr. App.) 74 S. W. 557; *Lemons v. State*, 59 App. 299, 128 S. W. 416; *Jenkins v. State*, 60 App. 236, 131 S. W. 542; *Wilkerson v. State*, 60 App. 388, 131 S. W. 1108, Ann. Cas. 1912C, 126. But see *Battles v. State*, 63 App. 147, 140 S. W. 783.

To maintain the charge of rape upon a woman by force, the state must prove (1) penetration, (2) force, and (3) that the carnal knowledge was without her consent. *Jenkins v. State*, 1 App. 346.

Where the want of consent of the woman is necessary to constitute the offense, it must be proved by the state, as well as resistance to the act on her part. *Jenkins v. State*, 1 App. 346.

Where the female ravished is under the age of consent it is not incumbent upon the state to prove the means by which the crime was accomplished, or to prove the want of consent of such female to the act. *Anschicks v. State*, 6 App. 524; *Mayo v. State*, 7 App. 342; *Craig v. State*, 18 App. 321; *Moore v. State*, 20 App. 275.

Where the rape was upon a female over the age of consent, no matter what was her physical or mental condition, the state must prove her want of consent to the act. *Craig v. State*, 18 App. 321; *Baldwin v. State*, 15 App. 275; contra, *Anschicks v. State*, 6 App. 524. But these decisions were made before the amendment of this article, and would not apply to the case of a woman mentally diseased so as to have no will to oppose to the act. In such case, however, it would devolve upon the state to prove that the defendant knew that she was so mentally diseased. Where the indictment charged a rape by force alone, and the state was permitted to prove that when the woman attempted to make an outcry the defendant placed his hand over her mouth and commanded her to desist on pain of death, it was held that this evidence was admissible because it was *res gestæ*, bore directly upon the question of her consent, showed the defendant's intent, and was an important fact to be considered in passing upon the degree and character of the force used by the defendant to accomplish his purpose. *Bass v. State*, 16 App. 62.

State can not be compelled to use the prosecutrix as a witness. *Bozeman v. State*, 34 App. 503, 31 S. W. 389.

In a prosecution for rape, the original petition in a prior civil action against the accused by prosecutrix, through her next friend, for damages from the alleged intercourse, was inadmissible. *Eckermann v. State*, 57 App. 287, 123 S. W. 424.

In a prosecution for rape on a female under the age of consent, evidence that defendant made her presents of candies and a ring, in answer to a question whether prior to the intercourse defendant had made her presents, was admissible as showing intimate relations between prosecutrix and accused, it appearing that the intercourse was had with her consent, and to show willingness on her part. *Rowan v. State*, 57 App. 625, 124 S. W. 668, 136 Am. St. Rep. 1005.

Where, on a trial for rape by means of a sham marriage, the evidence showed that accused had a legal wife at the time he married prosecutrix, testimony of the father of the legal wife that he, acting in behalf of his daughter, had redeemed accused's household goods from a pledge while accused was in jail on the charge, was inadmissible. *Wilkerson v. State*, 60 App. 388, 131 S. W. 1108, Ann. Cas. 1912C, 126.

The state, on a trial for rape by means of a sham marriage, may show declarations of accused to prosecutrix as to his possessing property, to show the reasonableness of the testimony of the prosecutrix that she believed that she married accused, and as affecting the probability of her consenting to marry. *Wilkerson v. State*, 60 App. 388, 131 S. W. 1108, Ann. Cas. 1912C, 126.

Attentions and letters, consistent with the idea of affection for the girl, held admissible. *Battles v. State*, 63 App. 147, 140 S. W. 783.

Admission of evidence held no error, although it tended to show the commission of another crime by one who aided accused. *Wragg v. State* (Cr. App.) 145 S. W. 342.

Where accused sought to show that a third person was the one who had had intercourse with prosecutrix, the court properly permitted the third person to testify that he had never had intercourse with her. *Cain v. State* (Cr. App.) 153 S. W. 147.

In a prosecution for rape on a girl under 15, whom defendant was keeping in his home for her father, defendant was properly allowed to show that all the time she was with him he gave her the tenderest care and treated her as he would his own child. *Haggart v. State* (Cr. App.) 178 S. W. 328.

17. — **Consent.**—It is proper to ask her when testifying, "Was it done with or without your consent?" *Coates v. State*, 2 App. 16.

Evidence of bona fide resistance manifests a want of consent. *Anschicks v. State*, 6 App. 524.

As to telephone conversation, see *Jacobs v. State* (Cr. App.) 146 S. W. 558.

Where one count charged force and another that prosecutrix was mentally defective, evidence of her mental condition was admissible upon the question of consent. *Hubbard v. State* (Cr. App.) 147 S. W. 260.

18. — **Intent.**—Evidence of acts and declarations of the defendant five years before the alleged rape was held inadmissible. *Tomlin v. State*, 25 App. 676, 8 S. W. 931.

Declarations made by the defendant a month before the alleged rape, held admissible. *Wood v. State*, 28 App. 61, 12 S. W. 405.

Statements of accused held admissible on the question of intent. *Sharp v. State*, 71 App. 633, 160 S. W. 369.

19. — **Character of female.**—The woman's character for chastity may be impeached by the defendant, not in justification of the offense, but as tending to show her consent to the act of carnal knowledge. The inquiry must be confined to her general reputation for chastity; and can not extend to particular instances of unchastity with other men than the defendant. *Lawson v. State*, 17 App. 292; *Favors v. State*, 20 App. 155; *Hernandez v. State*, Id. 155; *Jenkins v. State*, 1 App. 346; *Rogers v. State*, Id. 187; *Dorsey v. State*, Id. 33; *Pefferling v. State*, 40 Tex. 486; *Mayo v. State*, 7 App. 342. See, also, *Lemons v. State*, 59 App. 299, 128 S. W. 416.

It is admissible to prove a number of different acts of carnal intercourse when the prosecutrix is under the age of consent. *Hamilton v. State*, 36 App. 372, 37 S. W. 431; *Battles v. State*, 63 App. 147, 140 S. W. 783; *Clardy v. State* (Cr. App.) 147 S. W. 568; *Abernathy v. State* (Cr. App.) 174 S. W. 339.

Illicit intercourse between her and the defendant may be proved. *Lawson v. State*, 17 App. 292; *Mayo v. State*, 7 App. 342.

As evidence to establish her general reputation for a want of chastity it is competent for the defendant to prove that she had given birth to an illegitimate child prior to the alleged rape. *Wilson v. State*, 17 App. 525.

It is not permissible to prove that the injured female was regarded by her neighbors as lacking good sense. *Ellis v. State*, 33 App. 86, 24 S. W. 894.

Objection that State was permitted to prove that defendant had intercourse with prosecutrix who was under age of fifteen after she became the wife of another man is without merit. But on another trial, testimony should only be adduced by State of one act of intercourse between prosecutrix and defendant. (That stated in the indictment.) *Smith v. State* (Cr. App.) 74 S. W. 557.

The general reputation for chastity of prosecutrix's mother and sister held inadmissible; defendant's expert having testified that such general reputation would throw no light on whether or not prosecutrix had nymphomania. *Jenkins v. State*, 60 App. 236, 131 S. W. 542.

Prosecutrix's reputation for virtue and chastity can be shown by the state only when it is assailed by accused or she is a stranger in the county. *Holland v. State*, 60 App. 117, 131 S. W. 563.

Accused's testimony that prosecutrix invited him to her house on the absence of the family, and that she so acted as to invite intercourse, and that force was unnecessary, so assailed her chastity as to entitle the state to show that her reputation was good. *Holland v. State*, 60 App. 117, 131 S. W. 563.

Evidence of the female's good reputation as to chastity and truthfulness held admissible to support her testimony that she believed that she and accused were married. *Wilkerson v. State*, 60 App. 388, 131 S. W. 1108, Ann. Cas. 1912C, 126.

One accused of raping a female under age with her consent could show that about nine months before her child was born she was seen in compromising relations with another man, to rebut her testimony of exclusive intercourse with accused, and to support his denial of the offense. *Parker v. State*, 62 App. 64, 136 S. W. 453.

Other acts of intercourse of the prosecutrix under the age of consent are not admissible unless the fact of intercourse be questioned, or the evidence shows that another may be the father of the child, and hence, where the act of intercourse is proven by the birth of a child, evidence of acts recurring more than two years before the birth of the child is inadmissible. *Whitehead v. State*, 61 App. 558, 137 S. W. 356.

Evidence of other acts of intercourse on the part of the prosecutrix is admissible only when they are with the defendant, and for the purpose of showing consent. *Whitehead v. State*, 61 App. 558, 137 S. W. 356.

Evidence that others had had intercourse with prosecutrix is not admissible as a defense, but only to affect her credibility. *Wade v. State* (Cr. App.) 144 S. W. 246.

Evidence as to other acts of intercourse prior to the date of the offense charged is admissible solely to corroborate the prosecutrix as to the offense charged. *Lott v. State* (Cr. App.) 146 S. W. 544.

Defendant on cross-examination having attempted to show that the woman's pregnancy was due to another, the state was properly permitted on redirect examination to show who caused her pregnancy. *Lott v. State* (Cr. App.) 146 S. W. 544.

Evidence of the chastity of the prosecutrix is admissible, where accused claims that the intercourse was with her consent. *Jacobs v. State* (Cr. App.) 146 S. W. 558.

Evidence was admissible as to other acts of intimacy not amounting to intercourse between the defendant and prosecutrix. *Clardy v. State* (Cr. App.) 147 S. W. 568.

In a trial for rape on a female under 15 years of age, evidence that she has had prior intercourse with others than the defendant presents no defense and is inadmissible on the main issue. *Clardy v. State* (Cr. App.) 147 S. W. 568.

Evidence that prosecutrix under 15 years of age was a lewd woman at the time of the alleged offense is inadmissible to affect her credibility. *Kearse v. State* (Cr. App.) 151 S. W. 827.

Accused, on a trial for rape on a female under the age of 15 years, may, to affect her credibility, show that prior to the time of the alleged offense she had been an inmate of houses of ill fame, but he may not prove, as affecting her credibility, isolated or independent acts of immorality. *Bigliben v. State* (Cr. App.) 151 S. W. 1044.

Though accused, on a trial for rape on a female under the age of 15 years, showed on the cross-examination of prosecutrix that her act with him was the first act committed, he could not impeach her by showing her prior individual and isolated acts of immorality. *Bigliben v. State* (Cr. App.) 151 S. W. 1044.

It is not improper to allow the girl to testify that she did not understand the enormity of the offense. *Hamilton v. State* (Cr. App.) 168 S. W. 536.

20. — **Age of female.**—When the age of the prosecutrix is in issue it is admissible for a witness testifying to her age, to testify to collateral facts that impressed her age upon him at certain times, and to testify to her appearance, as to age when an infant, compared with other infants. *Bice v. State*, 37 App. 38, 38 S. W. 803.

It is also competent for an experienced physician, who has made a personal examination of the prosecutrix, to testify to her apparent age. *Bice v. State*, 37 App. 38, 38 S. W. 803.

Witness must testify as to her own knowledge as to her age and not as to what her mother may have said. *Johnson v. State*, 42 App. 298, 59 S. W. 899.

It is proper to refuse to cause prosecutrix to put on a suit so the jury may see her in a longer skirt where there is no testimony that she was over 14 years, or that accused was misled as to her age. *Campbell v. State*, 63 App. 595, 141 S. W. 232, Ann. Cas. 1913D, 858.

Testimony of a school census taker as to girl's age as stated by defendant held admissible. *Lott v. State* (Cr. App.) 146 S. W. 544.

As to statements by prosecutrix and rumor, see *Magee v. State* (Cr. App.) 168 S. W. 96.

In a prosecution for rape, where the age of the prosecutrix was in question, accused attempted to show that her parents had married at an earlier date than they testified. They testified that they were married under license issued on a certain day. Held, that the record of the license was properly admitted in evidence. *Walton v. State* (Cr. App.) 178 S. W. 358.

21. — **Character of accused.**—On a trial for rape the accused may prove his general reputation as a "peaceable and law-biding man." *Lincecum v. State*, 29 App. 328, 15 S. W. 818, 25 Am. St. Rep. 727.

On trial for rape of his own daughter it is error to allow a State's witness to testify, over defendant's objection, that defendant stated to him, witness, that he did not care if witness had carnal intercourse with his whole family. *Owens v. State*, 39 App. 391, 46 S. W. 240.

Defendant's good conduct and demeanor toward his children held inadmissible. *Cooper v. State*, 72 App. 266, 162 S. W. 364.

22. — **Other offenses.**—See notes under art. 783, C. C. P.

23. — **Identity of accused.**—On a trial for rape where one of the principal issues was the identification of the defendant, held, that it was not error to allow a witness for the state to testify that when the prosecutrix was brought into the presence of the defendant on the morning after the rape she "shuddered" at her first sight of the defendant; her shuddering being a circumstance which tended to show the certainty of and to corroborate her identification. *Bruce v. State*, 31 App. 590, 21 S. W. 681.

The state was permitted to prove by the sheriff of the county that after defendant's arrest he placed him and eight other negroes in a line, and brought the prosecutrix, also her little son, in before them separately, and they each identified defendant as being the person who committed the offense. This was introduced by the State as original evidence; held, error. (Overruling on this point, *Bruce v. State*, 31 App. 590, 21 S. W. 681; *Ruston v. State*, 4 App. 432; *Fulcher v. State*, 28 App. 471, 13 S. W. 750; *Rippy v. State*, 29 App. 37, 14 S. W. 448); *Reddick v. State*, 35 App. 463, 34 S. W. 274, 60 Am. St. Rep. 56.

24. — **Incriminating circumstances.**—Where witnesses for the state were permitted to testify, that, five days after the alleged rape, in company with the prosecutrix they went to the place where she said the rape was committed, and saw weeds, grass, etc., disarranged as well as other indications that persons had been lying upon the ground, it was held, that, in view of the circumstances of that case, such evidence was not admissible; that it was too remote and uncertain. *Lawson v. State*, 17 App. 292.

Condition of an undergarment of the alleged injured female, on the first evening and second morning after the alleged rape, held admissible evidence. *Grimmett v. State*, 22 App. 36, 2 S. W. 631, 58 Am. Rep. 630.

Evidence of the finding of a receipt, in the handwriting of the defendant at the place of the occurrence, and five or six days thereafter, held admissible as not being too remote. *Rodgers v. State*, 30 App. 510, 17 S. W. 1077.

The state may show that accused was at the time of his courtship with prosecutrix, and at the time of the alleged marriage, married to another woman, as bearing on his desire to have the marriage with prosecutrix kept secret, and to explain her conduct in leaving home to marry accused without notifying her parents. *Wilkerson v. State*, 60 App. 388, 131 S. W. 1108, Ann. Cas. 1912C, 126.

The court properly permitted a witness to testify that about the date alleged he saw defendant and a woman in a buggy. *Battles v. State*, 63 App. 147, 140 S. W. 783.

Evidence that the prosecutrix stated, in a room adjoining the one in which accused and her brother-in-law were sitting, that she was going for a walk, is admissible, where she was attacked during that walk and the brother-in-law testified to hearing the remark. *Jacobs v. State* (Cr. App.) 146 S. W. 553.

Evidence as to condition of locus and as to the finding of articles worn by the parties held admissible. *Sharp v. State*, 71 App. 633, 160 S. W. 369.

In a trial for rape on a girl under 15 years of age, her testimony that on reaching a junction where she changed cars, and where the offense was alleged to have occurred, she learned that her train would leave for her destination at 6 o'clock in the morning, and that defendant was not with her, was admissible. *Graham v. State* (Cr. App.) 163 S. W. 726.

Physician's opinion as to commission of offense owing to the woman's position held properly excluded. *Burge v. State* (Cr. App.) 167 S. W. 63.

25. — *Res gestæ* and hearsay.—See notes under art. 783, C. C. P.

26. — *Female's condition, complaints and declarations.*—Recent complaints by prosecutrix and her appearance and condition of her clothing shortly after the alleged occurrence may be proved as original evidence, though not strictly *res gestæ*. *Rogers v. State* (Cr. App.) 143 S. W. 631; *Ulmer v. State*, 71 App. 579, 160 S. W. 1188. See, also, *Jacobs v. State* (Cr. App.) 146 S. W. 558; *Burge v. State* (Cr. App.) 167 S. W. 63.

The state may prove that the prosecutrix promptly complained of the outrage, and may show her state and appearance, and the condition of her clothes shortly after the alleged occurrence. But proof of the particulars of her complaint, and her detailed statement of the facts connected with the alleged outrage cannot be admitted as original evidence, but may be admissible in rebuttal in support of her veracity and to establish the accuracy of her testimony when her credibility has been attacked by the evidence of the defendant. *Lawson v. State*, 17 App. 292; *Johnson v. State*, 21 App. 368, 17 S. W. 252; *Holst v. State*, 23 App. 1, 3 S. W. 757, 59 Am. Rep. 770; *Pefferling v. State*, 40 Tex. 486; *Irby v. State*, 25 App. 203, 7 S. W. 705; *McGee v. State*, 21 App. 670, 2 S. W. 890; *Lights v. State*, 21 App. 308, 17 S. W. 428; *Sentell v. State*, 34 App. 260, 30 S. W. 226.

Where the female alleged to have been outraged was held to be too young to testify as a witness, it was held that statements made by her immediately after the occurrence charging the defendant with the act, and giving some of its details, were inadmissible. *Smith v. State*, 41 Tex. 352.

The failure of the alleged injured party to make outcry, or to promptly disclose the outrage, may be proved by the defense to discredit her testimony. *Rogers v. State*, 1 App. 187.

Delay in making complaint is a fact which sometimes casts strong suspicion on the testimony of the prosecutrix, but it is a fact which may be satisfactorily explained by other facts showing good reason for not making complaint promptly. *Sharp v. State*, 15 App. 171.

The State may show by the prosecutrix, or by other persons, that she made complaint of the outrage soon after its commission, and when, where and to whom it was made; but the prosecution will not be allowed to prove new statements as to how the offense occurred. *Reddick v. State*, 35 App. 463, 34 S. W. 274, 60 Am. St. Rep. 56. See, also, *Valdez v. State*, 71 App. 487, 160 S. W. 341.

The only object in admitting such testimony is to corroborate her statements made on the stand. *Reddick v. State*, 35 App. 463, 34 S. W. 274, 60 Am. St. Rep. 56. See, also, *Hamilton v. State* (Cr. App.) 168 S. W. 536.

It is not error to allow a physician to testify to an examination of the prosecutrix, made more than two months after the alleged rape. *Gonzales v. State*, 32 App. 611, 25 S. W. 781.

Statements of complainant must be limited to the fact that complaint was made and the circumstances under which it was made. *Reddick v. State*, 35 App. 463, 34 S. W. 274, 60 Am. St. Rep. 56.

The rules in regard to evidence of outcry and complaint made by the prosecutrix do not apply when the indictment charges rape of a girl under fifteen years of age. *Hamilton v. State*, 36 App. 372, 37 S. W. 431.

It is inadmissible to prove that prosecutrix had "fits." *Johnson v. State*, 42 App. 298, 59 S. W. 899.

The statement made by prosecutrix and the circumstances and reasons for the disclosure, which had been for some time withheld, held admissible. *Bader v. State*, 57 App. 293, 122 S. W. 555.

The girl's statement held admissible, though made 10 days after the alleged offense. *Pettus v. State*, 58 App. 546, 126 S. W. 868, 137 Am. St. Rep. 978.

A physician who examined prosecutrix five days after the offense could testify to the conditions disclosed. *Hutcherson v. State*, 62 App. 1, 136 S. W. 53. See, also, *Caton v. State* (Cr. App.) 147 S. W. 590.

The prosecutrix may testify that the defendant is the father of her baby. *Whitehead v. State*, 61 App. 558, 137 S. W. 356.

Evidence of the physical condition of the prosecutrix the morning after the rape is admissible; accused having testified that the intercourse was with her consent. *Jacobs v. State* (Cr. App.) 146 S. W. 558.

The fact that the girl accused defendant is not admissible as original testimony. *Ulmer v. State*, 71 App. 579, 160 S. W. 1188.

In a prosecution of defendant for rape of his daughter, defendant's bill, which merely objected that the girl was permitted to testify that she told her mother, and did not tell her sooner because defendant threatened to kill her, presented no error. *Boyd v. State*, 72 App. 521, 163 S. W. 67.

The detailed statements of a child eight years old made to the first person she met after she had been raped, were not admissible, unless a part of the res gestae, and, where the interval between the assault and the meeting of such person was not shown, the proof of the statements could not be justified. *Douglass v. State* (Cr. App.) 165 S. W. 933.

The failure of prosecutrix to make outcry or call for aid, when it may be readily obtained, or within reasonable time to disclose the offense tends to discredit her testimony. *Burge v. State* (Cr. App.) 167 S. W. 63.

Evidence that the prosecutrix before making her complaint informed the witness that accused had never had sexual intercourse with her, and that another witness was in such a place that she must have heard the struggle is material. *Baker v. State* (Cr. App.) 169 S. W. 1154.

Evidence that the girl, who was under 15, had given birth to a child held admissible. *Abernathy v. State* (Cr. App.) 174 S. W. 339.

27. — **Documentary evidence and best and secondary evidence.**—See notes under art. 783, C. C. P.

28. — **Articles connected with commission of offense and physical conditions about locus in quo.**—See art. 783, C. C. P., and notes.

29. — **Expert testimony.**—See notes under art. 783.

30. — **Confessions of accused.**—See arts. 809, 810, C. C. P., and notes.

31. — **Presumptions and burden of proof.**—See notes under arts. 51, 52, ante, and art. 785, C. C. P.

32. — **Sufficiency in general.**—Evidence held to support conviction. *Ake v. State*, 6 App. 398, 32 Am. Rep. 586; *Cornelius v. State*, 13 App. 349; *Cone v. State*, Id. 483; *Sharp v. State*, 15 App. 171; *Bass v. State*, 16 App. 62; *Wilson v. State*, 17 App. 525; *Fitzgerald v. State*, 20 App. 281; *Grate v. State*, 23 App. 458, 5 S. W. 245; *Rhea v. State*, 30 App. 483, 17 S. W. 931; *Dove v. State*, 36 App. 105, 35 S. W. 648; *Helton v. State* (Cr. App.) 125 S. W. 21; *Whitehead v. State*, 61 App. 558, 137 S. W. 356; *Battles v. State*, 63 App. 147, 140 S. W. 783; *Smith v. State*, 63 App. 183, 140 S. W. 1096; *Tyler v. State*, 64 App. 512, 143 S. W. 620; *Hightower v. State* (Cr. App.) 143 S. W. 1168; *Wade v. State* (Cr. App.) 144 S. W. 246; *Jacobs v. State* (Cr. App.) 146 S. W. 558; *Vanderberg v. State* (Cr. App.) 148 S. W. 315; *Logan v. State* (Cr. App.) 148 S. W. 713; *Clinton v. State* (Cr. App.) 148 S. W. 1087; *Cain v. State* (Cr. App.) 153 S. W. 147; *Graham v. State* (Cr. App.) 163 S. W. 726; *Smith v. State* (Cr. App.) 164 S. W. 838; *Douglass v. State* (Cr. App.) 165 S. W. 933; *Baker v. State* (Cr. App.) 169 S. W. 1154; *Merkel v. State* (Cr. App.) 171 S. W. 738. And see *McCleavland v. State*, 24 App. 202, 5 S. W. 664; *Tillery v. State*, 24 App. 252, 5 S. W. 842, 5 Am. St. Rep. 882.

Evidence held insufficient. *Davis v. State*, 43 Tex. 189; *House v. State*, 9 App. 53; *Baldwin v. State*, 15 App. 275; *Lawson v. State*, 17 App. 292; *Gazley v. State*, Id. 267; *Allen v. State*, 18 App. 120; *Nicholas v. State*, 23 App. 317, 5 S. W. 239; *Dickey v. State*, 21 App. 430, 2 S. W. 809; *Thompson v. State*, 33 App. 472, 26 S. W. 987; *Lawrence v. State*, 35 App. 114, 32 S. W. 530; *Tittle v. State* (Cr. App.) 38 S. W. 202; *Lee v. State*, 43 App. 285, 64 S. W. 1047; *Jones v. State* (Cr. App.) 153 S. W. 136.

Evidence held to show that accused was not the husband of prosecutrix. *Munger v. State*, 57 App. 384, 122 S. W. 874; *Gent v. State*, 57 App. 414, 123 S. W. 594.

Sufficiency of evidence to justify that if defendant "kept watch" he was guilty. *Caruth v. State* (Cr. App.) 28 S. W. 532; *Shepard v. State* (Cr. App.) 28 S. W. 816.

Evidence that defendant was an old man and that prosecutrix was a woman is sufficient to prove sex. *Hill v. State* (Cr. App.) 34 S. W. 750.

Evidence held not to show a common-law marriage between the parties. *Wofford v. State*, 60 App. 624, 132 S. W. 929.

Age may be fixed by an event the date of which is shown. *Mora v. State* (Cr. App.) 167 S. W. 344.

33. — **Corroboration of female.**—A conviction can not be sustained upon the unsupported testimony of the female, who made no outcry for several weeks. *Topolanck v. State*, 40 Tex. 160.

A conviction may be supported upon the uncorroborated testimony of the prosecutrix, even though she be a child under ten years of age. But such cases require special scrutiny by the jury, and a careful weighing of the evidence, with all remote and near circumstances of probability. Extraordinary effort should be made to corroborate the testimony of the prosecutrix in such cases, and when such testimony can be procured its nonproduction should tell seriously against the prosecution. *Gazley v. State*, 17 App. 267; *Montresser v. State*, 19 App. 281; *Goss v. State*, 40 Tex. 520.

The prosecutrix testified positively as to defendant's identity, and was corroborated by other witnesses who had seen defendant in the neighborhood, both before and after the commission of the offense; held, the evidence was sufficient to support a verdict, assessing the death penalty. *Dove v. State*, 36 App. 105, 35 S. W. 648.

A conviction on the uncorroborated testimony of the injured female who went riding with the defendant a few days after the occurrence of the alleged offense, cannot stand. *Price v. State*, 36 App. 143, 35 S. W. 988.

A conviction for rape on a female under the age of consent may be sustained on her uncorroborated testimony. *Rattles v. State*, 63 App. 147, 140 S. W. 783.

The girl's unsupported testimony is sufficient when there is no doubt as to its reasonableness and probable truth. *Logan v. State* (Cr. App.) 148 S. W. 713.

The fact that the girl refused, until compelled to do so, to name any person as guilty is ordinarily a strong circumstance in support of her testimony. *Logan v. State* (Cr. App.) 148 S. W. 713.

34. — **Reasonable doubt.**—See notes under art. 785, C. C. P.

35. — **Examination and impeachment of witnesses.**—See notes under art. 3687, *Vernon's Sayles' Civ. St.* 1914.

36. **Charge.**—For charge held to be correct, see *Washington v. State*, 58 App. 345, 125 S. W. 917; *Wade v. State* (Cr. App.) 144 S. W. 246.

The court should instruct on the girl's age when the evidence raises the issue. *Tate v. State* (Cr. App.) 150 S. W. 781; *Cowden v. State* (Cr. App.) 150 S. W. 779.

When the evidence is conflicting as to consent, the jury should be instructed carefully on the point. See an instruction applicable to the particular case, improperly refused. *Clark v. State*, 30 Tex. 448.

The charge need only comprise the law applicable to every legitimate deduction which the jury may draw from the facts in evidence. *Rogers v. State*, 1 App. 188.

For charge subject to criticism, but, taken as a whole, not misleading, see *Burk v. State*, 8 App. 336.

The charge should explain to the jury the statutory meaning "force," and "threats," and "fraud," where the case demands it. *Jones v. State*, 10 App. 552; *Jenkins v. State*, 1 App. 346.

The charge should not submit an issue not presented by the indictment. *Craig v. State*, 18 App. 321.

Where the indictment charged a rape by force, threats, and fraud, and there was no allegation of the nonage of the female, but the evidence showed that she was under age, and tended to show that she consented to the act, the court should have instructed, at defendant's request, that the state must prove that she did not consent to the act. *Moore v. State*, 20 App. 275.

The charge should be confined to the case made by the evidence. If the evidence shows the rape to have been committed by one or two of the several means, viz.: force, threats, or fraud, but not by all three of the said means, it is error to charge the jury upon all three of the said means. In other words, though the indictment should charge the three means, the charge of the court should be confined to the means only that is proved by the evidence. *Serio v. State*, 22 App. 633, 3 S. W. 784; *Williams v. State*, 1 App. 90, 23 Am. Rep. 399.

For charge held abstractly correct, but, in view of the evidence, erroneous in that it did not direct an acquittal if the jury believed from the evidence that the female consented to the sexual act, and was over the age of consent, see *Taylor v. State*, 24 App. 299, 6 S. W. 42.

For charge held erroneous, because it rested the defendant's right to acquittal upon a hypothesis eliminated by the proof, see *Taylor v. State*, 24 App. 299, 6 S. W. 42.

Charge held erroneous in that, under the proof, it failed to instruct the jury that defendant should be acquitted of assault to rape or aggravated assault if the female was not under the age of consent and consented to the act of the defendant. *Taylor v. State*, 24 App. 299, 6 S. W. 42.

Upon requisites of the charge of the court in rape cases, see *Johnson v. State*, 27 App. 163, 11 S. W. 106; *Mooney v. State*, 29 App. 257, 15 S. W. 724; *Rodgers v. State*, 30 App. 510, 17 S. W. 1077.

On a trial for rape the question whether the prosecution has been corroborated is one of fact, and should not be given in charge. *Gonzales v. State*, 32 App. 611, 25 S. W. 781.

Where indictment charged in one count rape by force and fraud, and in another rape of a woman so mentally diseased as to have no will, etc., and prosecutrix testified that she kicked and fought defendant, it was error for the court to confine his charge to the second count. *Thompson v. State*, 33 App. 472, 26 S. W. 987.

Special charge as to defendant's testimony properly refused, see *Russell v. State*, 33 App. 424, 26 S. W. 990.

For charge held sufficient, see *Gonzales v. State* (Cr. App.) 31 S. W. 371.

The prosecutrix, a child, testified to the act; held, that the defendant was not entitled to a charge on circumstantial evidence. *Allen v. State*, 36 App. 381, 37 S. W. 429.

For a charge held to contain all the constituent elements of the offense, see *Pettitway v. State* (Cr. App.) 37 S. W. 860.

Charge on facts testified to by defendant; held, erroneous. *Shell v. State* (Cr. App.) 38 S. W. 207.

Where defendant testified, that he was not present when others, with whom he is charged to have been in conspiracy, committed the rape, but afterwards had intercourse with prosecutrix with her consent, this issue should have been submitted to jury. *Segrest v. State* (Cr. App.) 57 S. W. 845.

A charge held erroneous in using the word "crime," since it might have conveyed the impression that the court believed the offense had been committed. *Pettus v. State*, 58 App. 546, 126 S. W. 868, 137 Am. St. Rep. 978.

For charge held erroneous, see *Pettus v. State*, 58 App. 546, 126 S. W. 868, 137 Am. St. Rep. 978.

A charge requiring the jury to find the age of the prosecutrix is not erroneous, though her age is not contested. *Cain v. State* (Cr. App.) 153 S. W. 147.

Charge held to properly submit issue of age of the girl, there being no evidence

of mistake of fact as excusing defendant. *Martin v. State* (Cr. App.) 165 S. W. 579.

Refusal to charge that consent would be presumed held proper. *Burge v. State* (Cr. App.) 167 S. W. 63.

It is not necessary for the court to group the facts tending to show the girl was over 15 years. *Hamilton v. State* (Cr. App.) 168 S. W. 536.

Where the court submitted the case based on force alone, error in a charge defining rape as defined by the code was not reversible. *Calyon v. State* (Cr. App.) 174 S. W. 591.

37. **Improper argument of prosecuting attorney.**—See notes under art. 724, C. C. P.

38. **Verdict.**—See C. C. P. art. 763 et seq., and notes.

The court submitted to the jury "rape and assault with intent to rape." The verdict of the jury was, "We the jury find defendant guilty as charged in the indictment and assess his punishment at confinement in the penitentiary for fifty years;" held, this was evidently a finding that defendant was guilty of rape. *McGee and Fuller v. State*, 39 App. 190, 45 S. W. 709.

38. **New trial.**—See arts. 835–846, C. C. P. and notes.

40. **Civil liability.**—The fact that the woman yielded will not defeat a civil action for assault and battery. *Altman v. Eckerman* (Civ. App.) 132 S. W. 523.

Art. 1064. [634] Definition of "force."—The definition of "force," as applicable to assault and battery, applies also to the crime of rape, and it must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances of the case.

Force as element of offense.—There must be something more than the want of consent on the part of the woman; there must be a resistance made by her. The whole subject of resistance is referable to the question of the consent of the female. A feigned resistance would not show want of consent, while an unfeigned, positive resistance would. *Jenkins v. State*, 1 App. 346; *Anschicks v. State*, 6 App. 524; *Walton v. State*, 29 App. 163, 15 S. W. 646; *Mooney v. State*, 29 App. 257, 15 S. W. 724; *Rhea v. State*, 30 App. 483, 17 S. W. 931.

It is such force as might be reasonably supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances in the case. *Jones v. State*, 10 App. 552; *Saddler v. State*, 12 App. 194; *Favors v. State*, 20 App. 155; *Hernandez v. State*, Id. 15; *Sharp v. State*, 15 App. 171; *Passmore v. State*, 29 App. 241, 15 S. W. 286; *Brown v. State*, 27 App. 330, 11 S. W. 412; *Walton v. State*, 29 App. 163, 15 S. W. 646, and authorities cited; *Price v. State*, 36 App. 143, 35 S. W. 983.

In determining upon the sufficiency of the force used, the jury is authorized to take into consideration threats made at the time of the commission of the offense. *Sharp v. State*, 15 App. 171; *Bass v. State*, 16 App. 62; *Perez v. State*, 50 App. 34, 94 S. W. 1036.

The word "force" does not refer to the mere muscular force necessarily exerted by the male in the act of copulation; nevertheless, in estimating the efficiency of the resistance made by the female, her mental capacity is a proper subject of inquiry and consideration. *Baldwin v. State*, 15 App. 275.

The use of chloroform as a means comes within the meaning of fraud, and is not force. *Milton v. State*, 23 App. 204, 4 S. W. 574.

In default of resistance by the female, consent is presumed. *Mooney v. State*, 29 App. 257, 15 S. W. 724.

It is error to refuse to charge that if defendant did not intend to have carnal knowledge of prosecutrix if she resisted, he should be found guilty of simple assault. *Porter v. State*, 33 App. 385, 26 S. W. 626. See, also, *Sanford v. State*, 12 App. 196.

The force is that by which the dissenting woman is subjected to and put under the power of the assailant so that he is able notwithstanding her opposition to have intercourse with her. *Cromeans v. State*, 59 App. 611, 129 S. W. 1129.

— **Attempt to commit rape.**—To constitute an attempt to commit rape there must have been an intent to use such force as would constitute rape, or an assault to commit rape, but the attempt to apply force must have failed so that it did not amount to rape or an assault with intent to rape. *Holloway v. State*, 54 App. 465, 113 S. W. 933. And, see, *Fowler v. State* (Cr. App.) 148 S. W. 576. See, also, art. 1070, post, and notes thereunder.

— **Female under age of consent.**—Force is not an element of the offense when committed on a child under the age of ten years. *Rodgers v. State*, 30 App. 510, 17 S. W. 1077; *Alexander v. State*, 58 App. 621, 127 S. W. 189; *Cromeans v. State*, 59 App. 611, 129 S. W. 1129; *Ulmer v. State*, 71 App. 579, 160 S. W. 1188.

See, also, notes under art. 1063, ante.

Evidence.—Evidence held to support conviction. *Cole v. State*, 57 App. 51, 123 S. W. 409, 136 Am. St. Rep. 973.

See *Perez v. State*, 50 App. 34, 94 S. W. 1036.

Charge.—The legal significance of "force" must be given, whether asked or not. *Jenkins v. State*, 1 App. 346; *Brown v. State*, 27 App. 330, 11 S. W. 412.

Definition of "force" in charge, approved. *Jones v. State*, 10 App. 552; *Favors v. State*, 20 App. 155. See *Anschick v. State*, 6 App. 524.

Where the evidence raised an issue as to consent the court should have charged on force and resistance essential to be shown. *Tyler v. State*, 46 App. 10, 79 S. W. 558.

A requested charge on the degree of resistance by the woman held erroneous. *Lemons v. State*, 59 App. 299, 128 S. W. 416.

A requested charge on the effect of the woman's consent to violence exerted against her held erroneous. *Lemons v. State*, 59 App. 299, 128 S. W. 416.

One charged with assault with intent to commit rape cannot complain of a charge which substantially follows this definition of force. *Conger v. State* (Cr. App.) 140 S. W. 1112.

Charge held correct. *Conger v. State* (Cr. App.) 140 S. W. 1112.
See, also, notes under arts. 735-743, C. C. P.

Art. 1065. [635] What "threat" sufficient.—The "threat" must be such as might reasonably create a just fear of death, or great bodily harm, in view of the relative condition of the parties as to health, strength and all other circumstances of the case.

Cited, *Fowler v. State* (Cr. App.) 148 S. W. 576.

Threat as element of offense.—The threats used must be such as might reasonably create a just fear of death, or great bodily harm, in view of the relative condition of the parties as to health, strength, and all other circumstances of the case. *Jones v. State*, 10 App. 552.

Where both force and threats are alleged, in determining the sufficiency of the force, or the effect of the threats proved, it is proper to consider the cogency which the threats may have contributed to the force, and the intensifying influence which the force may have imparted to the threats. *Sharp v. State*, 15 App. 171.

As to the character and sufficiency of threats, see *Reagan v. State*, 28 App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

Evidence.—Evidence held to support conviction. *Cole v. State*, 57 App. 51, 123 S. W. 409, 136 Am. St. Rep. 973.

Charge.—See *Jones v. State*, 10 App. 552, and see notes under art. 1064, ante, and arts. 735-743, C. C. P.

Where the court submitted the case based on force alone, error in a charge defining rape as defined by arts. 1063, 1065, was not reversible. *Calyon v. State* (Cr. App.) 174 S. W. 591.

Art. 1066. [636] "Fraud" defined.—The "fraud" must consist in the use of some stratagem by which the woman is induced to believe the offender is her husband, or in administering, without her knowledge or consent, some substance producing unnatural sexual desire or such stupor as prevents or weakens resistance, and committing the offense while she is under the influence of such substance. It is a presumption of law, which can not be rebutted by testimony, that no consent was given under the circumstances mentioned in this article.

Cited, *Fowler v. State* (Cr. App.) 148 S. W. 576.

Fraud as element of offense.—It is rape to have carnal knowledge of woman who is asleep without her consent, when no more force is used than that involved in the act. *Payne v. State*, 40 App. 203, 49 S. W. 604, 76 Am. St. Rep. 712.

That portion of this article with reference to the use of stratagem, protects married women only. Having carnal knowledge of a woman when she is asleep, is not per se fraud within the meaning of the statute. To constitute the statutory fraud, it must be the use of some stratagem by which the woman is induced to believe that the offender is her husband. *King v. State*, 22 App. 650, 3 S. W. 342. The use of chloroform as a means is fraud, and not force. *Milton v. State*, 23 App. 204, 4 S. W. 574.

"Stratagem" defined, and, held, that it must be such as to induce the woman to believe the offender is her husband. *Mooney v. State*, 29 App. 257, 15 S. W. 724; *Franklin v. State*, 34 App. 203, 29 S. W. 1088; *Huffman v. State*, 46 App. 428, 80 S. W. 625.

If the fraud is such as to cause the woman, whether legally married or unmarried, to give consent to the copulation, believing she is the wife of the man she is copulating with, it is necessarily rape whether the woman be married or single. *Lee v. State*, 44 App. 354, 72 S. W. 1008, 61 L. R. A. 904. And see *Wilkerson v. State*, 60 App. 388, 131 S. W. 1108, Ann. Cas. 1912C, 126.

Deception and persuasion may sometimes be equivalent to the use of force in obtaining sexual intercourse. *Altman v. Eckerman* (Civ. App.) 132 S. W. 523.

Charge.—See notes under art. 735, C. C. P.

For approved charges, see *Melton v. State*, 71 App. 130, 158 S. W. 550, and cases cited.

Art. 1067. [637] Penetration only need be proved.—Penetration only is necessary to be proved upon a trial for rape.

Penetration as element of offense.—Penetration as used in this article means that penetration, with or without emission, is only necessary to be proved. *Johnson v. State*, 27 App. 163, 11 S. W. 106.

Penetration is an element of rape and must be proved beyond a reasonable doubt, though such penetration need not be of any particular depth. *Johnson v. State*, 27 App. 163, 11 S. W. 106; *Davis v. State*, 43 Tex. 189; *Rodgers v. State*, 30 App. 510, 17 S. W. 1077.

The word "penetration" is a limitation upon, and qualification of the meaning of the term "carnal knowledge;" and by "penetration only" this article means merely to dispense with emission in the commission of rape. *Lujano v. State*, 32 App. 414, 24 S. W. 97.

Evidence.—Where the rape is upon a female under the age of ten years, the testimony of medical experts should be had as to penetration, or its absence reasonably accounted for. Every source of knowledge as to this fact should, in such case, be explored. *Davis v. State*, 42 Tex. 226.

The fact of penetration must be proved beyond a reasonable doubt, but may be established by circumstantial evidence. *Word v. State*, 12 App. 175.

Evidence to prove penetration was held insufficient. *Baldwin v. State*, 15 App. 275; *Davis v. State*, 43 Tex. 189.

Where the girl was examined about ten days after the offense, the physician's testimony as to the fact of penetration was not so remote as to be inadmissible. *Thompson v. State*, 70 App. 610, 157 S. W. 494.

Testimony of the girl's mother that she examined her daughter's bloomers and found them cut and also found "white stuff like the passage of a man" on them was competent. *Thompson v. State*, 70 App. 610, 157 S. W. 494.

Testimony of the girl's mother that she found "the passage from him" on her daughter's bloomers was incompetent. *Thompson v. State*, 70 App. 610, 157 S. W. 494.

Where penetration was testified to by the girl and admitted by appellant in his confession, it was sufficiently proven. *Mora v. State* (Cr. App.) 167 S. W. 344.

Charge.—See *Fitzgerald v. State*, 20 App. 281.

The jury should be instructed, if asked, that penetration must be proved beyond a reasonable doubt. *Davis v. State*, 43 Tex. 189.

In explaining "penetration," the charge should instruct the jury plainly, that to constitute rape, the private parts of the female must have been penetrated by the male member, or sexual organ of the man. But see this case for a charge not so specific which was held to be sufficient. *Burk v. State*, 8 App. 336, and see, also, *Wilson v. State*, 17 App. 525.

The court should instruct the jury that penetration should be proved beyond a reasonable doubt. *Word v. State*, 12 App. 174.

For approved charge, see *Rodgers v. State*, 30 App. 510, 17 S. W. 1077.

Failure to charge this article if prejudicial at all would be prejudicial to the state and defendant can not complain. *Lujano v. State*, 32 App. 414, 24 S. W. 97.

Where evidence of defendant himself shows an act of carnal intercourse, error in charge on "penetration" is harmless. *Ledbetter v. State*, 33 App. 400, 26 S. W. 725.

When proof of penetration is positive, an instruction to the jury that penetration may be proven either by positive or circumstantial evidence cannot injure defendant. *Belcher v. State*, 39 App. 121, 44 S. W. 1106.

Where the evidence shows penetration, it is not error to refuse a request for a finding whether there was an attempt to commit rape. *Boyd v. State*, 72 App. 521, 163 S. W. 67.

Art. 1068. [638] Defendant must be over fourteen.—No person under the age of fourteen, at the time the offense is charged to have been committed, can be convicted of rape, or assault with intent to commit the offense.

Indictment.—Indictment need not charge that defendant was under fourteen years of age at the time the offense was committed. If true, it was matter of defense. *Davis v. State*, 42 Tex. 226; *Word v. State*, 12 App. 174; *Cornelius v. State*, 13 App. 349.

Burden of proof.—See notes under art. 52, ante.

Charge.—Where evidence tending to show that defendant was under fourteen years of age was very inconclusive, the court did not err in refusing to submit that issue to the jury. *Wilcox v. State*, 33 App. 322, 26 S. W. 989.

Art. 1069. [639] Punishment.—Whoever shall be guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five, in the discretion of the jury. [Act Nov. 10, 1886, p. 161.]

Cited, *Murff v. State* (Cr. App.) 172 S. W. 238.

Extent of punishment.—See *Dove v. State*, 36 App. 105, 35 S. W. 648.

Ninety-nine years in the penitentiary, held, not excessive punishment for rape on a female 9 years old. *Moore v. State*, 49 App. 449, 36 S. W. 327.

Twenty years' imprisonment is not excessive punishment for forcibly raping a child. *Hutcherson v. State*, 62 App. 1, 136 S. W. 53.

Where the jury fixed the punishment at 35 years, the sentence, in view of the indeterminate law, must be a sentence of imprisonment for not less than 5 years nor more than 35 years. *Douglass v. State* (Cr. App.) 165 S. W. 933.

Nine years for intercourse with a girl under 15 is not excessive. *Lafoon v. State* (Cr. App.) 166 S. W. 1168.

— **Minors.**—See art. 35, ante, and notes.

The maximum punishment of death does not apply where accused is under 17 years. *Munger v. State*, 57 App. 384, 122 S. W. 874.

Charge.—It is not error to charge that the jury may assess the punishment at death or imprisonment for not less than five years, although the jurors were

not asked whether they had conscientious scruples against punishment by death. *Wragg v. State* (Cr. App.) 145 S. W. 342.

A charge omitting to state that punishment may be by imprisonment for life is erroneous, but in this case the error was harmless. *Graham v. State* (Cr. App.) 163 S. W. 726.

Evidence as to age.—See art. 52, ante, and notes.

Art. 1070. [640] Conviction may be had for "attempt."—If it appear, on the trial of an indictment for rape, that the offense, though not committed, was attempted by the use of any of the means spoken of in articles 1064, 1065 and 1066, but not such as to bring the offense within the definition of an assault with intent to commit rape, the jury may find the defendant guilty of an attempt to commit the offense, and affix the punishment prescribed in article 1029.

Attempt.—See art. 1029, and notes.

Attempt to rape is a distinct offense from rape or assault to rape, and may be prosecuted and punished as such. *Melton v. State*, 24 App. 284, 6 S. W. 39, citing *Williams v. State*, 1 App. 90, 28 Am. Rep. 399; *Burney v. State*, 21 App. 565, 1 S. W. 458; *Moore v. State*, 20 App. 275; *Milton v. State*, 23 App. 204, 4 S. W. 574; *Taylor v. State*, 22 App. 529, 3 S. W. 753, 58 Am. Rep. 656. And see *Reagan v. State*, 28 App. 227, 12 S. W. 601, 19 Am. St. Rep. 833; *Franklin v. State*, 34 App. 203, 26 S. W. 1088; *Holloway v. State*, 54 App. 463, 113 S. W. 933; *Shockley v. State*, 71 App. 475, 160 S. W. 452.

An attempt, in legal parlance, means an endeavor to accomplish a crime carried beyond mere preparation, but falling short of the ultimate design in any part of it. *Lovett v. State*, 19 Tex. 174. See, also, *Marthall v. State*, 34 App. 22, 36 S. W. 1062.

The age of the female is immaterial, and though she be under 15 years of age force must be proven to convict under this article. *Warren v. State*, 38 App. 152, 41 S. W. 635.

The gravamen of the offense of attempting to rape a married woman by fraud in personating her husband is the fraud, and it is not necessary that the woman should believe the offender to be her husband. *Franklin v. State*, 34 App. 203, 29 S. W. 1088.

To convict under this article it must be shown that it was defendant's intent to use the same force as would make him guilty of rape or of assault with intent to rape, but that in the actual attempt carried beyond mere preparation, he fell short of the requisite degree of force. *McAdoo v. State*, 35 App. 603, 34 S. W. 955, 60 Am. St. Rep. 61. See, also, *Warren v. State*, 38 App. 152, 41 S. W. 635.

If the offense should fall within the definition of an assault with intent to rape the defendant cannot be convicted of an attempt to rape. *Waire v. State* (Cr. App.) 64 S. W. 1062.

The very definition under this article, excludes in an attempt to rape the question of assault. *Taylor v. State*, 44 App. 153, 69 S. W. 149.

An "attempt to rape" can be committed without an assault being made on the person of the female, but, in an "assault to rape," an assault in one of the ways defined by the Code is one of the constituent elements. *Taff v. State* (Cr. App.) 155 S. W. 214.

Assault with intent to rape.—See art. 1029, ante, and notes.

Burglary with intent to rape.—See arts. 1303, 1304, post, and notes.

Limitations.—See art. 226 et seq., C. C. P.

Indictment.—Willson's Cr. Forms, 479, 496.

See *Franklin v. State*, 34 App. 203, 29 S. W. 1088.

See, also, notes under art. 1029, ante.

A conviction for this offense can not be had under an indictment for an assault with intent to rape. *Brown v. State*, 7 App. 569; *Williams v. State*, 1 App. 90, 28 Am. Rep. 399; *Burney v. State*, 21 App. 565, 1 S. W. 458; *Taylor v. State*, 22 App. 529, 3 S. W. 753, 58 Am. Rep. 656; *Milton v. State*, 23 App. 204, 4 S. W. 574; *Shockley v. State*, 71 App. 475, 160 S. W. 452.

It is not necessary to a conviction for attempt to rape that the indictment be for rape. *Reagan v. State*, 28 App. 227, 12 S. W. 601, 19 Am. St. Rep. 833.

An indictment, alleging that accused unlawfully assaulted a female under the age of 15 years and attempted to ravish her, does not charge an attempt to commit rape. *Fowler v. State* (Cr. App.) 148 S. W. 576.

Evidence.—Sufficiency of evidence, see *Franklin v. State*, 34 App. 203, 29 S. W. 1088; *Bozeman v. State*, 34 App. 503, 31 S. W. 339.

Charge.—Where on a trial for rape the court, in its charge to the jury, made the fact of defendant's guilt to depend upon their belief, beyond reasonable doubt, that he had actually ravished and penetrated the injured female, held, that defendant could not be heard to complain that the court had omitted to charge the law with regard to an attempt to commit rape. *Massey v. State*, 31 App. 371, 20 S. W. 758.

Where the evidence shows penetration, it is not error to refuse a request for a finding whether there was an attempt to commit rape. *Boyd v. State*, 72 App. 521, 163 S. W. 67.

CHAPTER NINE

OF ABORTION

<p>Art. 1071. Definition and punishment. 1072. Furnishing the means—an accomplice. 1073. Attempt at.</p>	<p>Art. 1074. In case of death, murder. 1075. Destroying unborn child. 1076. Not punishable when procured by medical advice.</p>
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Article 1071. [641] Definition and punishment.—If any person shall designedly administer to a pregnant woman, or knowingly procure to be administered, with her consent, any drug or medicine, or shall use toward her any violence, or means whatever, externally or internally applied, and shall thereby procure an abortion, he shall be punished by confinement in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled.

By the term "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb, or that a premature birth thereof be caused. [Amended, Act 1907, p. 55.]

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| <p>1. Constitutionality.
2. Offense.
3. Principals and accomplices.
4. Indictment.
5. ——— Different counts, duplicity, and election.</p> | <p>6. Competency of wife as witness against husband.
7. Evidence.
8. ——— Opinion and expert testimony.
9. ——— Impeachment of witnesses.
10. Charge.
11. Continuance.</p> |
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1. **Constitutionality.**—This article is not unconstitutional as failing to sufficiently define or describe the offense. *Jackson v. State*, 55 App. 79, 115 S. W. 262, 131 Am. St. Rep. 792.

2. **Offense.**—Fingers inserted into the womb constitute an "instrument." *Shaw v. State* (Cr. App.) 165 S. W. 930.

3. **Principals and accomplices.**—A completed abortion should be prosecuted under this article only. If the attempt to commit abortion fails, accused should be prosecuted under both this and art. 1073. *Willingham v. State*, 33 App. 98, 25 S. W. 424. And see *Jackson v. State*, 55 App. 79, 115 S. W. 266, 131 Am. St. Rep. 792.

Though the injured female consents, she is not an accomplice to the act of abortion or attempt thereof. *Willingham v. State*, 33 App. 98, 25 S. W. 424, citing *Watson v. State*, 9 App. 237; *Shaw v. State*, 165 S. W. 930. And see *Miller v. State*, 37 App. 575, 40 S. W. 313; *Hunter v. State*, 38 App. 61, 41 S. W. 602; *Gray v. State* (Cr. App.) 178 S. W. 337.

The female subject of abortion cannot be a principal. The party prescribing and furnishing the means would be principal under this article. The party supplying the means on prescription with the knowledge that it was intended for abortion, would be accomplice under art. 1072. *Moore v. State*, 37 App. 552, 40 S. W. 287; *Cave v. State*, 33 App. 335, 26 S. W. 503. And see *Fondren v. State* (Cr. App.) 169 S. W. 411.

Article 79 applies to this offense. *Fondren v. State* (Cr. App.) 169 S. W. 411.

See, also, notes under arts. 74, 99, ante.

4. **Indictment.**—*Willson's Cr. Forms*, 498, 499.

See notes under arts. 447-487, C. C. P.

Indictment need not allege what drug or medicine was used, or more than that it was a drug or medicine calculated to produce abortion. *Watson v. State*, 9 App. 237; *Cave v. State*, 33 App. 335, 26 S. W. 503.

When the indictment alleges that the abortion was produced by means of a metallic instrument being introduced into the womb, the State must confine her proof to the allegations, and should not be allowed to prove attempts made at different times. *King v. State*, 35 App. 472, 34 S. W. 282.

Indictment held sufficient. *Navarro v. State*, 24 App. 378, 6 S. W. 542.

As to election between counts, see *Moore v. State*, 37 App. 552, 40 S. W. 287.

Evidence of use of other instruments than that alleged, held, admissible. *Moore v. State*, 37 App. 552, 40 S. W. 287.

A request to instruct a verdict of not guilty for want of evidence that the grand jury did not know the name of the instrument held properly refused. *Link v. State* (Cr. App.) 164 S. W. 987.

An indictment charging one as an accomplice need not allege that the principal knew the woman was pregnant. *Fondren v. State* (Cr. App.) 169 S. W. 411.

An indictment enlarged that accused did unlawfully and designedly make an assault on a pregnant woman, and, with the woman's consent used means calculated to produce, and which did produce, an abortion on the woman, who was then pregnant. Held that, as the term "abortion" generally means the premature delivery of the fetus or a miscarriage, and the term "pregnancy" includes the entire time from conception to delivery, the indictment charged the offense of abortion. *Gray v. State* (Cr. App.) 178 S. W. 337.

5. — Different counts, duplicity, and election.—See art. 481, C. C. P.

6. Competency of wife as witness against husband.—See notes under C. C. P., art. 795.

7. Evidence.—It is competent to prove by the prosecutrix the means used, how it affected her, and her suffering; but that defendant killed the child and came near killing her, are matters of opinion. *King v. State*, 35 App. 472, 34 S. W. 282.

Where the indictment charge the use of instruments, evidence of two attempts is admissible. *King v. State*, 35 App. 472, 34 S. W. 282.

Evidence held sufficient to show that abortion resulted from the act of defendant committed thirty days before the abortion occurred. *Moore v. State*, 37 App. 552, 40 S. W. 287.

On evidence to pregnancy, see *Link v. State* (Cr. App.) 164 S. W. 987.

Evidence of prosecutrix that the man who took her to defendant, and who made the arrangements to have the operation performed, was the author of her ruin and the father of her child, was admissible. *Shaw v. State* (Cr. App.) 165 S. W. 930.

8. — Opinion and expert testimony.—See notes under art. 783, C. C. P.

9. — Impeachment of witnesses.—See notes under art. 3637, *Vernon's Sayles'* Civ. St. 1914.

10. Charge.—See *Reum v. State*, 49 App. 125, 90 S. W. 1109. See, also, notes under arts. 735-743, C. C. P.

A charge to acquit if the medicine either caused, or was calculated to cause, the death of the fœtus, should not be given. *Link v. State* (Cr. App.) 164 S. W. 987.

It was not error to omit to define "assault," where the court stated in detail what the jury would be required to find before they could convict. *Link v. State* (Cr. App.) 164 S. W. 987.

11. Continuance.—See notes under art. 603, et seq. C. C. P.

Art. 1072. [642] Furnishing the means; an accomplice.—Any person who furnishes the means for procuring an abortion, knowing the purpose intended, is guilty as an accomplice.

Accomplices.—See notes under art. 1071, ante.

The woman's father testifying for the state, held to be an accomplice. *Watson v. State*, 9 App. 237.

This article is not exclusive in defining accomplices, but article 79 applies, so that one who advises, commands, or encourages another to commit the abortion, is guilty. *Fondren v. State* (Cr. App.) 169 S. W. 411.

See, also, *Willingham v. State*, 33 App. 98, 25 S. W. 424; *Moore v. State*, 37 App. 552, 40 S. W. 287.

Indictment.—*Willson's Cr. Forms*, 500.

Art. 1073. [643] Attempt at.—If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion; provided, it be shown that such means were calculated to produce that result, and shall be punished by fine not less than one hundred nor more than one thousand dollars. [Act Feb. 12, 1858, p. 172.]

Constitutionality.—This article sufficiently defines the offense. *Jackson v. State*, 55 App. 79, 115 S. W. 262, 131 Am. St. Rep. 792.

Offense.—Where an attempt to produce abortion fails of its purpose, the accused should be prosecuted under both this and art. 1071. *Willingham v. State*, 33 App. 98, 25 S. W. 424.

For construction of this article, see *Fretwell v. State*, 43 App. 501, 67 S. W. 1021.

Accomplices.—See notes under art. 1071, ante.

Evidence held to show that the father of the injured female was an accomplice. *Watson v. State*, 9 App. 237.

Where the injured female testifies the court is not required to instruct on the law of accomplice. *Willingham v. State*, 33 App. 98, 25 S. W. 424.

The injured female, though she consented to the attempt, is not an accomplice. *Hunter v. State*, 38 App. 61, 41 S. W. 602.

Indictment.—*Willson's Cr. Forms*, 501.

Where indictment charges attempt by use of drug or medicine it is not necessary to allege what drug or medicine was administered. *Watson v. State*, 9 App. 237; *Cave v. State*, 33 App. 335, 26 S. W. 503.

Evidence.—On trial for attempt to produce an abortion, the evidence showed that defendant had administered ergot; evidence of experts that ergot would under certain circumstances produce an abortion is sufficient to support a conviction. *Hunter v. State*, 38 App. 61, 41 S. W. 602. And further as to evidence, see *Watson v. State*, 9 App. 237.

Art. 1074. [644] In case of death, murder.—If the death of the mother is occasioned by an abortion so produced, or by an attempt to effect the same, it is murder.

Constitutionality.—The statute sufficiently defines the offense. *Jackson v. State*, 55 App. 79, 115 S. W. 262, 131 Am. St. Rep. 792.

Offense.—A homicide committed by procuring or attempting to procure an abortion is not murder per se, the intent to kill must exist. *Ex parte Fatheree*, 34 App. 594, 31 S. W. 403.

Evidence.—As to dying declarations, see art. 808, C. C. P., and notes.

Charge.—See Jackson v. State, 55 App. 79, 115 S. W. 262, 131 Am. St. Rep. 792, and notes under art. 735, C. C. P.

Art. 1075. [645] Destroying unborn child.—If any person shall, during parturition of the mother, destroy the vitality or life in a child, in a state of being born, and before actual birth, which child would otherwise have been born alive, he shall be punished by confinement in the penitentiary for life, or any period not less than five years, at the discretion of the jury.

Offense.—The child must be in a condition of being born alive and but for the act of the accused the child would have been born alive. This offense differs from infanticide, for in the latter the child must be born alive in order that its death may be brought within the definition of that offense. Hardin v. State, 52 App. 238, 106 S. W. 353.

Indictment.—Willson's Cr. Forms, 502.

The manner in which the vitality is destroyed must be alleged with reasonable particularity; a mere allegation in the language of the statute will not suffice. The indictment need not negative that the act was done under the advice of a physician. State v. Rupe, 41 Tex. 33.

Art. 1076. [646] Not punishable when procured by medical advice.—Nothing contained in this chapter shall be deemed to apply to the case of an abortion procured or attempted to be procured by medical advice for the purpose of saving the life of the mother.

CHAPTER TEN

ADMINISTERING POISONOUS AND INJURIOUS POTIONS

<p>Art. 1077. Poisoning food, well, etc. 1078. Causing another to inhale injurious substances.</p>	<p>Art. 1079. Death within a year, murder. 1080. Malpractice punishable.</p>
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Article 1077. [647] Poisoning food, well, etc.—If any person shall mingle or cause to be mingled any other noxious potion or substance with any drink, food or medicine, with intent to kill or injure any other person, or shall wilfully poison or cause to be poisoned any spring, well, cistern or reservoir of water with such intent, he shall be punished by imprisonment in the penitentiary not less than two nor more than ten years.

Offense.—This article denounces two offenses: 1. Poisoning food, etc., with intent to kill or injure; and, 2. Wilfully poisoning any spring, etc. An indictment for the first need not allege that the act was "wilfully" done, but such allegation would be essential in charging the second offense. Davis v. State, 4 App. 456. This offense is not to be treated as an assault with intent to murder, or as any other kind of an assault, although if death ensues the offense will be murder. Garnet v. State, 1 App. 605, 28 Am. Rep. 425.

"The intent to kill" or "the intent to injure" are made to stand in lieu of and must be proven just as malice aforethought under the general law, which means nothing more nor less than the taking of human life with the intention to do so, or when death results from an intention to do serious bodily harm. Rupe v. State, 42 App. 477, 61 S. W. 933.

This article defines an offense as it now stands, whether or not the word "other" as it appears in the article is rejected. Runnels v. State, 45 App. 446, 77 S. W. 460.

For one to be guilty he must have the intent to injure in doing the acts denounced and the administering or use by the intended victim must be unknown to the party taking or using the poisonous matters, or the party causing the injury must do it by some personal act to the party sought to be injured. If the receiving party knows of the deadly character of the poison, takes and swallows it, the party giving it is not guilty. Sanders v. State, 54 App. 101, 112 S. W. 69, 22 L. R. A. (N. S.) 243. See, also, Grace v. State, 44 App. 193, 69 S. W. 530.

Indictment.—Willson's Cr. Forms, 503, 504, 512.

This article defines two distinct offenses. Indictment for the first need not, as it must in the second, charge that the act was "wilfully" done. Davis v. State, 4 App. 456.

Evidence.—See Ellington v. State, 48 App. 160, 87 S. W. 153.

"In cases of murder by poison it is not essential to conviction that a chemical analysis of the stomach of the deceased should have been made in order to ascertain whether or not death was caused by poison, if death by poison was clearly

and satisfactorily proved by other evidence." *Johnson v. State*, 29 App. 150, 15 S. W. 647. And see, also, *Roe v. State*, 25 App. 33, 8 S. W. 463; *Johnson v. State*, 30 App. 419, 17 S. W. 1070, 28 Am. St. Rep. 930.

Charge.—Indictment being drawn under the provisions of this and art. 1079, post, which require that the defendant "mingle" or cause to be mingled the potion, with intent, etc., charge that he gave the deceased and caused him to swallow the drink in which the potion was mingled, was error. *Brooks v. State*, 42 App. 347, 60 S. W. 53.

Art. 1078. [648] Causing another to inhale injurious substances.—If any person shall, with intent to injure, cause another person to inhale or swallow any substance injurious to health or any of the functions of the body, or, if such substance was administered with intent to kill, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1858, p. 172.]

Murder by causing inhalation of poison.—See art. 1078, post.

Indictment.—Willson's Cr. Forms, 505, 513.

Art. 1079. [649] Death within a year, murder.—If by reason of the commission of the offenses named in the two preceding articles, the death of a person be caused within one year, the offender shall be deemed guilty of murder and be punished accordingly.

Offenses and procedure.—See notes to art. 1077, ante.

Indictment.—Willson's Cr. Forms, 511-513, 516.

Art. 1080. [650] Malpractice punishable.—If any person engaged in the practice of medicine and claiming to be a physician, shall, by the use of any noxious substance, administered in a grossly ignorant manner, produce death, or other great bodily injury, he shall be punished for the offense as any other person would be who had given such substance, knowing it to be injurious and intending to kill or injure.

Indictment.—Willson's Cr. Forms, 506.

CHAPTER ELEVEN

OF HOMICIDE

Art.	Definition.	Art.	Definition.
1081.	Definition.	1084.	Body of deceased must be found.
1082.	Destruction of life must be complete.	1085.	Persons killed must be in existence.
1083.	Gross negligence, etc., refers to acts of others.	1086.	Produced by words, etc.

Article 1081. [651] Definition.—"Homicide" is the destruction of the life of one human being by the act, agency, procurement or culpable omission of another.

Homicide.—See notes under arts. 1082, 1083.

As appertaining to this article, see *Hart v. State*, 15 App. 202, 49 Am. Rep. 188; *Treadwell v. State*, 16 App. 560.

Indictment.—Willson's Cr. Forms, 508.

Charge.—See notes under art. 1082, post.

A charge using the expression "the destruction of the life of one person" instead of the statutory expression "the destruction of the life of one human being," is not objectionable. *Jefferson v. State*, 71 App. 120, 158 S. W. 520.

Insanity and intoxication.—See arts. 39-41.

Principals, accomplices and accessories.—See notes to arts. 74-91, ante.

Art. 1082. [652] Destruction of life must be complete.—The destruction of life must be complete by such act, agency, procurement or omission; but, although the injury which caused death might not under other circumstances have proved fatal, yet, if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide.

Homicide.—This and the preceding article combine a more specific definition of "homicide" than that inherited from the common law. Under our system, the de-

struction of life must not only be complete, but it must be complete by the act, agency, procurement or omission of the defendant. *Morgan v. State*, 16 App. 593.

For a construction of the first clause of the second sentence of this article, and for an exposition of the principle, see the deciding opinion of Willson, J., *Morgan v. State*, 16 App. 593, and note that on the question, *Williams v. State*, 2 App. 271, and *Powell v. State*, 13 App. 244, appear to be overruled.

Indictment.—Willson's Cr. Forms, 508.

Charge.—Only in case there should be evidence tending to raise the issue that deceased may have died from some other cause than the infliction of the wound would the court be required to charge specifically on this subject. *Outley v. State* (Cr. App.) 99 S. W. 96; *Smith v. State*, 33 App. 513, 27 S. W. 137; *Wood v. State*, 31 App. 571, 21 S. W. 602.

Where the facts warrant it, an affirmative charge should be given to the effect that if the wound was not necessarily of a fatal character, and would not of itself have caused death, but that deceased died from blood poisoning superinduced either by gross neglect or manifestly improper treatment by deceased or those in attendance upon him, defendant would not be responsible for his death. *Johnson v. State*, 43 App. 283, 65 S. W. 93, 94; *Armsworthy v. State*, 48 App. 413, 88 S. W. 215.

Where the court has given a proper charge in accordance with this article, it is not proper for him to give a requested charge to the effect that if the deceased was shot, but the wound thereby inflicted was not necessarily fatal and the wounded party was suffering from or afflicted with a disease not connected with or superinduced by the shot and died therefrom, then the appellant should be acquitted. If the deceased would have shortly died from Bright's disease and it was an incurable malady, yet if appellant's shot assisted in bringing about the death he would be guilty of the homicide. *Gardner v. State*, 44 App. 572, 73 S. W. 14.

When the deceased lived 18 days after receiving the wound but the evidence shows that the wound caused his death the court need not charge this article. *Lahue v. State*, 51 App. 159, 101 S. W. 1011.

Where the evidence shows that the wound was not necessarily fatal, and that death might have ensued from deceased's neglect to have the wound treated, the court should charge this and the preceding article, and apply them to the facts of the case. *Noble v. State*, 54 App. 436, 113 S. W. 282, 22 L. R. A. (N. S.) 841.

The court, after defining homicide, charged that, though the injury which caused death might not, under other circumstances, have proved fatal, if it be the cause of death, without gross neglect or improper treatment by some other person, such as a physician, nurse, or other attendant, it would be homicide; and, if some one cut deceased and inflicted a wound, not in itself necessarily mortal, and it produced peritonitis or any other effect resulting in his death, the party inflicting the injury would be as guilty as if the wound of itself would inevitably lead to death. Held that, while correct as far as it went, the charge was not sufficient to present fully an issue as to whether improper treatment brought about peritonitis which resulted fatally, and accused was entitled to a requested instruction that, if death was brought about by improper treatment or gross neglect of the physicians, he would not be guilty. *McMillan v. State*, 58 App. 525, 126 S. W. 875.

Instructions that if accused inflicted wounds not necessarily fatal, but from the effects of which decedent died, accused was guilty of some degree of homicide unless decedent died from her own gross neglect, such as failure to obey instructions of her attending physician, but that if she was guilty of such gross neglect, and the neglect operating with the wounds, caused her death, which would not probably have resulted but for such neglect or if the jury had a reasonable doubt as to whether such were the facts, accused should be acquitted of any degree of homicide, etc., sufficiently presented an issue whether decedent's death was caused by her walking around, whereas the physician had told her to remain in bed. *Pettis v. State* (Cr. App.) 150 S. W. 790.

Where decedent's attending physician testified that the wound inflicted by accused was not necessarily fatal, that decedent's life might have been saved by an operation which the witness desired to perform, but was forbidden to do so by decedent's mother, who had him in charge, and that she administered to him certain medicine which was detrimental and which witness told her not to give, entitled accused to a charge on negligence and improper treatment by others. *Masters v. State*, 71 App. 608, 160 S. W. 693.

In a prosecution for homicide, where it was shown that shortly after he was shot, deceased was taken to a nearby house; that unsuccessful efforts were made to secure a doctor; that next day deceased was removed to a town where he was attended by a physician, but died shortly thereafter, and the doctor testified that the wound which extended from the upper left side through the lungs, liver, and intestines and lodged in the right hip was necessarily fatal—the court properly refused to instruct on the issue of negligence and gross mistreatment as the cause of death. *Francis v. State* (Cr. App.) 170 S. W. 779.

Death within a year and a day.—See notes under art. 228, ante.

Art. 1083. [653] Gross negligence, etc., refers to acts of others.—The foregoing article, in what is said of gross neglect or improper treatment, has reference to the acts of some person other than him who inflicts the first injury, as of the physician, nurse or other attendant. If the person inflicting the injury, which makes it necessary to call aid in preserving the life of the person injured,

shall wilfully fail or neglect to call such aid, he shall be deemed equally guilty, as if the injury were one which would inevitably lead to death.

See notes to art. 1082, ante.

Negligence and improper treatment.—The fact that the family of the deceased was present when the wound was inflicted, does not relieve the person inflicting the wound from furnishing aid to the injured party. *Williams v. State*, 2 App. 271.

In defining homicide, the Code is more specific than the common law. The common law defines it, as the "killing of any human creature," the "killing of a man by a man." The Code defines it as the destruction of the life of one human being by the act, agency, procurement, or omission of another, and still further, it requires that the destruction of life must be complete by such act, agency, etc. The words "but although the injury which caused death might not under other circumstances have proved fatal," used in article 1082, refer to and mean all injuries which are not of themselves inevitably fatal, or which are not inflicted under circumstances which render them inevitably fatal. In other words, all injuries, which under the circumstances of the particular case, are not necessarily fatal, but which may cause death. An injury which must cause death under any state of circumstances, such as the severance of the head from the body, the severance of the carotid artery, or the breaking of the neck, would not come within the meaning of the words quoted. For injuries of this character no legislation is required, because they can not be affected by either care or negligence, skillful or unskillful treatment. They produce death in spite of any human aid. But if the injury be such that death is not a certain result thereof, if it be such that human aid and skill may prevent a fatal termination, then it is such an injury as the words quoted refer to. At common law the neglect or improper treatment must produce the death in order to relieve the person who inflicted the original injury of the homicide. But the preceding articles of the Code do not require that the neglect or improper treatment should cause the death, either in whole or in part. If there be gross neglect, or manifestly improper treatment, either in preventing, or in aiding the fatal effects of the injury, the death of the injured person is not homicide by the party who inflicted the original injury. Gross neglect and improper treatment are not only such as produce the destruction of life, but such also as allow, suffer, or permit it. The preceding articles, therefore, undoubtedly change the rule of the common law, the theory of which is, that he who caused the first injury should be held guilty of the homicide. The cases of *Williams v. State*, 2 App. 271, and *Powell v. State*, 13 App. 244, which declare the common law rule, are virtually overruled upon this point. *Morgan v. State*, 16 App. 593.

If the party who inflicted the injury wilfully fails to furnish necessary aid, and the injured person dies from the injury, the injury is regarded as inevitably fatal, and no question as to neglect or improper treatment by others can in such case arise as a matter of defense. *Morgan v. State*, 16 App. 593.

Deceased cannot be charged with neglect or grossly improper treatment where he refuses to allow his leg to be amputated. *Franklin v. State*, 41 App. 21, 51 S. W. 952.

If one illegally shoots another or inflicts upon him an injury that might not be fatal, and yet of his malice fails to call aid, and the injured party dies, the killing might be imputed to him; but in any event the failure to call aid must be wilful, that is with legal malice and evil intent. *Ware v. State*, 41 App. 415, 55 S. W. 344.

Charge.—The following charge was held to be correct: "Homicide is the destruction of the life of one human being by the act, procurement, or culpable omission of another. The destruction of life must be complete by such act or agency. But, although the injury which caused death might not, under other circumstances, have proved fatal, yet, if such injury be the cause of death, without its appearing that there has been any great neglect, or manifest improper treatment by some other person, such as a physician, nurse, or other attendant, it would be homicide; and if the jury are satisfied, from the evidence, that some one shot the deceased, and inflicted upon him a wound, which was not in itself necessarily mortal, and that the wound inflicted produced blood poisoning, or any other effect which would result in the death of the deceased, the party inflicting the injury would be as guilty as if the wound would of itself inevitably lead to death." *Hart v. State*, 15 App. 202, 49 Am. Rep. 188. See this subject fully discussed in *Morgan v. State*, 16 App. 593.

For facts under which the court, properly charging this article, should, in connection therewith, have submitted articles 1147 and 1150, and in connection with these last named articles, have submitted manslaughter and aggravated assault, see *Lee v. State*, 44 App. 460, 72 S. W. 195.

Indictment.—Willson's Cr. Forms, 508.

Art. 1084. [654] Body of deceased must be found.—No person shall be convicted of any grade of homicide, unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of the death of the person charged to have been killed. [Act March 8, 1887, p. 4.]

See notes under art. 1140, post.

Indictment.—Willson's Cr. Forms, 508.

Evidence of corpus delicti.—In prosecutions for murder, the state must establish clearly and satisfactorily the corpus delicti. The corpus delicti consists of two things: (1) a criminal act; and (2), the defendant's agency in the commission of

such act. In homicide, in order to establish the corpus delicti it must be proved: (1) the death of the party alleged to be dead, and that the death was produced by the criminal act of some one other than the deceased, and was not the result of accident or natural cause; and (2), that the defendant committed the act which caused the death. The corpus delicti may be established by circumstantial evidence, but the fact of the death of the party alleged to have been killed, and that his death was caused by criminal agency, must be clearly shown, and a confession of the defendant is not of itself sufficient proof of this part of the corpus delicti. Special care should be exercised as to this part of the corpus delicti, and there should be no conviction except where this part of the case is proved with particular clearness and certainty. *Lovelady v. State*, 14 App. 545. And see *Id.*, 17 App. 286. *Walker v. State*, 14 App. 609; *Willson v. State*, 41 Tex. 320, *Id.*, 43 Tex. 472; *Gay v. State*, 40 App. 242, 49 S. W. 612, citing *Kugadt v. State*, 38 App. 681, 44 S. W. 989; *Gay v. State*, 42 App. 450, 60 S. W. 771; *Conde v. State*, 35 App. 98, 34 S. W. 286, 60 Am. St. Rep. 22; *Williams v. State* (Cr. App.) 65 S. W. 1060; *Lott v. State*, 60 App. 162, 131 S. W. 553.

See, also, *Stegald v. State*, 24 App. 207, 5 S. W. 853; *Shulze v. State*, 28 App. 316, 12 S. W. 1084; *Puryear v. State*, 28 App. 74, 11 S. W. 929; *Morris v. State*, 30 App. 95, 16 S. W. 757.

— **Admissibility of evidence.**—It is competent to show the cause of a death without the aid of expert witnesses, even in a case where death did not ensue immediately after the infliction of the wound. Experts may give their opinions as to the cause of the death. *Smith v. State*, 43 Tex. 643; *Powell v. State*, 13 App. 244. See, also, *McMillan v. State* (Cr. App.) 165 S. W. 576.

— **Sufficiency of proof of corpus delicti in general.**—Evidence held sufficient to establish the corpus delicti. *Lucas v. State* (Cr. App.) 155 S. W. 527; *Shulze v. State*, 28 App. 316, 12 S. W. 1084; *Davis v. State* (Cr. App.) 143 S. W. 1161.

Evidence held insufficient, on a trial for infanticide, to establish the corpus delicti. *Harris v. State*, 30 App. 549, 17 S. W. 1110. And see *Harris v. State*, 28 App. 308, 12 S. W. 1102, 19 Am. St. Rep. 837. And see, also, *Jackson v. State*, 29 App. 459, 16 S. W. 247; *Southern v. State*, 57 App. 188, 122 S. W. 259.

For cases and evidence bearing upon the question as to whether the death was caused by the criminal act or agency of another person than the deceased see *Olivares v. State*, 23 App. 305, 4 S. W. 903; *Treadwell v. State*, 16 App. 560; *Heacock v. State*, 13 App. 97; *Spear v. State*, 16 App. 98; *Scott v. State*, 23 App. 521, 5 S. W. 142; *Lucas v. State*, 19 App. 79; *Johnson v. State*, 20 App. 178.

The corpus delicti must be proven with greater certainty than a mere probability or strong suspicion. *Clifton v. State*, 39 App. 619, 47 S. W. 642.

The state is bound to prove the corpus delicti, and the amount of proof of identification cannot be complained of. *McCue v. State* (Cr. App.) 170 S. W. 281.

— **Circumstantial evidence.**—Where criminating facts are fully proven the conviction will not be set aside because the evidence is circumstantial. *Wilkins v. State*, 35 App. 525, 34 S. W. 627; *Wilson v. State*, 39 App. 365, 46 S. W. 251; *Gossett v. State*, 57 App. 43, 123 S. W. 428.

In a prosecution for killing a newborn child, evidence held to sustain a finding that the child's head was mashed in and its neck broken. *Jones v. State*, 63 App. 494, 141 S. W. 953.

— **Confession or testimony of accused.**—The uncorroborated testimony of the defendant is not sufficient of itself to establish the corpus delicti, nor to support a conviction. *Willard v. State*, 27 App. 386, 11 S. W. 453, 11 Am. St. Rep. 197; *Harris v. State*, 28 App. 308, 12 S. W. 1102, 19 Am. St. Rep. 837; *Jackson v. State*, 29 App. 459, 16 S. W. 247.

The confession of defendant, together with circumstances tending to show his guilt, is sufficient to prove or establish the corpus delicti. *Mathews v. State*, 39 App. 553, 47 S. W. 647, 48 S. W. 189.

Where, in a prosecution for infanticide, there was no proof other than defendant's confession that the child came to its death by any act of hers, except, perhaps, by her abandonment thereof, and no examination of its lungs had been made to determine whether in fact the child had ever lived, the proof of the corpus delicti was insufficient to sustain a conviction, under the rule that the corpus delicti must be proved independent of defendant's confession. *Ellison v. State*, 59 App. 3, 127 S. W. 542.

A confession will not sustain a conviction of homicide unless it is shown that decedent has been killed and that the killing was criminally caused by accused's act or agency. *Lott v. State*, 60 App. 162, 131 S. W. 553.

An extrajudicial confession standing alone is not sufficient proof of the corpus delicti, but is sufficient if there be such extrinsic corroborative circumstances as will, taken with the confession, produce conviction in the minds of the jury beyond a reasonable doubt. *Lott v. State*, 60 App. 162, 131 S. W. 553.

The corpus delicti need not be proved independently of confessions which may be taken in connection with circumstantial evidence to determine that fact. *Lott v. State*, 60 App. 162, 131 S. W. 553.

See, also, *Anderson v. State*, 34 App. 546, 31 S. W. 673, 53 Am. St. Rep. 722; *Hunter v. State*, 34 App. 599, 31 S. W. 674.

— **Finding of dead body and identification thereof.**—The old article read as follows: "No person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of killing."

This article was amended so as to avoid an important question which might have arisen, that is, did it not require, not only that the body of the deceased, or portions of it, should be identified as that of the alleged murdered party, but also that it should be so identified as to establish the fact of killing; that is, that the body, or portions of it, found and identified, should exhibit evidence sufficient to

prove that the individual had been killed, that is, that the death was produced by violence and not by natural causes. *Walker v. State*, 14 App. 609. Under the article as amended this question can not arise.

Where a party has disappeared and portions of a human body are found, after the admission of testimony concerning his disappearance the court should guard the jury against using the circumstances of the disappearance in identifying the remains found as those of the alleged murdered man. *Gay v. State*, 42 App. 450, 60 S. W. 771. It is only required that such proof be of a legal character and sufficient to clearly establish the death of the party alleged to have been killed. It need not be positive, and if circumstantial, all that is required is that it sufficiently identifies the remains, or portions thereof, as those of deceased. *Gay v. State*, 40 App. 242, 49 S. W. 612, citing *Taylor v. State*, 35 Tex. 97; *Wilson v. State*, 41 Tex. 320; s. c., 43 Tex. 472; *Brown v. State*, 1 App. 154; *Jackson v. State*, 29 App. 458, 16 S. W. 247; *Gay v. State*, 42 App. 450, 60 S. W. 771; *McCue v. State* (Cr. App.) 170 S. W. 280.

The body may be identified by the best evidence attainable, and its identification by positive testimony is not indispensable. *Taylor v. State*, 35 Tex. 97.

A witness unskilled in anatomy ought not to be permitted to testify as to the sex of a skeleton, but experts should be called to testify upon that question. *Wilson v. State*, 41 Tex. 320.

For the purpose of identifying the dead body or the portions thereof found, as the remains of the person alleged to have been killed, it is competent to identify clothing and other articles found upon, with, or near to such remains, as the property of the alleged deceased person. *Campbell v. State*, 8 App. 84; *Early v. State*, 9 App. 476; *McCue v. State* (Cr. App.) 170 S. W. 280.

It is indispensable that a dead body, or portions of a dead body, be found, and be clearly proved to be the body, or portions of the body of the person alleged to have been killed. *Walker v. State*, 14 App. 609.

For instances of identification and attempted identification of remains, see *Scott v. State*, 23 App. 521, 5 S. W. 142; *Lightfoot v. State*, 20 App. 77; *Hung Ah Hang v. State*, 18 App. 675; *Spear v. State*, 16 App. 98; *Lum v. State*, 11 App. 483; *Hamby v. State*, 36 Tex. 523.

Eyewitness testimony.—See notes to C. C. P. art. 717.

Charge.—This article is a rule of evidence and limitation on the quantum of proof, and need not be charged to the jury. *Southern v. State*, 60 App. 578, 132 S. W. 778.

For correct charge, see *Southern v. State*, 60 App. 578, 132 S. W. 778.

Art. 1085. [655] Person killed must be in existence.—The person upon whom the homicide is alleged to have been committed must be in existence by actual birth. It is homicide, however, to destroy human life actually in existence, however frail such existence may be, or however near extinction from other causes.

Child.—An infant can not be the subject of homicide until its complete expulsion, alive, from its mother. See this case held insufficient to prove the existence of the alleged murdered infant. *Wallace v. State*, 10 App. 255; see, also, *Sheppard v. State*, 17 App. 74; *Harris v. State*, 28 App. 308, 12 S. W. 1102, 19 Am. St. Rep. 837; *Harris v. State*, 30 App. 549, 17 S. W. 1110; *Josef v. State*, 34 App. 446, 30 S. W. 1067.

Indictment.—*Willson's Cr. Forms*, 508.

Indictment sufficiently alleged the "infant child of E. S., said child being without name." *Puryear v. State*, 28 App. 74, 11 S. W. 929.

Art. 1086. [656] Produced by words.—Although it is necessary to constitute homicide that it shall result from some act of the party accused, yet, if words be used which are reasonably calculated to produce and do produce an act which is the immediate cause of death, it is homicide; as, for example, if a blind man, a stranger, a child, or a person of unsound mind, be directed by words to a precipice or other dangerous place where he falls and is killed; or if one be directed to take any article of medicine, food or drink, known to be poisonous and which does produce a fatal effect; in these and like cases, the person so operating upon the mind or conduct of the person injured shall be deemed guilty of homicide.

Indictment.—*Willson's Cr. Forms*, 508.

CHAPTER TWELVE OF JUSTIFIABLE HOMICIDE

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Article 1087. [657] When justifiable.—Homicide is justifiable in the cases enumerated in the succeeding articles of this chapter.

1. OF A PUBLIC ENEMY

Art. 1088. [658] Killing a public enemy.—It is lawful to kill a public enemy, not only in the prosecution of war, but when he may be in the act of hostile invasion or occupation of any part of the state. A public enemy is any person acting under the authority or enlisted in the service of any government at war with this state or with the United States. Persons belonging to hostile tribes of Indians, who habitually commit depredations upon the lives or property of inhabitants of this state, and all persons acting with such tribes are public enemies, and this whether found in the act of committing such depredations or under circumstances which sufficiently show an intention so to do.

Art. 1089. [659] But not by poison.—Homicide of a public enemy by poison or the use of poisoned weapons is not justifiable.

Art. 1090. [660] Nor a deserter, prisoner, etc.—Homicide of a public enemy who is a deserter or prisoner of war, or the bearer of a flag of truce, is not justifiable.

2. OF A CONVICT

Art. 1091. [661] Execution of a convict.—The execution of a convict for a capital offense, by a legally qualified officer, under the warrant of a court of competent jurisdiction, is justifiable when the same takes place in the manner authorized by law and directed by warrant.

3. BY OFFICERS IN THE PERFORMANCE OF A DUTY, AND BY OTHER PERSONS UNDER CERTAIN CIRCUMSTANCES

Art. 1092. [662] By officer in execution of lawful order.—Homicide by an officer in the execution of the lawful orders of magistrates and courts is justifiable when he is violently resisted and has just ground to fear danger to his own life in executing the order.

Homicide by officers.—An officer's right of self-defense is limited to danger or apparent danger to his own life, and he is not authorized to slay a party to rescue

a prisoner, or a prisoner attempting to escape when his own life is not endangered, and when the weapon used in assault upon him is not a deadly weapon. *Williams v. State*, 41 App. 365, 54 S. W. 759.

Homicide by militiamen.—A militiaman in time of peace may kill in self-defense, but has no other authority to take human life. *Manley v. State*, 62 App. 392, 137 S. W. 1137.

And further as to militiamen, see *Manley v. State*, 62 App. 392, 137 S. W. 1137.

Art. 1093. [663] Even though it is erroneous.—The officer is justifiable, though there may have been an error of judgment on the part of the magistrate or court, if the order emanated from a proper authority.

Art. 1094. [664] Qualification of the foregoing.—The rule set forth in the two preceding articles is subject to the following restrictions:

1. The order must be that of a magistrate or a court having lawful authority to issue it.

2. It must have such form as the law requires to give it validity.

3. The person executing the order must be some officer duly authorized by law to execute the order, or some person specially appointed in accordance with law for the performance of the duty.

4. If the person executing the order be an officer, and performing a duty which no other person can by law perform, he must have taken the oath of office and given bond, where such is required by law.

5. The order must be executed in the manner directed by law, and the person executing the same must make known his purpose and the capacity in which he acts.

6. If the order be a written one, and the person against whom it issues, before resistance offered, wishes to see the same, or hear it read, the person charged with its execution shall produce the order and show it or read it.

7. In making an arrest under a written order, the person acting under such order shall, in all cases, declare to the party against whom it is directed the offense of which he is accused, and state the nature of the warrant, unless prevented therefrom by the act of the party to be arrested.

8. The officer or other person executing an order of arrest is required to use such force as may be necessary to prevent an escape when it is attempted, but he shall not in any case kill one who attempts to escape, unless in making or attempting such escape the life of the officer is endangered, or he is threatened with great bodily injury.

9. In overcoming a resistance to the execution of an order, the officer or person executing the same may oppose such force as is necessary to overcome the resistance, but he shall not take the life of the person resisting, unless he has just ground to fear that his own life will be taken, or that he will suffer great bodily injury in the execution of the order.

10. A prisoner under sentence of death, or of imprisonment in the penitentiary, or attempting to escape from the penitentiary, may be killed by the officer having legal custody of him, if his escape can in no other manner be prevented.

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| <p style="text-align: center;">Subd. 1</p> <p>1. Arrest.</p> <p>2. — Warrants.</p> <p>3. — Power of city to authorize arrest without warrant.</p> <p style="text-align: center;">Subd. 2</p> <p>4. Validity of process.</p> <p style="text-align: center;">Subd. 3</p> <p>5. Officers authorized.</p> <p style="text-align: center;">Subd. 4</p> <p>6. De facto officer.</p> <p style="text-align: center;">Subd. 5</p> <p>7. Execution of process.</p> <p style="text-align: center;">Subd. 6</p> <p>8. Execution of process in other county.</p> | <p style="text-align: center;">Subd. 7</p> <p>9. Failure to demand nature of authority.</p> <p style="text-align: center;">Subd. 8</p> <p>10. Force.</p> <p>11. Rights of officer making illegal arrest.</p> <p>12. Charge on right of self-defense.</p> <p style="text-align: center;">Subd. 9</p> <p>13. Force to overcome resistance.</p> <p>14. Degree of homicide.</p> <p style="text-align: center;">Subd. 10</p> <p>15. Convict and guard.</p> <p>16. Arrest of convict without warrant.</p> <p>17. Manslaughter.</p> |
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SUBD. 1

1. **Arrest.**—The rules under which an arrest may be made by a peace officer, without warrant, are defined by Code Cr. Proc. arts. 259–263. These articles prescribe the only circumstances under which an arrest can be made by a peace officer without a warrant, except when the arrest is made in the prevention of an offense. *Johnson v. State*, 5 App. 43; *Ross v. State*, 10 App. 455, 38 Am. Rep. 643; *Lacy v. State*, 7 App. 403; *Staples v. State*, 14 App. 136; *Jacobs v. State*, 28 App. 79, 12 S. W. 408; *Ex parte Sherwood*, 29 App. 334, 15 S. W. 812; *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

A person unlawfully carrying arms may be arrested without warrant. *Hodges v. State*, 6 App. 615. See, also, art. 479, ante; *Jacobs v. State*, 28 App. 79, 12 S. W. 408.

And see generally, *Graham v. State*, 29 App. 31, 13 S. W. 1013; *Newburn v. Durham*, 10 Civ. App. 655, 32 S. W. 112; *Miers v. State*, 34 App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705; *English v. State*, 34 App. 190, 30 S. W. 233; *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389; *Russell v. State*, 37 App. 314, 39 S. W. 674; *Mundine v. State*, 37 App. 5, 38 S. W. 619; *Moore v. State*, 40 App. 439, 50 S. W. 942; *Lynch v. State*, 41 App. 510, 57 S. W. 1130; *Montgomery v. State*, 43 App. 304, 65 S. W. 537, 55 L. R. A. 710; *Cortez v. State*, 43 App. 375, 66 S. W. 453; s. c., 44 App. 169, 69 S. W. 536; *Vann v. State*, 45 App. 434, 77 S. W. 813, 108 Am. St. Rep. 961; *Earles v. State*, 47 App. 559, 85 S. W. 1; *Johnson v. State*, 49 App. 250, 92 S. W. 257; *Early v. State*, 50 App. 344, 97 S. W. 82.

2. — **Warrants.**—For requisites of warrant of arrest, and complaint, see C. C. P. arts. 266–271, and *Pierce v. State*, 17 App. 232.

The ordinary jurisdiction of a justice of the peace is circumscribed by the limits of his precinct, but when proceeding as an examining court his authority is coextensive with his county. *Hart v. State*, 15 App. 202, 49 Am. Rep. 188.

A peace officer has no authority beyond the limits of his county to arrest a party accused of crime. A warrant of arrest issued by a justice of the peace confers no authority to arrest in another county, unless it is indorsed by a judge of the supreme court, court of appeals, or a district or county judge (when it may be executed anywhere in the state), or by a magistrate of the county in which the accused is found, when it may be executed in the latter county, but must be executed by an officer of the county where the accused is found. *Ledbetter v. State*, 23 App. 247, 5 S. W. 226; *Peter v. State*, 23 App. 684, 5 S. W. 228.

And see, also, *Toliver v. State*, 32 App. 444, 24 S. W. 286; *Russell v. State*, 37 App. 314, 39 S. W. 674.

3. — **Power of city to authorize arrest without warrant.**—See *Joske v. Irvine* (Civ. App.) 43 S. W. 278, and see art. 963 C. C. P. and notes.

SUBD. 2

4. **Validity of process.**—If a process, fair and legal on its face, is placed in the hands of an officer for execution, he will be protected in executing it, although he may know of facts which render such process in reality void. *Rainey v. State*, 20 App. 455; *Tierney v. Frazier*, 57 Tex. 437.

And further as to validity of process, see, also, *Alford v. State*, 8 App. 545; *Graham v. State*, 29 App. 31, 13 S. W. 1013.

See notes under art. 1094, subd. 1, ante.

SUBD. 3

5. **Officers authorized.**—See C. C. P. arts. 43–47, and notes thereunder. See, also, arts. 279, 280, C. C. P.

SUBD. 4

6. **De facto officer.**—See *Weatherford v. State*, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 828, and cases cited.

SUBD. 5

7. **Execution of process.**—See C. C. P. art. 288.

If a person whose arrest is attempted under legal process knows the purpose and official character of the officer, and the arrest be otherwise lawful, it is his duty to submit, and resistance is unjustifiable, though the officer makes no declaration of his official character or purpose. *Plasters v. State*, 1 App. 673. But it is otherwise where the process is illegal. *Miers v. State*, 34 App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.

SUBD. 6

8. **Execution of process in other county.**—A sheriff is not authorized to execute a *capias* beyond the limits of his county. In this case the paper was produced, and an altercation and exchange of shots occurred between the prisoner and the officer while the former was reading the warrant. *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454.

SUBD. 7

9. **Failure to demand nature of authority.**—Resistance after accompanying officer without demanding production of authority to make arrest. *Miller v. State*, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836.

SUBD. 8

Cited, *Williams v. State*, 41 App. 365, 54 S. W. 759.

10. **Force.**—If an officer kills his prisoner, who is not resisting or attacking him, but is simply running away to make his escape, in the absence of proof of express malice, he is guilty of murder in the second degree. *Caldwell v. State*, 41 Tex. 86; *Plasters v. State*, 1 App. 673.

In attempting to make an arrest for a petty offense, the officer is not authorized to fire on the party fleeing from such arrest. *Tiner v. State*, 44 Tex. 128.

Where the evidence showed that a prisoner had escaped by violence from an officer, and was fleeing, but was at the same time in the attitude of, or at least prepared for resistance, it was held that the officer had the right to treat him as resisting. *James v. State*, 44 Tex. 314.

Authority of sheriff to use force in preventing escape of prisoner in his custody, see *James v. State*, 44 Tex. 314; *Skidmore v. State*, 43 Tex. 93.

An officer having lawful authority to make an arrest, may, on meeting with resistance, employ such force as may be necessary to overcome such resistance; but he must use no greater force than is necessary for the arrest and detention of the accused. *Beaverts v. State*, 4 App. 175; *Giroux v. State*, 40 Tex. 97; *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

The officer must not use a deadly weapon in making an arrest unless compelled to do so by the conduct of the prisoner. *English v. State*, 34 App. 190, 30 S. W. 233.

11. **Rights of officer making illegal arrest.**—See *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944; *Miers v. State*, 34 App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705; *Mundine v. State*, 37 App. 5, 38 S. W. 619; *Hardin v. State*, 40 App. 208, 49 S. W. 607.

12. **Charge on right of self-defense.**—*Giebel v. State*, 28 App. 153, 12 S. W. 591.

SUBD. 9

Cited, *Williams v. State*, 41 App. 365, 54 S. W. 759.

13. **Force to overcome resistance.**—If the officer acts outside of his authority or exercises it unlawfully, his official character does not prevent accused from setting up the unlawful acts to justify or extenuate acts of resistance. *James v. State*, 44 Tex. 314.

An officer or other person, in executing an order of arrest, is authorized to use such force as is necessary in overcoming resistance to the execution of such order; but he shall not take the life of the person resisting arrest, unless he has just grounds to fear that his own life will be taken, or that he will suffer great bodily injury in the execution of the order. *Plasters v. State*, 1 App. 673.

Mistake as to identity of person being arrested. *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

Effect of previous threats of prospective prisoner against officer. *Miller v. State*, 32 App. 319, 20 S. W. 1103.

Use of deadly weapon is improper unless the conduct of the prospective prisoner requires it. *English v. State*, 34 App. 190, 30 S. W. 233.

Where accused was merely attempting to escape, and not resisting the officer, the latter had no right to kill him, and if the officer drew his pistol and shot at accused to kill him to prevent escape, the right of self-defense was complete. *Hardin v. State*, 40 App. 208, 49 S. W. 607.

14. **Degree of homicide.**—See notes under arts. 1128-1144, post.

SUBD. 10

Cited, *Ex parte Russell*, 71 App. 377, 160 S. W. 75.

15. **Convict and guard.**—A convict guard is not authorized to kill a convict in attempting to re-arrest him after he has escaped. In such case the guard has only the authority of a peace officer. *Wright v. State*, 44 Tex. 645.

The guard may kill if absolutely necessary to prevent the escape of the convict in the first instance. *Washington v. State*, 1 App. 647.

16. **Arrest of convict without warrant.**—See *Ex parte Sherwood*, 29 App. 334, 15 S. W. 812.

17. **Manslaughter.**—See art. 1128 et seq., post.

Art. 1095. [665] Order may be written or verbal.—The order referred to in this chapter may be either written or verbal, where a verbal order is allowed for the arrest of a person.

Process.—See arts. 42, 43, ante, and C. C. P., arts. 265 to 291.

Art. 1096. [666] Written order includes, what.—Under written orders are included all process in a criminal or civil action which directs the seizure of the person or of property.

Art. 1097. [667] Verbal order justifies only in felony.—No officer or other person ordered verbally to arrest another is justified in killing, except the arrest be in a case of felony, or for the prevention of a felony.

Illegal arrest.—As to illegal arrest, see *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944.

Art. 1098. [668] Persons aiding officer justified.—Persons called in aid of an officer, in the performance of a duty, are justified in the same manner as the officer himself.

Possemen.—A de facto officer, known to be such, is charged with the prevention of violations of law in his presence, and may summon the posse comitatus to aid him. A posseman acting within the scope of the officer's authority is justifiable in what he does. *Weatherford v. State*, 31 App. 530, 21 S. W. 251, 37 Am. St. Rep. 823. See, also, C. C. P., art. 45.

Art. 1099. [669] Persons aiding escape may be killed.—All persons opposing the execution of the order, or aiding in an escape, may be treated in the same manner as the person against whom the order is directed, or who is attempting to escape.

Art. 1100. [670] Federal officers included.—Officers acting under the authority of the laws or courts of the United States have the rights and are liable to the rules prescribed in this chapter.

Art. 1101. [671] In suppressing riots.—Homicide is justifiable when necessary to suppress a riot, when the same is attempted to be suppressed in the manner pointed out in the Code of Criminal Procedure, and can in no way be suppressed except by taking life.

Suppression of riots.—As to officer's authority, see C. C. P., arts. 139-147, and notes.

Art. 1102. [672] In adultery.—Homicide is justifiable when committed by the husband upon the person of any one taken in the act of adultery with the wife; provided, the killing take place before the parties to the act of adultery have separated.

Adultery as justification.—The words "taken in the act of adultery," as used in this article, do not mean that in order to avail himself of the protection given by said article, and justify a homicidal act, the husband should be an actual eyewitness to the physical act of coition between his wife and the person slain; but it will be sufficient if he sees them in bed together, or leaving that position, or in such a position as indicates with reasonable certainty to a rational mind that they had just then committed the adulterous act, or were then about to commit it. But no knowledge otherwise acquired by the husband, however positive, of an adulterous intercourse between his wife and the deceased, will justify the homicide. When adultery is an issue, it may be established by circumstantial evidence, and though a mistake as to the fact of adultery may possibly exist, yet "if a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal, he is guilty of no offense, provided it be such a mistake as does not arise from want of proper care on his part." Ante, arts. 46, 47. In other words, a person may always act upon reasonable appearances, and his guilt depends upon the reasonableness of the appearances judged of from his own standpoint. When the facts require it the charge of the court should thus explain the words, "taken in the act of adultery," otherwise the jury might conclude that they meant that the parties must be detected in the actual physical act of coition. The words, "before the parties to the act of adultery have separated," mean only that the parties are still together in company with each other, after the act of adultery; not that they are still united in the act of copulation, and, when the facts require it, the charge of the court should so instruct the jury. Adultery, as used in the preceding article, is ecclesiastical, and not statutory adultery, and to justify a homicide under said article, the defendant need not show that adultery, as defined by art. 490 of this Code, was committed, but it will be sufficient if he show a single defilement of his marriage bed, and where this issue is in the case, the court should so instruct the jury. *Price v. State*, 18 App. 474, 51 Am. Rep. 322.

One who apprehends his wife and another in the actual physical act of copulation slays the seducer before the parties have separated, is guilty of no grade of homicide. *Massie v. State*, 30 App. 64, 16 S. W. 770; *Morrison v. State*, 39 App. 519, 47 S. W. 369.

The statute makes no exception in favor of one place or another, but is broad enough to include every place. It does not authorize immunity to one who has debauched the wife of a citizen, provided he shall induce her to meet him at a house of ill fame, or assignation house. *Giles v. State*, 43 App. 561, 67 S. W. 412.

See this case for facts held to justify the defendant in believing that deceased and defendant's wife had been copulating or were about to do so, when he discovered them, and hence a charge on manslaughter was not authorized. *Dewberry v. State* (Cr. App.) 74 S. W. 308.

A charge explaining the expression "taken in the act of adultery" which says, "that the husband must see the parties together in such a position as indicates

with reasonable certainty to a rational mind," etc., is erroneous. It was the indication of circumstances that addressed themselves to appellant's mind at the time, which was the question the jury were investigating. If it reasonably appeared to defendant that his wife and deceased were about to commit or had committed adultery he would be justify in slaying deceased. *Gregory v. State*, 50 App. 73, 94 S. W. 1043.

Where, in a prosecution of accused for killing his wife, the state introduced his confession, in which he stated that he intentionally shot his wife while in flagrante delicto with another, which, by this article is declared justifiable homicide, an instruction that, if accused discovered his wife in such offense, and shot intending to kill her paramour, but accidentally struck and killed her, they should acquit was prejudicial error, though he testified that he shot at his wife's companion, and accidentally struck her. *Williams v. State* (Cr. App.) 165 S. W. 583.

Art. 1103. [673] But not in case of connivance.—Homicide cannot be justified by reason of the existence of the circumstances spoken of in the preceding article, where it appears that there has been, on the part of the husband, any connivance in or assent to the adulterous connection.

See notes under preceding article.

4. DEFENSE OF PERSON OR PROPERTY

Art. 1104. [674] In defense of person and property.—Homicide is permitted in the necessary defense of person or property, under the circumstances and subject to the rules herein set forth.

Art. 1105. [675] In preventing other felonies.—Homicide is permitted by law when inflicted for the purpose of preventing the offense of murder, rape, robbery, maiming, disfiguring, castration, arson, burglary and theft at night, or when inflicted upon a person or persons who are found armed with deadly weapons and in disguise in the night time on premises not his or their own, whether the homicide be committed by the party about to be injured or by some person in his behalf, when the killing takes place under the following circumstances:

1. It must reasonably appear by the acts or by words, coupled with the acts of the person killed, that it was the purpose and intent of such person to commit one of the offenses above named.

2. The killing must take place while the person killed was in the act of committing the offense, or after some act done by him showing evidently an intent to commit such offense.

3. It must take place before the offense committed by the party killed is actually completed; except that, in case of rape, the ravisher may be killed at any time before he has escaped from the presence of his victim, and except, also, in the cases hereinafter enumerated.

4. Where the killing takes place to prevent the murder of some other person, it shall not be deemed that the murder is completed so long as the offender is still inflicting violence, though the mortal wound may have been given.

5. If homicide takes place in preventing a robbery, it shall be justifiable if done while the robber is in the presence of the person robbed, or is flying with the money or other article taken by him.

6. In cases of maiming, disfiguring or castration, the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense.

7. In case of arson, the homicide may be inflicted while the offender is in or at the building or other property burnt, or flying from the place before the destruction of the same.

8. In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building, or at the place where the theft is committed, or is within reach of gunshot from such place or building.

9. When the party slain in disguise is engaged in any attempt, by word, gesture or otherwise, to alarm some other person or persons and put them in bodily fear.

In General	9. Charge of court.
1. Defense of another.	Subd. 4
2. Theft at night.	10. Defense of another.
Subd. 1	Subd. 5
3. Threats by deceased.	11. Charge.
4. Charge.	Subd. 6
5. Reasonableness of apprehension.	12. Mistreating with violence.
Subd. 2	Subd. 7
6. Construction and application.	13. Theft.
7. Charge of court.	14. Evidence.
Subd. 3	15. Charge.
8. Preventing debauchery of daughter.	

IN GENERAL

Cited, *Gilleland v. State*, 44 Tex. 356.

1. **Defense of another.**—A person acting in behalf of another, to prevent such other from being murdered, ravished, robbed, maimed, disfigured, or from sustaining serious bodily injury, is entitled to the same justification under the law as would be the person in whose behalf he acts. For a discussion of the law in such cases, see *Cuffee v. State*, 8 App. 187; *Foster v. State*, Id. 248; *Dyson v. State*, 14 App. 454; *Johnson v. State*, 5 App. 43; *Sterling v. State*, 15 App. 249.

2. **Theft at night.**—Accused and deceased gambled at cards in the nighttime, and when the game ceased two \$10 bills lying between them were claimed by both. Deceased started away with them, and accused demanded them, and, when deceased refused to give them to him, struck him a blow with a stick shown to be a deadly weapon, from which he died. Held, that evidence of these facts did not require the submission of the question of justification in preventing a theft at night, under Pen. Code 1911, art. 1105, providing that homicide is permitted when inflicted for the purpose of preventing such a theft. *Ballock v. State* (Cr. App.) 176 S. W. 725.

Under the present statute, the court's failure, on a trial for homicide, to submit the issue of justification in preventing a theft at night was not reversible error, where no exception was taken to the charge at the trial. *Ballock v. State* (Cr. App.) 176 S. W. 726.

SUBD. 1

Cited, *Alexander v. State*, 63 App. 102, 138 S. W. 721.

3. **Threats by deceased.**—See notes to arts. 1107, 1143, post.

4. **Charge.**—See *Welch v. State*, 57 App. 111, 122 S. W. 880.

5. **Reasonableness of apprehension.**—The apprehension upon the part of the slayer must be reasonable—not merely conjectural, such as might arise from the mere presence of the intruder, but must be predicated upon some act of deceased of a nature calculated to arouse in the mind of one of ordinary prudence and caution that a theft is about to be committed. *Grant v. Hass*, 31 Civ. App. 688, 75 S. W. 345.

SUBD. 2

6. **Construction and application.**—See notes to arts. 1014, subd. 6, ante, 1107-1110, post.

See *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Gonzales v. State*, 28 App. 130, 12 S. W. 733.

This article comprises all cases in which, from the acts of the assailant, or his words coupled therewith, it reasonably appears that his purpose or intent is to murder, ravish, rob, maim, disfigure, castrate, or do other serious bodily injury to the assailed party. In such case the assailed party may lawfully kill the assailant while he is committing the offense or injury, or when he has done some act evidently showing his intent to commit it, and the assailed party need not first resort to other means of prevention. *Kendall v. State*, 8 App. 569; *Ainsworth v. State*, Id. 532; *Robins v. State*, 9 App. 666; *Hill v. State*, 10 App. 618; *Gilly v. State*, 15 App. 287; *Short v. State*, Id. 370; *Foster v. State*, 11 App. 105; *King v. State*, 13 App. 277; *Risby v. State*, 17 App. 517; *Jones v. State*, Id. 602; *Stevenson v. State*, Id. 618; *Penland v. State*, 19 App. 365; *Hunnicut v. State*, 20 App. 632; *Williams v. State*, 22 App. 497, 4 S. W. 64; *Cartwright v. State*, 16 App. 473, 49 Am. Rep. 826; *May v. State*, 23 App. 146, 4 S. W. 591; *Boddy v. State*, 14 App. 528; *Woodring v. State*, 33 App. 26, 24 S. W. 293. And see *Horbach v. State*, 43 Tex. 242; *Orman v. State*, 22 App. 604, 3 S. W. 468, 58 Am. Rep. 662; s. c., 24 App. 496, 6 S. W. 544; *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Barrett v. State*, 9 App. 33; *Aycock v. State*, 55 App. 142, 115 S. W. 590; *Vinson v. State*, 55 App. 490, 117 S. W. 846.

One has the right to kill, resisting a combined attempt to rob and assault with a dangerous weapon. *Pryse v. State*, 54 App. 523, 113 S. W. 938.

Deceased having attacked defendant with a view of roping him and dragging him from his horse and inflicting death on him, defendant was not required to resort to any other means to repel the attack, than to defend himself in the best manner he could. *Williams v. State*, 61 App. 356, 136 S. W. 771.

Where there is evidence of threats by deceased against the accused, and of an attack by deceased on accused with a knife, by means of which he inflicted several wounds on accused, and that, after accused had succeeded in getting loose

from deceased and secured his gun, deceased came towards him again, and did not heed a warning to stop, a charge which required accused to resort to other means of defense than killing his assailant was error. *Maclin v. State* (Cr. App.) 144 S. W. 951.

7. Charge of court.—*Welch v. State*, 57 App. 111, 122 S. W. 880.

SUBD. 3

8. Preventing debauchery of daughter.—See art. 1102, and notes. As to protection of daughter from debauchery, see *Varnell v. State*, 26 App. 56, 9 S. W. 65.

9. Charge of court.—*Welch v. State*, 57 App. 111, 122 S. W. 880.

SUBD. 4

10. Defense of another.—Homicide in defense of another is justifiable: 1, when deceased is in the act of murdering such other person; 2, when it reasonably appears that deceased is in the act of committing murder upon such other person; 3, where deceased would have been guilty of murder when in the act of killing upon an insufficient provocation, or his passion had not in fact been aroused by such provocation. *Glover v. State*, 33 App. 224, 26 S. W. 204; and see, also, *Shumate v. State*, 38 App. 266, 42 S. W. 600; *Mitchell v. State*, 38 App. 170, 41 S. W. 816; *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941; *Garcia v. State* (Cr. App.) 57 S. W. 651.

SUBD. 5

11. Charge.—Charge held sufficient. *Welch v. State*, 57 App. 111, 122 S. W. 881.

SUBD. 6

12. Mistreating with violence.—To assault a person is to mistreat him; but a mere assault is not alway violence. *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488.

SUBD. 7

13. Theft.—Homicide is justifiable when committed to prevent theft at night and at the place of the theft or within gunshot therefrom. And it is immaterial that the person killed had abandoned the property and was fleeing. *Whitten v. State*, 29 App. 504, 16 S. W. 296.

Homicide though committed while deceased is engaged in committing theft at night cannot be justified if the killing was done upon malice and not to prevent the theft. *Laws v. State*, 26 App. 643, 10 S. W. 220. See, also, *Skaggs v. State*, 31 App. 563, 21 S. W. 257.

“Nighttime” is any time between thirty minutes after sunset and thirty minutes before sunrise. *Laws v. State*, 26 App. 643, 10 S. W. 220. And see *Whitten v. State*, 29 App. 504, 16 S. W. 296.

If one enters the premises of another at night with the purpose and intention of stealing and if his conduct was such as to make it reasonably appear that such is his intention his killing is justifiable. The killing must be done while the offender is in the act of committing the offense or after some act has been done showing an intention to commit the offense, or if the theft is completed the killing must occur within gun shot distance of the place where the theft was committed. *Grant v. Haas*, 31 Civ. App. 688, 75 S. W. 345.

The killing of a mere trespasser is unjustifiable, but, where one is stealing and is leaving with the stolen goods, the killing is justified. *Slack v. State* (Cr. App.) 149 S. W. 107.

14. Evidence.—In a homicide case, in which accused claimed that the killing was done to prevent a theft which he believed was about to be committed in the nighttime, evidence held to support a conviction. *Joy v. State*, 57 App. 93, 123 S. W. 584.

15. Charge.—Omission to define nighttime, held error. *Laws v. State*, 26 App. 643, 10 S. W. 220.

In a homicide case, in which the evidence made it an issue whether accused shot decedent in the honest belief that he was about to steal corn from him, the court instructed that, if accused believed that decedent was stealing his corn at night and killed him while in reach of gunshot from the place from which he believed the corn had been taken, and such belief did not arise from want of proper care by accused, the jury should acquit, even though decedent or any one else had not in fact stolen the corn, and further charged fully and correctly on manslaughter. Held, that since, under the charge given, accused could not have been convicted of second-degree murder, the element of malice being absent, failure to charge that, if accused shot under the belief that decedent was about to commit theft at night, for the purpose of preventing such theft, the killing could not be more than manslaughter, was not error. *Joy v. State*, 57 App. 93, 123 S. W. 584.

Charge held erroneous under the facts. *Slack v. State* (Cr. App.) 149 S. W. 107.

Art. 1106. [676] Presumption from the use of weapons.—When the homicide takes place to prevent murder, maiming, disfiguring or castration, if the weapons or means used by the party attempting or committing such murder, maiming, disfiguring or castration are such as would have been calculated to produce that result, it is to be presumed that the person so using them designed to inflict the injury.

See arts. 51, 1147, ante, and notes thereunder.

Presumption as to Intent.—See art. 51, ante, and art. 1147, post.

“Used” and “using a weapon” defined. *Ward v. State*, 30 App. 687, 18 S. W. 793. And note the presumption to arise from conduct of deceased. *Id.* *Cochran v. State*, 28 App. 422, 13 S. W. 651; *Skaggs v. State*, 31 App. 563, 21 S. W. 257.

A shotgun used as a firearm is a “deadly weapon.” *Deneaner v. State*, 58 App. 624, 127 S. W. 201.

A knife with a blade $2\frac{1}{2}$ or 3 inches long, held a “deadly weapon.” *Hudson v. State*, 59 App. 650, 129 S. W. 1125, Ann. Cas. 1912A, 1324.

Where deceased was making an assault on defendant with the loaded end of a quirt, which as sought to be used was a deadly weapon, the statute created from such fact a legal presumption that deceased intended to kill defendant, conferring on defendant the absolute right to kill deceased in self-defense. *Polk v. State*, 60 App. 499, 132 S. W. 767.

If decedent attacked accused with a knife in such a manner as was reasonably calculated to produce death or serious bodily harm, the law presumes that decedent intended to kill or seriously injure accused. *Shed v. State* (Cr. App.) 153 S. W. 125.

Charge.—If the weapon or means used by the assailant were calculated to effect the purpose of murder, rape, robbery, disfiguring, castration, or serious bodily injury, it is an absolute presumption of law that it was the intention of the assailant to effect the purpose indicated, and this presumption is imperative to juries as well as courts, and when applicable must be given in charge to the jury. *Kendall v. State*, 8 App. 569; *Jones v. State*, 17 App. 602; *King v. State*, 13 App. 277; *Cochran v. State*, 28 App. 422, 13 S. W. 651; *Renow v. State*, 56 App. 343, 120 S. W. 174; *Deneaner v. State*, 58 App. 624, 127 S. W. 201; *Skaggs v. State*, 31 App. 563, 21 S. W. 257; *Hall v. State*, 43 App. 479, 66 S. W. 784; *Yardley v. State*, 50 App. 644, 100 S. W. 400, 123 Am. St. Rep. 869; *Freeman v. State*, 40 App. 545, 46 S. W. 641, 51 S. W. 230; *Barnes v. State*, 39 App. 184, 45 S. W. 495.

Presumptions of law adverse to a defendant should rarely be given in charge, and then great care should be observed to protect his rights. *Shaw v. State*, 34 App. 435, 31 S. W. 361.

From appellant's standpoint, and according to the theory developed by his testimony, he and those with him were first assaulted by the prosecuting witness and those with him. Such assault was made upon them with guns. The firing began at a distance of about seventy-five yards. In such State of the case the court should have charged the jury in accordance with the provisions of this statute. *Scott v. State*, 46 App. 315, 81 S. W. 952.

When the facts show that the prosecuting witness had thrown a cleaver about two feet long at defendant and was advancing on him with a butcher knife, the law presumes that he intended to kill witness or inflict serious bodily injury upon him, and the court should have given this article in charge to the jury. *Cooper v. State*, 48 App. 36, 85 S. W. 1060.

It is best to charge this article whenever the defendant seeks to justify on the ground of threatened attack by the use of means calculated to produce death or serious bodily injury. *Henderson v. State*, 55 App. 15, 115 S. W. 46.

It is not required to give this article in charge in any case unless the weapon used is known in law as a deadly weapon. A stick $2\frac{1}{2}$ or 3 feet long and 1 inch in diameter is not in law a deadly weapon. *Renow v. State*, 56 App. 343, 120 S. W. 175; *Clark v. State*, 56 App. 293, 120 S. W. 179; *Coker v. State*, 59 App. 241, 128 S. W. 137.

Where the evidence for accused tended to show that deceased had something in his hand that looked like a gun, and the evidence for the State showed that deceased was not armed, the court should have given this article in charge. *Duke v. State*, 56 App. 502, 120 S. W. 894.

Where decedent's husband came to the door of a house and began shooting at defendant's companion, who thereupon turned quickly and without taking aim fired one barrel of a shotgun, the contents of which missed the husband and struck decedent, defendant was entitled to an instruction in the language of this article. *Deneaner v. State*, 58 App. 624, 127 S. W. 201.

Where deceased only grabbed accused but did not draw a knife, which was found closed, a charge on the presumption arising from the use of a deadly weapon was properly refused. *Spencer v. State*, 59 App. 217, 128 S. W. 118.

The charge was not required where deceased had the butt of his gun on the ground with his hand over the barrel in no attitude to shoot. *Blue v. State* (Cr. App.) 148 S. W. 730.

The court in charging on the presumption of intent from the use of a deadly weapon, should also give the substance of art. 1147. *Coker v. State*, 59 App. 241, 128 S. W. 137.

Evidence that the fatal blows were administered by a willow stick $2\frac{1}{2}$ or 3 feet long, 1 inch in diameter at the small end, and $1\frac{1}{2}$ inches in diameter at the large end, and weighing a pound and a half, is insufficient in itself to warrant an instruction on the presumption of intent from the use of a deadly weapon. *Coker v. State*, 59 App. 241, 128 S. W. 137.

Uncontradicted testimony that a knife, which was a deadly weapon, was found beside deceased, required the charging of this article. *Hudson v. State*, 59 App. 650, 129 S. W. 1125, Ann. Cas. 1912A, 1324.

Under this article where the defendant's testimony was that deceased was approaching him with an open knife with a blade three inches long, threatening to cut his guts out, it was error to refuse an instruction that when a deadly weapon is used the law presumes that death or serious bodily injury would be presumed. *Best v. State*, 61 App. 551, 135 S. W. 581.

Charge held to sufficiently present this presumption. *Alexander v. State*, 63 App. 102, 138 S. W. 721; *Munos v. State*, 58 App. 147, 124 S. W. 941.

Charge is not objectionable, though it does not define “deadly weapon.” *Anderson v. State*, 63 App. 525, 140 S. W. 457.

Where accused testified that he believed that decedent was armed, that decedent was attempting to enter accused's house at the time of the killing, that accused knew that decedent had something in his pocket, and that he had his hand in his pocket at the time the fatal shot was fired, a charge on self-defense, that, if decedent was armed and was about to use the weapon in a manner reasonably calculated to produce death or bodily injury, the law presumed that decedent intended to murder or inflict serious bodily injury on accused, who could rely on self-defense, was too favorable to accused. *Wells v. State*, 63 App. 618, 141 S. W. 96.

Where accused testified that decedent got his pistol from his pocket and dropped it, the court properly charged on the presumption arising from the use of a deadly weapon. *Fox v. State*, 71 App. 318, 158 S. W. 1141.

Where decedent was armed with a rock and threw it at accused, and then advanced on accused with a knife, the failure to charge this article was reversible error. *Williams v. State* (Cr. App.) 144 S. W. 620.

Where deceased shot defendant with a pistol which constituted the commencement of the difficulty, the court erred in failing to apply the law of presumption provided by this article. *Foster v. State* (Cr. App.) 148 S. W. 583.

An instruction presenting the presumption arising under this article in words that, "and if the weapon used by him, and the manner of its use, were such as were reasonably calculated to produce death or serious bodily injury," unless followed by the words "or it reasonably so appeared to defendant," or words of similar import, is erroneous. *Johnson v. State* (Cr. App.) 149 S. W. 165.

An instruction that when a killing takes place to prevent murder, if the weapons and means used by the party attempting such murder are such as would have been calculated to produce that result, it is presumed that the person so using them designed to inflict the injury, and that if, at the time accused struck and killed deceased, deceased was making an attack upon him which, under the circumstances, reasonably indicated an intention to murder, maim, or disfigure him, with a piece of iron, and the weapon and manner of its use were calculated to produce murder, maiming, or disfiguration, the law would presume that deceased intended to murder accused, and that if under these circumstances, viewed from accused's standpoint, he killed deceased, he should be found not guilty, should have been given, and was not covered by an instruction that, if accused believed his life was in danger, the jury should acquit, since under this article there is a legal presumption that the attacking party under the circumstances mentioned intends to kill or inflict serious bodily injury. *Edwards v. State* (Cr. App.) 151 S. W. 294.

Under this article it is error for the court to fail to charge this presumption where deceased actually attacks accused, or where accused's testimony would show an actual attack. *Bankston v. State* (Cr. App.) 175 S. W. 1068.

Where it appeared that deceased, at the time defendant struck and killed him, was making an assault on defendant with a deadly weapon, and defendant was entitled as a matter of law to the benefit of self-defense, an instruction that if defendant did kill deceased by stabbing him with a knife, and when so stabbing him deceased was unlawfully striking or attempting to strike defendant with a quirt, defendant should be acquitted, did not justify the refusal of a request to charge that when a homicide takes place to prevent murder or disfiguring, and the weapon used by the party attempting to commit such murder, maiming, or disfiguring is such as would have been calculated to produce that result, it is presumed that the person so using such weapon designed to inflict the injury. *Polk v. State*, 60 App. 499, 132 S. W. 767.

Where self-defense was involved, the court erred in failing to instruct that if deceased was armed with a pistol and shot at defendant, the law presumed deceased intended to kill him. *Hammons v. State* (Cr. App.) 177 S. W. 493.

In a prosecution for murder, where defendant's theory of the case was that he had called at deceased's store for his mail, when deceased cursed and ordered him out of the house, and, when he insisted on getting his mail, picked up an ax handle and struck him over the head, injuring his ear, whereupon defendant cut deceased with a small knife without intending to kill him, an instruction that reasonable fear of death or great bodily harm will excuse one in using all necessary force to protect his life or person, that it is not necessary that there should be actual danger, provided the party acts on a reasonable apprehension of danger as it appears to him from his standpoint at the time, that the party acting under the real or apparent danger is in no way bound to retreat in order to kill his assailant, and that, if from the evidence the jury believed that defendant killed the deceased, but that at the time the deceased was making an attack on defendant, which, from its manner and character, and defendant's knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant killed the deceased, then the jury should acquit, that, if the deceased was armed with an ax handle, and its manner of use was reasonably calculated to produce death or serious bodily harm, then the law presumed the deceased intended to murder or inflict serious injury on the defendant, that, in determining whether the defendant acted in what reasonably appeared to him to be necessary self-defense, the jury should look at the transaction from the defendant's standpoint at the time, and consider the same in the light of the facts and circumstances as the jury should believe they appeared to the defendant at the time and not from any other standpoint, and that it was for the jury to determine from the evidence what the appearances were to the defendant, and what his standpoint was, and in what light he did, in fact, view the facts, such instruction fully covered the issue of self-defense as presented by defendant's evidence. *Bolden v. State* (Cr. App.) 178 S. W. 533.

— Necessity of bill of exceptions or motion for new trial.—See art. 743, C. C. P. and notes.

Art. 1107. [677] In protecting person or property from attacks.—Homicide is justifiable also in the protection of the person or property against any other unlawful and violent attack besides those mentioned in the preceding article, and, in such cases, all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack; and any person interfering in such case in behalf of the party about to be injured is not justifiable in killing the aggressor, unless the life or person of the injured party is in peril by reason of such attack upon his property.

See art. 1014, ante, and notes. See, also, arts. 115, 116, C. C. P.
Cited, *Moss v. State*, 60 App. 268, 131 S. W. 1088.

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| 1. Defense of person or property. | 10. — Burden of proof. |
| 2. Defense of habitation. | 11. — Threats by deceased and deceased's character. |
| 3. Resisting arrest. | 12. Charge. |
| 4. Defense of another. | 13. — Provoking contest. |
| 5. Provoking contest, and impairment of self-defense. | 14. — Mutual combat. |
| 6. Mutual combat. | 15. — Threats by deceased. |
| 7. Threats by defendant. | 16. — Defense of another. |
| 8. Manslaughter. | 17. — Defense of habitation. |
| 9. Evidence on issue of self-defense. | |

1. **Defense of person or property.**—Self-defense is a defensive, not an offensive act. *Blake v. State*, 3 App. 581; *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389. Whether a killing is in self-defense depends on the motive and intent of accused at the time of the killing under the light presented to him at that time, and it is improper to leave the question to the jury's belief as to the real facts. *Manly v. State* (Cr. App.) 176 S. W. 724.

When the purpose of the unlawful and violent attack is other than those mentioned in article 1110, the person killing must resort to all other means of prevention, except that of retreat. "All other means" does not import all possible means, but all means reasonably proper and effective under the circumstances. *Kendall v. State*, 8 App. 569; *Ainsworth v. State*, 1d. 532; *Blake v. State*, 3 App. 588; *Horbach v. State*, 43 Tex. 242; *Williams v. State*, 2 App. 271; *Gilly v. State*, 15 App. 287.

The right to arrest for theft, given by C. C. P. art. 376, does not confer upon the person entitled to exercise it, the right to pursue and take the thief, dead or alive, nor is the thief if attacked under such circumstances deprived of all right of self-defense. *Luera v. State*, 12 App. 257.

To make the killing justifiable it must take place while the person killed is in the very act of making the unlawful and violent attack. *Gilly v. State*, 15 App. 287; *Williams v. State*, 2 App. 271; *Kendall v. State*, 8 App. 569; *Jordan v. State*, 11 App. 435.

The right of self-defense does not arise when there is opportunity to restrain the assailant by process of law. One who believes his life in danger must, if the circumstances are such that he can, resort to the law for protection. *Penland v. State*, 19 App. 365; *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389.

In no case of attempted felony, other than those named in article 1105, is it lawful to take life where the party making such attempt may be arrested and thereby prevented from committing the felony. To justify homicide to prevent the perpetration of a felony, the danger of such felony must not be problematical or remote, but evident and immediate. *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389.

The killing must be in necessary resistance to aggression apparently violent, immediate, and imminent toward the person about to be injured. *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389.

In order that killing in defense of property be justifiable, evidence must show that deceased was in the very act of making a violent attack, and that defendant had resorted to all other means to prevent the injury. *Woodring v. State*, 33 App. 26, 24 S. W. 293.

Homicide in defense of property is justifiable when committed while deceased was in the act of destroying defendant's property. *Sims v. State*, 36 App. 154, 36 S. W. 256.

When a trespasser goes upon property with the means and intent to commit a felony, the owner has a right to repel force by force. *Sims v. State*, 36 App. 154, 36 S. W. 256.

A party has a right to prepare himself for an attack and act in his own self-defense whether it endangers other people or not. *Lankster v. State*, 41 App. 603, 56 S. W. 66.

Where attack is made with deadly weapon it is error to charge that defendant must resort to all other means before killing assailant. *McCandless v. State*, 42 App. 58, 57 S. W. 673.

A party has the right to use whatever force is necessary to repel an aggression upon his property in order to prevent the same from being taken from him. *Howell v. State* (Cr. App.) 57 S. W. 836.

The issue of defense of property is not raised when the evidence does not show that the deceased was in the act of taking the property, but only shows that deceased had merely informed defendant that he was going to take the property. *Dean v. State*, 47 App. 243, 83 S. W. 817.

This article does not authorize a killing when the party is about to attack or is doing some act preparatory to the attack, but he must be then making such unlawful and violent attack. One is not compelled to wait until a battery has been inflicted upon him, but the attack must be then imminent, immediate and impending; otherwise he is not to slay, and even then all other means except retreat must be resorted to in order to avoid killing. *Bryant v. State*, 51 App. 66, 100 S. W. 371. And see *Patterson v. State*, 49 App. 613, 95 S. W. 129; *Baltrip v. State*, 30 App. 545, 17 S. W. 1106; *Garello v. State*, 31 App. 56, 20 S. W. 179; *Woodring v. State*, 33 App. 26, 24 S. W. 293; *Hunnicut v. State*, 18 App. 499, 51 Am. Rep. 330.

A party has the right to defend his person or his property against any other unlawful violence than those enumerated in article 1105. *French v. State*, 55 App. 538, 117 S. W. 849.

In a murder case, where it appeared that accused, while in an altercation with decedent, either shot his pistol or it was discharged, and decedent immediately ran 50 or 100 feet, pursued by accused, who was all the while shooting at him, and who finally shot him in the back, defendant could not rely on self-defense. *Hart v. State*, 57 App. 21, 121 S. W. 508.

If deceased made an unlawful assault, or threatened the defendant with an attack which might end in his death or serious bodily injury, defendant had a right to kill him without resorting to other means to prevent the injury. *Best v. State*, 61 App. 551, 135 S. W. 581.

Evidence held to justify a finding that accused knew that a horse belonged to decedent, so that accused pursuing decedent to obtain possession of the horse could not rely on self-defense; decedent not doing any act at the time of the killing that would create in accused's mind a reasonable apprehension of death. *Burton v. State* (Cr. App.) 148 S. W. 895.

Where accused claimed that deceased came into his pool hall, raised a row, and drove him from the hall, when deceased was caught by bystanders and ejected, and that thereafter deceased returned armed with a bottle, and upon his threatening to strike, accused shot, there is no ground for the submission to the jury of the issue that accused had the right to slay in defense of his property. *Ross v. State* (Cr. App.) 170 S. W. 305.

Where accused in self-defense inflicted a mortal wound, and deceased thereafter abandoned the combat, accused cannot pursue and inflict other wounds, and if he does so, and death is hastened or contributed to, he is guilty of an offense. *Maddox v. State* (Cr. App.) 173 S. W. 1026.

Where an attack is made upon an accused by two persons, they both being present, or by one person when the other is present, in any way aiding or encouraging the attack, accused can defend himself against both as well as either. *Stacy v. State* (Cr. App.) 177 S. W. 114.

2. Defense of habitation.—One's right to defend his own habitation is limited only in extent by the same rules which govern in defense of the person. It is not necessary that there be actual danger, provided the party acted on a reasonable apprehension of danger. *Richardson v. State*, 7 App. 486, citing *Munden v. State*, 37 Tex. 353; *Horbach v. State*, 43 Tex. 242; *Cheek v. State*, 4 App. 444; *Blake v. State*, 3 App. 581; *May v. State*, 6 App. 191; *Marnoch v. State*, 7 App. 269. See, also, *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389; *Turner v. State*, 16 App. 378; *Stanley v. State*, 16 App. 392.

The law does not protect a gambling room, so as to authorize the keeper thereof to eject a person from it. *Pierce v. State*, 21 App. 540, 1 S. W. 463.

An intruder or trespasser on the habitation of another, or a guest who puts himself in the wrong may be ejected provided no more force is used than is necessary to effect the expulsion. *Wells v. State*, 63 App. 618, 141 S. W. 96.

3. Resisting arrest.—Manslaughter, see notes to art. 1130.

If an arrest is attempted for misdemeanor, and the officer unlawfully fires on the party fleeing, the latter may return the fire, and if the officer is killed, the killing is not necessarily unlawful. *Tiner v. State*, 44 Tex. 128.

If an arrest is illegal and unauthorized, it is a continuous assault of an aggravated nature, and the person arrested, or others in his behalf, may employ adequate force to effect a release. If the officer making such illegal arrest is killed, the perpetrators of the homicide will be guilty of no higher offense than manslaughter, and under certain circumstances may be justified. *Alford v. State*, 8 App. 545; *Johnson v. State*, 5 App. 47; *Goodman v. State*, 4 App. 349; *James v. State*, 44 Tex. 314; *Dyson v. State*, 14 App. 454.

A citizen is authorized to stand upon his individual rights and oppose force to force in the prevention of an attempted wrong, and when he is threatened with unlawful arrest, he may not only use force, but can increase that force even to the killing of his adversary, if necessary to prevent the attempted wrong. *Ross v. State*, 10 App. 455, 38 Am. Rep. 643.

It is no excuse, justification, or extenuation, for a homicide committed by a prisoner held in legal custody, that it was committed in an attempt to secure his liberty by escaping from such custody. *Wallace v. State*, 20 App. 360; *Waite v. State*, 13 App. 169; *Washington v. State*, 1 App. 169.

Defendant cannot claim self-defense where he kills an officer who is trying to arrest him in a lawful manner. *Hardin v. State*, 40 App. 220, 49 S. W. 607.

If defendant is trying to escape or evade arrest and the officer tries to kill him, the former's right of self-defense is complete. *Hardin v. State*, 40 App. 220, 49 S. W. 607.

Homicide to prevent arrest, even though the attempted arrest be lawful, is justifiable if the arrest is attempted in such a wanton and menacing manner as to threaten the accused with loss of life or serious bodily harm. *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454.

A killing committed in the prevention of an illegal arrest is ordinarily a homicide of no higher degree than manslaughter. See the opinion for a state of case to which the foregoing rules apply; wherefore the omission of the trial court to give them in charge to the jury was material error. *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454.

See the opinion and the statement of the case for proof under which the charge of the court erroneously made the accused's right of self-defense depend upon whether or not he was the person named in the *capias* and whether the deceased was making or had made an unlawful attack upon him. *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454.

An officer making an arrest without authority is no more than a private person—a trespasser who may be resisted to the extreme if necessary. If he attempts to shoot to prevent escape and the escaping party shoots and kills him, the killing is justifiable. *Miers v. State*, 34 App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705.

A party may meet unnecessary force with force, but cannot take the arresting officer's life, unless it is necessary or apparently necessary in defense of himself. *Condron v. State* (Cr. App.) 155 S. W. 253.

The fact that officers had no legal authority to make an investigation held no justification for the killing of one of the officers. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

The evidence, if raising the issue of self-defense, was the self-defense in connection with attempted arrest. *Stewart v. State* (Cr. App.) 174 S. W. 1077.

See, also, *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Massie v. State*, 27 App. 617, 11 S. W. 638.

4. Defense of another.—See arts. 115, 116, C. C. P.

To justify defense of another's property, the peril must be not merely to the property, but to the person of the other involved in the assault, and then all reasonable means to avert killing must be resorted to. *Horbach v. State*, 43 Tex. 242; *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389; *Ledbetter v. State*, 26 App. 22, 9 S. W. 60; *Risby v. State*, 17 App. 517; *Kendall v. State*, 8 App. 569.

One who interferes in behalf of the owner of the property is not justified in killing the aggressor, unless the life of such owner is imperiled by reason of the attack upon the property. *Kendall v. State*, 8 App. 569; *Risby v. State*, 17 App. 517; *Ledbetter v. State*, 26 App. 22, 9 S. W. 60; *Lilly v. State*, 20 App. 1; *Coulter v. State*, 72 App. 602, 162 S. W. 885.

The culpability of a defendant who slays in defense of another is measured by the intent with which he acted, and not by the intent with which such other was actuated, unless he knew or might reasonably have known such intent. *Snell v. State*, 29 App. 237, 15 S. W. 722, 25 Am. St. Rep. 723. And see, also, *Varnell v. State*, 26 App. 56, 9 S. W. 65; *Bonner v. State*, 29 App. 223, 15 S. W. 821.

A mere threatened injury to another would not justify or reduce the homicide. *Reynolds v. State*, 33 App. 143, 25 S. W. 786, 47 Am. St. Rep. 25; *Mealer v. State*, 32 App. 102, 22 S. W. 142; *Reynolds v. State*, 32 App. 151, 22 S. W. 590.

A party who acts in defense of another is authorized to act in same manner as that party would be justified in doing. *Garcia v. State* (Cr. App.) 57 S. W. 651.

If decedent undertook to assault accused's brother with a knife, or accused believed that he was going to do so, accused would have the same right to defend his brother as the brother would have had to defend himself. *Griffin v. State*, 57 App. 280, 122 S. W. 553.

Where defendant R., learning that his brother was about to enter a mutual combat with deceased, accompanied his brother to settle the difficulty peaceably, which he tried to do, but deceased declined every offer of that sort and fired on the brother, R. was entitled to defend, not only his brother, but himself, when deceased turned on him, and if he killed deceased under those circumstances the killing was justified. *Burns v. State*, 58 App. 463, 125 S. W. 901.

If accused intervened in a difficulty between his brother and deceased, in which they were cutting each other with knives, and struck and killed deceased entirely in the defense of his brother, it would be justifiable homicide. *Vickers v. State*, 70 App. 553, 157 S. W. 767.

See, also, *Robins v. State*, 9 App. 666; *Foster v. State*, 8 App. 248; *Ainsworth v. State*, Id. 532; *Ross v. State*, 10 App. 455, 38 Am. Rep. 643; *North v. State*, 12 App. 111; *Glover v. State*, 33 App. 224, 26 S. W. 204; *Snell v. State*, 29 App. 236, 15 S. W. 722, 25 Am. St. Rep. 723; *Mealer v. State*, 32 App. 102, 22 S. W. 142; *Hargrove v. State*, 33 App. 431, 26 S. W. 993.

5. Provoking contest, and impairment of self-defense.—See notes to art. 1138, post.

If a person by his own wrongful act brings about the necessity of taking the life of another to prevent being himself killed, he can not say that such killing was in his necessary self-defense; but the killing will be imputed to malice, express or implied, by reason of the wrongful act which brought it about, or malice from which it was done. A person can not avail himself of a necessity which he has knowingly and wilfully brought upon himself. *Logan v. State*, 17 App. 50; *Cunningham v. State*, Id. 89; *King v. State*, 13 App. 277; *Gilleland v. State*, 44 Tex. 356; *Lee v. State*, 21 App. 241, 17 S. W. 425; *Thuston v. State*, 21 App. 245, 17 S. W. 474; *Roach v. State*, 21 App. 249, 17 S. W. 464; *Crist v. State*, 21 App. 361, 17 S. W. 260; *Hollis v. State*, 8 App. 620; *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Beard v. State* (Cr. App.) 29 S. W. 770; *Waldon v. State*, 34 App. 92, 29 S. W. 273; *Plew v. State* (Cr. App.) 35 S. W. 366; *Abram v. State*, 36 App. 44, 35 S. W. 389; *Hawkins v. State* (Cr. App.) 36 S. W. 443; *Koller v. State*, 36 App. 496, 38 S. W. 44; *Winters v. State*, 37 App. 582, 40 S. W. 303; *Best v. State*, 61 App. 551, 135 S. W. 581; *Clampett v. State* (Cr. App.) 146 S. W. 929; *Allen v. State*, 24 App. 216, 6 S. W. 187. And see, also, under self-defense, *Orman v. State*, 24 App. 495, 6 S. W. 544; *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Kelly v.*

State, 27 App. 562, 11 S. W. 627; *McDade v. State*, 27 App. 641, 11 S. W. 672, 11 Am. St. Rep. 216; *Gonzales v. State*, 28 App. 130, 12 S. W. 733; *Gonzalez v. State*, 30 App. 203, 16 S. W. 978; *Williams v. State*, 30 App. 429, 17 S. W. 1071; *Fuller v. State*, 30 App. 559, 17 S. W. 1108. But see *Carter v. State*, 37 App. 403, 35 S. W. 378.

If the accused provoked the deceased to strike him with a stick, which was not followed up by a further assault, he can not justify on the ground of self-defense if he retreats out of danger, draws a dagger, returns to the conflict, and kills his antagonist. *Isaacs v. State*, 25 Tex. 174.

Where the defendant sought an interview with the deceased for the purpose of demanding payment of a debt, and with no hostile intentions toward the deceased, and the deceased becoming angry, an altercation ensued during which the deceased drew a pistol and assaulted defendant with it in such a manner as to create in the mind of defendant a reasonable apprehension of death or serious bodily injury, and acting upon such reasonable apprehension defendant fired the fatal shot, he was justifiable on the ground of necessary self-defense. *Bonniard v. State*, 25 App. 173, 7 S. W. 862, 8 Am. St. Rep. 431.

Where a person was taken in adultery with another's wife, it was held that he was not deprived wholly of the right of self-defense by reason of this wrongful act on his part; but that in slaying the husband of the woman with whom he was committing adultery, he could claim partial or imperfect self-defense, and reduce the homicide from murder to manslaughter. The amenability of a person charged with crime is conditioned solely on his own acts, and is never dependent upon the immunity of the injured person in case the result had been different. *Reed v. State*, 11 App. 509, 40 Am. Rep. 795; *King v. State*, 13 App. 277.

A party may have a perfect right of self-defense, though he may not be entirely free from blame in the transaction. If the blame or wrong was not intended to produce the occasion, nor an act which was, under the circumstances, reasonably calculated to produce the occasion or provoke the difficulty, then the right of self-defense would be complete, though the act may not be blameless. *Franklin v. State*, 30 App. 628, 18 S. W. 468.

Where defendant went to deceased's house for the purpose of having carnal intercourse with deceased's wife and killed deceased while there in self-defense, he is guilty of manslaughter. *Franklin v. State*, 34 App. 286, 30 S. W. 231.

If the slayer provoked the contest with the apparent intention of killing deceased, or doing him some serious bodily injury, he is guilty of murder, although he may have done the act of killing suddenly, without deliberation, and in order to save his own life. The law allows no justification in such a case, and no reduction of the grade of the homicide below that of murder. But if the slayer provoked the contest without any intention to kill or inflict serious bodily injury, and suddenly, without deliberation, did the act of killing, while the homicide would not be justifiable, it might be a lower grade of homicide than murder. *Green v. State*, 12 App. 445; *King v. State*, 13 App. 277; *Smith v. State*, 15 App. 338.

Because the slayer by his own wrongful acts produced the necessity to kill, it does not always follow that the homicide can not be justified or excused. Consideration must be addressed to the nature and quality of the wrongful acts by which it is claimed the right of self-defense is forfeited or abridged. Adjudicated cases hold that among the slayer's acts which abrogate or abridge his right of self-defense, are the following: 1. Devices, by language, or otherwise, to provoke the deceased to make an assault which will furnish a pretext for taking his life, or inflicting serious bodily injury upon him. 2. Provocation of the deceased into a quarrel, causing the fatal affray; but mere words or libelous publications do not amount to such provocation. 3. Preconcert with the deceased to fight him with deadly weapons. 4. Commencing an attack, assault, or battery upon the deceased. 5. Going with a deadly weapon to where the deceased is, for the purpose of provoking a difficulty or bringing on an affray, and by words or acts making some demonstration of such purpose calculated to provoke the deceased. The right of self-defense is not impaired by mere preparation for the perpetration of a wrongful act, unheralded, and unaccompanied by any demonstration, verbal or otherwise, indicative of the wrongful purpose. *Cartwright v. State*, 14 App. 486; *Cunningham v. State*, 17 App. 89.

When a party is a mere trespasser upon another's premises, and thus provokes the difficulty which results in the homicide, and such trespass is not with any intent on his part to kill or do serious bodily injury, or to commit any felony, he would not be deprived wholly of the right of self-defense, but such right would be abridged, and would be only partial and imperfect, and would reduce the homicide from murder to manslaughter. *Roach v. State*, 21 App. 249, 17 S. W. 464; *Thuston v. State*, 21 App. 245, 17 S. W. 474; *Arto v. State*, 19 App. 126; *Jones v. State*, 17 App. 602; *King v. State*, 13 App. 277.

If the slayer goes upon the premises with the intention to kill, or to do serious bodily injury, or to commit felony, and abandons such intention in good faith, and tries to escape from or avoid his adversary, if he is pursued his right of self-defense revives. *Roach v. State*, 21 App. 249, 17 S. W. 464.

To be sufficient to revive the perfect right of self-defense, the abandonment of the difficulty must be one which clearly evinces a withdrawal in good faith, and shows clearly the honest effort of the slayer for peace. *Roberts v. State*, 30 App. 291, 17 S. W. 450.

When A. says to B.: "You are a God d—d liar," and B., upon the impulse of the moment, resents the insult by striking A. with his fist, and A. draws a pistol with intent to kill B., and B., to save his own life, kills A., held, manslaughter. Insulting words will not justify an assault; therefore B. was the aggressor. He was as much guilty of an assault and battery upon A., as he would have been had not A. given the insult; and though he may not have intended to produce the occasion, yet this would be the reasonable and natural consequence of his act for which the

law holds him responsible, and to the same extent as if he had intended to provoke the difficulty. *Polk v. State*, 30 App. 657, 18 S. W. 466.

The fact that a person may know that his presence on his own premises may be offensive to another does not deprive him of self-defense if his going to his premises is in good faith. *Milrainey v. State*, 33 App. 577, 28 S. W. 537.

Nor where in doing a lawful act he creates a disturbance. *Gilcrease v. State*, 33 App. 619, 28 S. W. 531.

One may speak to another in a quiet and peaceable manner in regard to derogatory charges or statements made by such other person against him, and knowing such other person is armed he may arm himself with the intention of protecting himself if necessary in self-defense. If such other person makes a violent assault upon him and he kills his assailant in self-defense, he is not guilty of any crime. *Shannon v. State*, 35 App. 2, 28 S. W. 687, 60 Am. St. Rep. 17.

The fact that a person arms himself before going to demand an explanation does not deprive him of the right of self-defense. *Shannon v. State*, 35 App. 2, 28 S. W. 687, 60 Am. St. Rep. 17; *Duke v. State*, 61 App. 19, 133 S. W. 432; *Cloud v. State* (Cr. App.) 153 S. W. 892; *Fox v. State*, 71 App. 318, 158 S. W. 1141; *Quinn v. State* (Cr. App.) 170 S. W. 783.

Although defendant provoked the fight, if it had ceased and afterward deceased renewed the quarrel, defendant would not be deprived of the right of self-defense. *Lindsey v. State*, 35 App. 164, 32 S. W. 768.

When defendant is the aggressor the fact that the deceased started to draw his pistol when defendant shot him, does not justify the homicide. *Lawrence v. State*, 36 App. 173, 36 S. W. 90.

That defendant armed himself to prevent deceased from building a fence on his land did not deprive himself of the right of self-defense. *Wilson v. State* (Cr. App.) 36 S. W. 587.

No matter what was defendant's purpose in seeking deceased, if, when he met him, he did nothing to provoke a difficulty and deceased assaulted him, his right of self-defense is perfect. *Airhart v. State*, 40 App. 472, 51 S. W. 214, 76 Am. St. Rep. 736.

Unless defendant's acts are clearly calculated or intended to provoke a difficulty, the right of self-defense is not lost, even though he went to the place for purpose of difficulty. Defendant is not tried merely for seeking out deceased but for his acts after he has met him. *Airhart v. State*, 40 App. 473, 51 S. W. 214, 76 Am. St. Rep. 736.

One must not only seek his adversary for the purpose of provoking the difficulty but he must provoke the difficulty at the time he meets deceased, before it can be claimed that he has forfeited his right to self-defense. *Matthews v. State*, 42 App. 31, 58 S. W. 90.

If one intends to provoke a difficulty, and although the means used are not reasonably calculated to provoke, yet if they in fact do provoke it, he is responsible for what he actually intended to do. *Matthews v. State*, 42 App. 31, 58 S. W. 90.

A cool and calm determination in the mind of the slayer to kill the deceased should the latter, at the time of the meeting, attack him, and do some act manifesting an intention to kill or seriously injure him, would not destroy the slayer's right of self-defense. *Pratt v. State*, 50 App. 227, 96 S. W. 8.

One who provokes a difficulty without intent to kill or inflict serious bodily injury, and with no intent at the time of provoking the difficulty, is not thereby deprived of his right of self-defense. *Best v. State*, 58 App. 327, 125 S. W. 909.

In order to abridge the right of self-defense, the language used or acts done must have been spoken or done by accused with intent at the time to provoke the difficulty, as well as reasonably calculated to do so. *Keeton v. State*, 59 App. 316, 128 S. W. 404.

Where defendant's wife told him that deceased had scared her, defendant was guilty of no wrong in seeking out deceased and demanding an explanation. *Bal-lard v. State*, 62 App. 435, 138 S. W. 120.

If accused placed money on a table and challenged decedent to take it to create an excuse for the killing, he cannot rely upon defense of property. *Mansfield v. State*, 62 App. 631, 138 S. W. 591.

That accused went where decedent was with a pistol did not forfeit his right to act in self-defense nor make him guilty of provoking the difficulty. *Kincaid v. State* (Cr. App.) 145 S. W. 597.

Defendant, who had armed himself and gone to take possession of a barn, knowing that his attempt would be likely to cause serious trouble, and knowing of threats against him by the claimant, had still a right to defend himself against a third party, whom he did not know. *Smith v. State* (Cr. App.) 148 S. W. 722.

Where defendant was talking to one person, and another person, whom he did not know, shot at him from behind a barn, his right to defend himself against such attack would not be impaired, even though his conduct might have impaired his right to self-defense had he killed the party to whom he was talking. *Smith v. State* (Cr. App.) 148 S. W. 722.

Where accused's own testimony showed that the difficulty between him and deceased was caused by his remark with reference to deceased that he would not let any son of a bitch run over his boy, that, when deceased asked if he was referring to him, he did not deny that he was, but drew a knife, and, when deceased got him by the collar, commenced cutting him, and entered into the fight with zeal, accused did not have the perfect right of self-defense which would justify his conduct, but, at most, only the imperfect right which would reduce the grade of offense to manslaughter, since the necessity for self-defense was caused by his own insulting language. *Carver v. State* (Cr. App.) 148 S. W. 746.

There is a difference between bringing on a difficulty and provoking a difficulty for the purpose of getting some advantage. *Ware v. State* (Cr. App.) 152 S. W. 1074.

A charge on provoking a difficulty or abridging the right of self-defense is not called for unless the interview was sought by defendant to provoke a difficulty, and when the meeting occurred defendant did some act or used language reasonably calculated to provoke the difficulty, and with intent to provoke a difficulty, and, in fact, did provoke a difficulty in which deceased was the aggressor *Sorrell v. State* (Cr. App.) 169 S. W. 299.

For a discussion of the principles of perfect and imperfect self-defense, see *Thumm v. State*, 24 App. 667, 7 S. W. 236; *Bonnard v. State*, 25 App. 173, 7 S. W. 862, 8 Am. St. Rep. 431; *Williams v. State*, 25 App. 216, 7 S. W. 666; *Varnell v. State*, 26 App. 56, 9 S. W. 65; *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Johnson v. State*, 26 App. 631, 10 S. W. 235; *Gonzales v. State*, 28 App. 130, 12 S. W. 733; *Levy v. State*, 28 App. 203, 12 S. W. 596, 19 Am. St. Rep. 826; *Carter v. State*, 28 App. 355, 13 S. W. 147; *Habel v. State*, 28 App. 588, 13 S. W. 1001; *Williams v. State*, 30 App. 429, 17 S. W. 1071; *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944; *Polk v. State*, 30 App. 657, 18 S. W. 466; *Ball v. State*, 29 App. 107, 14 S. W. 1012; *Franklin v. State*, 30 App. 628, 18 S. W. 468; *Muely v. State*, 31 App. 155, 18 S. W. 411, 19 S. W. 916; *Sullivan v. State*, 31 App. 486, 20 S. W. 927, 37 Am. St. Rep. 826; *Mundine v. State*, 37 App. 5, 38 S. W. 619; *Cheatham v. State*, 57 App. 442, 125 S. W. 565.

6. Mutual combat.—Manslaughter in mutual combat, see notes to art. 1129, post.

If a person voluntarily engages in a combat, knowing that it will, or may result in death, or some serious bodily injury which may probably produce the death of his adversary or himself, he can not claim that he is acting in self-defense. *Gilleland v. State*, 44 Tex. 356; *Logan v. State*, 17 App. 50; *Lee v. State*, 21 App. 241, 17 S. W. 425; *Cunningham v. State*, 17 App. 89; *Bordeaux v. State*, 58 App. 61, 124 S. W. 640.

The fact that deceased may have been in the act of firing upon the defendant does not render the killing justifiable, if it appear that defendant sought the conflict and voluntarily engaged in it, and that threats were mutual and a hostile meeting mutually determined upon. *Gilleland v. State*, 44 Tex. 356. See this case for a discussion of this article and article 1107.

If death ensues from mutual combat it is murder if undue advantage was taken by the slayer. *King v. State*, 4 App. 54, 30 Am. Rep. 160.

For discussion of principles entering into the question of mutual combat, see *Thumm v. State*, 24 App. 667, 7 S. W. 236; *Williams v. State*, 25 App. 216, 7 S. W. 666; *Gonzales v. State*, 28 App. 130, 12 S. W. 733; *Habel v. State*, 28 App. 588, 13 S. W. 1001; *White v. State*, 30 App. 652, 18 S. W. 462; *Waldon v. State*, 34 App. 92, 29 S. W. 273.

7. Threats by defendant.—Threats made by the defendant to kill the deceased will not deprive the former of his right to defend himself against an attack made on him by the deceased, on account of such threats. *Parker v. State*, 18 App. 72; *Smith v. State*, 15 App. 338; *White v. State*, 23 App. 154, 3 S. W. 710.

The fact that accused the night after a difficulty with decedent, in which deceased fired a gun at or over accused, wrote a letter to another person making threats against the deceased, does not preclude his relying on self-defense in a prosecution for murder committed the next day while accused was sitting peaceably in a public place, when decedent approached with a gun, and acted in a manner signifying an intention to shoot or kill accused, whereupon accused shot him; accused not having made any hostile movement towards deceased or attempted in any way to execute his threat. *Stanley v. State*, 62 App. 306, 137 S. W. 703.

Where accused claimed that he shot in self-defense and that he and deceased had been the best of friends, evidence of his remarks and threats against deceased, made some time before the killing, was admissible; it being the contention of the state that accused and his father, who on the day of the killing had a quarrel with deceased, conspired together to kill him. *Coulter v. State*, 72 App. 602, 162 S. W. 885.

Where accused, relying on self-defense and on the theory that he killed decedent to protect his family, had about three weeks before the killing made threats against decedent under such circumstances that they would probably be communicated to decedent, proof of the threats was admissible. *Roberts v. State* (Cr. App.) 168 S. W. 100.

And further on threats by defendant, see *Manning v. State*, 51 App. 211, 93 S. W. 251; *McMahan v. State*, 46 App. 540, 81 S. W. 296; *Pratt v. State*, 50 App. 227, 96 S. W. 8; *Reinhard v. State*, 52 App. 53, 106 S. W. 128; *Slade v. State*, 29 App. 381, 16 S. W. 253; *Gilcrease v. State*, 33 App. 620, 28 S. W. 531; *Utzman v. State*, 32 App. 426, 24 S. W. 412.

8. Manslaughter.—As to manslaughter under this article, see *Ross v. State*, 10 App. 456, 38 Am. Rep. 643; *Roach v. State*, 21 App. 249, 17 S. W. 464; *Ledbetter v. State*, 26 App. 22, 9 S. W. 60; *Milrainey v. State*, 33 App. 577, 28 S. W. 537; *Gilcrease v. State*, 33 App. 619, 28 S. W. 531; *Glover v. State*, 33 App. 224, 26 S. W. 204.

9. Evidence on issue of self-defense.—Evidence as to cuts on the person and clothing of the accused is admissible on the issue of self-defense. The objection that such evidence is easily fabricated goes to its credibility and not to its competency. *Good v. State*, 18 App. 39.

The state proved over objection that the pistol found on the body of deceased could only fire center-fire cartridges and was loaded with rim fire cartridges, which it could not explode. This evidence should have been excluded as immaterial, since defendant could not have known of the condition of deceased's pistol, the manner in which it was loaded, nor that it could not have been fired by deceased. *Everett v. State*, 30 App. 683, 18 S. W. 674. See, also, *Irvine v. State*, 26 App. 37, 9 S. W. 55.

When the defense is self-defense, it is admissible to show that deceased was not friendly with defendant and language used by him showing such feelings toward defendant is admissible. *Holley v. State*, 39 App. 301, 46 S. W. 39.

It is error to admit proof that deceased's gun was loaded with small shot, when defendant did not know this. *Carr v. State*, 41 App. 380, 55 S. W. 51.

Acts and declarations of deceased are not admissible for purposes of showing friendly feeling towards accused when they have not been communicated to accused. The facts must be regarded from defendant's standpoint. *Stell v. State* (Cr. App.) 58 S. W. 76.

In a prosecution for homicide by shooting, testimony of a witness that after decedent fell he saw him making a motion with his hand as if putting a knife in his pocket was inadmissible, since defendant could not have acted on anything decedent was doing at that time. *Barbee v. State*, 58 App. 129, 124 S. W. 961.

Evidence held to show that the killing was not in self-defense. *Pannell v. State*, 59 App. 383, 128 S. W. 133; *Snowberger v. State*, 58 App. 530, 126 S. W. 878; *Baum v. State*, 60 App. 638, 133 S. W. 271; *Florence v. State*, 61 App. 238, 134 S. W. 689; *Powdrill v. State* (Cr. App.) 155 S. W. 231; *Cole v. State* (Cr. App.) 165 S. W. 929; *Latham v. State* (Cr. App.) 172 S. W. 797.

Proof that decedent was unarmed is admissible. *Dougherty v. State*, 59 App. 464, 128 S. W. 398.

For testimony on the question of who began the difficulty. *Bradley v. State*, 60 App. 398, 132 S. W. 484.

Evidence held insufficient to raise an issue as to decedent's abandonment of the difficulty. *Duke v. State*, 61 App. 19, 133 S. W. 432.

Where defendant testified that when he got the pistol he had in mind a threat of deceased against him, and carried it for protection, testimony that he asked the witness if he would go on his bond if he got into trouble was admissible. *Drake v. State* (Cr. App.) 143 S. W. 1157.

Where the issue was self-defense, the question whether a witness had ever seen deceased about the witness' store with a pistol was improperly excluded. *Maclin v. State* (Cr. App.) 144 S. W. 951.

Evidence held to show that accused acted in self-defense. *Antu v. State* (Cr. App.) 147 S. W. 234.

Evidence was admissible for accused, that decedent had, on a number of occasions been seen to carry a pistol, if accused was shown to have known of such fact. *Andrus v. State* (Cr. App.) 165 S. W. 189.

An innocent motive, unknown to defendant, for acts producing an appearance on which he had a right to act in self-defense, may not be shown. And for application of rule, see *Singleton v. State* (Cr. App.) 167 S. W. 46; *Bradley v. State*, 60 App. 398, 132 S. W. 484; *Johnson v. State* (Cr. App.) 148 S. W. 328.

Where accused relies on self-defense, his words and conduct immediately after the killing are material on the issue as to why he killed decedent. *Roberts v. State* (Cr. App.) 168 S. W. 100.

Evidence in a prosecution for murder by shooting deceased several times, in which the defendant relied on self-defense, held sufficient to sustain a conviction of murder. *Crossett v. State* (Cr. App.) 168 S. W. 548.

Whatever accused may have known or heard that could have affected his mind, and had a tendency to lead him to believe that, from the conduct of deceased at the time, his life was in danger, was admissible. *Echols v. State* (Cr. App.) 170 S. W. 786; *Keeton v. State*, 59 App. 316, 128 S. W. 404; *Cloud v. State* (Cr. App.) 153 S. W. 892; *Garcia v. State*, 70 App. 485, 156 S. W. 939; *Roberts v. State* (Cr. App.) 168 S. W. 100; *Harper v. State* (Cr. App.) 170 S. W. 721.

Evidence, in a prosecution for murder, held to justify submission to the jury of the issue of self-defense. *Barnett v. State* (Cr. App.) 176 S. W. 580.

Evidence in a homicide case held not to raise the issue of manslaughter, but of self-defense. *Hove v. State* (Cr. App.) 177 S. W. 497.

10. — **Burden of proof.**—See notes to art. 52, ante, and art. 785, C. C. P.

11. — **Threats by deceased and deceased's character.**—See notes to art. 1143, post.

12. **Charge.**—See notes to C. C. P. art. 735.

In regulating the right to take life in necessary self-defense, the Code of this state establishes an essential distinction, based upon the nature and severity of the unlawful attack, and discriminates it into two classes. The first class, regulated by article 1105 of the Penal Code, comprises all cases in which, from the acts of the assailant, or his words coupled therewith, it is reasonably apparent that his intent is to murder or do serious bodily harm, in which case the assaulted party may lawfully slay his aggressor while he is committing the offense, or when he has done some act evidently showing his intention to commit it. The second class, regulated by article 1107 of the Penal Code, comprises those cases in which the purpose or intent reasonably indicated by the unlawful and violent attack is other than those above mentioned. The proof on this, as on the former trial of this case, shows that if the deceased made any attack on the accused, it was a murderous attack which came clearly within the provisions of article 1105, and there was no evidence whatever tending to show a milder attack. In this state of the proof the trial court erred in charging the provisions of article 1105, because such charge, being unauthorized by the proof, was calculated to confuse and mislead the jury. (Note the opinion for the approval on the subject of *Orman's Case*, 22 App. 604, 3 S. W. 468, 58 Am. Rep. 662, and *Kendall's Case*, 8 App. 569.) *Orman v. State*, 22 App. 604, 3 S. W. 468, 58 Am. Rep. 662; s. c., 24 App. 495, 6 S. W. 544. See, also, *Hill v. State*, 10 App. 618; *Jordan v. State*, 11 App. 435; *Foster v. State*, Id., 105; *Morgan v. State*, 16 App. 593; *Gonzalez v. State*, 30 App. 203, 16 S. W. 978; *Fuller v. State*, 30 App. 559, 17 S. W. 1108; *Warren v. State*, 22 App. 383, 3 S. W. 240; *Skaggs v. State*, 31 App. 563, 21 S. W. 257; *Kelly v. State*, 27 App. 562, 11 S. W. 627; *Bedford v. State*, 36 App. 477, 38 S. W. 210.

The charge should be applicable to the facts. It is often inadequate to charge simply the language of the statutory provisions upon this issue. *Richardson v. State*, 7 App. 486; *Kendall v. State*, 8 App. 569; *Talbert v. State*, Id. 316; *Salmon v. State* (Cr. App.) 154 S. W. 1023.

The charge should, in a proper case, draw clearly the distinctions between self-defense under article 1105 and self-defense under this article. *Kendall v. State*, 8 App. 569.

Where the evidence tends to show self-defense under either art. 1105 or art. 1107, the court should frame its charge with reference to the article which is applicable to the facts proved, and should not charge with reference to the other article. But where the evidence raises a question as to which of the two articles apply to the facts, the charge should be with reference to both articles, and should draw clearly the distinctions between the two kinds of attack justifying homicide. *Kendall v. State*, 8 App. 569.

A charge which limited the right of self-defense to "extreme necessity" held erroneous. *King v. State*, 13 App. 277.

The charge should be constructed upon the evidence in the particular case on trial. *Hackett v. State*, 13 App. 406.

The law of self-defense when invoked by the proof should be given to the jury in plain and intelligible language, without superfluous verbiage. Learned abstractions are not the best means to make it comprehensible by the jury. *Boddy v. State*, 14 App. 538.

The first subdivision of article 1105 declares that it must "reasonably appear," etc. It is error to substitute the word "necessarily" for the word "reasonably" in the charge, as the two words are essentially different in meaning. Also, homicide is justifiable when the slayer kills the deceased after the latter has done some act, etc. A charge which omits the word "after" is erroneous because it limits the justification to a killing while the deceased is in the act of killing the slayer, or in the act of doing the act which evidences his intention to kill the slayer or do him serious bodily injury. *Stevenson v. State*, 17 App. 618.

It is not error to give in charge the law of article 1107 before charging the law of article 1105. *Gonzalez v. State*, 30 App. 203, 16 S. W. 978.

A charge that the jury ought to consider the situation and circumstances from accused's standpoint, held sufficient. *Jackson v. State*, 32 App. 192, 22 S. W. 831.

On trial for murder when the issues raised were: First, whether deceased was killed in pursuance of an agreement between defendant, his father, and brother; second, whether deceased was killed by defendant in protection of the life of his father or brother; or third, whether deceased was killed in mutual combat. Held, that in such case the court should have instructed the jury, that unless the evidence satisfied them beyond a reasonable doubt that there was an agreement between defendant, his father, and brother, to kill deceased or that he was killed in mutual combat they must acquit defendant, unless they believed that defendant's father and brother began the difficulty, and defendant knew it when he entered into the conflict. *Hargrove v. State*, 33 App. 431, 26 S. W. 993.

See case held error to charge that to justify the homicide all other means must have first been resorted to to prevent the attack. *Cline v. State* (Cr. App.) 28 S. W. 684.

Erroneous charge on self-defense held harmless. *James v. State* (Cr. App.) 33 S. W. 342; *Ward v. State*, 70 App. 393, 159 S. W. 272; *Harper v. State* (Cr. App.) 170 S. W. 721.

When the court gives an instruction on self-defense which is directly applicable to the facts as testified to by the defendant, failure to give the general instruction on the same subject is not error. *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941.

The defense was justifiable homicide because deceased was making an assault on defendant's brother with a pistol, and was in the act of taking the latter's life; held, that defendant was not required to resort to other means to prevent the killing of his brother before taking the life of deceased, and a charge based upon such theory was erroneous. *Shumate v. State*, 38 App. 266, 42 S. W. 600.

A charge "that all self-defense rests upon necessity" is the law when the necessity is only apparent, such proposition should be more fully explained, but when such necessity is real it is not necessary to explain. *Williford v. State*, 38 App. 393, 42 S. W. 972.

It is proper to charge that one in defending himself against an unlawful attack can use all necessary and reasonable force, but no more than the circumstances reasonably indicate to be necessary. *Freeman v. State*, 40 App. 551, 46 S. W. 641, 51 S. W. 230.

Where court groups facts and charges if jury finds them true, self-defense could not be set up, it should then group facts embracing defendant's claim and instruct to acquit if the jury finds them to be true. *Francis v. State* (Cr. App.) 55 S. W. 489.

Charge should not restrict the rights of accused to the intent of deceased. Accused's intent must be judged by his own purpose and not by the intent of deceased. *Casner v. State*, 42 App. 118, 57 S. W. 821, 824.

When the killing occurs in sudden broil, no former grudge or quarrel being shown, and the evidence tends to sustain self-defense, the charge should limit the design to kill to an unlawful design to kill formed prior to the broil. *Manis v. State*, 41 App. 614, 58 S. W. 81.

Where party's life is in danger, or when the perfect right of self-defense has accrued, he has the right to use any means within his power to protect his life, or his person from serious bodily injury, even to the taking the life of his adversary, and a charge which restricts his right to any reasonable and necessary means, is erroneous. *Hall v. State*, 42 App. 444, 60 S. W. 770.

In a conflict of evidence it is a question of fact to be submitted to the jury

whether defendant has compromised his right of self-defense. *Hall v. State*, 42 App. 444, 60 S. W. 771.

The fact that the altercation grew out of adverse claims to possession of property would not require a charge involving the right of appellant to protect his claim to the property against an intrusion of the prosecutor. *Hill v. State*, 43 App. 583, 67 S. W. 506.

Defendant, having purchased a barn from a city located on a lot of which S. was possessed under a lease from the city, went to take down the barn, when he was forbidden to do so by S., though he had agreed to surrender possession within 10 days, which time had long since expired, on the ground that he was entitled to written notice of dispossession. Defendant claimed that, while discussing the matter with S., decedent, his son, armed with a rifle, appeared around the corner of the barn in a shooting position and immediately fired, whereupon defendant shot him. Held, that deceased, having no rights with reference to the property in question, had no right to assault defendant, unless necessary to save his father's life, as authorized by this article, and the court should have charged that if deceased made an attack on defendant as claimed, not in defense of his father, and defendant from his standpoint thought that his life was endangered, he could shoot deceased in self-defense. *Smith v. State*, 57 App. 455, 123 S. W. 698.

Where the state's evidence showed that decedent struck accused with his hand, and that the blow, which was not serious, was struck as a result of provocation, and the evidence of accused showed that decedent was trying to cut and kill accused with a knife when accused fired the fatal shot, an instruction on self-defense that homicide is justifiable in the protection of the person from any violent attack, and in such case all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the act of making such attack, or while the person killed is doing some hostile act that would, viewed from the standpoint of accused, produce in his mind a reasonable fear of death, etc., properly submitted the issue of self-defense. *Best v. State*, 58 App. 327, 125 S. W. 909.

Where the charge sufficiently directs attention to the facts, it is not essential to embody in the charge the details of every fact relied on. *Pratt v. State*, 59 App. 167, 127 S. W. 827.

Where the question of self-defense is in the case, accused is entitled to a charge thereon independent of the law of threats. *Lundy v. State*, 59 App. 131, 127 S. W. 1032.

The charge should embody, not only the acts of decedent, but also his words accompanying the acts illustrating the intent of decedent as viewed from accused's standpoint. *Lundy v. State*, 59 App. 131, 127 S. W. 1032.

Where there was no evidence that decedent intended or attempted at the time of the homicide to enter the storehouse of accused, except as such act related to a threatened assault on accused, and the court charged that one need not retreat to avoid the necessity of killing his assailant, but any one, in defending himself, may stand his ground and kill his adversary if necessary, etc., the refusal to charge that if decedent approached accused's storehouse, and manifested a purpose of entering the same over the protest of accused, accused could prevent decedent from entering the same, and could use force reasonably necessary, etc., was not prejudicial to accused. *Pratt v. State*, 59 App. 635, 129 S. W. 264.

Where decedent who had had prior difficulties with accused stated that he would take accused's gun, and he approached accused with an ax in hand, threatening to take the gun, and accused, after warning decedent several times, shot decedent as he continued to approach, the issues of self-defense applicable to real and apparent danger of bodily injury and applicable to the taking of the gun from accused were raised, so that the court properly charged the substance of this article. *Williams v. State*, 59 App. 624, 129 S. W. 838.

Where the jury were in terms instructed that, in passing on the issue whether accused had reasonable grounds to fear an attack by deceased, etc., the facts and circumstances must be looked at and the question determined from the standpoint of defendant alone, the issue of self-defense was properly submitted. *Hudson v. State*, 59 App. 650, 129 S. W. 1125, Ann. Cas. 1912A, 1324.

A difficulty having occurred between defendant and deceased, deceased appeared at a dance defendant was attending armed with a shotgun. Defendant was at once notified that deceased was coming armed to kill him. Defendant approached deceased, had some conversation with him, and on a movement by deceased, as if to shoot, defendant grabbed the gun. They scuffled out of doors, when a shot was fired by defendant, which killed deceased. Held, that defendant, under such circumstances, was entitled to a charge on self-defense, untrammelled by the limitations contained in this article. *Anderson v. State*, 60 App. 314, 131 S. W. 1124.

In a prosecution for homicide, an instruction that, if defendant fired on deceased in self-defense, but the deceased abandoned the difficulty and defendant had no reasonable apprehension of danger from deceased, defendant would not be justified in pursuing or firing other shots was error, where it failed to state that, if defendant under these conditions was, by the previous conduct of deceased, rendered incapable of cool reflection, he would not be guilty of any higher grade of offense than manslaughter. *Johnson v. State*, 63 App. 50, 133 S. W. 1021.

A charge that, if accused killed decedent while defending himself against the acts, or acts and words, of decedent, or the acts and words of those acting with him, and that his life was put in danger, or that he was put in danger of serious bodily harm, the jury should acquit was not objectionable as requiring the jury to find that accused acted against the combined acts and conduct of all the parties, before they could acquit on the ground of self-defense. *Beaver v. State* (Cr. App.) 142 S. W. 11.

A paragraph in the charge consisting of a mere definition, held, not erroneous. *Holmes v. State* (Cr. App.) 155 S. W. 205.

Where deceased had rented a farm from the father of accused, reserving the right to the pecan crop, and accused was on the land threshing such trees when deceased ordered him off the premises, and used threatening language and made a hostile demonstration, on trial for his murder, an instruction on the issue of defense of property should have been given. *Walker v. State*, 70 App. 84, 156 S. W. 206.

Where self-defense is an issue, an instruction submitting that defense should not require the jury to believe numerous unimportant details leading up to the fatal affray, before they can acquit. *McMillan v. State* (Cr. App.) 165 S. W. 576. Nor should the instruction require the jury to find that the affray started in the precise manner detailed by accused, before they could acquit, the evidence as to how the affray started being conflicting. *McMillan v. State* (Cr. App.) 165 S. W. 576.

Where the killing occurred in a shooting which defendant claimed was begun by deceased, it was error to instruct the jury that they could take into consideration the relative strength of the parties. *Hammons v. State* (Cr. App.) 177 S. W. 493.

Where, in a prosecution for murder, the evidence shows that, at the time of the killing, a brother was not aiding or encouraging deceased in any attack upon accused, though he had theretofore been cursing accused for a grievance, an instruction as to his right of self-defense as against such brother was unnecessary. *Stacy v. State* (Cr. App.) 177 S. W. 114.

Charges on self defense held correct. *Bright v. State*, 10 App. 68; *Kemp v. State*, 13 App. 561; *Rider v. State*, 26 App. 334, 9 S. W. 688; *Maxwell v. State*, 31 App. 119, 19 S. W. 914; *Garello v. State*, 31 App. 56, 20 S. W. 179; *Chalk v. State*, 35 App. 116, 32 S. W. 534; *Tate v. State*, 35 App. 231, 33 S. W. 121; *Sargent v. State*, 35 App. 325, 33 S. W. 364; *Graham v. State* (Cr. App.) 33 S. W. 537; *Thompson v. State*, 35 App. 352, 33 S. W. 871; *Williford v. State*, 36 App. 414, 37 S. W. 761; *Price v. State*, 36 App. 403, 37 S. W. 743; *Brittain v. State*, 36 App. 406, 37 S. W. 758; *Walters v. State*, 37 App. 90, 38 S. W. 794; *Snowberger v. State*, 58 App. 530, 126 S. W. 878; *Day v. State*, 61 App. 114, 134 S. W. 215; *Young v. State*, 61 App. 303, 135 S. W. 127; *Tabor v. State*, 61 App. 425, 135 S. W. 142; *Edwards v. State*, 61 App. 307, 135 S. W. 540; *Tilmeyer v. State*, 62 App. 272, 136 S. W. 1060; *Owens v. State*, 63 App. 633, 141 S. W. 530; *Treadway v. State* (Cr. App.) 144 S. W. 655; *Maclin v. State* (Cr. App.) 144 S. W. 951; *Stephens v. State* (Cr. App.) 145 S. W. 907; *Overcash v. State* (Cr. App.) 148 S. W. 701; *Lee v. State* (Cr. App.) 148 S. W. 706; *Williams v. State* (Cr. App.) 148 S. W. 763; *Penton v. State* (Cr. App.) 149 S. W. 190; *Luttrell v. State*, 70 App. 183, 157 S. W. 157; *Brookins v. State*, 71 App. 101, 158 S. W. 521; *Stewart v. State*, 71 App. 237, 158 S. W. 996; *Burnaman v. State*, 70 App. 361, 159 S. W. 244, 46 L. R. A. (N. S.) 1001; *Ward v. State*, 70 App. 393, 159 S. W. 272; *Thomas v. State*, 71 App. 183, 159 S. W. 1183; *Perales v. State*, 72 App. 176, 161 S. W. 482; *Carey v. State* (Cr. App.) 167 S. W. 366; *Johnson v. State* (Cr. App.) 167 S. W. 733; *Roberts v. State* (Cr. App.) 168 S. W. 100; *Crossett v. State* (Cr. App.) 168 S. W. 548; *Hicks v. State* (Cr. App.) 171 S. W. 755; *McAnthony v. State* (Cr. App.) 174 S. W. 1046; *Francis v. State* (Cr. App.) 175 S. W. 705; *Eads v. State* (Cr. App.) 176 S. W. 574.

Charges on self defense held erroneous. *Arman v. State*, 24 App. 496, 6 S. W. 544; *Kelly v. State*, 27 App. 562, 11 S. W. 627; *Gonzalez v. State*, 30 App. 203, 16 S. W. 978; *Bow v. State*, 34 App. 481, 31 S. W. 170; *Phipps v. State*, 34 App. 608, 31 S. W. 657; *Maines v. State*, 35 App. 109, 31 S. W. 667; *Anderson v. State*, 34 App. 546, 31 S. W. 673, 53 Am. St. Rep. 722; *Castro v. State* (Cr. App.) 40 S. W. 985; *Carson v. State*, 57 App. 394, 123 S. W. 590, 136 Am. St. Rep. 981; *Hardin v. State*, 57 App. 401, 123 S. W. 613; *Snowberger v. State*, 58 App. 530, 126 S. W. 878; *Gaines v. State*, 58 App. 631, 127 S. W. 181; *Castro v. State* (Cr. App.) 146 S. W. 553; *Antu v. State* (Cr. App.) 147 S. W. 234; *McDowell v. State* (Cr. App.) 151 S. W. 1049; *Wilson v. State*, 70 App. 355, 156 S. W. 1185; *Vickers v. State*, 70 App. 538, 157 S. W. 767; *Coulter v. State*, 71 App. 514, 160 S. W. 80; *Trevino v. State*, 72 App. 91, 161 S. W. 108; *Johnson v. State*, 72 App. 178, 161 S. W. 1098; *Williams v. State* (Cr. App.) 166 S. W. 1170.

And further as to charges, see *Brazzil v. State*, 28 App. 584, 13 S. W. 1006; *Slade v. State*, 29 App. 381, 16 S. W. 253; *Roberts v. State*, 30 App. 291, 17 S. W. 450; *McSpotton v. State*, 30 App. 616, 18 S. W. 298; *Beaty v. State*, 30 App. 677, 18 S. W. 646; *Lynch v. State*, 24 App. 350, 6 S. W. 190, 5 Am. St. Rep. 888; *McDade v. State*, 27 App. 641, 11 S. W. 672, 11 Am. St. Rep. 216; *Hawthorne v. State*, 28 App. 212, 12 S. W. 603; *Bonner v. State*, 29 App. 223, 15 S. W. 821; *Williams v. State*, 30 App. 429, 17 S. W. 1071; *Maxwell v. State*, 31 App. 119, 19 S. W. 914; *Ennis v. State* (Cr. App.) 38 S. W. 998; *Mundine v. State*, 37 App. 5, 38 S. W. 619; *Bedford v. State*, 36 App. 477, 38 S. W. 210; *Rucker v. State* (Cr. App.) 40 S. W. 991.

13. — **Provoking contest.**—A charge on provoking difficulties should be given separately from a charge of self-defense. *Castro v. State* (Cr. App.) 40 S. W. 985.

An instruction that defendant had the right, on a peaceable mission, to seek out decedent and ask him to retract insulting language, and to arm himself for his necessary self-defense, if he apprehended danger at the time he sought such apology, and that if defendant, on a peaceable mission, sought out decedent and asked him to apologize, and decedent refused to do so, and it reasonably appeared to defendant that he was in danger of death or serious bodily harm, and acting thereunder he shot decedent, to acquit, placed an improper limitation on defendant's rights by the words "on a peaceable mission." *McCleary v. State*, 57 App. 139, 122 S. W. 26.

A charge that one who willingly enters into a fight cannot justify shooting in self-defense is erroneous, as depriving him of his right of self-defense by virtue of the wrongful act, without reference to his intent in doing it. *Gardner v. State*, 57 App. 471, 125 S. W. 13.

An instruction on self-defense that if it reasonably appeared to defendant that deceased had abandoned the conflict, and that thereafter the defendant returned,

armed with a stick, and renewed the fight, then he cannot rely on the law of self-defense, was erroneous, as the court should have told the jury that, if the deceased had in fact abandoned the difficulty and the defendant knew he had so abandoned it, and then renewed the attack, he could not plead self-defense. *Coker v. State*, 59 App. 241, 128 S. W. 137.

A charge that if defendant used words or did acts, either or both of which provoked the difficulty, and that he did so for the purpose or with the intention of provoking a difficulty, he could not rely on self-defense, is proper, it not being necessary to point out the particular acts of provocation on the part of defendant. *Giesecke v. State*, 64 App. 531, 142 S. W. 1179.

Pursuit of deceased with intent to kill him was an overt act, depriving defendant of the right of self-defense and justifying refusal of an instruction that, though defendant pursued deceased with intent to kill him, yet if when he overtook deceased he drew a pistol and fired, defendant would be justified in killing him. *Hammons v. State* (Cr. App.) 177 S. W. 493.

Where the court instructed as to self-defense, without any limitation as to provocation of difficulty, it was not error to refuse a request that defendant, on seeking deceased for a peaceable settlement, had a right to arm himself, if he thought deceased might make an assault on him, in view of the undisputed evidence that defendant shot and killed one of deceased's sons, had shot another son of deceased and put out both his eyes, that the deceased had shot the defendant in the face and put out his eye, and that defendant had shot at deceased and thought that he had wounded him, and so believed until the defendant shot and killed deceased, and that, when defendant caught sight of deceased, he got his gun and pursued deceased until deceased turned and, as claimed by defendant, put his hand in his pocket. *Ford v. State* (Cr. App.) 177 S. W. 1176.

Charge held erroneous in the use of the word "peaceable." *Sorrell v. State* (Cr. App.) 169 S. W. 299; *Gaines v. State*, 53 App. 631, 127 S. W. 181.

As to sufficiency of charge, see, also, *Stoner v. State*, 72 App. 482, 162 S. W. 836; *Morgan v. State*, 34 App. 222, 29 S. W. 1092; *Gaines v. State*, 53 App. 631, 127 S. W. 181; *Gray v. State*, 61 App. 454, 135 S. W. 1179; *McGreagor v. State*, 71 App. 604, 160 S. W. 711; *Reed v. State* (Cr. App.) 168 S. W. 541; *Ghent v. State* (Cr. App.) 176 S. W. 566.

14. — **Mutual combat.**—Court need not make direct application of law of mutual combat to murder and manslaughter or either. *Gardner v. State* (Cr. App.) 59 S. W. 1116.

Though it is immaterial on the question of self-defense whether the abandonment of the conflict by deceased was in good faith, defendant may not complain of the instruction that if deceased in good faith abandoned the conflict, and fled, and defendant was then in no danger of violence from deceased, and, knowing he was in no danger, shot deceased, he could not justify the killing on the ground of self-defense. *Bordeaux v. State*, 58 App. 61, 124 S. W. 640.

Charge held sufficiently favorable to accused. *Anthony v. State*, 62 App. 138, 136 S. W. 1097.

15. — **Threats by deceased.**—See notes to art. 1143, post.

Where the evidence raises the issue of self-defense in connection with that of threats, an independent charge on self-defense, should be given, but is not necessary where the evidence does not raise that issue in connection with the issue of threats. *Bussey v. State* (Cr. App.) 153 S. W. 873; *Williams v. State*, 61 App. 356, 136 S. W. 771. See, also, *Ware v. State* (Cr. App.) 152 S. W. 1074; *Reagan v. State*, 70 App. 498, 157 S. W. 483; *Lyons v. State*, 71 App. 189, 159 S. W. 1070.

Where the court charged that in determining the rights of accused to act, the matter must be viewed from his standpoint at the time of the homicide, a charge submitting the issue of self-defense on the ground of threats was not erroneous for failing to state that the acts and conduct of decedent must be viewed from the standpoint of accused. *Payton v. State*, 60 App. 475, 132 S. W. 127.

In a homicide case, refusal to instruct that, if accused believed that decedent was armed and had reasonable ground for such belief, he could act thereon, though decedent was unarmed, was not justified by giving an instruction that if before the killing accused had been informed of decedent's threats to kill him, and if at the time of the difficulty decedent, by his manner, caused accused to believe that he intended to execute such threats, accused should be acquitted. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

Where the testimony of the defense raises the right to eject an intruder from the premises, the right of self-defense from attack, and the right of self-defense in view of previously communicated threats, each defense should be separately stated in distinct paragraphs, applying the law of reasonable doubt to each. *Reagan v. State*, 70 App. 498, 157 S. W. 483.

A charge that if deceased had made threats against accused, and such threats had been communicated, or reports of threats, whether actually made or not, had been reported to accused, and accused shot deceased, who, at the time of the killing, did some act reasonably indicating he was about to put his threats into execution, accused should be acquitted, is not erroneous as requiring the jury to find that deceased actually made the threats. *Eads v. State* (Cr. App.) 176 S. W. 574.

The evidence for accused tended to show that when he and deceased met, deceased jumped from his horse and threw his hand into his bosom as if to draw a pistol, after telling accused to halt, and that accused then shot him. The court charged that if deceased had threatened to kill accused, or if accused had been informed that deceased had done so, such threats, or the fact that accused had been so informed, afforded no justification for the killing, unless deceased at the time of the shooting did or was doing some act, or making some demonstration, manifesting an intention to execute or carry out such threats, or which was reasonably calculated, in view of all the circumstances considered from accused's

standpoint, to produce and which did produce in accused's mind the belief that he was about to execute such threats, that in that event accused had a right to act upon such reasonable appearance of danger, though the danger was not real, and that if deceased did any act which reasonably induced accused to believe that he was about to shoot or inflict serious bodily injury and if prompted by such belief accused shot deceased, his act was justifiable. The court did not charge upon self-defense on any other theory. Held, that the refusal of charges as to self-defense on the theory of demonstrations by deceased at the time of the killing without regard to threats was error, as the charge given was limited to threats and accompanying demonstrations. *Manly v. State* (Cr. App.) 176 S. W. 724.

16. — **Defense of another.**—See notes under art. 735, C. C. P.

It is error to charge jury that if they believed that defendant killed deceased in part to protect his brother's life and in part because of revenge to find him guilty. *Shumate v. State*, 38 App. 266, 42 S. W. 609.

In a prosecution for homicide, where defendant maintained that he had done the killing in defense of his brother, the court charged the jury that every person was permitted to defend himself or his brother, etc., and in the same charge, in applying the law to the facts, instructed the jury that if they believed that, when defendant cut deceased with a knife, it was a necessary measure to protect himself, they should acquit. Held, that this charge was too restrictive, for it should have charged the jury on the facts as to the right of defendant to kill in defense of his brother. *Johnson v. State*, 60 App. 512, 132 S. W. 804.

17. — **Defense of habitation.**—See *Oldham v. State*, 63 App. 527, 142 S. W. 13.

Art. 1108. [678] Retreat not necessary.—The party whose person or property is so unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant.

Retreat.—It is, under this article, a part of the law of self-defense that a party unlawfully assailed is not bound to retreat in order to avoid the necessity of slaying his assailant. *Voight v. State*, 53 App. 268, 109 S. W. 205; *Hix v. State*, 51 App. 431, 102 S. W. 405; *Watson v. State*, 50 App. 171, 95 S. W. 115; *Cooper v. State*, 49 App. 28, 89 S. W. 1068; *Arto v. State*, 19 App. 126; *Parker v. State*, 22 App. 105, 3 S. W. 100; *Smith v. State*, 57 App. 455, 123 S. W. 698. See, also, *May v. State*, 23 App. 146, 4 S. W. 591; *Gonzales v. State*, 28 App. 130, 12 S. W. 733; *Ball v. State*, 29 App. 107, 14 S. W. 1012; *Williams v. State*, 30 App. 429, 17 S. W. 1071; *Nalley v. State*, 30 App. 456, 17 S. W. 1084; *Warren v. State*, 31 App. 573, 21 S. W. 680; *King v. State*, 13 App. 277; *Smith v. State*, 33 App. 513, 27 S. W. 137; *Garner v. State*, 34 App. 356, 30 S. W. 782; *Renn v. State*, 64 App. 639, 143 S. W. 167.

Deceased demanded and insisted upon his right to move a fence in defendant's possession, and came with employes and a shot-gun to remove such fence; held, that defendant was not bound to retreat, and if he killed deceased while deceased was in the act of removing such fence, he was justified. *Sims v. State*, 36 App. 154, 36 S. W. 256.

The law of retreat is not applicable to cases of imperfect self-defense. *Carter v. State*, 30 App. 552, 17 S. W. 1102, 28 Am. St. Rep. 944.

Return to attack after retreat.—See *Isaacs v. State*, 25 Tex. 175; *Garner v. State*, 34 App. 356, 30 S. W. 782.

Charge.—When the evidence raises the issue of self-defense, it is the duty of the court, whether requested to do so or not, to give in charge to the jury all the law upon that issue applicable to the evidence. Under the Code it is a part of the law of self-defense, that an assailed party is not bound to retreat in order to make good his right of self-defense. Failure to so charge is error, which, if excepted to, necessitates the reversal of a conviction, and if not excepted to will still be ground for reversal if the error was calculated to prejudice the rights of the accused. *Bell v. State*, 17 App. 538; *Arto v. State*, 19 App. 126; *Parker v. State*, 22 App. 105, 3 S. W. 100; *White v. State*, 23 App. 154, 3 S. W. 710. But see *Hunt v. State*, 33 App. 252, 26 S. W. 206.

The following charge asked by the defendant was held to be substantially correct as matter of law, and, responding to the proof, should have been given. "If Jim Jones, defendant in this case, believed, and had reasonable ground to believe, or for such belief, at the time he shot the deceased, Tom Nowlin (if you find he shot him), that he, defendant, Jim Jones, was being unlawfully arrested, that is, arrested without lawful authority, and that the life or person of him, defendant Jim Jones, was in immediate serious danger thereby, and the acts done by the defendant, Jim Jones, were necessary to prevent such unlawful arrest of him, the said Jim Jones, and without a resort to such extremity, the said unlawful arrest could not have been prevented, and the deceased had not, in fact, any lawful authority to make such arrest, then the homicide was in law justifiable, and you will acquit the defendant." *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454. And see *Ball v. State*, 29 App. 107, 14 S. W. 1012; *Williams v. State*, 30 App. 429, 17 S. W. 1071; *Nalley v. State*, 30 App. 456, 17 S. W. 1084; *Baltrip v. State*, 30 App. 545, 17 S. W. 1006.

When the evidence shows that the defendant did retreat, it is unnecessary to charge the law of retreat. *Hudson v. State*, 28 App. 323, 13 S. W. 388.

The court instructed that the defendant had the right to resist an unlawful arrest and to use all force necessary to prevent it and to release himself and that he could only be convicted of manslaughter in case he used more force than was necessary. Held that there was no need to further instruct that defendant was not bound to retreat. *Montgomery v. State*, 45 App. 373, 77 S. W. 789.

Where defendant killed decedent while he was threatening to assault defendant's father, an instruction as to the necessity to retreat applied only to defendant is erroneous, as it should have applied also to the father. *Dobbs v. State*, 51 App. 113, 100 S. W. 946.

Art. 1109. [679] Requisites of the attack.—The attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death, or some serious bodily injury.

See notes to art. 1014, subdivision 6. ante.

Cited, *Alexander v. State*, 63 App. 102, 138 S. W. 721.

Attack and danger.—If at the time of the killing, the conduct of the deceased, viewed in the light of all the circumstances, was such as to create in the mind of the defendant, a reasonable apprehension of death or serious bodily injury, although in fact no such danger existed, his right to kill to prevent the apparent danger would be as complete as if the danger had been real. And the appearances or indications of danger must be viewed and considered from the defendant's standpoint in determining whether or not they were reasonably calculated to produce, and did produce in his mind the fear of death or serious bodily harm. Where the evidence demands it, the charge of the court should clearly explain to the jury these rules with reference to apparent danger, and should not restrict the right of self-defense to actual danger. *Marnoch v. State*, 7 App. 269; *Richardson v. State*, Id. 486; *Pharr v. State*, Id. 472; *Rodriguez v. State*, 8 App. 129; *Babb v. State*, Id. 173; *Jordan v. State*, 11 App. 455; *Moore v. State*, 15 App. 1; *Smith v. State*, Id. 338; *Cartwright v. State*, 16 App. 473, 49 Am. Rep. 826; *Jones v. State*, 17 App. 602; *Bell v. State*, 20 App. 445; *Brumley v. State*, 21 App. 222, 17 S. W. 140, 57 Am. Rep. 612; *Spearman v. State*, 23 App. 224, 4 S. W. 586; *Conner v. State*, 23 App. 378, 5 S. W. 189; *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Lander v. State*, 12 Tex. 462; *Anderson v. State*, 1 App. 730; *Patillo v. State*, 22 App. 586, 3 S. W. 766; *Gilly v. State*, 15 App. 287; *Short v. State*, Id. 370; *King v. State*, 13 App. 277; *Horbach v. State*, 43 Tex. 242; *Penland v. State*, 19 App. 365; *Lister v. State*, 3 App. 17; *Bode v. State*, 6 App. 424; *Munden v. State*, 37 Tex. 353; *Thomas v. State*, 40 Tex. 36; *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882; *Gonzales v. State*, 28 App. 130, 12 S. W. 733; *Nalley v. State*, 28 App. 387, 13 S. W. 670; *Ball v. State*, 29 App. 107, 14 S. W. 1012; *Bonner v. State*, 29 App. 223, 15 S. W. 821; *Cochran v. State*, 28 App. 422, 13 S. W. 651; *Brazzil v. State*, 28 App. 584, 13 S. W. 1006; *Williams v. State*, 30 App. 429, 17 S. W. 1071; *Nalley v. State*, 30 App. 456, 17 S. W. 1084; *Andrus v. State* (Cr. App.) 165 S. W. 189; *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Baltrip v. State*, 30 App. 545, 17 S. W. 1106; *Lankster v. State*, 42 App. 360, 59 S. W. 889; *Moss v. State*, 59 App. 68, 126 S. W. 1159; *Williams v. State*, 61 App. 356, 136 S. W. 771; *Ballard v. State*, 62 App. 435, 138 S. W. 120; *Carden v. State* (Cr. App.) 138 S. W. 396; *Williams v. State* (Cr. App.) 148 S. W. 763; *Edwards v. State* (Cr. App.) 151 S. W. 294; *Robbins v. State*, 70 App. 52, 155 S. W. 936; *Kirklin v. State* (Cr. App.) 164 S. W. 1016.

And on same question generally, see *Bell v. State*, 29 Tex. 494; *Irwin v. State*, 43 Tex. 236; *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389; *Sims v. State*, 9 App. 586; *Jones v. State*, 17 App. 603; *Allen v. State*, 17 App. 637; *Risby v. State*, 17 App. 517; *Walker v. State*, 70 App. 84, 156 S. W. 206.

The right of self-defense is based upon and limited by necessity. When the necessity arises, the right instantly accrues, and when the necessity, real or apparent, ceases, the right no longer exists. *Blake v. State*, 3 App. 581; *Lander v. State*, 12 Tex. 462; *Hobbs v. State*, 16 App. 517; *Brendendick v. State* (Cr. App.) 34 S. W. 116.

A party assailed or endangered may pursue his adversary until the danger is past, and if in so doing he kills the latter, it is justifiable. As long as the danger, real or apparent, exists, the right of defense continues. *West v. State*, 2 App. 460.

A reasonable belief that another intends to inflict on the party some serious bodily injury, and that he is in such a position that he may carry his intention into effect, is not sufficient to justify the killing of him upon that apprehension; such belief must be founded, in part at least, upon some act of the deceased, showing that he has a present intention to inflict the injury; and even then, the means used to repel the assault and prevent the impending injury must be only such as are necessary under the circumstances. *Hinton v. State*, 24 Tex. 454.

A previous difficulty with deceased is not a justification for shooting him two hours after it occurred, the accused being in no danger, at the time, of injury. *Hudson v. State*, 40 Tex. 12.

The assailed must decide at his peril as to the necessity, and threats by a dangerous man, unarmed, and making no effort toward their execution, does not warrant any apprehension. *Williams v. State*, 2 App. 271.

The right of self-defense is founded on the law of nature, and is not, nor can be, superseded by any law of society. *West v. State*, 2 App. 460. There must be at least an apparent necessity to ward off by force some unlawful and violent attack. It is not enough that the party believed himself in danger unless the facts were such that the jury can say he had reasonable ground for such belief. *Blake v. State*, 3 App. 581.

An apprehension of future danger does not justify a homicide. The apprehension must be of a present and imminent danger. *Holt v. State*, 9 App. 571.

If, there be evidence tending to prove that the homicide was committed for the protection of the slayer against an attack by the deceased, which produced a reasonable expectation or fear of "serious bodily injury" to the slayer, it is error to instruct the jury to convict, unless the slayer, before killing the deceased, resorted to other means for the prevention of the injury. *Hunnicut v. State*, 20 App. 632.

To justify homicide on ground of self-defense, either with or without threats, the danger must be apparently or really immediate and pressing, imminent and unavoidable. *Bush v. State*, 40 App. 543, 51 S. W. 238.

If the accused was pursued by the deceased with a pistol in his hand, which he attempted to fire, but failed, and the accused, still fleeing, turned and shot his pursuer, the case is clearly one of self-defense. *Underwood v. State*, 25 Tex. Supp. 389.

The theories of defense being mistaken identity and self-defense in an attempt to illegally arrest the deceased, the homicide must be of a grade inferior to manslaughter, though done upon reasonable apprehension of danger. *Carter v. State*, 30 App. 551, 17 S. W. 1102, 28 Am. St. Rep. 944. See, also, *Allen v. State*, 24 App. 216, 6 S. W. 187; *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882; *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *McDade v. State*, 27 App. 641, 11 S. W. 672, 11 Am. St. Rep. 216; *Cochran v. State*, 28 App. 422, 13 S. W. 651; *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899; *Williams v. State*, 30 App. 429, 17 S. W. 1071; *Sullivan v. State*, 31 App. 486, 20 S. W. 927, 37 Am. St. Rep. 826.

Self-defense cannot be pleaded on the ground of attack on defendant's brother, when the attack had ceased before defendant appeared on the scene. *Malone v. State* (Cr. App.) 35 S. W. 991.

Serious bodily injury does not mean an injury that must necessarily or probably be fatal. *Bruce v. State*, 41 App. 27, 51 S. W. 955.

Where the evidence showed that accused was quarreling with his employer, and that another interfered, and such other retreated to some distance, and then renewed the attack on accused, and the court charged on the right of one to interfere to prevent an assault on another, a further charge should have been given that, if such other person who was killed by accused stopped the pending assault, and then retreated, and thereafter attacked accused when he was doing nothing that accused could kill in self-defense if he was reasonably in fear of his life, etc. *Moss v. State*, 59 App. 68, 126 S. W. 1150.

One has the same right to defend against a threatened attack as he has to defend against an actual attack. *Payton v. State*, 60 App. 475, 132 S. W. 127.

In a prosecution for homicide, it appeared that the deceased had scared the defendant's wife, and when the defendant sought him out and demanded an explanation, deceased told defendant substantially that his wife had lied. The defendant knew that the deceased had a pistol on the morning of the homicide, and, as the deceased told defendant that his wife had lied, he stepped forward, placed his right hand in his shirt, and defendant shot him. Held, that those circumstances presented a case of self-defense upon apparent danger, and not manslaughter. *Ballard v. State*, 62 App. 435, 138 S. W. 120.

To abridge one's right of self-defense it must be apparent to him that the danger has ceased or he must have reached a place where it is not reasonable for him to have fear of his life or of serious bodily injury. *Holmes v. State* (Cr. App.) 150 S. W. 926.

Appearance of danger held not such as justified the shooting. *Cloud v. State* (Cr. App.) 153 S. W. 892.

The issue of self-defense upon the theory of apparent danger may be raised by the acts of deceased, coupled with his words or by his acts without words. *Andrus v. State* (Cr. App.) 165 S. W. 189.

Joint attack.—When there are more assailants than one, the slayer has the right to act upon the hostile demonstrations of either one of them, and to kill either of them, if it reasonably appeared to him that they were present and acting together to take his life, or do him serious bodily injury. *McLaughlin v. State*, 10 App. 340; *Jones v. State*, 20 App. 665; *Cartwright v. State*, 16 App. 473, 49 Am. Rep. 826; *Carter v. State*, 37 App. 403, 35 S. W. 378; *Stell v. State* (Cr. App.) 58 S. W. 76; *Gaines v. State* (Cr. App.) 148 S. W. 717. See, also, *Bean v. State*, 25 App. 346, 8 S. W. 278; *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Fifer v. State*, 64 App. 203, 141 S. W. 989; *Black v. State* (Cr. App.) 145 S. W. 944.

Charge.—Facts held to require a charge on apparent danger. *Lundy v. State*, 59 App. 131, 127 S. W. 1032; *Rodriguez v. State*, 58 App. 397, 126 S. W. 264.

Where accused's testimony only showed preparation for an attack on him by decedent and apparent danger, the court in its charge should not limit accused's right to act from an actual attack alone. *McCampbell v. State* (Cr. App.) 174 S. W. 345; *Rhea v. State* (Cr. App.) 148 S. W. 578.

A charge on apparent danger is properly refused where danger was real. *Stacey v. State* (Cr. App.) 33 S. W. 348; *Rodriguez v. State*, 71 App. 108, 158 S. W. 537.

The instruction should be, that if the attack by the deceased was such as might reasonably produce in the mind of the slayer a reasonable expectation of either death or serious bodily harm, he would not be required to resort to other means than killing to prevent the injury. *Blake v. State*, 3 App. 588; *Cheek v. State*, 4 App. 444; *Ainsworth v. State*, 8 App. 538; *Kendall v. State*, Id. 577; *Brite v. State*, 10 App. 368; *Foster v. State*, 11 App. 105; *Jordan v. State*, Id. 448; *Boddy v. State*, 14 App. 540; *Branch v. State*, 15 App. 103; *Short v. State*, Id. 376; *Gilly v. State*, Id. 301; *Sterling v. State*, Id. 256; *Cartwright v. State*, 16 App. 473, 49 Am. Rep. 826; *Morgan v. State*, Id. 595; *Jones v. State*, 17 App. 611; *Hunnicut v. State*, 18 App. 522, 51 Am. Rep. 330; *Williams v. State*, 22 App. 497, 4 S. W. 64; *Orman v. State*, 22 App. 604, 3 S. W. 468, 58 Am. Rep. 662; *Lee v. State*, 21 App. 241, 17 S. W. 425.

A charge is erroneous which turns the issue of self-defense not upon apparent danger, but upon an actual attack when there had been no actual attack. *Stewart v. State*, 40 App. 651, 51 S. W. 907.

Where the facts require it, the charge should instruct that the defendant had the right to act upon apparent danger as it reasonably appeared to him, and that to justify his acts the danger need not be real. The defendant is entitled to have explained correctly to the jury the law of self-defense in all the phases in which

it may be applicable to the evidence. *Wheelis v. State*, 23 App. 238, 5 S. W. 224; *Hill v. State*, 10 App. 618; *King v. State*, 13 App. 277; *Jackson v. State*, 15 App. 84; *Luera v. State*, 12 App. 257; *Edwards v. State*, 5 App. 593; *Wasson v. State*, 3 App. 474. And see *Barnes v. State*, 57 App. 449, 125 S. W. 39.

The rule prescribing the extent to which a person in emergency is authorized to act upon appearances of danger is as follows: If, from the standpoint of the slayer, it reasonably appeared to him, from the circumstances of the case, that the danger existed, and he acted under the reasonable belief that it did exist, he was justified in defending against it to the same extent and under the same rules as if the danger had been real. The charge in this case was erroneous in that it limited such right of the accused to his honest belief that he was in danger, and erroneously made this idea prominent by reiteration. *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882.

It is error to charge "that all other means must be resorted to before accused can kill." One has the right to act upon danger or the reasonable appearance of danger. *Casner v. State*, 42 App. 118, 57 S. W. 825.

Charge on self-defense relating to real and apparent danger held sufficient. *Gay v. State*, 58 App. 472, 125 S. W. 896.

Charge held not misleading in the use of the term "great bodily harm" as well as the statutory phrase "serious bodily injury." *Ward v. State*, 59 App. 62, 126 S. W. 1145; *Ward v. State*, 70 App. 393, 159 S. W. 272.

A charge that accused could kill if necessary for the preservation of his own life, or if he believed it was necessary, held erroneous for not charging that he could exercise the same right to protect himself against serious bodily harm apprehended by him, though he did not believe that his life was in danger. *Gaines v. State*, 58 App. 631, 127 S. W. 181.

Charge held not to limit the right of accused to kill in self-defense to the situation as it appeared to him, based only on acts of deceased at that time, and excluding threats made by deceased shortly before. *Millican v. State*, 63 App. 440, 140 S. W. 1136.

The charge is not objectionable in charging that defendant had the right to act from "apparent danger" as well as "real danger," though the testimony presented a situation of actual danger alone. *Allen v. State*, 64 App. 225, 141 S. W. 983.

It is error to limit the right of self-defense to an unlawful attack producing a reasonable apprehension of death or serious bodily harm; a party attacked having the right to defend himself against any unlawful assault so long as he uses no greater force than is necessary. *Kinslow v. State* (Cr. App.) 147 S. W. 249.

It is not error to charge that the real or apparent danger justifying the killing must have been imminent and pressing. *Williams v. State* (Cr. App.) 148 S. W. 763.

Where it appears that accused was really in danger of his life, an instruction on self-defense should not be confined to apparent danger, but should include real danger. *Garcia v. State*, 70 App. 485, 156 S. W. 939.

In a prosecution for murder, where defendant's theory of the case was that he had called at deceased's store for his mail, when deceased cursed and ordered him out of the house, and, when he insisted on getting his mail, picked up an ax handle and struck him over the head, injuring his ear, whereupon defendant cut deceased with a small knife without intending to kill him, an instruction that reasonable fear of death or great bodily harm will excuse one in using all necessary force to protect his life or person, that it is not necessary that there should be actual danger, provided the party acts on a reasonable apprehension of danger as it appears to him from his standpoint at the time, that the party acting under the real or apparent danger is in no way bound to retreat in order to kill his assailant, and that, if from the evidence the jury believed that defendant killed the deceased, but that at the time the deceased was making an attack on defendant, which, from its manner and character, and defendant's knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant killed the deceased, then the jury should acquit, that, if the deceased was armed with an ax handle, and its manner of use was reasonably calculated to produce death or serious bodily harm, then the law presumed the deceased intended to murder or inflict serious injury on the defendant, that, in determining whether the defendant acted in what reasonably appeared to him to be necessary self-defense, the jury should look at the transaction from the defendant's standpoint at the time, and consider the same in the light of the facts and circumstances as the jury should believe they appeared to the defendant at the time and not from any other standpoint, and that it was for the jury to determine from the evidence what the appearances were to the defendant, and what his standpoint was, and in what light he did, in fact, view the facts, such instruction fully covered the issue of self-defense as presented by defendant's evidence. *Bolden v. State* (Cr. App.) 178 S. W. 533.

Facts held to warrant a charge limiting accused's right to defend himself from actual attack. *Coulter v. State* (Cr. App.) 162 S. W. 885.

— **Joint attack.**—The rules as to apprehended danger are equally applicable and should be given in charge to the jury, where there is evidence tending to show that other persons are acting together with the deceased in the attack upon the defendant. In such case the charge should not ignore the participancy of such other persons, and should not limit the defendant's right of self-defense to the hostile demonstrations of the deceased alone, but should recognize such right with reference to the acts, each and all of the parties apparently making, or participating in the attack upon him. *McLaughlin v. State*, 10 App. 340; *Jones v. State*, 20 App. 665.

Where two are engaged in an attack upon defendant, a charge is defective which restricts attack to one; it should be enlarged so as to embrace a joint attack. *Francis v. State* (Cr. App.) 55 S. W. 489.

Where a number of parties are acting together and one of them is killed by accused, it is error to restrict defendant's right of self-defense to an act on part of deceased. If from all the circumstances the accused was in danger, viewed from his standpoint, he had the right to act. *Stell v. State* (Cr. App.) 58 S. W. 77.

Charge on accused's right to act on the hostile demonstrations of another person with deceased held sufficient. *Carson v. State*, 57 App. 394, 123 S. W. 590, 136 Am. St. Rep. 981.

The court should charge that if it appeared to accused, from the conduct of decedent or from the conduct of decedent and another acting with him, that his life was in danger, he could act in self-defense. *McCampbell v. State* (Cr. App.) 174 S. W. 345. See, also, *Mayhew v. State* (Cr. App.) 144 S. W. 229, 39 L. R. A. (N. S.) 671.

The charge should not limit the consideration of past threats solely to the action of deceased; the third person by acting in conjunction with deceased assuming all of his past threats. *Garcia v. State*, 70 App. 485, 156 S. W. 939.

Art. 1110. [680] Circumstances justifying in defense of property.—When, under article 1107, a homicide is committed in the protection of property, it must be done under the following circumstances:

1. The possession must be of corporeal property, and not of a mere right, and the possession must be actual and not merely constructive.

2. The possession must be legal, though the right of the property may not be in the possessor.

Legality of possession.—A charge that defendant might defend property to which he had the rightful possession, held, error. The possession required by the statute is "legal possession," and a person may hold legal possession of property without any claim of right. *Sims v. State*, 36 App. 154, 36 S. W. 256.

A "legal" possession of the property, without reference to "rightful" possession, is sufficient. *Sims v. State*, 36 App. 154, 36 S. W. 256; s. c., 38 App. 637, 44 S. W. 522.

On evidence, see *Sims v. State*, 38 App. 637, 44 S. W. 522; s. c., 36 App. 152, 36 S. W. 256.

Where defendant is shown to be in legal possession, it is reversible error to admit evidence as to rightful possession. *Carr v. State*, 41 App. 380, 55 S. W. 51.

Where accused tendered the issue of his right to defend his possession of land at the time he killed an officer attempting to execute a writ of sequestration, it was proper to permit a witness to state that a writ of possession on which accused had been ejected had been issued out of a district court. *Fifer v. State*, 64 App. 203, 141 S. W. 989.

Where accused, killing an officer attempting to execute a writ of sequestration claimed the land in good faith, evidence that at the time of the dispossession of accused, and prior to the killing, an officer took the decree of court dispossessing accused and in the presence of accused ran the lines of the land, and accused and his property were placed off the land, was admissible to show that he knew that a decree had been rendered decreeing him not the owner of the land. *Fifer v. State*, 64 App. 203, 141 S. W. 989.

A landlord who let farm land for crop rent, the tenant agreeing to work the crops, may, upon the tenant's failure, enter and work the crop for the benefit of both, and, where he peacefully acquired possession, he is not a trespasser, and, if the tenant attempts by display of force to drive him from the land, may defend himself. *Hillis v. State* (Cr. App.) 166 S. W. 1154.

Where accused claimed that he entered upon his land to work the crop for the benefit of himself and his tenant who had abandoned it, and that upon the tenant's attempting to drive him therefrom by display of force he killed deceased in defending himself, he is entitled to have his theory of the case submitted, and it is improper for the court to charge that he was under no circumstances entitled to go upon the land. *Hillis v. State* (Cr. App.) 166 S. W. 1154.

3. If possession be once lost, it is not lawful to regain it by such means as result in homicide.

Regaining possession.—In a prosecution for murder, wherein it appeared accused killed deceased when endeavoring to gain possession of a house occupied by deceased on land accused had recently bought, there was no error in refusing instructions in favor of the latter's title and right to possession, as the illegality of the possession of deceased would not authorize accused going on the place to forcibly eject him, and killing him in so doing, and the charge on manslaughter sufficiently guarded the question as to extenuating or mitigating circumstances. *Gay v. State*, 58 App. 472, 125 S. W. 896.

Whether or not deceased was in wrongful possession of a house on land of accused, accused could not go on the premises and eject him by force, as was sought to be done when he went to the place with a shotgun and killed deceased in the difficulty that ensued, as accused, who occupied a neighboring house on the same land, was not in such case acting under the statute authorizing the defense of property or habitation, but requiring him to be in possession, and art. 1110, subd. 3. *Gay v. State*, 58 App. 472, 125 S. W. 896.

An owner has no right to retake his stolen property by such means as would result in the loss of life or serious bodily injury. *Hartfield v. State*, 61 App. 515, 134 S. W. 1180.

That one is armed does not impair his right of self-defense, but he has no right to kill, though his adversary wrongfully seeks to obtain possession of premises in dispute. *Knight v. State* (Cr. App.) 147 S. W. 268.

One has no right to use force to regain possession. *Burton v. State* (Cr. App.) 148 S. W. 805.

4. Every other effort in his power must have been made by the possessor to repel the aggression before he will be justified in killing. Cited, *Smith v. State*, 57 App. 455, 123 S. W. 698.

Defense of property.—Homicide in the protection of property is only justifiable after all other means have been resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack; and such homicide, to be justifiable, must be committed under the following circumstances, viz.: 1. The possession must be of corporeal property, and not of a mere right, and the possession must be actual, and not merely constructive. 2. The possession must be legal, though the right of property may not be in the possessor. 3. If the possession be once lost, it is not lawful to regain it by such means as result in homicide. 4. Every other effort in his power must have been made by the possessor to repel the aggression before he will be justified in killing. It is a general rule that the owner of personal property has a right to use as much force as is necessary to prevent its forcible, illegal removal. *Lilly v. State*, 20 App. 1; *Weaver v. State*, 19 App. 547, 53 Am. Rep. 389; *Ross v. State*, 10 App. 455, 38 Am. Rep. 643. See, also, *Souther v. State*, 18 App. 352; *Woodring v. State*, 33 App. 25, 24 S. W. 293; *Leibetter v. State*, 26 App. 22, 9 S. W. 60; *Tolliver v. State*, 53 App. 329, 111 S. W. 655; *Wenzel v. State*, 48 App. 625, 90 S. W. 28; *Gilcrease v. State*, 33 App. 619, 28 S. W. 531; *Dean v. State*, 47 App. 243, 83 S. W. 816; *Allen v. State* (Cr. App.) 66 S. W. 674; *Walker v. State*, 70 App. 84, 156 S. W. 206.

Where accused went to where decedent was, and killed him simply because he was on accused's premises and would not leave, as demanded by accused, self-defense was not in the case. *Humphrey v. State* (Cr. App.) 165 S. W. 589.

Charge.—Charge held erroneously refused. *Newman v. State*, 58 App. 443, 126 S. W. 578, 21 Ann. Cas. 718.

Charge held correct. *Wells v. State*, 63 App. 618, 141 S. W. 96.

CHAPTER THIRTEEN

OF EXCUSABLE HOMICIDE

Art.
1111. Definition.

Art.
1112. The lawful act must be done by
lawful means.

Article 1111. [681] Definition.—Homicide is excusable when the death of a human being happens by accident or misfortune, though caused by the act of another, who is in the prosecution of a lawful object by lawful means.

Cited, *Cooper v. State*, 72 App. 250, 161 S. W. 1094.

Accident.—See, also, arts. 45, 48, ante.

If a person acting in his own necessary self-defense shoots and kills a third person by accident, he is guilty of no offense. *Clark v. State*, 19 App. 495, citing *Plummer v. State*, 4 App. 310, 30 Am. Rep. 165; *McCullough v. State*, 62 App. 126, 136 S. W. 1055; *Jackson v. State* (Cr. App.) 147 S. W. 589; *Hobbs v. State* (Cr. App.) 151 S. W. 809.

For facts held to constitute excusable homicide, see *Ex parte Warren*, 31 Tex. 143, and *Ross v. State*, 10 App. 455, 38 Am. Rep. 643.

Homicide by accidental discharge of defendant's pistol, when deceased was trying to prevent defendant from killing a third person, is not excusable. *Wheatley v. State* (Cr. App.) 39 S. W. 672.

Where a pistol accidentally dropped upon the floor is discharged and a person is thereby killed, the defendant by whom the pistol was dropped is, under an indictment for homicide, entitled to an acquittal. *Hodge v. State*, 60 App. 157, 131 S. W. 577.

Where accused shot deceased believing that he was A., he was entitled to all the defenses to which he would have been entitled if the person shot had in fact been A. *Wilson v. State*, 70 App. 355, 156 S. W. 1185.

Evidence.—Where there was a plea of accidental homicide and an issue as to whether the shooting was intentional, any circumstance or declaration showing accused's state of mind and which would throw light on such issue was admissible. *Singleton v. State*, 57 App. 560, 124 S. W. 92.

On a trial for homicide, in which accused claimed that he was intoxicated and that deceased was shot accidentally, evidence held sufficient to support a conviction for murder. *Gomez v. State* (Cr. App.) 170 S. W. 711.

Evidence as to whether deceased was killed by accused or killed himself intentionally or accidentally held sufficient to support a conviction. *Brown v. State* (Cr. App.) 174 S. W. 360.

Charge.—An instruction that if the jury believed from the evidence, or had a reasonable doubt, that defendant drew his pistol, not to assault prosecutrix, but to protect himself from danger taken from his standpoint at the time, and while endeavoring to make prosecutrix and her companions talk to him relative to getting his wife back, prosecutrix took hold of the barrel of the pistol, which, in the scuffle, was accidentally discharged and prosecutrix was wounded, defendant should be found not guilty, sufficiently presented the theory of accidental shooting. *Groszelmigen v. State*, 57 App. 241, 121 S. W. 1113.

Where the issue was whether the killing of decedent was accidental or the result of negligence, the court in its charge defined murder in the first and second degrees, and negligent homicide in the first and second degrees, and stated that if accused fired the pistol accidentally without intending to do so, and thereby killed decedent, and if he did not intend to kill decedent, accused was not guilty of negligence, sufficiently submitted the issue of accidental homicide. *Biggerstaff v. State*, 59 App. 575, 129 S. W. 840.

Evidence held to raise the issue of accidental shooting. *McCray v. State*, 63 App. 522, 140 S. W. 442. See, also, *Whiten v. State*, 71 App. 555, 160 S. W. 462.

Charge held insufficient. *Hamilton v. State*, 64 App. 175, 141 S. W. 966.

Evidence insufficient to present an issue of self-defense or accidental killing. *Vines v. State* (Cr. App.) 148 S. W. 727.

Charge held sufficient. *Vick v. State*, 71 App. 50, 159 S. W. 50.

Charges that accused should be acquitted, if the jury had a reasonable doubt whether he intended to kill or at the time he pointed his gun knew it was loaded or cocked, affirmatively present the issue of accidental homicide. *Windham v. State* (Cr. App.) 173 S. W. 661.

Art. 1112. [682] The lawful act must be done by lawful means.—The lawful act causing the death of another must be done by lawful means and used in a lawful degree. Though lawful for the parent, guardian, schoolmaster or master to chastise the child, ward, scholar or apprentice, yet, if this be done with an instrument likely to produce death, or, if with a proper instrument the chastisement be cruelly inflicted and death result, it is murder.

CHAPTER FOURTEEN

HOMICIDE BY NEGLIGENCE

<p>Art. 1113. Of two kinds.</p> <p>1. IN THE PERFORMANCE OF A LAWFUL ACT</p> <p>1114. In the performance of a lawful act.</p> <p>1115. "Lawful act" defined.</p> <p>1116. Must be an apparent danger of causing death.</p> <p>1117. How distinguished from excusable homicide.</p> <p>1118. Examples.</p> <p>1119. Must be no apparent intention to kill.</p>	<p>Art. 1120. Homicide must be consequence of the act.</p> <p>1121. Punishment.</p> <p>2. IN THE PERFORMANCE OF AN UNLAWFUL ACT</p> <p>1122. "Of second degree" defined, etc.</p> <p>1123. Can only be committed, when.</p> <p>1124. "Unlawful act" includes what.</p> <p>1125. Homicide in an attempt at felony, not negligent.</p> <p>1126. In an attempt at misdemeanor, punished how.</p> <p>1127. In a trespass, etc., how punished; decisions relating to.</p>
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Article 1113. [683] Of two kinds.—Homicide by negligence is of two kinds:

1. Such as happens in the performance of a lawful act; and 2. That which occurs in the performance of an unlawful act.

Accomplice in negligent homicide.—No accomplices to this offense, see art. 85, ante.

But as to testimony as accomplice of one formerly indicted for the same offense, see *Saye v State*, 50 App. 569, 99 S. W. 551.

Indictment.—Willson's Cr. Forms, 507.

1. IN THE PERFORMANCE OF A LAWFUL ACT

Art. 1114. [684] In the performance of a lawful act.—If any person in the performance of a lawful act shall, by negligence and carelessness, cause the death of another, he is guilty of negligent homicide of the first degree.

Cited, *Baskins v. State* (Cr. App.) 171 S. W. 723.

Negligent homicide of first degree.—Homicide committed by intentionally firing a pistol into a residence is not negligent homicide. *Russell v. State*, 38 App. 590, 44 S. W. 159.

If a husband believing that his wife is about to shoot herself attempts to take the gun from her and it is discharged, killing her, he is not negligent and the court need not charge on negligent homicide. *Blalock v. State*, 40 App. 154, 49 S. W. 100.

Where the victim was killed by discharge of a pistol which he was attempting to take from defendant or was attempting to prevent defendant from using it was not negligent homicide. *Williams v. State*, 45 App. 218, 75 S. W. 859.

The test of this offense seems to be that there must be an apparent danger of causing death. And the test of care or caution is that which distinguishes it from excusable homicide. The statute never intended to hold a surgeon liable for a homicide in cases of serious operation unless there was a want of proper caution and care, however dangerous the operation may be. *Gorden v. State* (Cr. App.) 90 S. W. 637.

Where the court charged that if the shooting was an accident defendant should be acquitted, defendant can not complain of failure to charge on negligent homicide of the first and second degree. *Combs v. State*, 52 App. 613, 108 S. W. 649.

In order to convict for negligent homicide, the killing must be accidental or unintentional, and under circumstances from which the law will impute negligence. *Joy v. State*, 57 App. 93, 123 S. W. 584.

The evidence made applicable a requested charge that, on the question of negligence, if accused in exercising ordinary care did not know that the gun was loaded, the jury should acquit. *McCray v. State*, 63 App. 522, 140 S. W. 442.

If accused obtained and took a gun from the rack and pointed it at decedent and pulled the trigger without knowing that it was loaded, he would not be guilty of negligent homicide in the first degree. *Hamilton v. State*, 64 App. 175, 141 S. W. 966.

Evidence held not to raise the issue of negligent homicide. *Cooper v. State*, 72 App. 250, 161 S. W. 1094.

Evidence held to raise the issue of negligent homicide. *Windham v. State* (Cr. App.) 173 S. W. 661; *Sewall v. State* (Cr. App.) 148 S. W. 569.

And generally, see *Spears v. State*, 41 App. 527, 56 S. W. 347; *Morton v. State*, 43 App. 533, 67 S. W. 115; *Posey v. State*, 46 App. 190, 78 S. W. 689; *Saye v. State*, 50 App. 569, 99 S. W. 551; *Holland v. State*, 55 App. 27, 115 S. W. 48.

Indictment.—Willson's Cr. Forms, 507.

Art. 1115. [685] "Lawful act" defined.—A "lawful act" is one not forbidden by the penal law, and which would give no just occasion for a civil action.

Indictment.—Willson's Cr. Forms, 507.

Art. 1116. [686] Must be an apparent danger of causing death.—To constitute this offense, there must be an apparent danger of causing the death of the person killed, or some other.

Indictment.—Willson's Cr. Forms, 507.

Art. 1117. [687] How distinguished from excusable homicide.—The want of proper care and caution distinguishes this offense from excusable homicide. The degree of care and caution is such as a man of ordinary prudence would use under like circumstances.

Cited, *Baskins v. State* (Cr. App.) 171 S. W. 723.

Negligence.—Negligence by omission consists in the omission to perform an act with the performance of which the party is especially charged, and there can be no criminal negligence in the omission to perform an act which it is not the express duty of the party to perform. Under this rule brakemen on a railway train, whose duty is shown to pertain in no degree to the operation of a locomotive, nor to the watching of the railway track, nor the sounding of the danger signal, can not be held liable for the killing of a person by the locomotive, operated by the engineer and fireman, upon whom the duty of operating it exclusively devolved. See the statement of the case for evidence held insufficient to support a conviction for negligent homicide. *Anderson v. State*, 27 App. 177, 11 S. W. 33, 3 L. R. A. 644, 11 Am. St. Rep. 189.

In order that a civil action for a death in the negligent operation of a ferry be deemed an action for an "offense" within Rev. St. art. 1198, subd. 8 it must be alleged that the defendants acted in person and not by agent. *Austin v. Cameron*, 83 Tex. 351, 18 S. W. 437.

Indictment.—Willson's Cr. Forms, 507.

Art. 1118. [688] Examples.—Throwing timbers by a workman from the roof or upper part of a house in a public street or highway, or where a number of persons are known to be around the house, or discharging firearms on or near a public highway, other than a street in a town or city, in such manner as would be likely to injure persons who might be passing, are examples of negligent homicide of the first degree, in case of death resulting therefrom. If death is caused by the careless discharge of fire-

arms in a public street of a town or city, the offense will be of a higher degree.

Negligent shooting.—If defendant shot and killed deceased, mistaking him for wild game, he was guilty of negligent homicide if he did not exercise ordinary prudence under the circumstances. *Bertrung v. State*, 2 App. 160.

Indictment.—Willson's Cr. Forms, 507.

Art. 1119. [689] Must be no apparent intention to kill.—To bring the offense within the definition of homicide by negligence, either of the first or second degree, there must be no apparent intention to kill.

Intent.—Negligent homicide is a killing which can only be predicated upon facts showing "no apparent intention to kill." *Aikin v. State*, 10 App. 619; *Clark v. State*, 19 App. 495.

Indictment.—Willson's Cr. Forms, 507.

Art. 1120. [690] Homicide must be consequence of the act.—The homicide must be consequence of the act done or attempted to be done.

See art. 1120 C. C. P. and note.

Indictment.—Willson's Cr. Forms, 507.

Art. 1121. [691] Punishment.—Negligent homicide of the first degree shall be punished by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars.

Indictment.—Willson's Cr. Forms, 507.

2. IN THE PERFORMANCE OF AN UNLAWFUL ACT

Art. 1122. [692] "Of second degree" defined, etc.—The definitions, rules and provisions of the preceding articles of this chapter, with respect to negligent homicide of the first degree, apply also to the offense of negligent homicide of the second degree, or such as is committed in the prosecution of an unlawful act, except when contrary to the following provisions:

Indictment.—Willson's Cr. Forms, 508.

Art. 1123. [693] Can only be committed, when.—Negligent homicide of the second degree can only be committed when the person guilty thereof is in the act of committing or attempting the commission of an unlawful act.

Art. 1124. [694] "Unlawful act" includes what.—Within the meaning of an "unlawful act" as used in this chapter are included—

1. Such acts as by the penal law are called misdemeanors; and,
2. Such acts, not being penal offenses, as would give just occasion for a civil action.

Negligent homicide of second degree.—Negligent homicide in the second degree is a homicide which occurs in the performance of an unlawful act, when the unlawful act does not rise above the grade of a misdemeanor; and when the evidence is of a character that would warrant the jury in concluding that, in the performance of the act, there was no apparent intention to kill, the law applicable to negligent homicide in the second degree should be given to the jury. *Robins v. State*, 9 App. 667; *Robins v. State*, *Id.* 671.

If, in the commission of a simple assault, or assault and battery upon another, there being no apparent intention to kill, one accidentally kill a third party, he is guilty of negligent homicide of the second degree. *McConnell v. State*, 13 App. 390.

Three elements concur to constitute negligent homicide of the second degree: 1. The killing must have occurred in the performance of an illegal act. 2. There must have been an apparent danger of causing the death of the person killed or some other. 3. There must have been no apparent intention to kill, and the homicide must have been the consequence of the act done or attempted to be done. See the opinion and the statement of the case for evidence held to raise the issue of negligent homicide of the second degree, and to have demanded of the trial court a charge upon that issue. *McConnell v. State*, 22 App. 354, 3 S. W. 699, 58 Am. Rep. 647; *Howard v. State*, 25 App. 686, 8 S. W. 929.

Two of the essentials to constitute negligent homicide of the second degree, are: 1. A killing while the accused is in the performance of an illegal act; 2. There must be no apparent intention to kill. *Flynn v. State*, 43 App. 407, 66 S. W. 551.

The act must be unlawful and a misdemeanor, and must be accompanied by want of proper care and caution, and there must be apparent danger of causing the

death of the person killed, and no apparent intention to kill. *Talbot v. State*, 58 App. 324, 125 S. W. 906.

Where, on a trial for homicide, there was evidence that accused's brother and H. were having a dispute, in which H. used insulting epithets reflecting on accused's mother, to which the brother responded in the same spirit, that knives were drawn by both, some of the evidence indicating that the brother was in the wrong in drawing his knife, that when accused arrived he urged his brother to make H. take back what he had said, and that while in this condition he shot at H., killing S., but accused claimed that the pistol was fired accidentally, the issue of negligent homicide should have been submitted, since, if accused was in the wrong in interfering in the trouble between his brother and H. and culpable under the law, he was doing an unlawful act and, though he did not intend to kill, was guilty of negligent homicide. *Whiten v. State*, 71 App. 555, 160 S. W. 462.

Where accused testified that he went to a house where his wife was, without intending to have a difficulty with her, but to induce her to go home with him, and as he was standing in the door some women got hold of his gun, and it was accidentally discharged in the scuffle, shooting his wife, the court should have instructed on negligent homicide in the second degree. *Hill v. State*, 72 App. 109, 161 S. W. 118.

Where accused engaged with another in the unlawful act of trying to take the wife away from the home of her husband by force or stealth, at night, and accused, in furtherance of the unlawful purpose, while trying to force himself into the house, killed decedent and accused claimed that his gun was accidentally discharged, he was guilty of negligent homicide of the second degree. *Chant v. State* (Cr. App.) 166 S. W. 513.

"Negligent homicide" is a killing which can only be predicated on facts showing no intention to kill, and one who intentionally fired a gun under the mistaken belief that it was loaded with shot that would inflict injury only, while the gun was so loaded as to cause decedent's death, he was guilty of negligent homicide in the second degree, and, if the shooting occurred on or near a public highway while engaged in a lawful act, he was guilty of negligent homicide in the first degree. *Egbert v. State* (Cr. App.) 176 S. W. 560.

Art. 1125. [695] Homicide in an attempt at felony not negligent.—When one, in the execution of or in attempting to execute an act made a felony by the penal law, shall kill another, though without an apparent intention to kill, the offense does not come within the definition of negligent homicide.

As to instructions, see note under art. 1114.

Negligent homicide.—When the slayer, under circumstances which would make the homicide manslaughter, if effected, in attempting to kill one, by accident kills another, against whom he had no malice, such killing would not be more penal than that intended. *Ferrell v. State*, 43 Tex. 504.

If one committing an assault with intent to murder, accidentally kill a third person, he is guilty of murder in the second degree. *McConnell v. State*, 13 App. 390; *Leggett v. State*, 21 App. 382, 17 S. W. 159; *Musick v. State*, 21 App. 69, 18 S. W. 95; *Thomas v. State*, 53 App. 272, 109 S. W. 155, 126 Am. St. Rep. 786.

If A. was killed through mistake, the slayer believing him to be K. whom he intended to kill, the homicide was no higher grade than murder in the second degree, and if the circumstances would have made the killing of K. manslaughter then the killing of A. would be manslaughter only. *Breedlove v. State*, 26 App. 445, 9 S. W. 768.

Unintentional killing of one without malice, in a malicious attempt to kill another was not murder in the first, but second degree. *Taylor v. State*, 3 App. 337; *Halbert v. State*, 3 App. 656; *Richards v. State*, 35 App. 38, 30 S. W. 805.

Indictment.—Willson's Cr. Forms, 508.

Charge.—When the testimony tends to show that the shooting was accidental an instruction as to negligent homicide should be given. *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456; *Brittain v. State*, 36 App. 406, 37 S. W. 758.

The court having charged on accident held that a charge on negligent homicide was not required. *Combs v. State*, 52 App. 613, 108 S. W. 649.

Facts held to demand a charge on the law of negligent homicide. *Curtis v. State*, 22 App. 227, 3 S. W. 86, 58 Am. Rep. 635; *McConnell v. State*, Id. 354, 3 S. W. 699, 58 Am. Rep. 647; *Elliston v. State*, 10 App. 361; *Howard v. State*, 25 App. 686, 8 S. W. 929; *Robins v. State*, 9 App. 666, Id. 671; *Curtis v. State*, 22 App. 227, 3 S. W. 86, 58 Am. Rep. 635.

For cases where the charge was not necessary or proper, see *Williams v. State*, 45 App. 218, 75 S. W. 859; *Clifton v. State*, 47 App. 472, 84 S. W. 237, 111 S. W. 740; *Scott v. State*, 47 App. 568, 85 S. W. 1060, 122 Am. St. Rep. 717; *Leito v. State*, 49 App. 309, 92 S. W. 418.

Art. 1126. [696] In an attempt at misdemeanor, punished, how.—When the unlawful act attempted or executed is known as a misdemeanor, the punishment of negligent homicide committed in the execution of such unlawful act shall be imprisonment in the county jail not exceeding three years, or by fine not exceeding three thousand dollars.

Art. 1127. [697] In a trespass, etc., how punished.—If the act intended is one for which an action would lie, but not an offense

against the penal law, the homicide resulting therefrom is a misdemeanor, and may be punished by fine not exceeding one thousand dollars, and by imprisonment in the county jail not exceeding one year.

CHAPTER FIFTEEN OF MANSLAUGHTER

Art.		Art.	
1128.	Definition of.	1134.	General character of female in issue.
1129.	"Under influence of sudden passion" explained.	1135.	Discretion of jury in such cases.
1130.	"Adequate cause" explained.	1136.	"Relation" includes whom.
1131.	What are not adequate causes.	1137.	"Adequate cause" must produce the passion.
1132.	What are.	1138.	Provoking contest with intent to kill, not manslaughter.
1133.	For insult to female, killing must be immediate.	1139.	Punishment.

Article 1128. [698] **Definition of.**—Manslaughter is voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law.

Cited, *Jaynes v. State* (Cr. App.) 150 S. W. 441.

Elements of offense.—The question of force, or degree of force is not an element of the crime. Force and comparative force are applicable to defensive, and not to acts which are solely defensive. *Beaty v. State*, 30 App. 677, 18 S. W. 646.

Malice is not an ingredient of manslaughter. *Roquemore v. State*, 59 App. 568, 129 S. W. 1120.

For other decisions pertinent to this subject, see notes to arts. 1022, 1026, 1087-1110, 1140-1143.

— **Passion and adequate cause.**—Manslaughter is predicated upon adequate cause and unless adequate cause exists, the homicide will not be reduced from murder, although it was committed under the immediate influence of sudden passion, rendering the mind incapable of cool reflection. *McKinney v. State*, 8 App. 626; *Hill v. State*, 11 App. 456; *Neyland v. State*, 13 App. 536; *Richardson v. State*, 9 App. 612; *Boyett v. State*, 2 App. 93; *Johnson v. State*, 43 Tex. 612; *Jennings v. State*, 7 App. 350; *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Boyd v. State*, 28 App. 137, 12 S. W. 737; *Bonner v. State*, 29 App. 223, 15 S. W. 821; *Weathersby v. State*, 29 App. 278, 15 S. W. 823; *Lacy v. State*, 30 App. 119, 16 S. W. 761; *Massie v. State*, 30 App. 64, 16 S. W. 770; *Ex parte Jones*, 31 App. 422, 20 S. W. 983 (following *Breedlove v. State*, 26 App. 453, 9 S. W. 768); *Childs v. State*, 35 App. 573, 34 S. W. 939; *Treadway v. State* (Cr. App.) 144 S. W. 655; *Burns v. State* (Cr. App.) 145 S. W. 356; *Johnson v. State* (Cr. App.) 149 S. W. 165; *Redman v. State* (Cr. App.) 149 S. W. 670; *Kelly v. State* (Cr. App.) 151 S. W. 304; *Wisnoski v. State* (Cr. App.) 153 S. W. 316; *Cloud v. State* (Cr. App.) 153 S. W. 892; *Davis v. State*, 70 App. 37, 155 S. W. 546; *Corbitt v. State*, 72 App. 396, 163 S. W. 436; *Lamb v. State* (Cr. App.) 169 S. W. 1158; *Witty v. State* (Cr. App.) 171 S. W. 229.

If adequate cause is present, and intent to kill is formed in excited state of mind, in case death results the offense would be manslaughter, hence if death does not ensue the offense is only aggravated assault. *Chatman v. State*, 40 App. 278, 50 S. W. 396.

Passion and the want of premeditation may characterize both murder in the second degree and manslaughter; the crimes are distinguishable by the causes leading to the homicide. If the cause be inadequate, it is murder; if adequate, manslaughter. *Childers v. State*, 33 App. 509, 27 S. W. 133.

On trial for murder, where there was a total want of provocation, there can not possibly be any manslaughter. *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456.

Where one's mind is capable of cool reflection, even though statutory adequate cause is shown, a homicide committed by him is murder. *Rogers v. State* (Cr. App.) 149 S. W. 127.

Under the direct provision of the statute, as well as in the absence of statute, to reduce voluntary homicide to manslaughter there must exist "sudden passion" in accused, which must have arisen from an "adequate cause." *Wilson v. State*, 71 App. 399, 160 S. W. 83.

To reduce the offense of murder to manslaughter, the killing must have been committed under the influence of a sudden transport of passion. *Coulter v. State*, 72 App. 602, 162 S. W. 885.

"Manslaughter" is the killing of a human being under sudden passion before the slayer has time to reflect. *Cook v. State* (Cr. App.) 171 S. W. 227.

Under the statute sudden passion is requisite to constitute "manslaughter," which is homicide committed under the immediate influence of "sudden passion," arising from an adequate cause, the passion that blindly strikes, and not the passion of revenge; and, however sudden the passion, if the evidence does not show that it was from an adequate cause, the homicide cannot be manslaughter; and,

whatever the adequate cause, if the homicide was not committed under the immediate influence of sudden passion arising therefrom, it cannot, under the statute, be manslaughter. *Hicks v. State* (Cr. App.) 171 S. W. 755.

Killing by mistake.—See notes under art. 48, ante.

Principals and accomplices.—See notes to art. 74 et seq.

Limitations.—See C. C. P. art. 228 and notes.

Indictment.—Willson's Cr. Forms, 509.

On indictments generally, see C. C. P. art. 447 et seq.

A common law indictment for manslaughter is not sufficient, as this offense at common law differs materially in its definition and essential elements from the offense defined in the preceding article. To be sufficient under the preceding article, the indictment must charge that the defendant, under the immediate influence of sudden passion, arising from an adequate cause, neither justified nor excused by law, did unlawfully and voluntarily kill, etc. *Jennings v. State*, 7 App. 350.

Where a count of an indictment for manslaughter did not sufficiently charge the offense in respect to the instrument used, it was error to authorize the jury to convict on that count. *Huddleston v. State*, 70 App. 260, 156 S. W. 1168.

Evidence.—Where killing occurred over a contract, evidence of the terms of the contract is immaterial. *Chalk v. State*, 35 App. 116, 32 S. W. 534.

As to evidence showing the state of accused's mind, see *Burnam v. State*, 61 App. 51, 133 S. W. 1045.

Defendant's quarrel with a third person just previous to his killing of deceased was admissible as showing the condition of his mind and the circumstances that led up to the killing. *Lee v. State* (Cr. App.) 148 S. W. 706.

One convicted of this offense can not complain that the evidence established murder instead of manslaughter. *Powell v. State*, 5 App. 234.

On a second trial after defendant had been acquitted of murder in both degrees the court did not err in refusing to instruct the jury to acquit defendant because the evidence showed murder and not manslaughter. See opinion for facts stated, *Scroggins v. State*, 32 App. 71, 22 S. W. 45.

Evidence held to show defendant guilty of manslaughter. *Castro v. State* (Cr. App.) 40 S. W. 985; *Carter v. State*, 37 App. 403, 35 S. W. 378; *Id.* (Cr. App.) 40 S. W. 498; *Childers v. State*, 33 App. 509, 27 S. W. 133; *Johnson v. State*, 60 App. 362, 132 S. W. 362; *Tabor v. State*, 61 App. 425, 135 S. W. 142; *Anderson v. State*, 63 App. 525, 140 S. W. 457; *Wells v. State* (Cr. App.) 145 S. W. 950; *Wysong v. State* (Cr. App.) 146 S. W. 941; *Mims v. State* (Cr. App.) 153 S. W. 321; *Rodriguez v. State*, 70 App. 77, 155 S. W. 530; *Johnson v. State*, 71 App. 620, 160 S. W. 695; *Dawson v. State*, 72 App. 68, 161 S. W. 469; *Green v. State*, 72 App. 538, 162 S. W. 1151; *Harper v. State* (Cr. App.) 170 S. W. 721; *Quinn v. State* (Cr. App.) 170 S. W. 783; *Latham v. State* (Cr. App.) 172 S. W. 797.

Evidence held not to show manslaughter. *Harcastle v. State*, 36 App. 555, 38 S. W. 186; *Woolbright v. State* (Cr. App.) 35 S. W. 393; *Eggleston v. State*, 59 App. 542, 128 S. W. 1105; *Powdrill v. State* (Cr. App.) 155 S. W. 231; *Lamb v. State* (Cr. App.) 169 S. W. 1158.

Charge.—See notes under arts. 735 and 743, C. C. P.

If the facts proved create a doubt in the mind of the trial judge as to the necessity of a charge upon the law of manslaughter in a trial for murder, the doubt should be resolved in favor of the accused, and such charge given. *Williams v. State*, 7 App. 396; *Robles v. State*, 5 App. 346; *Halbert v. State*, 3 App. 656; *Maria v. State*, 28 Tex. 698.

A charge on manslaughter is not required, where the proof shows either murder or justifiable homicide only. *Grissom v. State*, 4 App. 374; *Roberts v. State*, 5 App. 141; *Berry v. State*, 8 App. 515; *Bejarano v. State*, 6 App. 265; *Halbert v. State*, 3 App. 656; *Boyett v. State*, 2 App. 93; *Jones v. State*, 40 Tex. 188; *Hudson v. State*, *Id.* 12; *Myers v. State*, 33 Tex. 525; *Vela v. State*, 33 App. 322, 26 S. W. 396; *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941; *Treadway v. State* (Cr. App.) 144 S. W. 655; *Blue v. State* (Cr. App.) 148 S. W. 730; *Summers v. State* (Cr. App.) 148 S. W. 774; *Smith v. State*, 70 App. 62, 156 S. W. 214; *Hammons v. State* (Cr. App.) 177 S. W. 493; *Thompson v. State* (Cr. App.) 177 S. W. 503.

Where the evidence, however inclusively, tends to prove facts from which the jury may deduce a finding of manslaughter, it is incumbent on the trial court to give the law of manslaughter in charge to the jury, and it should be given affirmatively, directly, and pertinently to the theory of the case indicated by such evidence. Mere negative or abstract propositions are not sufficient. *McLaughlin v. State*, 10 App. 340; *Johnson v. State*, 43 Tex. 612; *Jennings v. State*, 7 App. 350; *Williams v. State*, *Id.* 396; *Moore v. State*, 15 App. 1; *Neyland v. State*, 13 App. 536; *Rutherford v. State*, 16 App. 649; *Gaines v. State* (Cr. App.) 148 S. W. 717.

It is error to charge the jury that they may find the defendant guilty of manslaughter, without also instructing them as to what state of facts would constitute that offense. *Babb v. State*, 12 App. 491.

In the absence of evidence tending to establish, or that creates a doubt as to whether the homicide be of a lower grade than murder, it is unnecessary and improper for the court to charge upon manslaughter. *Neyland v. State*, 13 App. 536; *Jackson v. State*, 18 App. 586; *Burkhard v. State*, *Id.* 599; *Anderson v. State*, 15 App. 447; *Smith v. State*, *Id.* 139; *Jones v. State*, 22 App. 324, 3 S. W. 230; *Wallace v. State*, 20 App. 360; *Roberts v. State*, 5 App. 141; *Grissom v. State*, 4 App. 374; *Hill v. State*, 11 App. 456; *Boyett v. State*, 2 App. 93; *Halbert v. State*, 3 App. 657; *Sierra v. State*, 37 App. 430, 35 S. W. 982; *Johnson v. State* (Cr. App.) 35 S. W. 387.

The charge must be limited to the case on trial. When the defendant was charged with murder, and on a former trial had been convicted for manslaughter, such conviction operated as an acquittal of both degrees of murder, and it was held error for the court upon a second trial to charge the jury upon the law ap-

plicable to murder. The charge should have been limited to the law of manslaughter, that being the case on trial. *Parker v. State*, 22 App. 105, 3 S. W. 100.

Where the defendant was on trial for manslaughter, under an indictment charging murder, having on a former trial been acquitted of murder, it was held error to charge the jury that if they believed, from the evidence, that the defendant was guilty of either degree of murder, they could find him guilty of manslaughter. Such charge was not warranted by the rule that a verdict for an inferior grade will not be set aside because the evidence showed a higher grade of offense. *Parker v. State*, 22 App. 105, 3 S. W. 100.

Objection that the court charged the jury abstractly upon the issue of manslaughter can not be entertained, inasmuch as it was not interposed when the charge was given and no probable injury to the accused is shown. See the opinion for a charge upon homicide in defense of the person against an unlawful attack, and the statement of the case for a charge upon adequate cause, held sufficient under the facts of the case. And note that the evidence does not call for a charge upon "cooling time," nor upon self-defense, wherefore the trial court did not err in omitting to charge upon "cooling time," nor refusing the special charge as to self-defense. *Miller v. State*, 27 App. 63, 10 S. W. 445; *Arrellano v. State*, 24 App. 43, 5 S. W. 526; *Thumm v. State*, 24 App. 667, 7 S. W. 236; *Bonnard v. State*, 25 App. 173, 7 S. W. 862, 8 Am. St. Rep. 431; *Phillips v. State*, 26 App. 238, 9 S. W. 557, 8 Am. St. Rep. 471; *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Johnson v. State*, 26 App. 631, 10 S. W. 235; *Alexander v. State*, 25 App. 260, 7 S. W. 867, 8 Am. St. Rep. 438; *Miller v. State*, 27 App. 63, 10 S. W. 445; *Green v. State*, 27 App. 244, 11 S. W. 114; *Hawthorne v. State*, 28 App. 212, 12 S. W. 603; *Cochran v. State*, 28 App. 422, 13 S. W. 651; *Floyd v. State*, 29 App. 349, 16 S. W. 188; *Williams v. State*, 30 App. 429, 17 S. W. 1071.

The evidence failing to show adequate cause, the court properly refused to charge on manslaughter. *Warren v. State*, 31 App. 573, 21 S. W. 680. And see, also, *Orman v. State*, 24 App. 495, 6 S. W. 544; *Williams v. State*, 25 App. 216, 7 S. W. 666; *Alexander v. State*, 25 App. 260, 7 S. W. 867, 8 Am. St. Rep. 438; *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Clore v. State*, 26 App. 624, 10 S. W. 242; *Johnson v. State*, 26 App. 631, 10 S. W. 235; *Hawthorne v. State*, 28 App. 212, 12 S. W. 603; *Cochran v. State*, 28 App. 422, 13 S. W. 651; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Baltrip v. State*, 30 App. 545, 17 S. W. 1106; *Bracken v. State*, 29 App. 362, 16 S. W. 192.

Where deceased interfered in a fight to keep defendant's friend from cutting another with a knife, and defendant standing by saw and knew that his friend was in no danger but deliberately shot and killed deceased, held that a charge on murder in the first degree was correct. And the court did not err in refusing to instruct upon the law of manslaughter. *Reyons v. State*, 33 App. 143, 25 S. W. 786, 47 Am. St. Rep. 25.

Where defendant having quarreled with deceased's brother got a gun and deceased was shot by defendant while trying to disarm him, an instruction on manslaughter was properly refused. *Beard v. State* (Cr. App.) 29 S. W. 770.

An objection that the charge of manslaughter was too restrictive, because it confined the jury to the facts occurring at the time of the homicide; held, the objection was untenable, there being no evidence of any acts of deceased before the time of the homicide. *Woodring v. State*, 34 App. 419, 30 S. W. 1060.

Instruction properly limited to acts done at the time the homicide was committed. *Woodring v. State*, 34 App. 419, 30 S. W. 1060.

On a trial for murder, when the acts and conduct of a codefendant have been adduced in evidence, the charge of manslaughter instructed the jury to look into all facts and circumstances before them; held, sufficiently comprehensive to permit the jury to consider the acts of such codefendant. *Magruder v. State*, 35 App. 214, 33 S. W. 233.

A charge on manslaughter which leaves the jury absolutely untrammelled to review all the evidence in the case in order to determine adequate cause and ascertain whether or not defendant's mind was thereby influenced, is sufficient. *Sargent v. State*, 35 App. 325, 33 S. W. 364.

Where vicious assault was committed by deceased upon defendant several hours before killing and the circumstances were such as to show that mind of the defendant had not become cool, the assault constituted provocation and manslaughter should have been charged, although there was no other provocation at time of killing. *Thomas v. State*, 42 App. 386, 56 S. W. 72.

On the trial of a tenant for killing his landlord, there was evidence for accused that the landlord was trying to put him off of the place in the middle of the year, with considerably less property than he was entitled to, that when the landlord offered to let him take such property he had his hand on his pistol, and when accused declined the offer said, "You will take this;" that accused became alarmed and went to a blacksmith shop some distance away; that, though this was not the usual road of travel, the landlord drove down by the blacksmith shop, with the lines in his left hand, and his right hand in the pocket where accused had seen the pistol; that accused grabbed his gun and ordered the landlord to drop the pistol; but that, instead of dropping it, he looked as if he was trying to get it out of his pocket. The state's evidence tended to show that the landlord was using both hands in driving the team, and did not attempt to get his pistol until accused grabbed his gun and ordered him to drop the pistol. Held, that this made a question whether the antecedent circumstances, in connection with the landlord's conduct at the time of the killing, engendered in accused's mind such a degree of anger, rage, or resentment as rendered him incapable of cool reflection, and the failure to properly submit this issue was error. *Burton v. State* (Cr. App.) 178 S. W. 334.

In a prosecution for homicide, it was error to charge in one instruction that if defendant was led to commit the homicide from learning that decedent had insulted his wife, and also that the decedent had used violent language to and threat-

ened defendant with bodily harm, he was only guilty of manslaughter, and in the next that, in order to reduce his offense to manslaughter, it was only necessary for the jury to believe that he was led to commit the homicide from learning that decedent had insulted his wife. *Barbee v. State*, 58 App. 129, 124 S. W. 961.

In a trial for assault with intent to murder, the charge was sufficient where the court, while it did not in terms define manslaughter, did, in charging on aggravated assault, fairly submit the grounds on which the assault, if unlawful, would have been reduced to that offense. *Dowell v. State*, 58 App. 482, 126 S. W. 871.

The charge should submit the issue with reference to all the facts in evidence. *Snowberger v. State*, 58 App. 530, 126 S. W. 878.

Held, that instructions held not to correctly present the law of mutual combat, not submitting the facts that would justify conviction for murder, nor drawing the distinction from the facts between murder and manslaughter. *McGill v. State*, 60 App. 614, 132 S. W. 941.

The court instructed in a homicide case that, if accused defended against the acts, or acts and words, of decedent, or the acts and words of those acting with him, etc., and his mind was agitated beyond cool reflection, and he did not believe that his life was in danger, the jury should acquit of murder and convict of manslaughter. Held, that the charge was not objectionable as requiring the jury to find that accused acted against the combined acts and conduct of all of the parties, before they could find him guilty of manslaughter. *Beaver v. State*, 63 App. 581, 142 S. W. 11.

The court should charge the law as to manslaughter from the standpoint of accused. *Whiten v. State*, 71 App. 555, 160 S. W. 462.

Where the issue of manslaughter was presented, an instruction on murder held erroneous in excluding the fact that if the circumstances reduced the offense to manslaughter, it would not be murder. *Mason v. State*, 72 App. 501, 163 S. W. 66.

Where the court undertakes to enumerate the circumstances that would conduce to show adequate cause and consequent passion, he should enumerate all the circumstances. *Kirklín v. State* (Cr. App.) 164 S. W. 1016.

Evidence held not to call for a charge on manslaughter. *Luster v. State*, 63 App. 541, 141 S. W. 209, Ann. Cas. 1913D, 1089; *McDade v. State*, 27 App. 641, 11 S. W. 672, 11 Am. St. Rep. 216; *Maxwell v. State*, 31 App. 119, 19 S. W. 914; *Adams v. State*, 35 App. 285, 33 S. W. 354; *Blount v. State*, 58 App. 509, 126 S. W. 570; *Dougherty v. State*, 59 App. 464, 128 S. W. 398; *Hardeman v. State*, 61 App. 111, 133 S. W. 1056; *Ballard v. State*, 62 App. 435, 138 S. W. 120; *Alexander v. State*, 63 App. 102, 138 S. W. 721; *Lacy v. State*, 63 App. 189, 140 S. W. 461; *Kinney v. State* (Cr. App.) 144 S. W. 257; *Treadway v. State* (Cr. App.) 144 S. W. 655; *Blue v. State* (Cr. App.) 148 S. W. 730; *Summers v. State* (Cr. App.) 148 S. W. 774; *Johnson v. State* (Cr. App.) 149 S. W. 165; *Maxwell v. State* (Cr. App.) 149 S. W. 171; *Kirby v. State* (Cr. App.) 150 S. W. 455; *Roberts v. State* (Cr. App.) 150 S. W. 627; *Pettis v. State* (Cr. App.) 150 S. W. 790; *Pace v. State* (Cr. App.) 153 S. W. 132; *Sanchez v. State* (Cr. App.) 153 S. W. 1133; *Beaupre v. State*, 70 App. 19, 156 S. W. 625; *Cook v. State*, 71 App. 532, 160 S. W. 465; *Shaw v. State*, 72 App. 114, 161 S. W. 963; *Francis v. State* (Cr. App.) 170 S. W. 779; *Cook v. State* (Cr. App.) 171 S. W. 227; *Guerrero v. State* (Cr. App.) 171 S. W. 731.

For evidence demanding a charge on manslaughter, see *Ross v. State*, 23 App. 689, 5 S. W. 184; *Tow v. State*, 22 App. 175, 2 S. W. 582; *Leggett v. State*, 21 App. 382, 17 S. W. 159; *Rutherford v. State*, 15 App. 236; *Smith v. State*, Id. 338; *Moore v. State*, Id. 1; *Reynolds v. State*, 14 App. 427; *Green v. State*, 12 App. 445; *Ellison v. State*, Id. 557; *Brunet v. State*, Id. 521; *Luera v. State*, 12 App. 257; *Holmes v. State*, 11 App. 223; *Reed v. State*, 9 App. 317; *Richardson v. State*, Id. 612; *Larson v. State* (Cr. App.) 29 S. W. 782; *Adams v. State*, 35 App. 285, 33 S. W. 354; *Mootry v. State*, 35 App. 450, 33 S. W. 877, 34 S. W. 126; *Carter v. State*, 37 App. 403, 35 S. W. 378; *Green v. State*, 58 App. 428, 126 S. W. 860; *Williams v. State*, 61 App. 356, 136 S. W. 771; *Jackson v. State*, 63 App. 351, 139 S. W. 1156; *Anderson v. State*, 63 App. 525, 140 S. W. 457; *Williams v. State* (Cr. App.) 148 S. W. 763; *Wood v. State* (Cr. App.) 150 S. W. 780; *Whiten v. State*, 71 App. 555, 160 S. W. 462; *Masters v. State*, 71 App. 608, 160 S. W. 693; *House v. State* (Cr. App.) 171 S. W. 206; *Edwards v. State* (Cr. App.) 172 S. W. 227; *McCampbell v. State* (Cr. App.) 174 S. W. 345.

Charge held correct. *Simmons v. State*, 23 App. 653, 5 S. W. 208; *Johnson v. State*, 23 App. 206, 2 S. W. 609; *Clark v. State*, 19 App. 495; *Arto v. State*, Id. 126; *Bennett v. State*, 12 App. 15; *Drake v. State*, 5 App. 649; *Lienpo v. State*, 28 App. 179, 12 S. W. 588; *Williams v. State*, 30 App. 429, 17 S. W. 1071; *Kemp v. State*, 13 App. 561; *White v. State*, 34 App. 153, 29 S. W. 1094; *Childs v. State*, 35 App. 573, 34 S. W. 939; *Bishop v. State* (Cr. App.) 35 S. W. 170; *Lawrence v. State*, 36 App. 173, 36 S. W. 90; *Adams v. State* (Cr. App.) 40 S. W. 590; *Abrams v. State* (Cr. App.) 40 S. W. 798; *Best v. State*, 58 App. 327, 125 S. W. 909; *Pratt v. State*, 59 App. 167, 127 S. W. 827; *Maxey v. State* (Cr. App.) 145 S. W. 952; *Carver v. State* (Cr. App.) 148 S. W. 746; *Williams v. State* (Cr. App.) 148 S. W. 763; *Kelly v. State* (Cr. App.) 151 S. W. 304; *Oliver v. State*, 70 App. 140, 159 S. W. 235; *Girtman v. State* (Cr. App.) 164 S. W. 1008; *Kirklín v. State* (Cr. App.) 164 S. W. 1016; *Muldrew v. State* (Cr. App.) 166 S. W. 156; *Reed v. State* (Cr. App.) 168 S. W. 541; *House v. State* (Cr. App.) 171 S. W. 206.

Charge held bad. *Hardy v. State*, 36 App. 400, 37 S. W. 434; *Id.* (Cr. App.) 37 S. W. 737; *Burns v. State*, 58 App. 463, 125 S. W. 901; *Wilson v. State*, 70 App. 355, 156 S. W. 1185; *Reagan v. State*, 70 App. 498, 157 S. W. 483; *Whiten v. State*, 71 App. 555, 160 S. W. 462.

Art. 1129. [699] "Under the influence of sudden passion" explained.—By the expression "under the immediate influence of sudden passion" is meant—

1. That the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation.

2. The act must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by passion arising from some other provocation, or a provocation given by some person other than the party killed.

3. The passion intended is either of the emotions of the mind, known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection.

Cited, *Jaynes v. State* (Cr. App.) 150 S. W. 441.

Sudden passion.—A provocation sufficient to produce a state of mind precluding cool reflection, and to reduce a homicide to manslaughter, must arise at the time of the killing. *Cloud v. State* (Cr. App.) 153 S. W. 892; *Johnson v. State*, 43 Tex. 612; *Boyett v. State*, 2 App. 93; *Barbee v. State*, 50 App. 426, 97 S. W. 1058. See, also, *Miles v. State*, 18 App. 156; *Johnson v. State*, 22 App. 206, 2 S. W. 609; *Orman v. State*, 24 App. 495, 6 S. W. 544; *Baltrip v. State*, 30 App. 545, 17 S. W. 1106; *Lamb v. State* (Cr. App.) 169 S. W. 1158; *Hicks v. State* (Cr. App.) 171 S. W. 755.

Where the killing is the result of the provocations mentioned in subdivisions 3 and 4 of article 1132, post, the requirement that "the provocation must arise at the time of the commission of the offense, and that the passion is not the result of a former provocation," is not applicable. In such cases, the time intervening between the slayer's appraisal of the insult, and his first meeting with deceased is not a material consideration; but it is essential not only that the adequate cause be shown but that the state of the slayer's mind predicated thereon, did actually exist at the time of the killing. *Eanes v. State*, 10 App. 421; *Hill v. State*, 5 App. 2; *Paulin v. State*, 21 App. 436, 1 S. W. 453; *Orman v. State*, 22 App. 604, 3 S. W. 468, 58 Am. Rep. 662; *Howard v. State*, 23 App. 265, 5 S. W. 231. See, also, *Johnson v. State* (Cr. App.) 167 S. W. 733.

To reduce the killing from murder to manslaughter two things must concur; there must have been provocation legally sufficient to produce passion, and such passion must in fact have been produced, which rendered the party while under its influence incapable of cool reflection, depriving her for a time of the power to comprehend the consequences of her act. *Maria v. State*, 28 Tex. 698.

The adequate cause is measured not by pain but by passion. *Williams v. State*, 15 App. 617.

— **Abandonment of combat.**—If the deceased attacked defendant, and after shooting at him retreated and quitted the combat as far as he could, and the defendant then, under the immediate influence of sudden passion produced by the assault, fired upon and killed the deceased, he would be guilty of manslaughter. *West v. State*, 2 App. 460.

One continuing to shoot after it is apparent that all danger has passed, but under the influence of passion aroused by the difficulty, is guilty of no higher offense than manslaughter. *Mason v. State*, 72 App. 501, 163 S. W. 66.

The court, in charging on self-defense and abandonment of difficulty held reduced to charge on manslaughter. *McCampbell v. State* (Cr. App.) 174 S. W. 345.

Where accused fires the first shot in self-defense and decedent flees, but by his conduct the mind of accused is rendered incapable of cool reflection, though not justified in continuing to shoot after the abandonment of the difficulty by decedent, he would be guilty of no higher grade of offense than manslaughter. *McCampbell v. State* (Cr. App.) 174 S. W. 345.

— **Mutual combat.**—Mutual combat as impairing self-defense, see notes to art. 1107.

Where, in a sudden quarrel, both parties engage in the contest willingly, fight on equal terms, and no undue advantage is sought or taken by either, if death ensue, the killing will amount to manslaughter. If one party seeks, or takes any undue advantage of his adversary, and slays him, the killing is murder. *King v. State*, 4 App. 54, 30 Am. Rep. 160; *Wilson v. State*, Id. 637.

A homicide committed in mutual combat will not be reduced from murder to manslaughter unless it was committed under the influence of sudden passion arising from adequate cause. *Spearman v. State*, 23 App. 224, 4 S. W. 586; *Crist v. State*, 21 App. 361, 17 S. W. 260.

An assault committed in a mutual combat will not be reduced to an aggravated assault unless committed under the influence of sudden passion arising from an adequate cause. *Spearman v. State*, 23 App. 224, 4 S. W. 586; *Crist v. State*, 21 App. 361, 17 S. W. 260.

When a person entering into a fight with no intent to kill, but during the fight receives great bodily injury and then slays his antagonist, the crime would be manslaughter. *Cole v. State*, 35 App. 384, 33 S. W. 968.

But when he willingly entered the fight he cannot rely on manslaughter unless during the fight he received great bodily injury. *Id.*

It appeared from the evidence that there had been two fights between defendant and the injured party, in both of which defendant had entered willingly; held, that he could not rely on heat of passion aroused by the first fight as a defense, or to lower the grade of assault. *Cole v. State*, 35 App. 384, 33 S. W. 968.

Where accused and decedent agreed to fight without deadly weapons, and in pursuance thereof left decedent's house for a more private place where the fight could be had without interference, that decedent struck accused before giving notice of his intention so to do did not give accused protection under the ordinary rule of

self-defense; but, where there was raised in his mind that degree of terror, rage, or resentment recognized by the law, the killing by accused was manslaughter. *Anthony v. State*, 62 App. 138, 136 S. W. 1097.

— **Cooling time.**—When the evidence shows two difficulties between the parties, into both of which defendant entered willingly, the doctrine of "cooling time" does not apply. *Cole v. State*, 35 App. 384, 33 S. W. 968.

Although provocation must arise at trial of homicide and must not be the result of former provocation, yet the statute includes such provocation as constitutes part of *res geste*, or is so near in point of time as not to allow the mind of a man of ordinary temper, which is excited by previous provocation, to become cool and composed before the killing. What is cooling time is matter of fact to be judged by circumstances of each case. *Thomas v. State*, 42 App. 386, 56 S. W. 70.

For other decisions as to "cooling time," see *Hobbs v. State*, 16 App. 517; *Eanes v. State*, 10 App. 421; *Wadlington v. State*, 19 App. 266.

Evidence.—While provocation must arise at time of killing, yet if there is testimony of antecedent acts to illustrate, as to intensify or render more significant the act of provocation, this is admissible. *Stanton v. State*, 42 App. 269, 59 S. W. 272. See, also, *Gaines v. State*, 58 App. 631, 127 S. W. 181.

Charge.—Sudden passion is a necessary element; instructions should not omit it. *Hinton v. State*, 24 Tex. 454.

It is error to restrict charge on provocation to time of killing if there is proof of previous acts that intensify the provocation. *Spangler v. State*, 41 App. 424, 55 S. W. 330; *Miles v. State*, 18 App. 156.

Where the evidence tends to show that passion was aroused by an adequate cause, the question whether the act of killing was caused by the passion is for the jury and not the court to pass upon. *Mackey v. State*, 13 App. 360.

The provocation on the part of deceased was a sudden altercation between deceased and defendant's friend. The court properly limited in his charge the provocation to what occurred at the time of the killing. *Kidwell v. State*, 35 App. 264, 33 S. W. 342.

Where decedent seized the bridle and gave the horse, on which accused was riding, a jerk, which threw accused against the pommel of the saddle, injuring him, and decedent held onto the bridle over accused's protest, and accused shot decedent, the failure to charge, in submitting the issue of manslaughter, that, if decedent's assault created pain and engendered sudden passion, accused would be guilty of no higher offense than manslaughter, was erroneous, notwithstanding a charge that the provocation causing sudden passion must arise at the time of the killing, and that the jury, in determining adequacy of the provocation, must consider all the facts, etc. *Craft v. State*, 57 App. 257, 122 S. W. 547.

Where, in an instruction on manslaughter, the court charged that the passion, which is an element of that offense, "is not the result of former provocation," but immediately followed with a statement that in determining the question the jury might consider former provocations, if any, in connection with the provocation at the time of the killing, to determine the state of defendant's mind at the time of the killing, the instruction was not erroneous. *Edwards v. State*, 61 App. 307, 135 S. W. 540.

A charge on manslaughter, that the provocation must arise at the time of the commission of the offense, and the passion must not be the result of a former provocation, presents no error, where the court later on instructed the jury, in determining the adequacy of provocation, to consider all the facts and circumstances in evidence, in passing on the condition of defendant's mind, and if, by reason thereof, his mind at the time of the killing was incapable of cool reflection, etc. *Johnson v. State*, 63 App. 50, 138 S. W. 1021.

A charge omitting the statutory definition of "under the immediate influence of sudden passion," is improper. *Burns v. State* (Cr. App.) 145 S. W. 356.

A charge that the provocation must arise at the time of the commission of the offense, held not erroneous for failure to qualify it by a statement that such provocation might have its origin prior thereto, where the court had charged that in considering the sufficiency of such provocation the jury should consider all the circumstances. *Burns v. State* (Cr. App.) 145 S. W. 356.

A charge defining "immediate influence of sudden passion," held correct and applicable to the facts. *Burns v. State* (Cr. App.) 145 S. W. 356.

A charge that the jury should determine the adequacy of the provocation, instead of the adequacy of the cause of accused's passion, held not error. *Williams v. State* (Cr. App.) 148 S. W. 763.

Where there is no evidence of a former provocation it is error to charge that the provocation must arise at the time, and must not be caused or brought about by any former provocation, etc. *McDowell v. State* (Cr. App.) 151 S. W. 1049.

Where a member of the National Guard, while on duty in time of peace, bayoneted a citizen in an altercation with reference to permission to cross a military line, a request to charge that if deceased intended to enter the inclosure guarded by accused, or it so appeared to him, and he intentionally thrust deceased with a bayonet and killed him, his offense was manslaughter, was properly refused as eliminating adequate cause and sudden passion, essential elements of manslaughter. *Manley v. State* (Cr. App.) 154 S. W. 1008.

Where the homicide did not take place at the first meeting after accused was informed that deceased was the cause of accused's wife living a life of shame, and he learned no new facts after the first meeting, an instruction requiring that, if adequate cause existed, it produced "sudden passion" was proper. *Simmons v. State* (Cr. App.) 155 S. W. 229.

In a case of joint attack of deceased and another, the charge on manslaughter should not limit provocation solely to the attack of deceased. Nor should the charge limit the passion under which accused acted to that induced solely by the

provocation of deceased's attack, but it should include passion caused by the joint attack. *Garcia v. State*, 70 App. 485, 156 S. W. 939.

The charge should directly submit the question whether the wound or stab made in a joint attack was such provocation as to cause passion, reducing the killing, if not in self-defense, to manslaughter, and a mere general charge is not sufficient. *Garcia v. State*, 70 App. 485, 156 S. W. 939.

A charge which directs an acquittal if the mind of accused was agitated by anger, rage, resentment, or terror, regardless of what caused or produced the mental condition, is too favorable to accused. *Stewart v. State*, 71 App. 237, 158 S. W. 996.

While the provocation must arise at the time of the commission of the offense, yet antecedent matters should be considered in passing upon the state of defendant's mind; but the court should not enumerate them, but tell the jury that they must look to all the facts and circumstances in the case. *Willis v. State* (Cr. App.) 166 S. W. 1172.

Charge enumerating hostile acts to show passion held erroneous. *Henson v. State* (Cr. App.) 168 S. W. 89.

The court should instruct the jury to consider the question of provocation from the standpoint of the defendant as the facts were presented to his mind. *House v. State* (Cr. App.) 171 S. W. 206.

Evidence held to warrant charging this article. *Smith v. State* (Cr. App.) 147 S. W. 240.

The giving of an instruction on manslaughter which quoted Pen. Code 1911, art. 1129, subd. 1, providing that provocation must arise at the time of the commission of the offense, and that the passion must not be the result of a former provocation, was not prejudicial, though it was not authorized by the evidence, where the court also stated that in determining whether adequate cause existed at the time of the killing the jury may consider all of the facts and circumstances in evidence occurring both at the time and prior to the time of the killing. *Thompson v. State* (Cr. App.) 177 S. W. 503.

On a trial for homicide, the court charged that by the expression "under the immediate influence of sudden passion" was meant that the provocation must arise at the time of the commission of the offense, and that the passion was not the result of former provocation, that the act must be directly caused by the passion arising out of the provocation, and that it was not enough that the mind was merely agitated by passion arising from such other provocation. Held that, though this was correct so far as it went, where manslaughter was in the case by reason of antecedent circumstances also operating on accused's mind, the court should have further charged that in determining whether the provocation at the time of the killing was adequate cause to produce a state of mind incapable of cool reflection the jury should consider all the facts and circumstances in evidence, and that, if they found that the provocation occurring at the time, viewed in the light of the antecedent circumstances, was such as to produce, and in fact did produce, such a state of mind, the killing would be manslaughter. *Burton v. State* (Cr. App.) 178 S. W. 334.

— **Mutual combat.**—If there be no evidence in the case warranting or calling for a charge on mutual combat, it is error to give it. *Everett v. State*, 30 App. 683, 18 S. W. 674. But see a case wherein such a charge, though error, was held to be harmless. *Polk v. State*, 30 App. 657, 18 S. W. 466. And see, also, *Williams v. State*, 25 App. 216, 7 S. W. 666; *Bonnard v. State*, 25 App. 173, 7 S. W. 862, 8 Am. St. Rep. 431; *Anthony v. State*, 62 App. 138, 136 S. W. 1097.

Defendant and another engaged in a scuffle and broke a glass in a saloon. The saloon keeper had defendant arrested. Defendant made his escape from the officer and returned to the saloon in about an hour with a shotgun. There was a question as to which fired first, the saloon keeper or defendant; held, the question of adequate cause and cooling time should have been submitted. *Mundine v. State*, 37 App. 5, 38 S. W. 619.

Facts held to call for a submission of manslaughter from the viewpoint of mutual combat. *Reed v. State*, 72 App. 103, 161 S. W. 97.

— **Cooling time.**—Where the evidence presents the question of cooling time, it is error to omit to charge on that subject. *Love v. State*, 71 App. 79, 158 S. W. 525.

Where there was but one difficulty, which was immediately and continuously prosecuted until the killing, within a very short time after the difficulty had begun, the question of cooling time was not in the case. *Wilson v. State*, 71 App. 399, 160 S. W. 83.

A charge omitting to submit the question of "cooling time" held too favorable to accused. *Myers v. State*, 71 App. 594, 160 S. W. 679.

Where statutory adequate cause is not in the case and the court charges that the jury, in considering provocation, may consider all the circumstances, failure to charge on cooling time is not error. *Johnson v. State* (Cr. App.) 167 S. W. 733.

Art. 1130. [700] "Adequate cause" explained.—By the expression "adequate cause" is meant such as would commonly produce a degree of anger, rage, resentment or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection.

Cited, *Jaynes v. State* (Cr. App.) 150 S. W. 441.

Adequate cause.—*High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Johnson v. State*, 26 App. 631, 10 S. W. 235; *Boyd v. State*, 28 App. 137, 12 S. W. 737; *Cochran v. State*, 28 App. 422, 13 S. W. 651; *Bonner v. State*, 29 App. 223, 15 S. W. 821; *Bracken v. State*, 29 App. 362, 16 S. W. 192.

To raise the issue of manslaughter, it is not essential that the overt act relied upon was sufficient to raise the issue of self-defense. but if, in connection with other antecedent facts and circumstances, it excited in the mind of accused, and was sufficient to excite in the mind of a person of ordinary temper, such sudden passion as would render it incapable of cool reflection. then adequate cause would be produced sufficient to raise the issue of manslaughter, and the law of manslaughter would be a part of the law of the case, and should be given in charge to the jury. *Howard v. State*, 23 App. 265, 5 S. W. 231; *Hobbs v. State*, 16 App. 523; *Baltrip v. State*, 30 App. 545, 17 S. W. 1106; *Orman v. State*, 24 App. 495, 6 S. W. 544; *Hawthorne v. State*, 28 App. 213, 12 S. W. 603; *Cochran v. State*, 28 App. 422, 13 S. W. 651; *Bracken v. State*, 29 App. 562, 16 S. W. 192; *Williams v. State*, 30 App. 429, 17 S. W. 1071. See, also, *Lamb v. State* (Cr. App.) 169 S. W. 1158.

Where defendant killed deceased through terror and under belief that his life was in danger the homicide would be manslaughter even though his belief was not reasonable. *Gilcrease v. State*, 33 App. 619, 28 S. W. 531.

There are other adequate causes besides those outlined in the statute, and an adequate cause may be produced by another than the party assaulted; the question must be viewed from the defendant's standpoint. *Chatman v. State*, 40 App. 280, 50 S. W. 396.

There may be adequate causes outside of those named in statute, and provocation occurring at the time may be intensified by matters occurring before, and such matters can be considered. *Warthan v. State*, 41 App. 385, 55 S. W. 57.

A blow which causes pain is adequate cause to render mind incapable of cool reflection and reduce killing to manslaughter. *Warthan v. State*, 41 App. 385, 55 S. W. 57.

A blow which causes either pain or bloodshed, is not adequate cause per se, to reduce homicide to manslaughter. It must produce anger, rage, resentment or terror, to such an extent as to render the mind incapable of cool reflection. *Chatman v. State* (Cr. App.) 55 S. W. 346.

That decedent, accused's wife, was whipping their child held not sufficient provocation to make her killing manslaughter. *Wilson v. State*, 60 App. 1, 129 S. W. 613.

Adequate cause to justify an assault with a deadly weapon which would otherwise be assault with intent to murder must be some such reason for the difficulty as to disturb the mind beyond cool reflection. *Black v. State* (Cr. App.) 145 S. W. 944.

Where the mind of the party is aroused by an adequate cause to such a degree of sudden anger, fear, rage, or resentment as to render him incapable of cool reflection, the act does not constitute assault to murder, but merely aggravated assault. *Vining v. State* (Cr. App.) 146 S. W. 909.

Where defendant's reason was dethroned because of his anger and resentment caused by the wrongful words, acts, and conduct of prosecutor, the alleged assault with intent to murder was not excused, but the jury could reduce the grade of the offense to aggravated assault. *Anderson v. State* (Cr. App.) 148 S. W. 802.

The fact that deceased had aided his mother in investigating defendant's violation of an injunction against him in her divorce action and in making an affidavit for his punishment therefor, did not constitute adequate cause for homicide. *Powdrill v. State* (Cr. App.) 155 S. W. 231.

That deceased compelled his wife to make a confession and procured its publication, held not to constitute adequate cause. *Jones et al. v. State*, 72 App. 504, 163 S. W. 81.

The mere fact accused's wife declined to go home when he demanded it, was not adequate cause to reduce the killing of the wife to manslaughter. *Hill v. State* (Cr. App.) 168 S. W. 864.

To constitute "manslaughter," it is essential that there be not only adequate cause but an existing passion caused by what deceased has said or done. *Witty v. State* (Cr. App.) 171 S. W. 229. See, also, notes under art. 1123, ante.

— **Arrest.**—An attempted unlawful arrest is adequate cause. *Ross v. State*, 10 App. 455, 38 Am. Rep. 643; *Peter v. State*, 23 App. 684, 5 S. W. 228; *Goodman v. State*, 4 App. 349; *Mundine v. State*, 37 App. 5, 38 S. W. 619; *Ledbetter v. State*, 23 App. 247, 5 S. W. 226; *Jones v. State*, 26 App. 1, 9 S. W. 53, 8 Am. St. Rep. 454; *Meuly v. State*, Id., 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Lynch v. State*, 41 App. 510, 57 S. W. 1130; *Miers v. State*, 34 App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705; *Condron v. State* (Cr. App.) 155 S. W. 253. And see *Fifer v. State*, 64 App. 203, 141 S. W. 989.

When a person illegally restrained kills the officer, the offense is not of a higher grade than manslaughter. *Goodman v. State*, 4 App. 349.

If an arrest is attempted by an unauthorized person, and in the mêlée such person is cut by the defendant, the offense is not greater than an aggravated assault and battery. *Johnson v. State*, 5 App. 43.

An officer is not authorized to kill one who is attempting to rescue a prisoner. If he is assaulted by such an one, but not with a deadly weapon, and kills him, it is manslaughter. *Williams v. State*, 41 App. 365, 54 S. W. 759. And see *Demarco v. State*, 60 App. 185, 131 S. W. 589.

Testimony that the accused told the witness several hours after the killing that he was not going to be arrested and that all he wanted was one shot at the constable was admissible to show a threat to resist arrest, regardless of whether it constituted a part of the res gesta. *Walker v. State* (Cr. App.) 169 S. W. 1156.

Charge.—See notes under arts. 735-743, C. C. P.

Charge held sufficient. *Tyler v. State* (Cr. App.) 148 S. W. 1086; *Burns v. State* (Cr. App.) 145 S. W. 356; *Williams v. State* (Cr. App.) 148 S. W. 763; *McKelvey v. State* (Cr. App.) 155 S. W. 932. See, also, *Brookins v. State*, 71 App. 101, 158 S. W. 521.

To use the words of the statute in a charge upon adequate cause is sufficient; it is error to interpolate the words "and courage" after "temper" in the sentence "resentment or terror in a person of ordinary temper." *Gardner v. State*, 40 App. 22, 48 S. W. 170.

Any condition or circumstance which is capable of creating sudden passion, rendering the mind incapable of cool reflection, may be "adequate cause," and where the evidence shows a number of conditions or circumstances tending either singly or collectively to show "adequate cause," the jury should not be restricted by the charge to a consideration of a single condition or circumstance, but should be directed to consider them all in determining the question of "adequate cause." In confining the "adequate cause" to the insulting language, and in failing to submit to the jury whether the said acts and threats of the deceased (which were proved to have been communicated to the defendant), of themselves or in connection with the insulting language, were not "adequate cause," the charge was erroneous. *Orman v. State*, 24 App. 495, 6 S. W. 544. And see *Hawthorne v. State*, 28 App. 212, 12 S. W. 603.

Under the facts the court properly refused to charge upon homicide in resisting illegal arrest. *Wolfforth v. State*, 31 App. 387, 20 S. W. 741.

The court need not give statutory definition of adequate cause but may define it in a general way and leave it to the jury to determine from all the facts whether there was adequate cause. *Blanco v. State* (Cr. App.) 57 S. W. 829.

It is error to restrict provocation constituting adequate cause to time of killing. The jury can look to past occurrences between the parties, especially those of deceased towards defendant. *Adams v. State*, 42 App. 366, 60 S. W. 48.

Where the court, in applying the law to the facts with reference to manslaughter, limited the issue of adequate cause to the acts and words of deceased at the time of the killing, the charge was erroneous, though the court in previously stating the law generally had stated that the jury should take into consideration all the facts and circumstances in the case. *Barnes v. State*, 61 App. 37, 133 S. W. 887.

Where the adequate cause relied on is statutory, the jury cannot determine whether there is sufficient provocation, so that a charge blending the statutory adequate cause with other facts and making the jury the judges of whether there was sufficient provocation, is erroneous. *Ware v. State* (Cr. App.) 152 S. W. 1074.

Where threats uttered by deceased against defendant had been communicated to defendant, the conduct of deceased in approaching defendant and making a hostile demonstration, and using threatening language, entitled defendant to a charge on manslaughter from the standpoint of decedent's threats. *Walker v. State*, 70 App. 84, 156 S. W. 206.

Failure to define adequate cause, held error on a trial for assault to murder. *Robinson v. State*, 70 App. 81, 156 S. W. 212.

When statutory adequate cause or causes are alleged as an excuse, it is the court's duty to appropriately instruct with reference to each of such causes; and, if there be independent or a combination of independent causes, not specifically set forth in the statute, those should be combined and charged on separately from the statutory adequate cause. *Love v. State*, 71 App. 79, 158 S. W. 525. See, also, *Lee v. State* (Cr. App.) 148 S. W. 706.

Charge held erroneous for omitting all the facts bearing on the conduct of decedent. *Sneed v. State*, 71 App. 299, 158 S. W. 530.

Art. 1131. [701] What are not adequate causes.—Insulting words or gestures, or an assault and battery, so slight as to show no intention to inflict pain or injury, or an injury to property, unaccompanied by violence, are not adequate causes.

Cited, *Jaynes v. State* (Cr. App.) 150 S. W. 441; *Witty v. State* (Cr. App.) 171 S. W. 229; *Lamb v. State* (Cr. App.) 169 S. W. 1158.

Adequate cause.—The circumstances and conditions which constitute adequate cause to reduce a homicide to manslaughter are not restricted to those named in the statute. *Burton v. State* (Cr. App.) 178 S. W. 334.

Insulting words or gestures, or an assault and battery so slight as to show no intention to inflict injury, or an injury to property unaccompanied by violence are not adequate causes. *Boyett v. State*, 2 App. 93; *Rutherford v. State*, 15 App. 236; *Clore v. State*, 26 App. 624, 10 S. W. 242; *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *McGregor v. State*, 71 App. 604, 160 S. W. 711.

Facts held not to raise the issue of manslaughter under this article. *Charba v. State*, 48 App. 316, 87 S. W. 830; *Snowberger v. State*, 58 App. 530, 126 S. W. 878; *Ward v. State*, 59 App. 62, 126 S. W. 1145; *Johnson v. State* (Cr. App.) 167 S. W. 733.

Threats by deceased held insufficient to reduce the offense to manslaughter. *Davis v. State*, 37 App. 371, 35 S. W. 388; *Hardeman v. State*, 61 App. 111, 133 S. W. 1056.

To make a killing under sudden passion manslaughter there must actually have existed an adequate cause. *McKinney v. State*, 8 App. 626.

Manslaughter is predicable alone on the supposition of the existence of adequate cause. *Neyland v. State*, 13 App. 536.

Where the evidence shows assault with intent to murder, evidence of abusive language by the prosecutor will not reduce the offense to aggravated assault nor require a charge thereon. *Barbee v. State*, 34 App. 129, 29 S. W. 776.

If the cause is such as will be reasonably calculated to rouse the passion of a man of ordinary temper and render him incapable of cool reflection it is deemed an adequate cause. *Childers v. State*, 33 App. 509, 27 S. W. 133.

An attack on one's property, where it may not justify homicide, is justly re-

garded as great provocation and may be adequate cause. *Milrainey v. State*, 33 App. 577, 28 S. W. 537.

Calling a man a son of a bitch, and charging him with attempting to rape prosecutor's wife, held, not justification, and not to reduce assault with intent to murder to an aggravated assault. *Barbee v. State*, 34 App. 129, 29 S. W. 776.

An offense against one's property, even if wrongful, does not reduce the killing of the offender to manslaughter, unless there are other circumstances. *Ward v. State*, 59 App. 62, 126 S. W. 1145. See, also, *Wisnoski v. State* (Cr. App.) 153 S. W. 316.

Facts held not calculated to arouse such passion as to render the mind incapable of cool reflection so as to reduce the killing of deceased at the time to manslaughter. *Hardeman v. State*, 61 App. 111, 133 S. W. 1056.

Threats of themselves alone will not reduce a killing to manslaughter, but, though an assault by deceased later was such as would not reasonably cause one to believe that he was in danger of losing his life or of serious bodily injury, yet the conduct at the time was such, considering the previous threats, as to cause such a degree of anger or terror as to render the mind incapable of cool reflection, the offense would be only manslaughter. *Kelly v. State* (Cr. App.) 151 S. W. 304.

The circulation of a slanderous report in regard to a man will not avail to reduce a homicide to manslaughter, though the killing take place when the mind is incapable of cool reflection. *Cloud v. State* (Cr. App.) 153 S. W. 892.

Calling a man a son of a bitch and striking at him with the open hand, without hitting him, is not adequate cause. *Wilson v. State*, 71 App. 399, 160 S. W. 83.

Calling a man an opprobrious name and advancing on him with a heavy club in a threatening attitude is not adequate cause. *Shaw v. State*, 71 App. 630, 160 S. W. 103.

The statement of decedent that if accused did not leave, decedent would go for an officer to have accused arrested for his misconduct, was not adequate cause. *Tores v. State* (Cr. App.) 166 S. W. 523.

Acts of deceased held not to constitute false imprisonment, upon which an issue of manslaughter could be predicated. *Johnson v. State* (Cr. App.) 167 S. W. 733.

Charge.—An instruction on manslaughter was properly refused where there was no evidence whatever of adequate cause. *Hill v. State*, 11 App. 456.

Charge held correct. *Davis v. State*, 57 App. 545, 124 S. W. 104.

Under Pen. Code 1911, art. 1131, providing that insulting words or gestures are not adequate cause to reduce a homicide to manslaughter in a prosecution for murder, where the defense was self-defense, and the state's case was that defendant killed deceased because he refused to deliver to him his mail, that both cursed each other, and that, when deceased called defendant a black son of a bitch, defendant inflicted a fatal knife wound in his breast, the refusal of defendant's special instructions that the evidence was insufficient to authorize a conviction for murder was proper. *Bolden v. State* (Cr. App.) 178 S. W. 533.

Art. 1132. [702] What are.—The following are deemed adequate causes:

1. An assault and battery by the deceased, causing pain or bloodshed.

Cited High v. State, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Jaynes v. State* (Cr. App.) 150 S. W. 441.

Adequate cause.—An assault and battery causing either pain or bloodshed is adequate cause. It is not necessary that it should cause both pain and bloodshed. *Hill v. State*, 8 App. 142; *Foster v. State*, Id. 248; *Childers v. State*, 33 App. 509, 27 S. W. 133; *Williams v. State*, 15 App. 617; *Washington v. State*, 19 App. 521, 53 Am. Rep. 387; *Spivey v. State*, 30 App. 343, 17 S. W. 546; *Lee v. State*, 54 App. 382, 113 S. W. 302; *Anthony v. State*, 62 App. 133, 136 S. W. 1097; *Gaines v. State* (Cr. App.) 148 S. W. 717; *Corbitt v. State*, 72 App. 396, 163 S. W. 436. See, also, *Solis v. State* (Cr. App.) 174 S. W. 343.

Where such a cause or causes arising at the time or in connection with a homicide as will produce a degree of anger, fear, or rage, such as to render the mind of an ordinary person incapable of cool reflection, is disclosed, and the jury believes that such cause or causes did produce such a state of mind, the offense is only manslaughter, though such cause or causes are not enumerated in the Code as sufficient to reduce an unlawful killing to manslaughter. *Carter v. State* (Cr. App.) 170 S. W. 739; *Childers v. State*, 33 App. 509, 27 S. W. 133 (following *Williams v. State*, 15 App. 617). And see *Bonner v. State*, 29 App. 223, 15 S. W. 821; *Renow v. State*, 49 App. 281, 92 S. W. 801; *Milrainey v. State*, 33 App. 577, 28 S. W. 537.

There are other "adequate causes" than those stated in this article. The statute is explanatory and not restrictive, and the question as to whether or not adequate cause existed is one of fact for the jury to determine. *Brown v. State*, 38 Tex. 482; *Johnson v. State*, 43 Tex. 612; *West v. State*, 2 App. 460; *Guffee v. State*, 8 App. 187; *Williams v. State*, 7 App. 396; *Maria v. State*, 28 Tex. 698; *Sterling v. State*, 15 App. 249; *Williams v. State*, Id. 617; *Neyland v. State*, 13 App. 536; *Johnson v. State*, 22 App. 206, 2 S. W. 609; *Hobbs v. State*, 16 App. 517.

Any condition or circumstance which is capable of enacting, and does create, sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not, is "adequate cause." Where there are several causes to arouse passion, although no one of them might constitute adequate cause, yet all the causes combined might be sufficient to do so. *Wadlington v. State*, 19 App. 266; *Neyland v. State*, 13 App. 536; *Williams v. State*, 15 App. 617.

A killing upon a sudden quarrel and after an assault committed by the deceased, held to be manslaughter. *Moffatt v. State*, 35 App. 257, 33 S. W. 344.

An assault and battery with intent to injure or inflict bodily pain, constitutes adequate cause. *McGregor v. State*, 71 App. 604, 160 S. W. 711.

Charge.—See notes under arts. 735–743, C. C. P.

Charge held correct and applicable to the facts. *Myers v. State*, 71 App. 594, 160 S. W. 679; *Irvin v. State* (Cr. App.) 148 S. W. 589; *Lee v. State* (Cr. App.) 148 S. W. 706.

A charge that assault and battery would not be adequate cause unless it produced severe pain or bloodshed, was held to be erroneous. *Tickle v. State*, 6 App. 623.

In a trial for assault with intent to murder, the trial court charged the jury that “an assault and battery so slight as to show no intention to inflict pain or injury is not, in law, deemed an adequate cause.” Held that, although abstractly correct, the charge, in view of the proof which showed that the injured party struck the defendant, with a manifest intention to injure him, before the defendant made the assault, was material error. The proof leaving it in doubt whether or not a blow inflicted by the injured party upon the defendant, causing pain and bloodshed, was inflicted before the assault by the defendant, the trial court erred in refusing an instruction to the effect that if the jury should find that the blow causing the pain and bloodshed was inflicted before the assault, it would be “adequate cause.” *Williams v. State*, 25 App. 216, 7 S. W. 666.

A charge that, if defendant’s mind was aroused by shooting at him, this would be adequate cause, held correct. *Lofton v. State*, 59 App. 270, 128 S. W. 384.

One convicted of manslaughter cannot complain of an instruction which requires a finding of provocation of the difficulty with intent to kill or do serious bodily injury, since manslaughter can arise from a provocation with intent merely to beat or injure. *Gray v. State*, 61 App. 454, 135 S. W. 1179.

It is error to leave it to the jury to determine what is adequate cause, and whether the pain caused by the assault produced passion. *Luttrell v. State* (Cr. App.) 143 S. W. 628.

The charge must state what constitutes an adequate cause and submit the issues of the assault and the resulting passion. *Smith v. State* (Cr. App.) 148 S. W. 699.

A charge which failed to submit the law of manslaughter with reference to a blow inflicting pain and bloodshed held fatally defective. *Gaines v. State* (Cr. App.) 148 S. W. 717.

A charge on adequate cause must be given where the testimony shows such cause. *Rodriguez v. State* (Cr. App.) 155 S. W. 530.

Charge held inapplicable. *Reagan v. State*, 70 App. 498, 157 S. W. 483.

Where the provocation was the pain caused by deceased’s assault, a charge on manslaughter limiting the cause to that of an assault causing pain is not too restrictive. *Finch v. State*, 71 App. 325, 158 S. W. 510.

Charge held too restrictive in failing to instruct that if the jury found deceased inflicted pain or bloodshed on defendant in the prior attack, that would be sufficient cause to arouse sudden passion. *Love v. State*, 71 App. 79, 158 S. W. 525.

Where there was evidence that just before the killing deceased struck defendant a blow in the face and pursued him with blows, a requested instruction defining manslaughter was improperly refused. *Herrera v. State* (Cr. App.) 170 S. W. 719.

2. A serious personal conflict, in which great injury is inflicted by the person killed, by means of weapons, or other instruments of violence, or by means of great superiority of personal strength, although the person guilty of the homicide was the aggressor; provided, such aggression was not made with intent to bring on a conflict and for the purpose of killing.

Cited, *High v. State*, 26 App. 545, 10 S. W. 238, 8 Am. St. Rep. 488.

Charge.—For facts which required a charge of this subdivision, see *Ellison v. State*, 12 App. 557; *Lawrence v. State*, 10 App. 495.

Where there is no evidence of an assault by decedent, it is not error to fail to charge the substance of this clause. *Wheeler v. State*, 58 App. 296, 125 S. W. 29.

3. Adultery of the person killed with the wife of the person guilty of the homicide; provided, the killing occurs as soon as the fact of an illicit connection is discovered.

Adultery as justification for homicide.—See art. 1102, ante.

Adultery as adequate cause.—Adultery of the deceased with the wife of the slayer, provided the killing occurred as soon as the fact of the illicit connection was discovered, is one of the adequate causes expressly enumerated in the statute as sufficient to reduce a homicide from murder to manslaughter. Where this is the provocation it is not required that it should arise at the time of the homicide, but the homicide will be extenuated thereby to manslaughter if it be committed as soon as the fact of such illicit connection is discovered. *Paulin v. State*, 21 App. 436, 1 S. W. 453; *Pickens v. State*, 31 App. 554, 21 S. W. 362; *Massie v. State*, 30 App. 64, 16 S. W. 770; *Ex parte Jones*, 31 App. 422, 20 S. W. 983; *Giles v. State*, 60 App. 436, 132 S. W. 359.

The statute presupposes that the adultery would arouse a degree of passion which, for the time, would dethrone reason, but that such passion could constitute an “adequate cause,” only until there had been reasonable time for it to subside. *Winkfield v. State*, 41 Tex. 148.

If an adulterer is attacked by the husband he is not deprived wholly of the right of self-defense. If he kills the husband to save his own life, he will be guilty of manslaughter only. *Reed v. State*, 11 App. 509, 40 Am. Rep. 795.

It is essential that the information to accused produce passion. *Oldham v. State*, 63 App. 527, 142 S. W. 13.

In a prosecution for homicide, where accused claimed that deceased had improper relations with his wife, the state may show the wife's good reputation for virtue. *Eads v. State* (Cr. App.) 176 S. W. 574.

In a prosecution for homicide, where defendant claimed that he killed deceased under the provocation, reducing the crime to manslaughter, that he had been informed that deceased had sustained criminal relations with his wife, the point was, not whether deceased had actually been guilty of the acts, but whether defendant had been so informed and so believed. *Sweat v. State* (Cr. App.) 178 S. W. 554.

In a prosecution for homicide, where the defendant offered evidence of provocation, to reduce the offense to manslaughter, that deceased had been guilty of improper relations with defendant's wife, and where the whole trend of the state's evidence was to show that deceased had not been guilty, and that the matter was a fabrication pure and simple, the jury should have been instructed that the material point on the issue of provocation was, not whether deceased had been guilty of the conduct alleged, but whether defendant had been informed and believed that he was so guilty. *Sweat v. State* (Cr. App.) 178 S. W. 554.

Defendant in homicide could not show that deceased had recently taken the wives of several men; he not contending any of the husbands could have killed deceased, or that he was related to the women or their husbands. *White v. State* (Cr. App.) 177 S. W. 93.

And see *Oliver v. State*, 70 App. 140, 159 S. W. 235.

4. Insulting words or conduct of the person killed towards a female relation of the party guilty of the homicide.

Insult to female as adequate cause.—See notes to art. 1133.

Art. 1133. [703] For insult to female, killing must be immediate.—When it is sought to reduce the homicide to the grade of manslaughter, by reason of the existence of the circumstances specified in the fourth subdivision or article 1132 of the Penal Code, it must appear that the killing took place immediately upon the happening of the insulting conduct, or the uttering of the insulting words, or so soon thereafter as the party killing may meet with the party killed, after having been informed of such insults. [Act Feb. 12, 1858, pp. 172-3.]

Insult to female as adequate cause.—Subdivision 4 of article 1132 makes insulting words or conduct toward a female relative of the slayer an adequate cause for the passion which reduces murder to manslaughter, provided the killing occurred immediately upon the happening thereof, or so soon thereafter as the slayer, having been informed of the insults, met with the person killed. In such case the requirement of article 1129 that the provocation must arise at the time of the killing, and that the passion be not the result of a past provocation, is inapplicable. The time intervening between the slayer's appraisal of the insult and his first meeting with deceased is not a material consideration, but it is essential not only that the adequate cause have a status in the evidence, but that the state of the slayer's mind predicated thereon did actually exist at the time of the homicide. In the state of case contemplated by subdivision 4 of article 1132 in connection with this article four issues of fact are presented: 1. The occurrence of insulting words or conduct on the part of the deceased toward a female relative of the accused; 2. Whether that was the real provocation which induced the killing; 3. Whether the killing took place immediately on the happening of the insult or as soon thereafter as the accused, having been apprised thereof, met with the deceased; and 4. Whether the accused, when he killed the deceased, was affected by such a degree of anger, rage, resentment, or terror as would commonly, in a person of ordinary temper, render the mind incapable of cool reflection. In determining these issues the jury should consider the aspect in which the evidentiary circumstances presented themselves to the accused at the time he acted upon them. *Eanes v. State*, 10 App. 421; *Niland v. State*, 19 App. 166. See, also, *Orman v. State*, 22 App. 604, 3 S. W. 468, 58 Am. Rep. 662; *Howard v. State*, 23 App. 265, 5 S. W. 231; *Jones v. State*, 33 App. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; *Knowles v. State*, 31 App. 383, 20 S. W. 829; *Reagan v. State*, 70 App. 498, 157 S. W. 483.

Insult to female relative as adequate cause is governed by the same rules that apply when adultery with the slayer's wife is the provocation. See *Hill v. State*, 5 App. 2; *Whaley v. State*, 9 App. 305.

Deceased accused defendant of insults towards his wife, and ordered him to leave the country; held, that this was not such provocation as would reduce the homicide from murder to manslaughter. *Davis v. State*, 37 App. 371, 35 S. W. 388.

One is not guilty of murder if he sought decedent to demand an apology for an insult to accused's wife, but shot decedent on account of the insult without demanding an apology. *Kincaid v. State* (Cr. App.) 145 S. W. 597.

To make remarks imputing unchastity to a female relative adequate cause to reduce a killing to manslaughter, they must have produced anger in accused. *Fox v. State*, 71 App. 318, 158 S. W. 1141.

— **Relation of female to accused.**—See notes to art. 1136, post.

Insulting conduct of deceased in presence of proprietress of house of prostitution, whose guest, so called, defendant was, does not constitute legal provocation to defendant. *Meyers v. State*, 39 App. 512, 46 S. W. 817.

The insult must be given to the female while under the protection of the slayer, and the killing must also be done while she is under his protection. *Ex parte Jones*, 31 App. 422, 20 S. W. 983. And see *Williams v. State* (Cr. App.) 144 S. W. 620.

Insulting words used toward a female relative does not apply where the insulting words or conduct is used to defendant herself. She is not a relative of herself in contemplation of the statute. *Moore v. State*, 33 App. 351, 26 S. W. 404.

Insulting words to a female in one's presence does not reduce assault with intent to murder to aggravated assault, when the female is not a relative nor under the protection and control of assaulting party. *Moody v. State* (Cr. App.) 59 S. W. 895.

— **Words or conduct constituting insult.**—The insult need not be in the presence of the female; the word "towards" does not so imply. *Hudson v. State*, 6 App. 565, 32 Am. Rep. 593. See, also, *Wright v. State*, 52 App. 542, 107 S. W. 822; *Blocker v. State*, 61 App. 413, 135 S. W. 130; *Whiten v. State*, 71 App. 555, 160 S. W. 462.

Calling a man a son of a bitch or a son of a whore is not an insult to a female relative. (Following *Graham v. State* (Cr. App.) 33 S. W. 537.) *Fitzpatrick v. State*, 37 App. 20, 38 S. W. 806; *Simmons v. State*, 23 App. 653, 5 S. W. 208; *Levy v. State*, 28 App. 203, 12 S. W. 596, 19 Am. St. Rep. 826; *Woods v. State*, 71 App. 398, 159 S. W. 1183; *Trevino v. State*, 72 App. 91, 161 S. W. 108. And see, also, *Melton v. State*, 24 App. 47, 5 S. W. 652; *Parker v. State*, 24 App. 61, 5 S. W. 653; *Williams v. State*, 24 App. 637, 7 S. W. 333; *Norman v. State*, 26 App. 221, 9 S. W. 606; *Richardson v. State*, 28 App. 216, 12 S. W. 870; see, also, *Evers v. State*, 31 App. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811; *Knowles v. State*, 31 App. 383, 20 S. W. 829.

A love letter to a wife is not statutory adequate cause, but it should be considered by the jury in passing upon husband's state of mind at the time of the killing of the writer. *Willis v. State* (Cr. App.) 166 S. W. 1172.

Though such letter in itself was not sufficient provocation, yet it might be when considered with all the antecedent conduct and acts of deceased. *Willis v. State* (Cr. App.) 166 S. W. 1172.

The Mexican term, "Cabron," which means that the person to whom it is applied consents to the prostitution of his wife, is insulting words toward a female relative within the meaning of the statute. *Escareno v. State*, 16 App. 85.

The conduct need not offend the female; as where she consents to caresses. *Garrett v. State*, 36 App. 230, 36 S. W. 454.

Where defendant's wife was scared by deceased, and when defendant sought out deceased, demanding an explanation, and deceased told him in substance that his wife had lied, it was provocation sufficient to reduce the killing to manslaughter. *Ballard v. State*, 62 App. 435, 138 S. W. 120.

The acts of the deceased toward the female tending to show improper relations will not reduce the killing to manslaughter where the accused himself in his conversations has imputed a want of chastity in her. *Teague v. State* (Cr. App.) 148 S. W. 1063.

The words "insulting words or conduct towards a female relative," embrace not only such circumstances as really insult the woman, but such conduct as to be an insult to her husband, which, if in fact it does produce such anger or resentment as to render his mind incapable of cool reflection, reduces his homicide to manslaughter. *Rogers v. State* (Cr. App.) 149 S. W. 127.

It is not insult where the accused knows the statement to be true. *Redman v. State* (Cr. App.) 149 S. W. 670.

Where accused was seized with sudden passion on seeing his wife caressed by another, and shot at him, but struck his wife, he would be guilty of no higher offense than aggravated assault; the insult to the wife being adequate cause. *Hobbs v. State* (Cr. App.) 151 S. W. 809.

Simply calling defendant's daughter a "wolf" was not statutory adequate cause to reduce a shooting from assault to murder to aggravated assault, though it would be a circumstance to be considered along with any others. *Singleton v. State* (Cr. App.) 167 S. W. 46.

Insulting language towards and of defendant's daughter, by one not present at the time of the shooting, though the father of the one shot, could not reduce the offense from assault to murder to aggravated assault. *Singleton v. State* (Cr. App.) 167 S. W. 46.

— **Time of insult.**—To be adequate cause, insulting words toward a female relative must be used in the presence of defendant, or the killing occur upon the first meeting of the parties after defendant hears of the insulting language or conduct and the insult must be the real cause of the killing. *Jones v. State*, 33 App. 492, 26 S. W. 1082, 47 Am. St. Rep. 46; *Wright v. State*, 36 App. 427, 37 S. W. 732; *Hardcastle v. State*, 36 App. 555, 38 S. W. 186; *Norman v. State*, 26 App. 221, 9 S. W. 606; *Bledsoe v. State* (Cr. App.) 34 S. W. 120; *Cheatham v. State*, 57 App. 442, 125 S. W. 565; *Moss v. State*, 60 App. 268, 131 S. W. 1088; *Mansfield v. State*, 62 App. 631, 138 S. W. 591; *Kincaid v. State* (Cr. App.) 145 S. W. 597; *Davis v. State*, 70 App. 37, 155 S. W. 546; *Thompson v. State*, 72 App. 659, 163 S. W. 973; *Willis v. State* (Cr. App.) 166 S. W. 1172. And see, also, *Richardson v. State*, 28 App. 216, 12 S. W. 870; *Hammond v. State*, 28 App. 413, 13 S. W. 605; *Pitts v. State*, 29 App. 374, 16 S. W. 189; *Williams v. State*, 30 App. 429, 17 S. W. 1071; *Parker v. State*, 24 App. 61, 5 S. W. 653.

This rule applies to an accomplice. *Parker v. State*, 24 App. 61, 5 S. W. 653.

The word "meet" signifies that the parties were brought into such proximity as would enable the defendant to act in the premises whether he was armed or unarmed. *Gillespie v. State*, 53 App. 167, 109 S. W. 158.

Accused cannot justify a homicide through remarks made by decedent to accused's wife, but not communicated to accused until after the homicide. *Lacy v. State*, 63 App. 189, 140 S. W. 461.

— **Information and belief as to insult.**—If defendant believed the wife's story of insulting conduct by deceased, it was immaterial whether it had occurred. *Jones v. State*, 33 App. 492, 26 S. W. 1082, 47 Am. St. Rep. 46.

The criterion was not whether the alleged insulting language was used, but whether accused believed the language was uttered and acted on that belief. *Morrison v. State*, 61 App. 223, 135 S. W. 551.

Evidence.—To authorize introduction of evidence of insult to female relative it must appear that prior to killing the insult was communicated to defendant and that he shot deceased on first meeting him. *Wright v. State*, 36 App. 431, 37 S. W. 732; *Howard v. State*, 23 App. 265, 5 S. W. 231.

The declarations of the defendant made the instant before killing, that deceased had insulted his wife, are not admissible in his behalf, in the absence of other testimony that such insult had been given. *Bassham v. State*, 38 Tex. 622.

The wife of the deceased was the only witness to the killing. Over objection by the defendant, she was allowed to testify that a few minutes before he killed her husband, he made indecent proposals to her; but of this fact the deceased was never apprised, and there was nothing to indicate that it influenced or explained the motives or acts of either the deceased or the defendant. Held, that this testimony was irrelevant, and of a character likely to incense the jury against the defendant, and it was material error to admit it. *Gardner v. State*, 11 App. 265.

Evidence of insulting language toward female relatives of defendant was properly excluded when there was no evidence that the fact was communicated to defendant. *Wright v. State*, 36 App. 427, 37 S. W. 732.

Evidence as to the age of defendant's sister seduced by deceased is immaterial. *Caveness v. State* (Cr. App.) 37 S. W. 750.

The defense was that defendant's wife had told defendant of the misconduct of deceased, which testimony the State controverted; held, that defendant was entitled to prove similar statements made by his wife to a third person. *Jones v. State*, 38 App. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719.

The defense was insulting conduct toward defendant's wife; held, competent for defendant to prove by a witness that his wife told witness of such conduct, and that witness told defendant. He may also prove that deceased was a man of unchaste and lecherous habits, upon the issue as to whether he believed his wife's statements. *Jones v. State*, 38 App. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719.

Where defendant's testimony was that deceased had used insulting language about his female relatives, evidence that prior thereto he had spoken nicely about them, is inadmissible, because it was not part of conversation of defendant's witness with deceased, and it tended to discredit them. *Fossett v. State*, 41 App. 400, 55 S. W. 498.

Evidence held admissible to show that the motive of the killing was not the insult to defendant's wife, but malice. *Barbee v. State*, 58 App. 129, 124 S. W. 961.

Where accused killed decedent on his first meeting him after learning of his insulting conduct towards the wife of accused, evidence of the criminal relations between the wife and decedent not known to accused was inadmissible. *Young v. State*, 59 App. 137, 127 S. W. 1058.

On evidence as to decedent's character, see *Redman v. State* (Cr. App.) 149 S. W. 670.

Evidence of improper relations between accused's wife and the party assaulted two years before held incompetent. *Martinez v. State* (Cr. App.) 153 S. W. 886.

Remarks by deceased not communicated to defendant, held admissible as corroborative of the communicated insults, and also as tending to show that deceased uttered the communicated insults. *Walker v. State*, 70 App. 84, 156 S. W. 206.

Evidence that the female was only 14 is admissible as tending to lessen the probability that she was a prostitute. *Walker v. State*, 70 App. 84, 156 S. W. 206. And further on evidence, see *Hart v. State*, 57 App. 21, 121 S. W. 508.

Charge.—Charge held sufficient. *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A. 1244; *Norman v. State*, 26 App. 221, 9 S. W. 606; *Knowles v. State*, 31 App. 383, 20 S. W. 829; *Price v. State*, 36 App. 403, 37 S. W. 743; *Redman v. State* (Cr. App.) 149 S. W. 670.

It is error to charge that the "provocation must arise at the time of the killing, and must not be the result of a former provocation." *Paulin v. State*, 21 App. 436, 1 S. W. 453; *Niland v. State*, 19 App. 166. See, also, *Williams v. State*, 24 App. 637, 7 S. W. 333; *Maxwell v. State* (Cr. App.) 56 S. W. 62.

For facts which require a charge as to insulting words used by the deceased toward the wife of the defendant, see *Smith v. State*, 15 App. 338; *Washington v. State* (Cr. App.) 151 S. W. 818.

Facts not involving manslaughter, as predicated upon insulting conduct toward wife of accused. *Wolforth v. State*, 31 App. 387, 20 S. W. 741; and see *Wood v. State*, 31 App. 571, 21 S. W. 602; *Gay v. State*, 58 App. 472, 125 S. W. 896.

On trial for murder where the evidence presents the issue of killing by defendant upon first meeting after learning of deceased's insulting conduct toward his wife, the court should instruct on the law of manslaughter. *Jones v. State*, 33 App. 492, 26 S. W. 1082, 47 Am. St. Rep. 46.

The court should not limit the jury to the insults to female relative to the time of the homicide but can consider former insults as well. *Martin v. State*, 40 App. 665, 51 S. W. 912.

The charge was, "If you believe, from the evidence, beyond a reasonable doubt, that the defendant did unlawfully kill the deceased, by shooting him with a pistol, and that the same was done under the immediate influence of sudden passion, arising from an adequate cause, such as insulting words or conduct of the deceased toward female relations of defendant, you will find defendant guilty of manslaughter." Held, erroneous, because it in effect requires that the killing, in order to be reduced to manslaughter, must have immediately followed the insulting words in

order to be sudden, although the insulting words were uttered not in the presence or hearing of the defendant, and although the killing occurred at the first meeting of the parties after the defendant had been informed of the insulting words. *Orman v. State*, 22 App. 604, 3 S. W. 468.

When evidence showed brutal and insulting conduct toward the mother of defendant, court charged that defendant was not thereby authorized to seek the party so offending for the purpose of killing him and the killing would not for that reason be reduced to manslaughter. Held, error. *Halliburton v. State*, 32 App. 51, 22 S. W. 48.

Evidence held insufficient to justify a charge on an insult to a female relative. *Turner v. State*, 37 App. 451, 36 S. W. 87.

It was error to charge that, before defendant would be entitled to a reduction of his offense to manslaughter, the jury must believe both that he was led to commit the homicide from learning that decedent had insulted his wife, and also that the decedent had used violent language to and threatened him with bodily harm. *Barbee v. State*, 58 App. 129, 124 S. W. 961.

Charge held too restrictive. *Reinhardt v. State*, 60 App. 662, 133 S. W. 265.

The court should determine as a matter of law whether the remarks made were insulting, and, if so found, should charge that the use of the words constituted adequate cause. *Morrison v. State*, 61 App. 223, 135 S. W. 551.

Charge limiting the provocation or adequate cause held improper in view of the facts. *Kincaid v. State* (Cr. App.) 145 S. W. 597.

The court should not only define adequate cause, but should apply the law to the facts. *Rogers v. State* (Cr. App.) 149 S. W. 127.

The charge should apply the law to the fresh provocation, authorizing the jury to look to the preceding facts only in passing on the condition of defendant's mind. *Rogers v. State* (Cr. App.) 149 S. W. 127.

Where accused's theory was that he shot his wife, intending to shoot another, whom he discovered caressing her, such insult to her being a statutory adequate cause, accused was entitled to an affirmative charge that if the shooting occurred on account of this conduct of the person at whom he shot toward his wife, and the passion was thus engendered, he would be guilty of no greater offense than manslaughter, had death occurred, and, death not having resulted, his offense could not be greater than aggravated assault. *Hobbs v. State* (Cr. App.) 151 S. W. 809.

Wherever there is insulting conduct or words at the time of a difficulty and there had been prior insulting remarks which had been conveyed to the accused, and the killing had been upon the first meeting both causes should be included in the charge on provocation. *Walker v. State*, 70 App. 84, 156 S. W. 206.

Insulting words used by deceased concerning defendant's wife and lady companion, whom defendant was accompanying at the time, were not ground for an instruction on adequate cause, where the evidence as a whole and defendant's own testimony showed that the difficulty out of which the killing occurred was not caused by such language, even if used by deceased. *McGregor v. State*, 71 App. 604, 160 S. W. 711.

A charge held not to submit to the jury the question whether it would be adequate cause if defendant was informed and believed that insulting language was used to his wife by deceased, but to state that it would be; and to leave to the jury, as was proper, the questions whether he was so told and so believed, and whether this produced that condition of mind, defined, to reduce the offense to manslaughter. *Davis v. State* (Cr. App.) 163 S. W. 442.

Charge held not erroneous, as eliminating all acts and conduct of deceased at the time of the killing tending to show adequate cause. *Hicks v. State* (Cr. App.) 171 S. W. 755.

Art. 1134. [704] General character of female in issue.—In every case where the defense spoken of in the preceding article is relied on, it shall be competent to prove the general character of the female insulted, in order to ascertain the extent of the provocation. [Id., p. 173.]

Character of female.—Not special acts but only the general reputation of the female for chastity, as bearing upon the question of provocation is provable. *Wood v. State*, 31 App. 571, 21 S. W. 602; *Fox v. State*, 71 App. 318, 158 S. W. 1141. And see *Redman v. State* (Cr. App.) 149 S. W. 670; *Oliver v. State*, 70 App. 140, 159 S. W. 235; *Ballard v. State*, 71 App. 587, 160 S. W. 716; *Strickland v. State*, 71 App. 582, 161 S. W. 110.

Presumption of the chastity of a female obtains in the absence of proof of general bad reputation, and that language impeaching such chastity is such as would provoke the anger, rage and resentment on the part of the relative to reduce the killing of deceased to manslaughter. *Hammond v. State*, 28 App. 413, 13 S. W. 605.

For propriety of instructions on insult to relative and defendant's knowledge, see *Fuller v. State*, 50 App. 14, 95 S. W. 541.

It is not permissible to prove specific acts of adultery of the wife with deceased in a case where the defense was that deceased had raped the wife. *Jones v. State*, 51 App. 472, 101 S. W. 995, 996.

Art. 1135. [705] Discretion of jury in such cases.—The jury shall be at liberty to determine in every case whether, under all the circumstances, the insulting words or gestures were the real cause which provoked the killing. [Id.]

Construction and operation in general.—The question whether insulting words and conduct toward the wife of the defendant actually produced rage in defend-

ant's mind is for the jury. *Reagan v. State*, 70 App. 498, 157 S. W. 483; *Eanes v. State*, 10 App. 421; *Halliburton v. State*, 32 App. 51, 22 S. W. 48; *Fuller v. State*, 50 App. 14, 95 S. W. 541; *Rogers v. State* (Cr. App.) 149 S. W. 127; *Davis v. State*, 70 App. 37, 155 S. W. 546; *Burton v. State* (Cr. App.) 178 S. W. 334. And see *Willis v. State* (Cr. App.) 166 S. W. 1172.

An instruction that insulting words about and concerning a female relative, who is not present, would not necessarily be adequate cause, was held erroneous. The jury must be left the liberty of determining whether, under all the circumstances, the insulting words were the real cause which provoked the homicide. *Hudson v. State*, 6 App. 565, 32 Am. Rep. 593.

Where adequate cause and existing passion are shown as the moving cause for a homicide, the jury will not be authorized to find, as a matter of fact, otherwise than is indicated by the testimony. *Davis v. State*, 70 App. 37, 155 S. W. 546.

Art. 1136. [706] "Relation" includes whom.—Any female under the permanent or temporary protection of the accused, at the time of the killing, shall also be included within the meaning of the term "relation." [Id.]

Female relation.—Any female under permanent or temporary protection, at the time of the killing, is included in the term "relative" under this article. In both cases the insult must be given while the relationship exists, but in the last case the killing must occur while the statutory relationship exists, and not after it has been dissolved. *Ex parte Jones*, 31 App. 422, 20 S. W. 983. See, also, *Melton v. State*, 24 App. 47, 5 S. W. 652; *Parker v. State*, 24 App. 61, 5 S. W. 653; *Williams v. State*, 24 App. 637, 7 S. W. 333; *Massie v. State*, 30 App. 64, 16 S. W. 770.

A man's mistress living at his house is a female relative. *Gaines v. State* (Cr. App.) 148 S. W. 717. And so is a cousin of the wife present at the house in which the slayer lives. *Williams v. State* (Cr. App.) 144 S. W. 620.

It is not essential that the female be under the defendant's protection if a relative; it is only when the female is not a relative that she must be under his protection. A stepdaughter need not be under the defendant's protection in order that he may avail himself of the defense. *Clanton v. State*, 20 App. 615.

A promised wife is not a "female relative." *Carter v. State* (Cr. App.) 170 S. W. 739. But in *Lane v. State*, 29 App. 310, 15 S. W. 827, the court approves instructions given on the theory that insult to defendant's betrothed might constitute adequate cause.

Art. 1137. [707] "Adequate cause" must produce the passion.—In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary not only that adequate cause existed to produce the state of mind referred to in the third subdivision of article 1129, but also that such state of mind did actually exist at the time of the commission of the offense.

Cited, *Wilson v. State*, 71 App. 399, 160 S. W. 83; *Witty v. State* (Cr. App.) 171 S. W. 229; *Lamb v. State* (Cr. App.) 169 S. W. 1158.

Adequate cause and passion.—See notes to arts. 1128, 1131.

Manslaughter is predicated on adequate cause and unless that exists the homicide will not be reduced to manslaughter though committed under influence of sudden passion that rendered the mind incapable of cool reflection. *Clore v. State*, 26 App. 624, 10 S. W. 242; *Blackwell v. State*, 29 App. 194, 15 S. W. 597; *Neyland v. State*, 13 App. 536; *Hill v. State*, 11 App. 456.

The cause, to reduce a homicide from murder to manslaughter, must be one acting upon the mind of the slayer. *Wolfforth v. State*, 31 App. 387, 20 S. W. 741. And see, also, *Evers v. State*, 31 App. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811; *Ex parte Jones*, 31 App. 422, 20 S. W. 983.

Art. 1138. [708] Provoking contest with intent to kill, not manslaughter.—Though a homicide may take place under circumstances showing no deliberation, yet, if the person guilty thereof provoked a contest with the apparent intention of killing, or doing serious bodily injury to the deceased, the offense does not come within the definition of manslaughter.

Provoking contest.—If accused provoked the contest with the apparent intention of killing decedent, or doing him serious bodily injury, he is guilty of murder, though he may have killed him suddenly without deliberation and to protect his own life, though, if he provoked the contest without intent to kill, or inflict serious bodily injury and suddenly without deliberation killed decedent, the offense might be a lower grade than murder. *Keeton v. State*, 59 App. 316, 128 S. W. 404; *Jackson v. State*, 32 App. 192, 22 S. W. 831; *Polk v. State*, 30 App. 657, 18 S. W. 466; *Johnson v. State*, 26 App. 631, 10 S. W. 235; *Varnell v. State*, 26 App. 56, 9 S. W. 65; *Alexander v. State*, 25 App. 260, 7 S. W. 867, 8 Am. St. Rep. 438; *Gray v. State*, 55 App. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513; *Best v. State*, 58 App. 327, 125 S. W. 909. See, also, *Rogers v. State*, 71 App. 271, 159 S. W. 44.

Though a homicide may take place under circumstances showing no deliberation, yet, if the person guilty thereof provoked a contest with the apparent intention of killing, or doing serious bodily injury to the deceased, the offense does not come within the definition of manslaughter. But if he provoked the contest without any apparent intention of killing or doing serious bodily injury, and suddenly,

without deliberation, did the act of killing, while the homicide would not be justifiable, still it might be reduced to a lower grade than murder. *Green v. State*, 12 App. 445; *King v. State*, 13 App. 277; *Smith v. State*, 15 App. 338; *Cartwright v. State*, 14 App. 486; *Cunningham v. State*, 17 App. 89; *Jones v. State*, Id. 602; *Arto v. State*, 19 App. 126; *Thuston v. State*, 21 App. 245, 17 S. W. 474; *Roach v. State*, 21 App. 249, 17 S. W. 464; *Reed v. State*, 11 App. 509, 40 Am. Rep. 795. See, also, *Burris v. State*, 34 App. 387, 30 S. W. 785.

Although the circumstances show no deliberation, yet if defendant provoked the contest apparently for the purpose of killing, or doing serious bodily mischief, the offense is not manslaughter. *Hartless v. State*, 32 Tex. 88.

Provoking contest with intent to kill can not be manslaughter. *Melton v. State*, 24 App. 47, 5 S. W. 652; *Bonnard v. State*, 25 App. 173, 7 S. W. 862, 8 Am. St. Rep. 431; *Meuly v. State*, 26 App. 274, 9 S. W. 563, 8 Am. St. Rep. 477; *Rider v. State*, 26 App. 334, 9 S. W. 688; *Johnson v. State*, 26 App. 631, 10 S. W. 235; *Nalley v. State*, 28 App. 387, 13 S. W. 670; *Williams v. State*, 30 App. 429, 17 S. W. 1071; *Polk v. State*, 30 App. 657, 18 S. W. 466; *Muely v. State*, 31 App. 155, 18 S. W. 411, 19 S. W. 915.

When defendant provokes difficulty, but not with intent to kill, and deceased assaults defendant, and from latter's standpoint he is in danger of death or serious bodily injury and he slays, he is guilty of nothing higher than manslaughter. *Tollett v. State* (Cr. App.) 55 S. W. 575.

If one provokes a difficulty for the purpose of killing and does kill, he is guilty of murder even though in the difficulty deceased assaulted him. *Tollett v. State* (Cr. App.) 55 S. W. 575.

If one provokes a contest with the apparent intention of killing or doing serious bodily harm to his adversary, then in no event is he justified in killing his adversary, even to save his own life; and if he kills his adversary he is at least guilty of murder in second degree. But if he have no such intention, and suddenly, without deliberation, kills, while the act might not be justifiable, still it might be of a lower grade of homicide than murder. *Gray v. Phillips*, 54 Civ. App. 148, 117 S. W. 873.

Though accused used an insulting epithet to provoke a difficulty, if he intended to provoke only an ordinary fight, and was forced to kill under the circumstances, he was not guilty of a higher grade of homicide than manslaughter. *Reed v. State*, 72 App. 103, 161 S. W. 97.

Where defendant, after a difficulty with deceased, went back and made a remark calculated to provoke a renewal of the difficulty, but without any intent to kill, and where he was not justified in killing, he would be guilty of no higher offense than manslaughter. *Mason v. State*, 72 App. 501, 163 S. W. 66.

Evidence of advice given to accused before he entered on land in dispute is admissible to show that he had no intention of provoking a difficulty. *Hillis v. State* (Cr. App.) 166 S. W. 1154.

Charge.—Facts held not to warrant charge on provoking a difficulty. *Edwards v. State*, 60 App. 323, 131 S. W. 1078; *Keeton v. State*, 59 App. 316, 128 S. W. 404; *Johnson v. State* (Cr. App.) 149 S. W. 165.

Evidence held to call for a charge on provocation of difficulty. *Mason v. State*, 72 App. 501, 163 S. W. 66; *Gray v. State*, 61 App. 454, 135 S. W. 1179; *Lamb v. State* (Cr. App.) 169 S. W. 1158.

As to sufficiency of charge, see, also, *Gaines v. State*, 58 App. 631, 127 S. W. 181; *McGregor v. State*, 71 App. 604, 160 S. W. 711.

Under the facts, the court erred in failing to instruct the jury to the effect that if the defendant did not intend to provoke a difficulty with deceased, but sought him solely for the purpose of demanding payment of a money demand, and a difficulty ensued in which defendant, on account of abuse heaped upon him by deceased, voluntarily slew the deceased in the heat of passion engendered by the abuse, in connection with previous wrongs done him by the deceased, and the circumstances, altogether combined, were of such a character as to produce adequate cause sufficient to render the mind incapable of cool reflection, then the killing would be manslaughter. The court should have instructed the jury to the effect that if defendant sought an interview with the deceased with no hostile intention, and deceased became enraged and committed an assault upon defendant which did inflict pain or bloodshed, and under the passion thus engendered defendant shot and killed deceased, the pain or bloodshed would amount to "adequate cause," and the killing would be manslaughter. *Bonnard v. State*, 25 App. 178, 7 S. W. 862, 8 Am. St. Rep. 431.

It is not necessary in charge upon provoking difficulty for the court to tell the jury the facts upon which they can find appellant has provoked the difficulty. *Matthews v. State*, 42 App. 31, 58 S. W. 86, 90, citing cases on same question.

Evidence held not to call for a charge as to accused's right to arm himself. *Brown v. State* (Cr. App.) 144 S. W. 265.

Provoking contest as impairing self-defense.—See notes under art. 1107 ante.

Art. 1139. [709] Punishment.—Manslaughter is of various degrees of culpability, according to the circumstances under which it was committed. It shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [Id., p. 173.]

The original article fixed the punishment at not exceeding five years.

Indictment.—See Willson's Cr. Forms, §49.

Charge.—A charge that three years is the minimum is reversible error. *Williams v. State*, 25 App. 76, 7 S. W. 661.

CHAPTER SIXTEEN

OF MURDER

Art.	Art.
1140. "Murder" defined.	1143. Evidence of threats and deceased's character admissible, when.
1141. Punishment.	1144. [Repealed.]
1142. [Repealed.]	

Article 1140. [710] "Murder" defined.—Every person with sound memory and discretion who, with malice aforethought shall unlawfully kill any person within this State shall be guilty of murder. Murder is distinguishable from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide, or manslaughter, or which excuse or justify the homicide. [Act Feb. 12, 1858, p. 173; Act 1913, p. 238, ch. 116, § 1.]

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| 1. Explanatory. | 22. — Presumption and burden of proof. |
| 2. Offense defined. | 23. — Presumptions from means or instruments used. |
| 3. — Capacity to commit offense. | 24. — Admissibility of evidence as to malice and intent. |
| 4. — Malice as element. | 25. — Commission of act. |
| 5. — Degrees under former law. | 26. — Character of accused. |
| 6. — Abortion. | 27. — Physical condition of parties. |
| 7. — Accident or mistake. | 28. — Motive. |
| 8. — Poisoning. | 29. — Threats by defendant. |
| 9. — Principals, accomplices and accessories. | 30. — Circumstances preceding act. |
| 10. Indictment. | 31. — Identity of accused. |
| 11. — Charging principals; accomplices and accessories. | 32. — Means or instruments used. |
| 12. — Name of deceased. | 33. — Subsequent incriminating or exculpatory circumstances. |
| 13. — Proof. | 34. — Cause of death. |
| 14. Evidence—Criminal actions generally. | 35. — Incriminating others. |
| 15. — Calling eye-witnesses. | 36. — Sufficiency of evidence. |
| 16. — Corpus delicti. | 37. Charge. |
| 17. — Dying declarations. | 38. — Corpus delicti. |
| 18. — Insanity. | 39. — Intent and malice. |
| 19. — Justifiable homicide. | 40. — Degrees under former law. |
| 20. — Manslaughter. | |
| 21. — Threats by deceased and deceased's character. | |

1. **Explanatory.**—Act 1913, ch. 116, § 1 repeals articles 1140, 1141, 1142, 1144 Revised Penal Code, and inserts, in lieu thereof articles 1140 and 1141, to read as herein set out. Sec. 2 repeals all laws in conflict. Sec. 3, the emergency clause, recites: "The fact that the present law defining murder divides the same into two degrees, to-wit: first degree murder and second degree murder, and the fact that such definitions of murder or divisions of murder are creating complications in the trial of those charged with murder," etc.

Cited, *Essery v. State*, 72 App. 414, 163 S. W. 17.

2. **Offense defined.**—Offenders may be punished under indictments charging murder under the prior law which was not repealed by Act April 3, 1913. This act only abolished the degrees and changed the penalty. *Andrus v. State* (Cr. App.) 165 S. W. 189; *Shaw v. State*, 71 App. 630, 160 S. W. 103; *Henson v. State* (Cr. App.) 168 S. W. 89. And see *Ex parte Stephenson*, 71 App. 380, 160 S. W. 77; *Cook v. State*, 71 App. 532, 160 S. W. 465; *Ybarra v. State* (Cr. App.) 164 S. W. 10; *Echols v. State* (Cr. App.) 170 S. W. 786.

The court should charge the jury as to the definition of murder under the old law, but, as to the penalty, under the new law the offense having been committed before the change in the law. *Robbins v. State* (Cr. App.) 166 S. W. 528. See, also, *Herrera v. State* (Cr. App.) 170 S. W. 719.

The case is governed by the law in force at the time of the killing and the beginning of the trial. *Jones et al. v. State*, 72 App. 504, 163 S. W. 81. See, also, *Hill v. State*, 72 App. 109, 161 S. W. 118.

The matter of defendant's right to a charge of murder in the first and second degrees, under the law in effect when the crime was committed, is not jurisdictional, and, in the absence of proper objection, can not be raised for the first time in the reviewing court. *James v. State*, 72 App. 457, 163 S. W. 61.

Where accused was convicted of murder in the second degree, and before retrial after reversal the degrees of murder were abolished, he was still subject to conviction at least of murder in the second degree under the old law. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

3. — **Capacity to commit offense.**—As to insanity and intoxication, see arts. 39-41, ante, and notes.

"Sound mind and discretion" means ability to distinguish between right and wrong as to the particular act. *Witty v. State* (Cr. App.) 171 S. W. 229.

4. — **Malice as element.**—Malice aforethought includes all those states of the mind under which the killing of a person takes place without any cause which

will in law justify, excuse or extenuate the homicide. It is the doing of a wrongful act intentionally, without just cause or excuse. It is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken. *Vela v. State*, 33 App. 322, 26 S. W. 396; *Powell v. State*, 28 App. 393, 13 S. W. 599; *Gallaher v. State*, 28 App. 247, 12 S. W. 1037 (citing *McKinney's Case*, 8 App. 626, *Harris' Case*, Id. 90, and *Landers' Case*, 12 Tex. 481); *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Tooney v. State*, 5 App. 163; *Hayes v. State*, 14 App. 330; *Bramlette v. State*, 21 App. 611, 2 S. W. 765, 57 Am. Rep. 622; *Ellis v. State*, 30 App. 601, 18 S. W. 139; *Jackson v. State*, 31 App. 552, 21 S. W. 367; *Stevens v. State*, 42 App. 154, 59 S. W. 549; *Witty v. State* (Cr. App.) 171 S. W. 229. See, also, *Harrell v. State*, 39 App. 204, 45 S. W. 581 (following *Martinez v. State*, 30 App. 129, 16 S. W. 767, 28 Am. St. Rep. 895).

The distinguishing characteristic of murder is homicide with malice aforethought, express or implied. *Evans v. State*, 6 App. 513; *Pharr v. State*, 7 App. 472; *Babb v. State*, 12 App. 491; *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Ainsworth v. State*, 29 App. 599, 16 S. W. 652; *Smith v. State*, 31 App. 14, 19 S. W. 252; *Patterson v. State* (Cr. App.) 60 S. W. 561; *Witty v. State* (Cr. App.) 171 S. W. 229; *Brown v. State* (Cr. App.) 174 S. W. 360.

Express malice is where one with a sedate and deliberate mind and formed design unlawfully kills another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, concerted schemes to do the person slain some bodily harm, or any other circumstances showing such sedate and deliberate mind and formed design unlawfully to kill another, or to inflict serious bodily harm which might probably end in the death of the person upon whom the same was inflicted. *Martinez v. State*, 30 App. 129, 16 S. W. 767, 28 Am. St. Rep. 895; *Farrer v. State*, 42 Tex. 271; *Sharpe v. State*, 17 App. 486; *Lewis v. State*, 15 App. 647; *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Jordan v. State*, 10 Tex. 479; *Harrell v. State*, 41 App. 507, 55 S. W. 824; *Benson v. State*, 51 App. 367, 103 S. W. 911; *Plasters v. State*, 1 App. 673; *Holden v. State*, Id. 226; *Primus v. State*, 2 App. 369; *Halbert v. State*, 3 App. 657; *Jones v. State*, Id. 150; *Cox v. State*, 5 App. 493; *Tooney v. State*, Id. 163; *Gaitan v. State*, 11 App. 544; *Crook v. State*, 27 App. 198, 11 S. W. 444; *Frizzell v. State*, 30 App. 42, 16 S. W. 751; *Baltrip v. State*, 30 App. 545, 17 S. W. 1106. And see *Ex parte Jones*, 31 App. 422, 20 S. W. 983; *Harris v. State*, 40 App. 13, 48 S. W. 502.

It is not necessary that any length of time should intervene between the formation of the intent to kill and the killing. *Lawrence v. State*, 36 App. 173, 36 S. W. 90; *Duebbe v. State*, 1 App. 160; *Halbert v. State*, 3 App. 657; *Jordan v. State*, 10 Tex. 479; *Farrer v. State*, 42 Tex. 265; *Atkinson v. State*, 20 Tex. 522; *Snowberger v. State*, 58 App. 530, 126 S. W. 878.

Implied malice is that which the law infers from or imputes to certain acts. Thus, when the fact of an unlawful killing is established, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse, or justify the act, then the law implies malice. *Harris v. State*, 8 App. 90; *Douglass v. State*, Id. 520; *Hubby v. State*, Id. 597; *Neyland v. State*, 13 App. 536; *Reynolds v. State*, 14 App. 427; *Turner v. State*, 16 App. 378; *Stanley v. State*, Id. 392; *Hill v. State*, 11 App. 456; *Hart v. State*, 21 App. 163, 17 S. W. 421; *Smith v. State*, 19 App. 95; *Ellison v. State*, 12 App. 557; *Sharp v. State*, 6 App. 650, the latter decision modified in *Morgan v. State*, 16 App. 593, so as to expunge from the definition of implied malice the word "evident," used in the charge approved in that case. And see *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941; *Burns v. State* (Cr. App.) 145 S. W. 356.

A prisoner in legal custody commits murder in killing to effect escape. *Washington v. State*, 1 App. 647; *Wallace v. State*, 20 App. 360; *Ex parte Sherwood*, 29 App. 334, 15 S. W. 812.

The intent may be to do only serious bodily harm, yet if death ensue it is murder. *Summers v. State*, 5 App. 365, 32 Am. Rep. 573.

Where one, knowing he has violated the law and that he will be arrested, deliberately determines to make the issue one of life and death, and prepares himself and kills the party attempting to make the arrest, he is guilty of murder although the arrest is illegal. *Miller v. State*, 32 App. 319, 20 S. W. 1103. See, also, *Hill v. State*, 35 App. 371, 33 S. W. 1075.

Where parties engaged in robbing a train compel one to stand in place of danger and he is killed by those resisting the robbery, who do not intend to kill him, but intend to kill the robbers, the robbers are guilty of murder, and a charge to this effect is correct, but the court should also charge that if the persons engaged in the robbery did not compel deceased to stand in the place of danger, they are not guilty. *Taylor v. State*, 41 App. 564, 55 S. W. 965.

Motive is not essential. *Butler v. State*, 61 App. 133, 134 S. W. 230.

A voluntary and intentional killing may be manslaughter or murder, according to the attendant circumstances, and to elevate the offense from manslaughter to murder, or from aggravated assault to intent to murder, there must be malice express or implied. *Daniels v. State*, 71 App. 662, 160 S. W. 707.

"Malice aforethought" is the voluntary and intentional doing of an unlawful act by one of sound memory and discretion with the purpose, means, and ability to accomplish the reasonable and probable consequences of the act. *Witty v. State* (Cr. App.) 171 S. W. 229.

5. — Degrees under former law.—First degree on express malice. *Wilkins v. State*, 35 App. 525, 34 S. W. 627; *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Jones v. State*, 3 App. 150; *Murray v. State*, 1 App. 417; *Sherar v. State*, 30 App. 349, 17 S. W. 621; *Hall v. State*, 33 App. 191, 26 S. W. 72; *Benson v. State*, 51 App. 367, 103 S. W. 911; *Farrer v. State*, 42 Tex. 265; *Ake v. State*, 30 Tex. 466; *Atkinson v. State*, 20 Tex. 522; *Duebbe v. State*, 1 App. 159; *Ferrell v. State*, 43 Tex. 503; *Summers v. State*, 5 App. 365, 32 Am. Rep. 573; *Musick v. State*, 21 App.

69, 18 S. W. 95; Plasters v. State, 1 App. 673; Primus v. State, 2 App. 369; Halbert v. State, 3 App. 656; Cheek v. State, 4 App. 444; Tooney v. State, 5 App. 163; Sharpe v. State, 17 App. 486; Pharr v. State, 7 App. 472; Singleton v. State, 1 App. 501; Gonzales v. State, 19 App. 394; Giles v. State, 23 App. 281, 4 S. W. 886; Roach v. State, 8 App. 478; Reyes v. State, 10 App. 1; Isaacs v. State, 36 App. 505, 38 S. W. 40; Johnson v. State, 44 App. 332, 71 S. W. 25; Gay v. State, 40 App. 260, 49 S. W. 612; Washington v. State, 25 App. 387, 8 S. W. 642; Carter v. State, 28 App. 355, 13 S. W. 147; Mendez v. State, 29 App. 608, 16 S. W. 766; Williams v. State, 30 App. 354, 17 S. W. 408; Ex parte Jones, 31 App. 422, 20 S. W. 983; Reyons v. State, 32 App. 151, 22 S. W. 590; Chapman v. State, 34 App. 27, 28 S. W. 811; Lancaster v. State (Cr. App.) 31 S. W. 515; Harvey v. State, 35 App. 545, 34 S. W. 623 (following Conde v. State, 35 App. 98, 34 S. W. 286, 60 Am. St. Rep. 22); Mitchell v. State, 36 App. 378, 33 S. W. 367, 36 S. W. 456; Hardcastle v. State, 36 App. 555, 38 S. W. 186; Walker v. State (Cr. App.) 38 S. W. 788; Caton v. State (Cr. App.) 38 S. W. 192; Burt v. State, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; Little v. State, 39 App. 654, 47 S. W. 984; Speights v. State, 41 App. 323, 54 S. W. 595; Martin v. State, 42 App. 144, 58 S. W. 113; Rupe v. State, 42 App. 477, 61 S. W. 929; Chapman v. State, 43 App. 328, 65 S. W. 1098, 96 Am. St. Rep. 874; Thomas v. State, 57 App. 452, 125 S. W. 35; Milo v. State, 59 App. 196, 127 S. W. 1025; Wilson v. State, 60 App. 1, 129 S. W. 613; Ridge v. State, 61 App. 214, 134 S. W. 732; Alexander v. State, 63 App. 102, 138 S. W. 721; Bailey v. State (Cr. App.) 144 S. W. 996; Mitchell v. State (Cr. App.) 144 S. W. 1006; Foster v. State (Cr. App.) 150 S. W. 936; Cloud v. State (Cr. App.) 153 S. W. 892; Simmons v. State (Cr. App.) 155 S. W. 229; Parsons v. State, 70 App. 551, 157 S. W. 939; Christian v. State, 71 App. 566, 161 S. W. 101; Essery v. State, 72 App. 414, 163 S. W. 17; Brown v. State (Cr. App.) 169 S. W. 437; Witty v. State (Cr. App.) 171 S. W. 229.

Second degree on implied malice. McGrath v. State, 35 App. 413, 34 S. W. 127, 941; Atkinson v. State, 20 Tex. 522; Cotton v. State, 32 Tex. 614; Farrer v. State, 42 Tex. 265; McCoy v. State, 25 Tex. 33, 78 Am. Dec. 520; Thomas v. State, 53 App. 272, 109 S. W. 155, 126 Am. St. Rep. 786; Ferrell v. State, 43 Tex. 503; Jordan v. State, 10 Tex. 479; Hamby v. State, 36 Tex. 523; Murray v. State, 1 App. 417; Tooney v. State, 5 App. 163; Hill v. State, 11 App. 456; Neyland v. State, 13 App. 536; Taylor v. State, 3 App. 387; Baker v. State, 4 App. 223; Templeton v. State, 5 App. 398; Wallace v. State, 7 App. 570; McLaughlin v. State, 10 App. 340; Whitaker v. State, 12 App. 436; Moore v. State, 40 App. 444, 50 S. W. 942; Humphries v. State, 25 App. 126, 7 S. W. 663; Green v. State, 27 App. 244, 11 S. W. 114; Carter v. State, 28 App. 355, 13 S. W. 147; Baltrip v. State, 20 App. 545, 17 S. W. 1106; Blocker v. State, 27 App. 16, 10 S. W. 439; Caldwell v. State, 28 App. 566, 14 S. W. 122; White v. State, 30 App. 652, 18 S. W. 462; Aud v. State, 36 App. 76, 35 S. W. 671; Childs v. State, 35 App. 573, 34 S. W. 939; Scruggs v. State, 35 App. 622, 34 S. W. 951; Baldez v. State, 37 App. 413, 35 S. W. 664; Lancaster v. State, 36 App. 16, 35 S. W. 165; Briscoe v. State, 37 App. 464, 36 S. W. 281; Hardcastle v. State, 36 App. 555, 38 S. W. 186; Walker v. State (Cr. App.) 38 S. W. 788; Harrell v. State, 39 App. 204, 45 S. W. 581; Swann v. State, 39 App. 310, 46 S. W. 36; Fendrick v. State, 39 App. 147, 45 S. W. 589; Godwin v. State, 39 App. 404, 46 S. W. 226; Bennett v. State, 39 App. 639, 48 S. W. 61; Turner v. State (Cr. App.) 51 S. W. 366; Wheeler v. State, 56 App. 547, 121 S. W. 166; King v. State, 57 App. 363, 123 S. W. 135; Gossett v. State, 57 App. 43, 123 S. W. 428; Barnes v. State, 57 App. 449, 125 S. W. 39; Pollard v. State, 58 App. 239, 125 S. W. 390; Best v. State, 58 App. 327, 125 S. W. 909; Green v. State, 58 App. 428, 126 S. W. 860; Miller v. State, 58 App. 600, 126 S. W. 864; Snowberger v. State, 58 App. 530, 126 S. W. 878; Henderson v. State, 58 App. 579, 126 S. W. 1148; Wynne v. State, 59 App. 117, 127 S. W. 197; Wynne v. State, 59 App. 126, 127 S. W. 213; Ellison v. State, 59 App. 3, 127 S. W. 542; Pratt v. State, 59 App. 167, 127 S. W. 827; Bass v. State, 59 App. 186, 127 S. W. 1020; Dougherty v. State, 59 App. 464, 128 S. W. 398; Pratt v. State, 59 App. 635, 129 S. W. 364; Wilson v. State, 60 App. 1, 129 S. W. 613; Edwards v. State, 61 App. 307, 135 S. W. 540; Patton v. State, 62 App. 71, 136 S. W. 459; Powdrill v. State, 62 App. 442, 138 S. W. 114; Hickey v. State, 62 App. 568, 138 S. W. 1051; Anderson v. State, 63 App. 525, 140 S. W. 457; Jones v. State, 63 App. 394, 141 S. W. 953; McCline v. State, 64 App. 19, 141 S. W. 977; Ford v. State, 64 App. 14, 142 S. W. 6; Clay v. State (Cr. App.) 144 S. W. 280; Burns v. State (Cr. App.) 145 S. W. 356; Simmons v. State (Cr. App.) 146 S. W. 550; Crowell v. State (Cr. App.) 148 S. W. 570; Overcash v. State (Cr. App.) 148 S. W. 701; Rainer v. State (Cr. App.) 148 S. W. 735; Williams v. State (Cr. App.) 148 S. W. 763; Menefee v. State (Cr. App.) 149 S. W. 133; Johnson v. State (Cr. App.) 149 S. W. 165; Pinson v. State (Cr. App.) 151 S. W. 556; Crutchfield v. State (Cr. App.) 152 S. W. 1053; Cloud v. State (Cr. App.) 153 S. W. 892; Hendricks v. State (Cr. App.) 154 S. W. 1005; Davis v. State, 70 App. 37, 155 S. W. 546; Smith v. State, 70 App. 62, 156 S. W. 214; Roberts v. State, 70 App. 297, 156 S. W. 651; Reagan v. State, 70 App. 498, 157 S. W. 483; Brookins v. State, 71 App. 101, 158 S. W. 521; Thomas v. State, 71 App. 183, 159 S. W. 1183; Heidelberg v. State, 71 App. 393, 159 S. W. 1187; Whiten v. State, 71 App. 555, 160 S. W. 462; Smith v. State, 72 App. 127, 161 S. W. 477; Cooper v. State, 72 App. 250, 161 S. W. 1094; Wright v. State (Cr. App.) 163 S. W. 976; McGowen v. State (Cr. App.) 164 S. W. 999; Herrera v. State (Cr. App.) 170 S. W. 719; Witty v. State (Cr. App.) 171 S. W. 229; Hicks v. State (Cr. App.) 171 S. W. 755; Gusman v. State, 72 App. 258, 171 S. W. 770. See also, Caton v. State (Cr. App.) 38 S. W. 192.

A homicide committed in sudden passion, and without adequate cause, held murder of the second degree. Ex parte Jones, 31 App. 422, 20 S. W. 983; Puryear v. State, 56 App. 231, 118 S. W. 1042 (overruling Clark v. State, 51 App. 519, 102 S. W. 1136, and Kannmacher v. State, 51 App. 118, 101 S. W. 238). And see Hicks v. State (Cr. App.) 171 S. W. 755; Reyons v. State, 32 App. 151, 22 S. W. 590; English v. State, 34 App. 190, 30 S. W. 233; Baltrip v. State, 30 App. 545, 17 S. W. 1106; McGrath v. State, 35 App. 413, 34 S. W. 127, 941.

6. — Abortion.—See notes to art. 1074, ante.
7. — Accident or mistake.—See, ante, arts. 45, 46, 47, 48, 1111, and notes.
8. — Poisoning.—See arts. 1077-1079.
9. — Principals, accomplices and accessories.—See notes to arts. 74-91, ante.

10. **Indictment.**—Willson's Cr. Forms, 477, 510-516, 921, 923.
 Indictment sufficient if it alleges homicide with malice aforethought. Giebel v. State, 28 App. 151, 12 S. W. 591; Washington v. State, 25 App. 387, 8 S. W. 642; Johnson v. State, 29 App. 150, 15 S. W. 647; Mendez v. State, 29 App. 608, 16 S. W. 766; Williams v. State, 30 App. 354, 17 S. W. 408; Johnson v. State, 30 App. 419, 17 S. W. 1070, 28 Am. St. Rep. 930; Smith v. State, 31 App. 14, 19 S. W. 252; McElroy v. State, 14 App. 235; Tooney v. State, 5 App. 163; McCoy v. State, 25 Tex. 33, 78 Am. Dec. 520; Penland v. State, 19 App. 365; Bohannon v. State, 14 App. 271; Dwyer v. State, 12 App. 535; Peterson v. State, Id. 650; Longley v. State, 3 App. 611; Stapp v. State, 3 App. 138; Perry v. State, 44 Tex. 473; Henrie v. State, 41 Tex. 573; Wall v. State, 18 Tex. 682, 70 Am. Dec. 302; White v. State, 16 Tex. 206; Gehrke v. State, 13 Tex. 568; Banks v. State, 24 App. 559, 7 S. W. 327; Jackson v. State, 25 App. 314, 7 S. W. 872; Rather v. State, 25 App. 623, 9 S. W. 69; Douglass v. State, 26 App. 109, 9 S. W. 489, 8 Am. St. Rep. 459; Green v. State, 27 App. 244, 11 S. W. 114; Lucas v. State, 27 App. 322, 11 S. W. 443; Cudd v. State, 28 App. 124, 12 S. W. 1010; Hall v. State, 28 App. 146, 12 S. W. 739; Giebel v. State, 28 App. 151, 12 S. W. 591; Hunter v. State, 30 App. 314, 17 S. W. 414; Cravey v. State, 36 App. 90, 35 S. W. 658, 61 Am. St. Rep. 833; Hamlin v. State, 39 App. 579, 47 S. W. 656.

Indictments for murder held sufficient. Wade v. State, 23 App. 308, 4 S. W. 896; Smith v. State, 21 App. 277, 17 S. W. 471; De Olles v. State, 20 App. 145; Stephens v. State, Id. 255; Lucas v. State, 19 App. 79; Walker v. State, Id. 176; Penland v. State, Id. 365; Bean v. State, 17 App. 60; Sharpe v. State, Id. 486; Moore v. State, 15 App. 1; Bohannon v. State, 14 App. 271; Walker v. State, Id. 609; Dwyer v. State, 12 App. 535; Peterson v. State, Id. 650; Caldwell v. State, 28 App. 566, 14 S. W. 122; Giebel v. State, 28 App. 151, 12 S. W. 591; Williams v. State, 30 App. 354, 17 S. W. 408; Scott v. State, 31 App. 363, 20 S. W. 755; Oates v. State, 48 App. 131, 86 S. W. 770; Oates v. State, 51 App. 449, 103 S. W. 860; Jones v. State, 53 App. 131, 110 S. W. 742, 126 Am. St. Rep. 776.

It need not aver that the party slain was a "person of sound memory and discretion" or "a reasonable creature in being" or "a human being." Bean v. State, 17 App. 60; Ogden v. State, 15 App. 454; Bohannon v. State, 14 App. 271; Wade v. State, 23 App. 308, 4 S. W. 896; Perryman v. State, 36 Tex. 321; Zunago v. State, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

It is not necessary to allege an assault or to use the word "felonious" or "feloniously" in charging murder. It need not be alleged that the killing was "unlawfully" or "wilfully" done. Stephens v. State, 20 App. 255; Bean v. State, 17 App. 60; Thompson v. State, 36 Tex. 326; Jackson v. State, 25 App. 314, 7 S. W. 872.

Under the statute of 1848 it was held that the indictment must allege that the assault was made "feloniously and of malice aforethought," but that these words need not be repeated as to the stroke. Arthur v. State, 3 Tex. 403.

The common law form of indictment for murder is sufficient. Gehrke v. State, 13 Tex. 568; White v. State, 16 Tex. 206; Wall v. State, 18 Tex. 682, 70 Am. Dec. 302; Perry v. State, 44 Tex. 473.

Quære: Is it necessary under our Code, except in cases named in articles 1079 and 1146, to allege and prove that the death occurred in a year and a day from the time of the injury? See Edmondson v. State, 41 Tex. 498; Sutton v. State, Id., 515; Hardin v. State, 4 App. 370; Strickland v. State, 19 App. 518.

As to murder by poisoning, see Marshall v. State, 5 App. 273.

It may charge the murder of two or more persons in one count. Rucker v. State, 7 App. 549; Chivarrio v. State, 15 App. 330.

The indictment must set forth the means by which the life of the deceased was extinguished, or allege that the means used were unknown to the grand jury. Drye v. State, 14 App. 185; Walker v. State, Id. 609; Dwyer v. State, 12 App. 535; Peterson v. State, Id. 650; Sheppard v. State, 17 App. 74; State v. Williams, 36 Tex. 352.

An allegation that the defendant "did deprive him" (the deceased) "of life" was held to be a sufficient allegation of killing. Walker v. State, 14 App. 609.

It must allege that the defendant killed the deceased. Strickland v. State, 19 App. 518; Pierce v. State, 21 App. 669, 3 S. W. 111.

The indictment charged that "Mack Green, on or about the first day of May, 1888, in the county and state aforesaid, did, with malice aforethought, kill Sam Smith, by shooting him with a gun, contrary," etc. On motion in arrest of judgment the indictment is held a good indictment for murder, and sufficient to sustain a conviction in the first degree. Green v. State, 27 App. 244, 11 S. W. 114.

Every means of death suggested by the proof should be alleged in the indictment. Burt v. State, 38 App. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

An indictment, alleging that the instrument used by accused to commit the homicide was a piece of pipe, sufficiently charged the nature of the instrument with which the crime was committed. Beaver v. State, 63 App. 581, 142 S. W. 11.

An indictment for murder is also an indictment for each degree of homicide, and for assault. Gentry v. State (Cr. App.) 152 S. W. 635.

A count charging the killing of deceased by stabbing him "with some sharp instrument" is insufficient. Huddleston v. State, 70 App. 260, 156 S. W. 1168.

Where the indictment charged that deceased was killed with some sharp instrument to the grand jury unknown, it was not error for the district attorney to testify as to the efforts of the grand jury to ascertain the character of instrument used. Mason v. State (Cr. App.) 168 S. W. 115.

11. — **Charging principals, accomplices and accessories.**—See notes to art. 74 et seq.

12. — **Name of deceased.**—See C. C. P., art. 456.

13. — **Proof.**—On issues and proof under former law, see *Roach v. State*, 8 App. 478; *Reyes v. State*, 10 App. 1; *Sharp v. State*, 17 App. 486; *Mitchell v. State*, 1 App. 194; *Tooney v. State*, 5 App. 163; *Hedrick v. State*, 40 App. 536, 51 S. W. 252; *Fuller v. State*, 30 App. 559, 17 S. W. 1108; *Smith v. State*, 22 App. 316, 3 S. W. 684; *Breedlove v. State*, 26 App. 445, 9 S. W. 768; *Nalley v. State*, 28 App. 387, 13 S. W. 670; *Caldwell v. State*, 28 App. 566, 14 S. W. 122; *Jones v. State*, 29 App. 338, 15 S. W. 403; *Floyd v. State*, 29 App. 349, 16 S. W. 188.

The killing may be proved to have taken place at any time before the presentation of the indictment, either before or after the time charged in the indictment. *O'Connell v. State*, 18 Tex. 343.

Where the sex of the deceased is averred, which is unnecessary to do, such averment is descriptive of the offense, and must be proved. *Wallace v. State*, 10 App. 255.

Allegation that deceased was killed by a shot from a gun will admit proof of a shooting by any kind of fire-arm. This indictment alleged the kind of weapon to be unknown to the grand jury. The evidence admitted to prove the diligence of the grand jury to ascertain the fact was too broad, and should have been excluded. Allegation that deceased was killed by being shot devolved upon the state to prove that fact. *Monk v. State*, 27 App. 450, 11 S. W. 460. See, also, *Reno v. State*, 25 App. 102, 7 S. W. 532; *Levy v. State*, 28 App. 203, 12 S. W. 596, 19 Am. St. Rep. 826; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Frizzell v. State*, 30 App. 42, 16 S. W. 751; *White v. State*, 30 App. 652, 18 S. W. 462.

Proof that the means of death was unknown to the grand jury, as alleged in the indictment, need not be offered. *Harris v. State*, 37 App. 441, 36 S. W. 88.

Though an indictment charges the murder to have been committed on February 24, 1910, and the evidence shows it was committed on January 24th, relevant evidence of facts that occurred prior to the date charged were not for that reason inadmissible. *Ridge v. State*, 61 App. 214, 134 S. W. 732.

The testimony of the foreman of the grand jury that he heard the evidence read before the grand jury, and was unable to ascertain any manner in which the poison was administered, was inadmissible. *Orner v. State* (Cr. App.) 143 S. W. 935.

Under an indictment charging murder on or about March 30th, proof that the crime was committed on March 29th would present no variance. *James v. State*, 72 App. 457, 163 S. W. 61.

14. **Evidence—Criminal actions generally.**—See notes to C. C. P., art. 783 et seq.

15. — **Calling eye-witnesses.**—See notes to C. C. P., art. 717.

16. — **Corpus delicti.**—See notes to art. 1084, ante.

17. — **Dying declarations.**—See notes to C. C. P., art. 808.

18. — **Insanity.**—See notes to art. 40, ante.

19. — **Justifiable homicide.**—See notes to arts. 1087-1110, ante.

20. — **Manslaughter.**—See notes to art. 1128 et seq.

21. — **Threats by deceased and deceased's character.**—See notes to art. 1143, post.

22. — **Presumptions and burden of proof.**—As to presumption of innocence and reasonable doubt, see notes to art. 11, ante, and C. C. P. 785.

See, also, ante, arts. 51, 52 and notes. And see *Rider v. State*, 26 App. 334, 9 S. W. 688; *Taylor v. State*, 27 App. 44, 11 S. W. 35.

Express malice must be proved, and cannot be inferred. Its actual existence is manifested by external acts or circumstances which may transpire before, at the time of, or immediately after the killing. It is not required that its existence be demonstrated by the evidence with mathematical precision, but it is sufficiently proved if the evidence be sufficient to satisfy and convince the jury beyond a reasonable doubt that it did exist, and the fact of its existence may be established by circumstantial, as well as by direct, evidence. *Walker v. State*, 14 App. 609; *Gaitan v. State*, 11 App. 544; *Jackson v. State*, 9 App. 114; *Richarte v. State*, 5 App. 359; *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Gomez v. State*, 15 App. 327; *Holden v. State*, 1 App. 226; *Murray v. State*, Id. 418; *Jones v. State*, 3 App. 150; *Farrer v. State*, 42 Tex. 266; *Drake v. State*, 29 App. 265, 15 S. W. 725. See, also, *Logan v. State*, 39 App. 573, 47 S. W. 645; *Snowberger v. State*, 58 App. 530, 126 S. W. 878.

The homicide being proved, the presumption is that the offense is murder; but it may be extenuated to manslaughter by evidence showing an absence of malice. *Chandler v. State*, 2 Tex. 305; *Jordan v. State*, 10 Tex. 479; *Lander v. State*, 12 Tex. 462; *Brown v. State*, 4 App. 275.

Where fresh provocation intervened between the preconceived intention and the act resulting in death, it will not be presumed that the killing was upon the antecedent malice, in the absence of proof to that effect. *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Murray v. State*, 1 App. 417; *Primus v. State*, 2 App. 369.

The constituents of express malice to be established are: 1. The slayer must be sufficiently self-possessed to comprehend and contemplate the consequences of his acts, and such acts must not be the result of a sudden, rash, inconsiderate impulse or passion. 2. The design formed must be to kill the deceased, or do him serious bodily injury, which may end in death; but this specific malevolence toward the party slain may be embraced in such utter and reckless disregard of life as shows the slayer to be an enemy of all mankind, such as shooting into a crowd, resolving to kill the next man he meets, etc. If the formed design be not to kill or do serious bodily harm to the deceased, but to commit some other felony, the killing will not be on express malice. 3. Malice of all kinds, being a state of mind, must necessarily be inferred. Its actual existence is manifested by external acts,

and these external acts or circumstances may transpire before, at the time of, or subsequent to the killing. Even a sudden killing may be attended with such circumstances as to evidence the existence of actual or express malice, and such existence is always a question for the jury and must be proved by the state. *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Richarte v. State*, 5 App. 359; *Summers v. State*, Id. 365, 32 Am. Rep. 573.

Express malice may be shown by proof of the cool, calm, and circumspect deportment and bearing of the party when the act is done, and immediately preceding and subsequent thereto; his apparent freedom from passion or excitement; the absence of any obvious or known cause to disturb his mind or arouse his passions; the nature and character of the act done; the instrument used, as well as the manner in which the murder is committed; declarations indicating not only the state of the mind, but also the purpose and intent with which he acts, and the motives by which he is actuated; and all such other matters and things pertinent to the issue which may be suggested by the facts. *Farrer v. State*, 42 Tex. 265; *Gaitan v. State*, 11 App. 544; *Garza v. State*, Id. 345; *Singleton v. State*, 1 App. 501; *Plasters v. State*, Id. 673; *Campbell v. State*, 15 App. 506; *Miller v. State*, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836.

The existence of express malice is never presumed from the mere act of killing another with a deadly weapon, by its intentional and deliberate use against the person killed. There must be the other element of murder, to wit, a cool and sedate mind, and a killing in pursuance of a former design to kill, or to inflict some serious bodily injury which would probably result in death. *Summers v. State*, 5 App. 365, 32 Am. Rep. 573; *Murray v. State*, 1 App. 418; *Hamby v. State*, 36 Tex. 523; *Farrer v. State*, 42 Tex. 266.

Express malice may be evidenced by other external circumstances besides lying in wait, antecedent menaces, former grudges, and concocted schemes. Even in sudden difficulty, homicide may be committed under circumstances of such enormity, cruelty, or deliberate malignity, as will suffice to show that it was done with express malice. *Lewis v. State*, 15 App. 647; *Gaitan v. State*, 11 App. 544; *Ex parte Beacom*, 12 App. 318.

The evidence should not only show that at about the time alleged the accused shot a person, and that such person was dead, but it should also show the time of his death, and its cause. *Irving v. State* (Cr. App.) 150 S. W. 611.

Evidence that deceased had abused his children, and that when defendant re-nonstrated, deceased stated that they were his and he could do as he pleased, held inadmissible. *Francis v. State* (Cr. App.) 170 S. W. 779.

23. — Presumptions from means or instruments used.—See art. 51 ante, and art. 1147 post, and notes.

24. — Admissibility of evidence as to malice and intent.—Evidence of ill feeling between accused and deceased and accused's threats, is admissible on the question of malice and motive. *Coffman v. State* (Cr. App.) 165 S. W. 939; *Bryant v. State*, 35 App. 394, 33 S. W. 978, 36 S. W. 79; *Singleton v. State*, 57 App. 560, 124 S. W. 92; *Hunter v. State*, 59 App. 439, 129 S. W. 125; *Bradley v. State*, 60 App. 398, 132 S. W. 484; *Wheeler v. State*, 61 App. 527, 136 S. W. 68; *Leech v. State*, 63 App. 339, 139 S. W. 1147; *Lacy v. State*, 63 App. 189, 140 S. W. 461; *Fifer v. State*, 64 App. 203, 141 S. W. 989; *Johnson v. State* (Cr. App.) 149 S. W. 165; *Pettis v. State* (Cr. App.) 150 S. W. 790; *Rodriguez v. State* (Cr. App.) 150 S. W. 1167; *Brock v. State* (Cr. App.) 151 S. W. 801; *Coulter v. State*, 72 App. 602, 162 S. W. 885; *Gant v. State* (Cr. App.) 165 S. W. 142; *Reed v. State* (Cr. App.) 168 S. W. 541; *Sorrell v. State* (Cr. App.) 169 S. W. 299; *Harper v. State* (Cr. App.) 170 S. W. 721.

Evidence of the conduct and language of the defendant previous to the killing, and which show, or tend to show, the state of mind of the accused, is admissible. *Wright v. State*, 41 Tex. 246. See, also, *Pace v. State*, 58 App. 90, 124 S. W. 949; *Drake v. State* (Cr. App.) 143 S. W. 1157; *Williams v. State* (Cr. App.) 148 S. W. 763; *Kelly v. State* (Cr. App.) 151 S. W. 304; *Powdrill v. State* (Cr. App.) 155 S. W. 231; *Manning v. State* (Cr. App.) 164 S. W. 11.

Antecedent menaces, quarrels, and grudges may always be shown to prove malice. *Anderson v. State*, 15 App. 447; *McKinney v. State*, 8 App. 626; *Smith v. State*, 43 Tex. 643; *Howard v. State*, 25 App. 686, 8 S. W. 929; *Frizzell v. State*, 30 App. 42, 16 S. W. 751; *Fuller v. State*, 30 App. 559, 17 S. W. 1108; *White v. State*, 30 App. 652, 18 S. W. 462; *Flores v. State* (Cr. App.) 38 S. W. 790; *Menefee v. State* (Cr. App.) 149 S. W. 138; *Hill v. State*, 72 App. 109, 161 S. W. 118; *Paschal v. State* (Cr. App.) 174 S. W. 1057. And see *Brown v. State* (Cr. App.) 169 S. W. 437.

Acts and admissions, and the language of the accused before, at the time of, and even after the killing, may often be pertinent evidence to show express malice. *Duebbe v. State*, 1 App. 159; *Garza v. State*, 11 App. 345; *Crass v. State*, 31 App. 312, 20 S. W. 579; *Clampitt v. State*, 9 App. 27.

Declaration of deceased, not in the presence of defendant and without his knowledge as to his intentions, is not admissible as a predicate to show motive or animus of defendant at time of killing. *Woodward v. State*, 42 App. 188, 58 S. W. 144. See, also, *Coffman v. State*, 62 App. 88, 136 S. W. 779; *Roberts v. State* (Cr. App.) 150 S. W. 627.

Facts and circumstances originating with the person on trial may be proved where they shed light on the causes of the difficulty, or tend to show malice. *Williams v. State* (Cr. App.) 148 S. W. 763. See, also, *Burnam v. State* (Cr. App.) 148 S. W. 757; *Wright v. State* (Cr. App.) 163 S. W. 976.

Evidence of a former difficulty between the parties may be admissible in behalf of the defendant as explanatory of his acts, and is admissible for the state to show the animus of the homicide. *Marnoch v. State*, 7 App. 269.

Where the scienter or quo animo of the defendant is necessary to be proved, it is competent for the state to introduce testimony of his acts, conduct, or declarations, which tend to establish his knowledge or intent, though such acts, conduct,

or declarations may themselves constitute distinct crimes, and are apparently collateral and foreign to the main issue, and may have occurred either prior or subsequent to the act for which the accused is being tried. *McKinney v. State*, 8 App. 626.

That the deceased had witnessed an assault and battery committed by defendant, and had made complaint against him therefor, was held competent evidence to prove express malice. *Williams v. State*, 15 App. 104.

A fact, apparently irrelevant, may be made relevant and admissible by other facts with which it is connected by the proof. Thus, where the defendant was on trial for the murder of a policeman, the state was allowed to prove that a short time before the killing the defendant said: "He can't arrest me." It was held that this exclamation, isolated from other facts, would not have been legal evidence, but in view of other facts in proof, tending to show that the exclamation referred to the deceased, it was relevant and admissible. *Campbell v. State*, 15 App. 506.

Refusal to permit a defendant, on trial for the murder of his wife, to introduce evidence to prove her infidelity, and that recently before the homicide, he was informed of that fact, held, error. Any evidence showing that the defendant had reasonable cause to be excited, troubled in mind, or in any wise mentally distracted, and that would render it improbable that in perpetrating the homicide he acted with a cool, sedate, and deliberate mind, is admissible upon the issue of express malice. *Burkhard v. State*, 18 App. 599. See, also, *Greta v. State*, 10 App. 36.

On trial for murder of a policeman, it appeared that on the day previous to the homicide defendant was in the public streets unlawfully carrying a pistol and threatening to kill any d—d policeman who tried to arrest him; that the threats were communicated to deceased and another policeman, and in their efforts to arrest defendant without warrant, deceased was shot and killed by defendant. Held, that the evidence was relevant and was properly admitted. *Miller v. State*, 32 App. 319, 2 S. W. 1103.

"Lying in wait" is evidence of express malice, and one of the standard illustrations thereof. *Osborne v. State*, 23 App. 431, 5 S. W. 251.

Antecedent menaces, former grudges, and quarrels may be proved to show the state of mind and the malice of the accused at the time of the killing. Under this rule the state was properly permitted to prove former difficulties between the accused and the deceased, and the previous threats made by the accused against the deceased. *Howard v. State*, 25 App. 686, 8 S. W. 929.

The acts and conduct of the defendant after a previous difficulty with accused were, in this case, held admissible to show his animus toward deceased. *Everett v. State*, 30 App. 682, 18 S. W. 674.

Where there is evidence of an old grudge, but defendant's theory is fresh provocation, he should be allowed to prove the recent provocation if he can in order to lessen the degree. *Utzman v. State*, 32 App. 426, 24 S. W. 412; *Rodgers v. State*, 28 S. W. 685; *Stewart v. State*, 34 App. 214, 29 S. W. 1080; *Houston v. State*, 34 App. 587, 31 S. W. 403.

The state has a right to show that one who, in resisting arrest, killed an officer was a horse thief. *English v. State*, 34 App. 190, 30 S. W. 233.

When threats have been proven on the part of defendant towards deceased, defendant may prove that he proposed afterwards to drop the difficulty between them. *Gaines v. State*, 38 App. 202, 42 S. W. 385.

In a conversation about deceased a short time before the homicide, defendant remarked that if he gets after me with a knife, I will cut off his wind; held, admissible. *Self v. State*, 39 App. 455, 47 S. W. 26.

It is proper to admit a conversation of defendant in which he stated that he was afraid that he would have trouble with deceased. *Mott v. State* (Cr. App.) 51 S. W. 369.

Statement of defendant that he would stop the laying out of the road with his gun is admissible, although he did not go to the place of the killing for this purpose, yet it showed animus. *Furlow v. State*, 41 App. 12, 51 S. W. 939.

It is admissible, both as to defendant and deceased, to prove that statements had been made to each of a character making it prudent for him to go armed. In fine, any fact, hearsay or not, which goes to explain the condition of a person's mind, when such condition is at issue, is admissible. *Heffington v. State*, 41 App. 315, 54 S. W. 757.

While it is admissible to prove statement of defendant before the killing to show state of mind, yet the state of mind must in some manner be directed toward deceased, either by direct expression or so as to embrace deceased. *Fossett v. State*, 41 App. 400, 55 S. W. 498.

The conduct of defendant previous to homicide to show intent and animus of defendant at time of killing, his desire for peace and apprehension of danger should have been received. *Nelson v. State* (Cr. App.) 58 S. W. 107.

Evidence of what defendant said about deceased twelve or fifteen years prior to homicide is inadmissible, as it throws no light on anything in the trial, and it is not shown that what he said was communicated to deceased. *Woodward v. State*, 42 App. 188, 58 S. W. 142.

Efforts on part of defendant to settle peaceably his trouble with deceased can be shown, as this tends to show state of deceased's mind and also of defendant's, and throws light upon the question as to who was the aggressor in the fatal encounter. *Schauer v. State* (Cr. App.) 60 S. W. 251.

Evidence that defendant severely whipped deceased at times held properly admitted. *Betts v. State*, 57 App. 389, 124 S. W. 424.

Evidence that accused was a large man, and young and robust, and that decedent was an elderly man, and small, and blind in one eye, held admissible to indicate the animus and motive of accused. *Lundy v. State*, 59 App. 131, 127 S. W. 1032.

It was not error to exclude testimony that decedent made "certain statements" respecting accused a few days before the homicide, existence of ill feeling between the parties being undisputed. *Kemper v. State*, 63 App. 1, 138 S. W. 1025.

On circumstances showing premeditation, see *Kirby v. State* (Cr. App.) 150 S. W. 455.

That accused procured a bottle of muriatic acid and a shotgun before the homicide held admissible to show premeditation. *Asbeck v. State*, 70 App. 225, 156 S. W. 925.

A note sent by accused to the sheriff, which disclosed premeditation and a formed and fixed design to kill, held admissible. *Lee v. State*, 72 App. 237, 162 S. W. 843.

Where defendant killed his wife and another at the same time, evidence that on the same evening a witness heard defendant cursing his wife was admissible and pertinent, in a prosecution for the killing of the other. *Robbins v. State* (Cr. App.) 166 S. W. 528.

In a prosecution for murder, where the state did not dispute that accused went to deceased's store only to get his mail, and that an unpremeditated quarrel then arose between the deceased and accused, the exclusion of evidence that accused had stated he was going down to deceased's store to get his mail, offered to show that there was no premeditation, was proper. *Bolden v. State* (Cr. App.) 178 S. W. 533.

25. — Commission of act.—See notes to art. 1437, post.

When the inculpatory evidence is circumstantial in its nature, any fact, however unimportant in itself, which tends in the least degree to establish the guilt or innocence of the accused, is competent evidence. In such cases, therefore, incidents may be legitimate evidence which would be deemed irrelevant in a case dependent on direct and positive testimony. In such cases the mind seeks to explore all sources from which light, however feeble, may be derived, and in the investigation of such cases greater scope is allowed than when the evidence is direct and positive. *Preston v. State*, 8 App. 30; *Howard v. State*, Id. 53; *Bouldin v. State*, Id. 332; *Washington v. State*, Id. 377; *Simms v. State*, 10 App. 131; *Dubose v. State*, Id. 230; *Langford v. State*, 17 App. 445; *Ryan v. State*, 64 App. 628, 142 S. W. 878; *Archer v. State* (Cr. App.) 168 S. W. 857.

When the evidence fails to show that defendant belonged to a mob, or that the killing was done at the instigation of a mob, it is inadmissible to prove other killing by a mob. *Campbell v. State*, 35 App. 160, 32 S. W. 774.

It is competent to prove by a witness that he heard shots in the direction of the place and at the time that deceased was alleged to have been killed. *Harvey v. State*, 35 App. 545, 34 S. W. 623.

It is error to admit evidence on a murder trial that defendant offered to pay for testimony in another case. *Newton v. State*, 41 App. 610, 56 S. W. 64.

Evidence of the physical surroundings, near the scene of the killing, held admissible, as throwing light on the transaction. *Lundy v. State*, 59 App. 131, 127 S. W. 1032.

26. — Character of accused.—Conversation between deceased and another policeman as to defendant's dangerous character and the method of arrest when afterward in making arrest deceased was killed by defendant held admissible. *Miller v. State*, 32 App. 319, 20 S. W. 1103.

While it is competent to prove that defendant's mother had hired deceased, instead of her son, to attend to her business, it is not admissible to ask defendant if he had not spent his part of the estate and was drunken and worthless. *Williford v. State*, 36 App. 414, 37 S. W. 761.

Evidence that a witness carried a pistol because he had heard of a prior difficulty between accused and deceased, and was afraid of deceased, held outside the issues and inadmissible, and so was evidence as to the relative strength of deceased and a third person. *Echols v. State* (Cr. App.) 170 S. W. 786.

27. — Physical condition of parties.—Testimony of physicians as to having attended accused when he was suffering from a severe attack of pneumonia held inadmissible. *Joseph v. State*, 59 App. 82, 127 S. W. 171.

Evidence of the relative size of defendant and deceased and their respective ages is admissible; the evidence, as a whole, making this a material issue. *Sanchez v. State* (Cr. App.) 153 S. W. 1133.

28. — Motive.—The crime being proved and the circumstances pointing to the accused as the perpetrator, facts tending to show motive, though remote, are admissible. *Johnson v. State*, 28 App. 17, 11 S. W. 667; *Leeper v. State*, 29 App. 63, 14 S. W. 398; *Johnson v. State*, 29 App. 150, 15 S. W. 647; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Somerville v. State*, 6 App. 433; *Dill v. State*, 1 App. 278; *Lane v. State*, 59 App. 595, 129 S. W. 353; *Harrelson v. State*, 60 App. 534, 132 S. W. 783; *Leech v. State*, 63 App. 339, 139 S. W. 1147; *Millican v. State*, 63 App. 440, 140 S. W. 1136; *Mitchell v. State* (Cr. App.) 144 S. W. 1006; *Foster v. State* (Cr. App.) 150 S. W. 936; *Kelly v. State* (Cr. App.) 151 S. W. 304; *Asbeck v. State*, 70 App. 225, 156 S. W. 925; *Corbitt v. State*, 72 App. 396, 163 S. W. 436; *Coffman v. State* (Cr. App.) 165 S. W. 939.

On the question of motive, see, also, *Simmons v. State*, 31 App. 227, 20 S. W. 573; *Crass v. State*, 31 App. 312, 20 S. W. 579; *Gonzales v. State*, 31 App. 508, 21 S. W. 253; *Miller v. State*, 31 App. 609, 21 S. W. 925, 37 Am. St. Rep. 836; *House v. State* (Cr. App.) 171 S. W. 206. See, also, *Barbee v. State*, 58 App. 129, 124 S. W. 961; *Powdrill v. State*, 62 App. 442, 138 S. W. 114; *Spates v. State*, 62 App. 532, 138 S. W. 393; *Drake v. State* (Cr. App.) 143 S. W. 1157; *Bailey v. State* (Cr. App.) 144 S. W. 996; *Johnson v. State* (Cr. App.) 149 S. W. 165; *Holmes v. State* (Cr. App.) 150 S. W. 926; *DeLeon v. State* (Cr. App.) 155 S. W. 247; *Millner v. State*, 72 App. 45, 162 S. W. 348; *Francis v. State* (Cr. App.) 170 S. W. 779; *Guerrero v. State* (Cr. App.) 171 S. W. 731.

On intimacy with wife of deceased, see *Goode v. State*, 57 App. 220, 123 S. W. 597; *Pannell v. State*, 59 App. 333, 128 S. W. 133; *Millner v. State* (Cr. App.) 169 S. W. 899.

Antecedent menaces, threats, grudges, and recent difficulties between accused and decedent are admissible on the issue of motive. *Hill v. State* (Cr. App.) 168 S. W. 864; *Penton v. State* (Cr. App.) 149 S. W. 190; *Gant v. State* (Cr. App.) 165 S. W. 142.

Evidence that deceased on the morning before he was murdered had received money, was admissible as tending to prove a motive for his murder. *Cordova v. State*, 6 App. 207; *Milo v. State*, 59 App. 196, 127 S. W. 1025.

An indictment pending against accused at the time of the homicide, for an offense against the person of deceased or for theft of his property is competent evidence to prove motive. *Hudson v. State*, 28 App. 323, 13 S. W. 388; *Dubose v. State*, 13 App. 418; *Taylor v. State*, 14 App. 340.

It was held competent for the defendant to prove that the house of the deceased, where the homicide occurred, was a house of prostitution, for the purpose of explaining the intent and object of his presence there. *Villareal v. State*, 26 Tex. 107.

It is competent for the state to prove acts of the accused antecedent to the act of killing, which, either in themselves or in connection with other circumstances, tend to prove motive or preparation. *Hubby v. State*, 8 App. 597.

The declarations of the accused, made at the time the act is done, and expressive of its object and character, are regarded as verbal acts indicating a present purpose and intention, and are admissible in evidence to determine his motive. *Ward v. State*, 41 Tex. 612.

It was held permissible for the state to introduce in evidence an indictment charging defendant's brother with theft from the deceased. *Coward v. State*, 6 App. 60.

It was held admissible for the state to put in evidence an indictment against the defendant for an assault on one W., and also an indictment against said W. and the bail bond of said W. on which deceased was a surety. There was evidence of ill-will and threats of the defendant against the deceased because of his having become the surety of said W. on the bail bond. *Rucker v. State*, 7 App. 549.

It was held competent for the state to prove that the deceased had considerable money before his removal to Texas, where he was assassinated, though such testimony tended only remotely to prove a motive for his murder. *Early v. State*, 9 App. 476.

In a trial for murder, the wife of the deceased testified, over objection of the defendant, that a few minutes before the killing, the defendant made indecent proposals to her; but of this fact the deceased was not apprised, and there was no evidence indicating that such proposals influenced or explained the motives or acts of either the deceased or the defendant. Held, that such testimony was irrelevant and it was error to admit it. *Gardner v. State*, 11 App. 265.

It was held competent to prove that the defendant had served a term in the penitentiary for burglarizing the house of deceased. *Powell v. State*, 13 App. 244.

An affidavit made by the deceased a short time before the killing, and which was pending at the time of the killing, charging the defendant with an offense, was held admissible evidence to prove motive. *Robinson v. State*, 16 App. 347.

The defendant was a watchman at a railroad freight depot, and in the nighttime fired upon and wounded two men passing near the depot. Held, that as tending to throw light upon the question of motive in shooting, and as having a tendency to mitigate if not to justify, the conduct of the defendant in shooting, he was entitled to prove that there had been a great deal of car breaking and stealing from the cars at the depot where he was on duty as guard. *Hobbs v. State*, 16 App. 517.

Where there was evidence of a conspiracy between the defendant and two other parties to kill the deceased, it was held that the state was entitled to prove on the separate trial of the defendant, ill-feeling existing prior to the homicide between said two other parties and the deceased, as tending to show motive for the commission of the murder. *Thompson v. State*, 19 App. 593.

Where a defendant is charged with the murder of his wife, the state may prove her infidelity to him, and his knowledge of such infidelity to show a motive for the murder. *Phillips v. State*, 22 App. 139, 2 S. W. 601.

In the trial of a husband for the murder of his wife, it is not competent for the state to prove acts of infidelity on the part of the wife, unless it is also proved that the husband, at the time of the homicide, had knowledge of such acts. *Phillips v. State*, 22 App. 139, 2 S. W. 601. See the same case for other testimony held to be irrelevant.

An indictment against the defendant for an offense different from that for which he is on trial, may be introduced in evidence against him, if such indictment, in any degree, tends to show a motive on the part of the defendant to commit the offense for which he is on trial. This is so, even where such indictment was presented subsequent to the murder for which the defendant is on trial, where such indictment is connected by other testimony with transactions which occurred before the murder, and which tend to show a motive on the part of the defendant to commit the murder. *Kunde v. State*, 22 App. 65, 3 S. W. 325.

The State was permitted, over objection by defendant, to prove that defendant had said, prior to the homicide, that he would kill "any man who fooled with Mandy Smith." This was admissible, it being shown that defendant and deceased were rival suitors of Miss Smith. *Mathis v. State*, 34 App. 39, 28 S. W. 817.

That deceased knew that defendant's brother-in-law had stolen cattle and proposed to testify against him is admissible. *Easterwood v. State*, 34 App. 400, 31 S. W. 294.

Evidence that deceased had money is inadmissible in the absence of evidence showing that defendant had knowledge of that fact. *Lancaster v. State* (Cr. App.) 31 S. W. 515.

Evidence that defendant had money after the murder is admissible, but defendant should be allowed to prove in rebuttal that deceased was impecunious. *Lancaster v. State* (Cr. App.) 31 S. W. 515.

Deceased being a Mexican, it is proper to prove that defendant had been attending meetings the object of which was to get rid of Mexicans in that community. *Chalk v. State*, 35 App. 116, 32 S. W. 534.

When the testimony shows that deceased had money at the time of the killing, evidence of his poverty previous to the time is inadmissible in rebuttal. *Lancaster v. State*, 36 App. 16, 35 S. W. 165.

A certified copy of the will of deceased, leaving all her estate to the defendant, her husband, is admissible to show motive. *Golin v. State*, 37 App. 90, 38 S. W. 794.

See a case where it was held improper to allow the State to prove that defendant's witness was the beneficiary in deceased's life insurance policy. *Barry v. State*, 37 App. 302, 39 S. W. 692.

On trial for murder committed in the perpetration of burglary, proof that a burglary was committed in a certain way, and defendant was identified therewith, does not authorize the proof of another burglary committed in the same way, but with which defendant is in no way identified. *Williams v. State*, 38 App. 128, 41 S. W. 645.

It is always admissible to show motive by proving threats against deceased, and it is not necessary that his name be mentioned if it can be shown that the threats had reference to him. *Godwin v. State*, 38 App. 466, 43 S. W. 336.

When deceased was a witness against defendant in a theft case, it is admissible to prove what deceased stated in reference to defendant's connection with the theft case to prove motive, if defendant knew what deceased's testimony would be, but not otherwise. *Attaway v. State*, 41 App. 395, 55 S. W. 45.

It is admissible to show what the defendant said and did just before the homicide, of a criminative nature, to show motive. *Howard v. State* (Cr. App.) 57 S. W. 948.

It is error to admit evidence that subsequent to the killing accused and his wife's sister, who lived with him and his family, had been indicted for adultery, on the theory that accused killed deceased while the latter was approaching accused's house because of jealousy; there being no evidence that deceased knew the sister-in-law, or to show for what purpose he was approaching the house. *Newman v. State*, 58 App. 443, 126 S. W. 578, 21 Ann. Cas. 718.

The sister of the accused testified that a few days before the homicide she told the accused that the decedent was the cause of her removal from one school to another, denied on cross-examination that the school superintendent told her, prior thereto, that decedent had nothing to do with her removal. Held that it was competent to contradict her with the testimony of the superintendent. And note other contradicting testimony, held properly admitted. *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244.

Testimony by decedent's wife that she and her husband were living on accused's place, when the killing occurred, and that accused and her husband were in partnership, was admissible. *Spencer v. State*, 59 App. 217, 128 S. W. 118.

Where defendant killed deceased because of animosity growing out of defendant's marriage to deceased's daughter, evidence that deceased had been guilty of incest with his daughter, and that that was the cause of the separation between deceased and his wife, was irrelevant. *Jennings v. State*, 60 App. 421, 132 S. W. 473.

Evidence that decedent had charged accused with larceny was admissible to show motive and resentment of accused. *Harrelson v. State*, 60 App. 534, 132 S. W. 783.

On criminal intimacy between defendant and deceased's sister, see *Baum v. State*, 60 App. 638, 133 S. W. 271.

Evidence that deceased had considerable money the evening before he was killed, and that there was only 15 cents on his body when found the next morning, was admissible. *Spates v. State*, 62 App. 532, 138 S. W. 393.

Where policies on deceased's life were in part payable to accused, evidence that on the day of the homicide she was inquiring concerning the policies was admissible. *Streight v. State*, 62 App. 453, 138 S. W. 742.

Where accused tendered the issue of his right to defend his possession, when he killed an officer attempting to execute a writ of sequestration, the state could show that accused had been enjoined from entering on the land, and that he had signed an agreement not to go on the land, as bearing on his motive. *Fifer v. State*, 64 App. 203, 141 S. W. 989.

In a prosecution for homicide, deceased's wife was permitted to testify over objection that she had told her sister-in-law, in the absence of accused, that her husband was going to prosecute accused for cattle stealing. There was no evidence that this statement was communicated to accused, and, although counsel for accused had examined the witness about a part of this conversation, the statement objected to was not germane to those called out by accused's counsel. Held, that the admission of this evidence was reversible error. *Maclin v. State* (Cr. App.) 144 S. W. 951.

Where the state's theory was that accused poisoned deceased in an attempt to poison his wife, on whose life accused held a policy of insurance, evidence showing that accused had collected insurance money for a personal injury and also on a horse that had died was admissible, if tending to show accused's mania for insurance money. *Bailey v. State* (Cr. App.) 144 S. W. 996.

Where the trouble arose over deceased's appointment as guardian of infants living with accused, the letters of guardianship, showed to accused just before the

killing, and the order of appointment were competent to show motive. *Welch v. State* (Cr. App.) 147 S. W. 572.

On resisting arrest, see *Vines v. State* (Cr. App.) 148 S. W. 727.

Evidence of the action of deceased in making affidavit charging accused with a violation of an injunction in an effort to have him punished therefor was admissible. *Powdrill v. State* (Cr. App.) 155 S. W. 231.

Evidence of deceased's general reputation for virtue and chastity is inadmissible for any purpose. *Hall v. State*, 70 App. 590, 158 S. W. 272.

Where, at the time of a homicide, defendant was unaware of the issuance of a marriage license authorizing the marriage of deceased and defendant's divorced wife, evidence of the issuance of the license was not admissible against defendant as showing motive. *Kirklin v. State* (Cr. App.) 164 S. W. 1016.

That deceased husband had had illicit intercourse and had visited houses of ill fame held inadmissible. *Millner v. State* (Cr. App.) 169 S. W. 899.

The killing of the husband of a woman with whom the slayer has had illicit intercourse is not justified by the fact that the deceased had had illicit intercourse with another woman, and evidence of that fact is inadmissible. *Millner v. State* (Cr. App.) 169 S. W. 899.

Evidence that after the killing accused was freely spending money held admissible, where it appeared that deceased had money. *McCue v. State* (Cr. App.) 170 S. W. 280.

On a trial for homicide, while resisting arrest after commission of a burglary, evidence of the details of the burglary, committed in the presence of decedent and a third person, was admissible. *Stewart v. State* (Cr. App.) 174 S. W. 1077.

29. — **Threats by defendant.**—Evidence of indefinite and indirect threats is inadmissible. *Duke v. State*, 61 App. 19, 133 S. W. 432; *Maclin v. State* (Cr. App.) 144 S. W. 951; *Rogers v. State* (Cr. App.) 149 S. W. 127; *Wade v. State* (Cr. App.) 172 S. W. 215.

A threat of general malignity embracing all persons is admissible. *Hiles v. State* (Cr. App.) 163 S. W. 717. See, also, *Mathis v. State*, 34 App. 39, 28 S. W. 817.

It is admissible to prove that defendant some time before the transaction used words tending to show that he was going to do a thing similar to that which he did, although he did not in any manner refer to what he afterwards did. *Hedrick v. State*, 40 App. 535, 51 S. W. 252.

Witness testified that about a week before the homicide occurred he said to defendant, "I heard that fellow (meaning deceased) ballooning at you." Defendant replied, "Yes, I'll fix him." Held, relevant and admissible. *White v. State*, 32 App. 625, 25 S. W. 784.

It appeared that accused and deceased had an altercation. Accused went off to get a larger pistol and on returning he called to accused, "Now I am ready for you," held, this did not constitute an accidental meeting, but was an invitation by defendant for a renewal of the difficulty. *Mathis v. State*, 34 App. 39, 28 S. W. 817.

Threats made by defendant are admissible. *Bryant v. State*, 35 App. 394, 33 S. W. 978, 36 S. W. 79.

Abstract declarations made by defendant shortly before the homicide, such as "I'm going to wind it up," "I've had enough of it," are not admissible unless it be shown in some way that such remarks had reference to the killing. *Gaines v. State*, 38 App. 202, 42 S. W. 385.

That defendant at one time said he was going to kill somebody, and at another time said he was going to kill his wife and her protector, are inadmissible unless it be shown in some way that such expressions had reference to deceased. *Strange v. State*, 38 App. 280, 42 S. W. 551.

So much of a conversation between witness and defendant as showed threats of defendant against a syndicate for whom deceased was manager, and that the cause for the threats was the sending of a telegram by deceased, was admissible. *Williams v. State*, 61 App. 356, 136 S. W. 771.

A statement by defendant that "he would kill anybody who killed his hogs" was admissible, where, taken in connection with the remaining testimony, it clearly points to deceased. *Pace v. State* (Cr. App.) 153 S. W. 132.

Where there was evidence that accused was mad at deceased and called him vile names, testimony as to a threat by accused clearly shown to refer to deceased was properly admitted. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

A remark by accused that he would use his pistol held inadmissible, in the absence of evidence that he referred to deceased. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

A threat made by defendant to kill is admissible, though deceased's name was not mentioned at the time, if it can be reasonably gathered from the evidence that deceased was then meant. *Howe v. State* (Cr. App.) 177 S. W. 497.

In a prosecution for murder, evidence that accused made love to deceased's fiancée and said that he would kill her lover, and that he asked another whether the two were going to be married and made a bet that they would not, is admissible to show motive, malice, intent, and threats. *Stacy v. State* (Cr. App.) 177 S. W. 114.

30. — **Circumstances preceding act.**—Acts, statements, and declarations of the deceased which tend to prove a peaceable motive, or friendly animus toward the defendant, but which have not been communicated to him, are inadmissible as evidence because they could in no manner have influenced his action and should not be used to establish or aggravate his crime. *Brumley v. State*, 21 App. 222, 17 S. W. 140, 57 Am. Rep. 612; *Johnson v. State*, 22 App. 206, 2 S. W. 609; *Ball v. State*, 29 App. 107, 14 S. W. 1012; *Fuller v. State*, 30 App. 559, 17 S. W. 1108; *Neison v. State* (Cr. App.) 58 S. W. 108; *Hunter v. State*, 59 App. 439, 129 S. W. 125. But see *Craig v. State*, 30 App. 619, 18 S. W. 297.

In a prosecution for murder, evidence showing the facts previous to and leading up to the killing is admissible. *Barnett v. State* (Cr. App.) 176 S. W. 580.

When defendant is charged with murder of his wife, his ill treatment of her previous to the killing is admissible. *Spears v. State*, 41 App. 527, 56 S. W. 348; *Stanton v. State*, 70 App. 519, 158 S. W. 994; *Cooper v. State*, 72 App. 250, 161 S. W. 1094.

See *Allison v. State*, 14 App. 402, for evidence held to be irrelevant in a murder case, the murder growing out of a feud, having its origin in a controversy about a schoolhouse.

The defense proposed, but was not permitted, to prove that a short time prior to the shooting the deceased was known to be making efforts to trade for a pistol. This proof, in view of the evidence, was competent as tending to explain why it was that defendant and deceased were together at the place of the shooting; why the defendant invited the deceased to that place, and why defendant had a pistol on that occasion; and, moreover, it tended strongly to throw light on the whole transaction. *Irby v. State*, 25 App. 203, 7 S. W. 705.

The state was allowed to prove that a few minutes before the homicide deceased left a crowd of young ladies remarking that he was going to his store, that he went to the store, lighted a lamp, and remained there a few minutes and then started to return to the plaza. Defendant and his codefendant were seen to change positions on the opposite side of the street and when deceased had gone about fifty yards from his store, the fatal shot was fired. Held, that the evidence was admissible. *Rodriguez v. State*, 32 App. 259, 22 S. W. 978.

Evidence that defendant assaulted deceased about a year before the killing, is too remote when the evidence shows that defendant had been gone from the country and had not been seen in the country for several months. *Wilkins v. State*, 35 App. 525, 34 S. W. 627.

It is not error to exclude a statement made by deceased that he had struck defendant with a walking stick, and that defendant would remember him by the mark he left. *Bishop v. State* (Cr. App.) 35 S. W. 170.

Statements made by defendant's son before the homicide was committed, not connected with the killing, are inadmissible. *Wilson v. State*, 37 App. 64, 38 S. W. 610.

That defendant fired a pistol on the night before the homicide, held admissible to show that defendant had a pistol. *Brittain v. State*, 36 App. 406, 37 S. W. 758; *Id.* (Cr. App.) 40 S. W. 297.

In a case of murder which grew out of a difficulty between two factions, it was competent to prove that a member of one faction went and challenged a member of the other faction to come up to the place where the killing was afterwards committed. *Mitchell v. State*, 38 App. 170, 41 S. W. 816.

Prior acts of the deceased connected with the killing are admissible in explanation of the killing. *Heffington v. State*, 41 App. 315, 54 S. W. 758.

Former acts and conduct may be shown to shed light on what occurred at time of homicide. *Spangler v. State*, 41 App. 424, 55 S. W. 330.

It is inadmissible to prove that defendant carried a pistol at home of deceased's mother some time before the killing, it not being shown that deceased was near the place at the time. *Woodward v. State*, 42 App. 188, 58 S. W. 142.

Evidence that deceased remarked that he would separate "that other man and his wife," held not objectionable as not sufficiently referring to accused. *Jennings v. State*, 60 App. 421, 132 S. W. 473.

Testimony is admissible that accused bought a knife about a week before the homicide; the knife being identified as that used. *Bradley v. State*, 60 App. 398, 132 S. W. 484.

The rule that actions and declarations of the decedent are not admissible against the accused, who was not present and had no notice of them, applies only to cases involving self-defense, where the accused has a right to act upon movements apparently hostile towards him, and does not exclude testimony as to the actions, movements, and declarations of decedent on the day of the homicide, which are merely explanatory of his presence at the place where he was killed. *Bozanno v. State*, 60 App. 507, 132 S. W. 777.

Evidence that decedent was called out just before being shot held inadmissible in the absence of a showing accused was instrumental in the calling. *Clements v. State*, 61 App. 161, 134 S. W. 728.

Where evidence of previous threats by accused against deceased was introduced, evidence of the fact of a prior altercation between them, in which defendant out deceased, without the details thereof, was admissible. *Powdrill v. State*, 62 App. 442, 138 S. W. 114.

Where the trouble originated over the efforts of accused's father to have decedent put out of a house rented by him, evidence was not admissible that decedent did not pay part of the rent to accused's father resulting in some ill feeling between them. *Jackson v. State*, 63 App. 351, 139 S. W. 1156.

Evidence that accused, on trial for murder by poison, was, prior to the homicide, in a saloon drinking with a third person, and was assisted home in a drunken condition, was inadmissible. *Orner v. State* (Cr. App.) 143 S. W. 935.

Evidence of divorce proceedings between accused and his wife, and accompanying circumstances, held inadmissible. *Drake v. State* (Cr. App.) 143 S. W. 1157.

State held properly permitted to show that, before the killing, accused procured a pistol from a third person, who first refused to give it to him, stating in accused's presence that she would not let him have it because he was "mad." *Wysong v. State* (Cr. App.) 146 S. W. 941.

A witness having testified that he and decedent were friendly, it was not error to exclude testimony whether he and decedent did not "drink together"; it not being claimed that decedent drank the day he was killed. *Kirby v. State* (Cr. App.) 150 S. W. 455.

The acts and conduct of both parties when deceased was in sight of accused are admissible. *Roberts v. State* (Cr. App.) 150 S. W. 627.

That witness had seen decedent intoxicated some time during the preceding summer, held not admissible. *Ward v. State*, 70 App. 393, 159 S. W. 272.

Evidence by decedent's daughter that her father was shot at by an unknown person in February preceding the homicide in question in June, offered to show why decedent had purchased a gun, was not admissible for that purpose, in absence of a showing that accused knew that decedent had been shot at in February and was carrying a gun for that reason. *Cook v. State*, 71 App. 532, 160 S. W. 465.

Where accused killed deceased shortly after his father had had a quarrel with him, evidence of that difficulty and what was said by both parties is admissible; it appearing that it took place only a very short time before the fatal affray. *Coulter v. State*, 72 App. 602, 162 S. W. 885.

The state can show, by either direct or circumstantial evidence, that the defendant had heard, prior to time of the killing, statements made by his wife which were offered in evidence against him. *Robbins v. State* (Cr. App.) 166 S. W. 528.

A conversation between the parties just prior to the killing was admissible. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

Evidence that some time prior thereto and subsequent to a difficulty between deceased and defendant's brothers a witness saw defendant with a gun near a fence dividing deceased's field from that of defendant's father held inadmissible. *Sorrell v. State* (Cr. App.) 169 S. W. 299.

As to declarations by deceased, see, also, *Brown v. State* (Cr. App.) 169 S. W. 437.

In a prosecution for murder, where the state was permitted to prove that after trouble between defendant and deceased on the day before the killing defendant went to town, and there purchased shotgun shells loaded with buckshot, as tending to show premeditation, it was error to exclude evidence that before purchasing the shells defendant went to a justice of the peace and tried to have deceased put under a peace bond, which the justice refused to do. *Sunday v. State* (Cr. App.) 177 S. W. 97.

In a prosecution for murder, where the state claimed that defendant and his brother, who was jointly indicted with him, had waylaid deceased, while they claimed self-defense, and there was evidence that defendant's brother had been told that deceased and another had threatened to kill him if he did not move off from the place of deceased's father-in-law, it was error to exclude evidence that just before the killing defendant's brother had employed witness to move him off from the place, as a circumstance tending to show an effort by defendant to avoid trouble. *Sunday v. State* (Cr. App.) 177 S. W. 97.

Where there was evidence that on a day preceding that of the killing defendant was going from store to store with part of a luggy shaft about two feet long looking for deceased, it was error to admit evidence that deceased sought advice as to what he should do, and followed it by going to his home, where it was not shown that defendant knew that deceased was trying to evade him. *Hammons v. State* (Cr. App.) 177 S. W. 493.

31. — Identity of accused.—It is erroneous to permit witness to state that he examined other persons than the defendant arrested on suspicion and failed to identify them and they were turned loose. *Moore v. State*, 40 App. 443, 50 S. W. 942.

A witness may be allowed to testify that he believes he recognizes defendant as the man to whom he had loaned a pistol a short time before the killing occurred. *Tate v. State*, 35 App. 231, 33 S. W. 121.

A witness testified that in his judgment and belief defendant was the same person that came to his house to borrow a pistol; held, admissible; the fact that he was not certain, would go only to the weight of the testimony. *Tate v. State*, 35 App. 231, 33 S. W. 121.

Evidence that defendant threw away a pistol which was identified as the one he had taken from an officer, held admissible on the question of defendant's identity. *Vines v. State* (Cr. App.) 148 S. W. 727.

See, also, *Bailey v. State* (Cr. App.) 144 S. W. 996.

32. — Means or instruments used.—Witness may be permitted to state that if deceased had a weapon he did not see it and that he was in position to have seen it. *Tate v. State*, 35 App. 231, 33 S. W. 121; *McGrath v. State*, 35 App. 413, 34 S. W. 127, 941.

It is not error to permit the exhibition of the rock with which the killing was committed, though the testimony as to identification is slight. *McBrayer v. State* (Cr. App.) 34 S. W. 114.

The fact that defendant's accomplice assisted in finding the instrument with which the murder was committed does not render it inadmissible. *Batson v. State*, 36 App. 606, 38 S. W. 48.

Where the evidence showed that accused had whipped the deceased child with a waistbelt, evidence of the character, weight, length, and size of the belt was admissible. *Betts v. State*, 60 App. 631, 133 S. W. 251.

Where it was the theory of the state that accused killed his child with a hairbrush, the testimony of the sheriff that he found the hairbrush in a broken condition, and that it appeared to be freshly broken, was admissible. *Betts v. State*, 60 App. 631, 133 S. W. 251.

Evidence with reference to a knife held admissible. *Ward v. State*, 70 App. 393, 159 S. W. 272.

Evidence that accused's pistol would go off by just touching the trigger, held properly excluded. *Truett v. State* (Cr. App.) 168 S. W. 523.

33. — **Subsequent incriminating or exculpatory circumstances.**—The declarations and conduct of the defendant, either before or after being charged with the offense, are admissible evidence, not as part of the *res gestae*, but as indicative of a guilty mind. *Cordova v. State*, 6 App. 207; *Langford v. State*, 17 App. 445. But see *Fulcher v. State*, 28 App. 465, 13 S. W. 750.

How far and circumstances under which acts and declarations of defendant are admissible in evidence. *Giebel v. State*, 28 App. 151, 12 S. W. 591; *Angus v. State*, 29 App. 52, 14 S. W. 443; *Blackwell v. State*, 29 App. 195, 15 S. W. 597; *Lewis v. State*, 29 App. 201, 15 S. W. 642, 25 Am. St. Rep. 720; *Morris v. State*, 30 App. 95, 16 S. W. 757; *Craig v. State*, 30 App. 619, 18 S. W. 297. And further on the question, *Simmons v. State*, 31 App. 227, 20 S. W. 573; *Lynch v. State*, 24 App. 350, 6 S. W. 190, 5 Am. St. Rep. 888; *Wilson v. State*, 70 App. 355, 156 S. W. 1185.

Clothing admissible in evidence. *Kidwell v. State*, 35 App. 264, 33 S. W. 342; *Harris v. State* (Cr. App.) 148 S. W. 1074.

The actions of the accused when brought into the presence of the dead body of the deceased are competent evidence as indicative of a guilty mind. *Handline v. State*, 6 App. 347.

So his flight after the commission of the homicide, together with the circumstances attending such flight, is evidence against him. *Aiken v. State*, 10 App. 610; *Hardin v. State*, 4 App. 355; *Blake v. State*, 3 App. 581; *Gose v. State*, 6 App. 121; *Hart v. State*, 22 App. 563, 3 S. W. 741; *Williams v. State*, 22 App. 497, 4 S. W. 64.

A state's witness, in a trial for murder, testified that after the fatal blow was struck, and just after the deceased fell, he, the witness, picked up a pistol from the ground near the feet of the deceased; that he did not know to which of the parties it belonged, but supposing it to belong to the deceased, he put it in deceased's wagon among his other things. The defense proved the defendant's declarations, made a few minutes after he struck the fatal blow, to the effect that just before he seized the weapon, with which he struck the blow, he saw the deceased thrust his hand behind him, as he thought to draw a knife. He then proposed to prove that a very short time after the difficulty, he requested a witness to summon a doctor; that said witness in going for the doctor put on and wore the coat of the state's witness who testified to having picked up the pistol, and that witness who went for the doctor, found in the coat pocket of said state's witness a pistol, which he identified as the pistol of the deceased. Held, that the proposed testimony, in view of the other evidence in the case, was pertinent and admissible. *Lilly v. State*, 20 App. 1.

The state was permitted to prove that the husband of deceased said to defendant when they met at the body of the dead woman: "Aleck, you have killed my wife," and defendant made no reply, but walked off. *Brown v. State*, 32 App. 119, 22 S. W. 596.

Where the evidence showed that the key in defendant's pocket fitted the door of the room in which the murder occurred, defendant should be allowed to explain his possession of the key. *Radford v. State*, 33 App. 520, 27 S. W. 143.

Witness can not testify that defendant's clothes looked like they had been smeared over with ashes. *Moffatt v. State*, 35 App. 257, 33 S. W. 344.

Witness testified that he saw defendant ride into the field where deceased was at work, and after the shooting deceased came to witness and asked him who it was that was shooting at him; held, admissible. *Williamson v. State*, 36 App. 225, 36 S. W. 444.

Evidence of the finding of a hat at deceased's house, after the homicide, with shot holes in it; held, admissible. *Houston v. State* (Cr. App.) 40 S. W. 803.

It is competent for the State to prove the clothing deceased wore at the time he was killed, and then exhibit such clothing to the jury. *Mitchell v. State*, 38 App. 170, 41 S. W. 816.

Where there was a controversy as to the number of shots, and by whom fired, evidence that near deceased's hand was found a pistol with only one shell in it was admissible. *Godwin v. State*, 39 App. 404, 46 S. W. 226.

Where the evidence showed a bitter state of feeling between the parties, evidence of statements of accused, made after the homicide, showing intense dislike and ill will towards decedent, was admissible to show such ill will and animosity, and to illustrate accused's attitude respecting the killing. *Carson v. State*, 57 App. 394, 123 S. W. 590, 136 Am. St. Rep. 981.

The state could show that bullet shells appearing to have been recently exploded and fresh bullet marks on a tree were found the next morning at the scene of the homicide. *Butler v. State*, 61 App. 133, 134 S. W. 230.

Where the evidence is wholly circumstantial, evidence as to articles found is admissible to connect defendant with the crime. *Ridge v. State*, 61 App. 214, 134 S. W. 732.

The state can show finding in accused's possession shortly after the homicide of wearing apparel belonging to decedent, and in his possession at or shortly before the homicide; but the things must be identified with reasonable certainty as decedent's. *Harris v. State*, 62 App. 235, 137 S. W. 373.

Where death was caused by a blunt instrument, evidence that, when deceased's body was found the next morning, the witness and others looked for the weapon used, and that a piece of two-inch iron pipe with blood stains and hair on it was discovered, was admissible. *Spates v. State*, 62 App. 532, 138 S. W. 393.

Where accused claimed that he shot deceased in the defense of his brother, and that brother, while he and accused were being taken to the scene of the homicide, stated that accused fired the shot in defense of their father, and accused failed to deny that, evidence of such statement was admissible, tending to inculpate accused by showing that his explanation of the crime was untrue. *Zimmer v. State*, 64 App. 114, 141 S. W. 781.

Evidence that the articles used by decedent after she was poisoned disappeared or were washed held inadmissible, unless accused was connected therewith. *Orner v. State* (Cr. App.) 143 S. W. 935.

Evidence that an account book belonging to the deceased had been lost and not found would not tend to prove any issue. *Williams v. State* (Cr. App.) 144 S. W. 622.

Evidence that the sheriff, after obtaining from deceased's wife a description of the man who did the killing, traced the horse of the slayer for some distance was admissible where the horse was recognized by many people and described by deceased's wife. *Mitchell v. State* (Cr. App.) 144 S. W. 1006.

That witnesses saw no weapon on deceased, was not inadmissible on the ground that the evidence showed that other people had been to the place of the killing before such witnesses; that fact only going to the weight of their evidence. *Swanney v. State* (Cr. App.) 146 S. W. 548.

Where the evidence was conflicting as to whether, when accused shot deceased, he had deceased by the right hand pulling him, evidence that immediately after the killing the shirt sleeve on deceased's right arm was drawn down over his hand was admissible. *Welch v. State* (Cr. App.) 147 S. W. 572.

Where deceased wore a truss, and a truss was found in accused's trunk with a blue stain on it, evidence that deceased wore blue shirts which faded was admissible. *Harris v. State* (Cr. App.) 148 S. W. 1074.

Where the state's theory was that the killing took place over an alleged indebtedness, accused's daughter could testify what she heard accused say about the matter. *Ward v. State*, 70 App. 393, 159 S. W. 272.

Evidence that tracks were found leading from the place where deceased's body was found, held admissible. *Thompson v. State*, 72 App. 659, 163 S. W. 973.

Evidence of the discovery of a twig whittled by deceased held not objectionable, because it was found several days after the killing. *Bullock v. State* (Cr. App.) 165 S. W. 196.

Where deceased had been shot while in bed, evidence that the mattress had been burned, and the bedclothes washed, is properly received, where it was not intimated that accused's mother, who took charge of the premises, did so to suppress evidence. *Coffman v. State* (Cr. App.) 165 S. W. 939.

That defendant was nervous and had a haggard appearance, held admissible. *Mason v. State* (Cr. App.) 168 S. W. 115.

34. — Cause of death.—The cause of death may be proved without the aid of expert testimony, even where death did not ensue immediately after the infliction of the injury which caused it. *Smith v. State*, 43 Tex. 613.

Where a blow is the proximate cause of death, the prior enfeebled condition of deceased is not material. *Griffin v. State*, 40 App. 314, 50 S. W. 366, 76 Am. St. Rep. 718.

In a case of death alleged to be by poison, it is proper to admit evidence of friends and neighbors of deceased that she was apparently contented, happy and joyful in disposition and did not appear to be sick, but had the appearance of a healthy woman. This to rebut theory that deceased died from natural causes. *Morrison v. State*, 40 App. 493, 51 S. W. 358.

The physician who made the post mortem examination may testify that deceased had been hit with a heavy instrument, describe the places where he was struck, and the effect thereof. *Spates v. State*, 62 App. 522, 138 S. W. 393.

It is permissible to show that when decedent arrived home he had to be helped into the house. *Ward v. State*, 70 App. 393, 159 S. W. 272.

Where accused attempted to show that the ligaments, etc., were not properly sewed up, and that death was caused by such improper treatment, physicians could give evidence describing the wound, its depth and course, and the ligaments, etc., severed. *Ward v. State*, 70 App. 393, 159 S. W. 272.

Evidence that deceased was in perfect health, and that she died in 14 hours after being shot in the abdomen by accused, was clearly admissible. *Gomez v. State* (Cr. App.) 170 S. W. 711.

35. — Incriminating others.—Where the evidence showed that a party who was jointly indicted with the defendant for the murder, had equal opportunities with the defendant to commit the murder, it was held that the defendant was entitled to prove the acts and declarations of such party done and made prior to the murder, tending to show motive on the part of such party toward the deceased, and to show a motive on the part of such party to commit the murder. The cases of *Bowen v. State*, 3 App. 617; *Boothe v. State*, 4 App. 202; *Walker v. State*, 6 App. 576; *Holt v. State*, 9 App. 571, which hold a contrary doctrine, are overruled. The rule now established is, that investigation with reference to other parties than the accused should not be permitted in cases either positive or circumstantial, unless the inculpatory facts are such as are proximately connected with the transaction. In other words, to show remote acts or threats would not be admissible unless there were other facts also in proof proximately and pertinently connecting such third party with the homicide at the time of its commission. *Kunde v. State*, 22 App. 65, 3 S. W. 325; *McInturf v. State*, 20 App. 335; *Hart v. State*, 15 App. 202, 49 Am. Rep. 188; *Dubose v. State*, 10 App. 230.

A defendant on trial for murder proposed to introduce evidence of the ill-feeling and previous threats of an independent third party against the deceased, which proposed proof, upon objection, was excluded. Held, that in view of the other proof on the trial, which tended to show the presence of both the defendant and the said third party at the time and place and their participation in the homicide, and because of the further fact that such proof would in no event show the absence of the defendant from the place of the homicide, the exclusion of the proposed evidence did not constitute reversible error. *Harris v. State*, 31 App. 411, 20 S. W. 916.

It is not error to reject evidence that another had threatened deceased's life. *Henry v. State* (Cr. App.) 30 S. W. 802; *Martin v. State*, Id. 222.

Evidence that certain persons assaulted deceased about a year before the killing is inadmissible. *Wilkins v. State*, 35 App. 525, 34 S. W. 627.

When the evidence is circumstantial evidence that other persons than defendant had made threats, is admissible. *Murphy v. State*, 36 App. 24, 35 S. W. 174.

Accused may meet the charge by showing that another, or others, committed the offense. *Wheeler v. State*, 56 App. 547, 121 S. W. 166.

That deceased was in fear of a former husband held inadmissible. *Brown v. State* (Cr. App.) 169 S. W. 437.

36. — **Sufficiency of evidence.**—Evidence held to justify conviction. *Fletcher v. State*, 62 App. 417, 138 S. W. 109; *Lander v. State*, 12 Tex. 462; *Killingsworth v. State*, 23 Tex. 204; *Gillmore v. State*, 36 Tex. 334; *Weeden v. State*, 41 Tex. 84; *Gilleland v. State*, 44 Tex. 356; *Lopez v. State*, 2 App. 204; *Noland v. State*, 3 App. 598; *Hill v. State*, 5 App. 2; *Proffit v. State*, Id. 54; *Rodriguez v. State*, Id. 256; *Templeton v. State*, Id. 398; *Bejarino v. State*, 6 App. 265; *Gardenhire v. State*, Id. 147; *Wilson v. State*, Id. 427; *Evans v. State*, Id. 513; *Rye v. State*, 8 App. 163; *Clark v. State*, Id. 350; *Ross v. State*, 10 App. 455, 38 Am. Rep. 643; *Homberg v. State*, 12 App. 1; *Brownlee v. State*, 13 App. 255; *Kemp v. State*, Id. 561; *Coffey v. State*, Id. 580; *Charles v. State*, Id. 658; *Graves v. State*, 14 App. 113; *Allison v. State*, Id. 402; *McDonald v. State*, 15 App. 493; *Conner v. State*, 17 App. 1; *Bell v. State*, Id. 538; *Venters v. State*, 18 App. 198; *Lewis v. State*, Id. 401; *Pierson v. State*, Id. 524; *Loyd v. State*, 19 App. 137; *Rainey v. State*, 20 App. 455; *Rainey v. State*, Id. 473; *Musick v. State*, 21 App. 69, 18 S. W. 95; *Smith v. State*, 22 App. 316, 3 S. W. 684; *Leache v. State*, 22 App. 279, 3 S. W. 539, 58 Am. Rep. 638; *Gehrke v. State*, 13 Tex. 568; *O'Connell v. State*, 18 Tex. 343; *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302; *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Drury v. State*, 25 Tex. 45; *Johnson v. State*, 30 Tex. 748; *Nelson v. State*, 32 Tex. 71; *Wilson v. State*, 32 Tex. 112; *Holland v. State*, 38 Tex. 474; *Garrett v. State*, 41 Tex. 530; *Wilson v. State*, 43 Tex. 472; *Smith v. State*, Id. 643; *Duebbe v. State*, 1 App. 159; *Singleton v. State*, Id. 501; *Washington v. State*, Id. 647; *Williams v. State*, 3 App. 123; *Bowen v. State*, Id. 617; *Powell v. State*, Id. 630; *Jones v. State*, Id. 150; *Jackson v. State*, 4 App. 292; *Walker v. State*, 6 App. 576; *Coward v. State*, Id. 59; *Harris v. State*, Id. 97; *Cordova v. State*, Id. 207; *Brown v. State*, Id. 286; *Handline v. State*, Id. 348; *Tuttle v. State*, Id. 556; *Lanham v. State*, 7 App. 126; *Noftinger v. State*, Id. 301; *Smith v. State*, Id. 414; *Krebs v. State*, 8 App. 1; *Preston v. State*, Id. 30; *Howard v. State*, Id. 53; *Carter v. State*, Id. 372; *Washington v. State*, Id. 377; *Tooney v. State*, Id. 452; *Beltram v. State*, 9 App. 280; *Thomas v. State*, 11 App. 315; *Gaitan v. State*, Id. 544; *Caldwell v. State*, 12 App. 303; *Scott v. State*, Id. 594; *Clanton v. State*, 13 App. 139; *Waite v. State*, Id. 169; *Creswell v. State*, 14 App. 1; *Duran v. State*, Id. 195; *Bohannon v. State*, Id. 271; *Stanley v. State*, Id. 315; *Taylor v. State*, Id. 340; *Davis v. State*, Id. 645; *Phelps v. State*, 15 App. 45; *Darnell v. State*, Id. 70; *Williams v. State*, Id. 104; *Smith v. State*, Id. 139; *Cavitt v. State*, Id. 190; *Gomez v. State*, Id. 327; *Ogden v. State*, Id. 454; *Campbell v. State*, Id. 506; *Lewis v. State*, Id. 647; *Escareno v. State*, 16 App. 85; *Spear v. State*, Id. 98; *Walker v. State*, 17 App. 16; *Chevarrio v. State*, Id. 390; *Sharpe v. State*, Id. 488; *George v. State*, Id. 513; *Rhodes v. State*, Id. 579; *Bryant v. State*, 18 App. 107; *Mendiola v. State*, Id. 462; *Johnson v. State*, Id. 385; *Lane v. State*, 19 App. 54; *Adams v. State*, Id. 250; *Penland v. State*, Id. 365; *Washington v. State*, 19 App. 521, 53 Am. Rep. 387; *Weaver v. State*, 19 App. 548, 53 Am. Rep. 389; *Thompson v. State*, 19 App. 593; *Kennedy v. State*, Id. 618; *McInturf v. State*, 20 App. 335; *De Olles v. State*, Id. 145; *Johnson v. State*, Id. 178; *Wallace v. State*, Id. 360; *Thornton v. State*, Id. 519; *Pierson v. State*, 21 App. 14, 17 S. W. 468; *Smith v. State*, 21 App. 277, 17 S. W. 471; *Murray v. State*, 21 App. 466, 1 S. W. 522; *Robinson v. State*, 22 App. 129, 2 S. W. 539; *Jones v. State*, 22 App. 324, 3 S. W. 230; *May v. State*, 22 App. 595, 3 S. W. 781; *Cooper v. State*, 22 App. 419, 3 S. W. 334; *Cook v. State*, 22 App. 511, 3 S. W. 749; *Rodriguez v. State*, 23 App. 503, 5 S. W. 255; *Scott v. State*, 23 App. 521, 5 S. W. 142; *McCullough v. State*, 23 App. 620, 5 S. W. 175; *Ex parte Smith*, 23 App. 100, 5 S. W. 99; *Giles v. State*, 23 App. 281, 4 S. W. 886; *Heard v. State*, 24 App. 103, 5 S. W. 846; *Rather v. State*, 25 App. 623, 9 S. W. 69; *Murphy v. State*, 28 App. 350, 13 S. W. 141; *Frizzell v. State*, 30 App. 42, 16 S. W. 751; *Scroggin v. State*, 30 App. 92, 16 S. W. 651; *Burleson v. State*, 33 App. 549, 28 S. W. 198; *Delgado v. State*, 34 App. 157, 29 S. W. 1070; *McGill v. State*, 25 App. 499, 8 S. W. 661; *Isaacs v. State*, 36 App. 505, 38 S. W. 40; *Aud and Townsend v. State*, 36 App. 76, 35 S. W. 671; *Gill v. State*, 36 App. 589, 38 S. W. 190; *Carter v. State*, 39 App. 345, 46 S. W. 236, 48 S. W. 508; *Morris v. State*, 39 App. 371, 46 S. W. 253; *Kirkpatrick v. State*, 57 App. 17, 121 S. W. 511; *Singleton v. State*, 57 App. 560, 124 S. W. 92; *Thomas v. State*, 57 App. 452, 125 S. W. 35; *Pollard v. State*, 58 App. 299, 125 S. W. 390; *Elliott v. State*, 58 App. 200, 125 S. W. 563; *Robinson v. State*, 58 App. 550, 126 S. W. 276; *Joseph v. State*, 59 App. 82, 127 S. W. 171; *Long v. State*, 59 App. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244; *Pratt v. State*, 59 App. 167, 127 S. W. 827; *Mass v. State*, 59 App. 390, 128 S. W. 394; *Jenkins v. State*, 59 App. 475, 128 S. W. 1113; *Pratt v. State*, 59 App. 635, 129 S. W. 364; *Lott v. State*, 60 App. 162, 131 S. W. 553; *Butler v. State*, 61 App. 133, 134 S. W. 230; *Wheeler v. State*, 61 App. 527, 136 S. W. 68; *Hamilton v. State*, 62 App. 68, 136 S. W. 450; *Boyce v. State*, 62 App. 374, 137 S. W. 116; *Vela v. State*, 62 App. 361, 137 S. W. 120; *Jordan v. State*, 62 App. 380, 137 S. W. 133; *Mansfield v. State*, 62 App. 631, 138 S. W. 591; *Condon v. State*, 62 App. 485, 138 S. W. 594; *Zunago v. State*, 63 App. 58, 138 S. W. 713, Ann. Cas. 1913D, 665; *Hargrove v. State*, 63 App. 143, 140 S. W. 234; *McCleannan v. State*, 63 App. 558, 141 S. W. 90; *Villa v. State*, 63 App. 537, 141 S. W. 104; *Calderon v. State*, 63 App. 639, 141 S. W. 251; *Owens v. State*, 63 App. 633, 141 S. W. 530; *Jordan v. State*, 64 App. 187, 141 S. W. 786; *Jones v. State*, 63 App. 394, 141 S. W. 953; *McCline v. State*, 64 App. 19, 141 S. W. 977; *John-*

son v. State, 64 App. 399, 142 S. W. 589; Ryan v. State, 64 App. 628, 142 S. W. 878; Brown v. State (Cr. App.) 144 S. W. 265; Bailey v. State (Cr. App.) 144 S. W. 996; Mitchell v. State (Cr. App.) 144 S. W. 1006; Burns v. State (Cr. App.) 145 S. W. 356; Ex parte Martinez (Cr. App.) 145 S. W. 959; Henry v. State (Cr. App.) 146 S. W. 879; Smith v. State (Cr. App.) 146 S. W. 896; Lubbock v. State (Cr. App.) 147 S. W. 253; Rainer v. State (Cr. App.) 148 S. W. 735; Burnam v. State (Cr. App.) 148 S. W. 757; Harris v. State (Cr. App.) 148 S. W. 1074; Tyler v. State (Cr. App.) 148 S. W. 1086; Rodriguez v. State (Cr. App.) 150 S. W. 1167; Pugh v. State (Cr. App.) 151 S. W. 546; Pinson v. State (Cr. App.) 151 S. W. 556; Brock v. State (Cr. App.) 151 S. W. 801; Wisnoski v. State (Cr. App.) 153 S. W. 316; Decker v. State (Cr. App.) 154 S. W. 566; Powdrill v. State (Cr. App.) 155 S. W. 231; Lucas v. State (Cr. App.) 155 S. W. 527; Christie v. State (Cr. App.) 155 S. W. 541; Beaupre v. State, 70 App. 19, 156 S. W. 625; Stanton v. State, 70 App. 519, 158 S. W. 994; Vick v. State, 71 App. 50, 159 S. W. 50; Oliver v. State, 70 App. 140, 159 S. W. 235; Heidelberg v. State, 71 App. 393, 159 S. W. 1187; Wilson v. State, 71 App. 399, 160 S. W. 83; Coulter v. State, 72 App. 602, 162 S. W. 885; Thompson v. State, 72 App. 659, 163 S. W. 973; Espinoza v. State (Cr. App.) 165 S. W. 208; Sewall v. State (Cr. App.) 165 S. W. 593; Cole v. State (Cr. App.) 165 S. W. 929; Davis v. State (Cr. App.) 170 S. W. 725; Echols v. State (Cr. App.) 170 S. W. 786; Shamblyn v. State (Cr. App.) 171 S. W. 718; Hicks v. State (Cr. App.) 171 S. W. 755; Castillo v. State (Cr. App.) 172 S. W. 788; Paschal v. State (Cr. App.) 174 S. W. 1057; White v. State (Cr. App.) 177 S. W. 93; Satterwhite v. State (Cr. App.) 177 S. W. 959.

Evidence insufficient. Pullen v. State, 28 App. 114, 12 S. W. 502; Ex parte Henseley, 30 App. 139, 16 S. W. 761; Sherar v. State, 30 App. 350, 17 S. W. 621; Hamby v. State, 36 Tex. 523; Saunders v. State, 37 Tex. 710; Burnham v. State, 43 Tex. 322; Jones v. State, 4 App. 436; s. c., 7 App. 457; Cox v. State, 5 App. 493; Simms v. State, 8 App. 230; Roach v. State, 8 App. 478; Hodde v. State, Id. 383; Kemp v. State, 11 App. 175; Heacock v. State, 13 App. 97; Lovelady v. State, 14 App. 545; s. c., 17 App. 236; Williams v. State, 15 App. 401; Ex parte Pace, 16 App. 541; Ex parte Catney and Hammons, 17 App. 332; Hung Ah Hang v. State, 18 App. 675; Ex parte Cochran, 20 App. 242; Ex parte Dickson, 20 App. 332; Ex parte Bryant, 21 App. 639, 2 S. W. 891; Kunde v. State, 22 App. 65, 3 S. W. 325; Ex parte Allen, 22 App. 201, 2 S. W. 588; Ex parte Kunde, 22 App. 418, 3 S. W. 332; Ex parte O'Connor, 22 App. 660, 3 S. W. 340; Ex parte England, 23 App. 90, 3 S. W. 714; Scott v. State, 23 App. 452, 5 S. W. 189; Ex parte McDowell, 23 App. 679, 5 S. W. 187; Loggins v. State, 32 App. 364, 24 S. W. 512; Chapman v. State, 34 App. 27, 28 S. W. 811; Underwood v. State, 25 Tex. Supp. 389; Ake v. State, 31 Tex. 416; Barnes v. State, 41 Tex. 342; King v. State, 4 App. 256; Alford v. State, 8 App. 546; White v. State, 10 App. 381; Hogan v. State, 13 App. 319; Nolen v. State, 14 App. 474, 46 Am. Rep. 247; Smith v. State, 15 App. 338; Turner v. State, 16 App. 433; Alexander v. State, 17 App. 614; Lucas v. State, 19 App. 79; Turner v. State, 20 App. 56; Holmes v. State, 20 App. 110; Olivares v. State, 23 App. 305, 4 S. W. 903; Scott v. State, 23 App. 452, 5 S. W. 189; Milrainey v. State, 33 App. 577, 28 S. W. 537; Gill v. State, 36 App. 589, 38 S. W. 190; Huddleston v. State, 70 App. 260, 156 S. W. 1168.

In a prosecution dependent wholly upon circumstantial testimony, greater latitude is allowed in the presentation of evidence; but, in such cases it is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant. They must exclude, to a moral certainty, every other hypothesis. Lovelady v. State, 14 App. 545; Pogue v. State, 12 App. 283; Pharr v. State, 10 App. 485; Jackson v. State, 9 App. 114; Taylor v. State, 9 App. 100; Shultz v. State, 13 Tex. 401; Barnes v. State, 41 Tex. 342; Roseborough v. State, 43 Tex. 570; Williams v. State, 41 Tex. 209; Perkins v. State, 32 Tex. 109; Law v. State, 33 Tex. 37; Black v. State, 1 App. 369; Hampton v. State, Id. 652; Taylor v. State, 3 App. 170; King v. State, 34 App. 228, 29 S. W. 1086; Spearman v. State, 34 App. 279, 30 S. W. 229; Wheeler v. State, 56 App. 547, 121 S. W. 166; Durfee v. State (Cr. App.) 165 S. W. 180.

The mere fact that the defendant knew where the body of the deceased was, is not prima facie evidence of the guilt of the defendant of the homicide. Elizabeth v. State, 27 Tex. 329.

The mere presence of the defendant at the killing will not justify his conviction of the homicide. Ake v. State, 31 Tex. 416.

The guilt of the defendant must be proved with such certainty as to establish it beyond a reasonable doubt. White v. State, 36 Tex. 347; Wallace v. State, 9 App. 299; Holmes v. State, Id. 313; McNair v. State, 14 App. 78; Hackett v. State, 13 App. 406; Dyson v. State, Id. 402.

It is never indispensable to a conviction that a motive for the commission of crime should appear, though in cases of circumstantial evidence, the existence or want of motive is sometimes of great importance. Preston v. State, 8 App. 30.

Deceased, a strong healthy man, was stabbed with a knife immediately under the left nipple. He spoke only once thereafter and died in about fifteen minutes; held, that such facts showed conclusively that the wound was the immediate proximate cause of his death. Thompson v. State, 38 App. 335, 42 S. W. 974.

It is not necessary to show motive. Wynne v. State, 59 App. 117, 127 S. W. 197. Circumstantial evidence considered, and held sufficient to sustain a conviction of murder in the perpetration of robbery. Ridge v. State, 61 App. 214, 134 S. W. 732.

Evidence in a murder case held to authorize a conviction, conceding the truth of testimony, on alibi, as to defendant being at his home at 12:30 or 1 o'clock on the night of the homicide. Wheeler v. State, 61 App. 527, 136 S. W. 68.

The question whether accused intended to kill deceased, or deemed her to be another person about to attack him, held, under the evidence, for the jury. Garrett v. State (Cr. App.) 155 S. W. 251.

Evidence held sufficient to authorize the submission to the jury of the question whether defendant was carrying a pistol prior to the killing. *Condron v. State* (Cr. App.) 155 S. W. 253.

Where, on a trial for homicide, the evidence for the state showed a cold-blooded killing, and accused's connection therewith was shown by the testimony of an accomplice, which was corroborated, the verdict could not be disturbed, though accused's testimony tended somewhat persuasively to show that the killing was by a third person. *Jones v. State* (Cr. App.) 163 S. W. 75.

In a prosecution for homicide, evidence held to sustain a conviction of murder pursuant to a conspiracy to organize a company in Texas to invade Mexico and to prevent decedent from giving information concerning the conspirators' unlawful purpose. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

One who has pleaded guilty, can not be convicted under the plea if the evidence to determine his punishment shows that he acted in self-defense. *Harris v. State* (Cr. App.) 172 S. W. 975.

37. Charge.—See C. C. P. art. 735 et seq.

Evidence held to raise issue of murder. *Edwards v. State* (Cr. App.) 172 S. W. 277; *Windham v. State* (Cr. App.) 173 S. W. 661; *Stewart v. State* (Cr. App.) 174 S. W. 1077.

The court should apply the law of threats, like any other law of the case, directly to the issues raised by the testimony. *Askew v. State*, 59 App. 152, 127 S. W. 1037. And see *Bussey v. State* (Cr. App.) 153 S. W. 873.

See facts which were held to justify a charge to the effect that if one kills another by beating in a cruel and unusual manner, it is murder with express malice although he did not intend to kill. *Duebbe v. State*, 1 App. 159.

It is never safe to depart from established authorities in giving instructions. With reference to murder, the law has been so fully settled that the courts can not err if they but employ in their charges the language of standard cases. *Hunt v. State*, 7 App. 212.

Deceased was an officer, but there was no evidence tending to show that he was attempting to arrest defendant at the time of the killing, a charge predicated upon such theory was erroneous. *Murphy v. State*, 36 App. 24, 35 S. W. 174.

When indictment charges the killing with malice aforethought, and the crime was committed in the perpetration of robbery, it is proper to define robbery. *Wilkins v. State*, 35 App. 525, 34 S. W. 627.

Charge held sufficient as to identification of defendants. *Polk v. State*, 35 App. 495, 34 S. W. 633.

When there is no evidence tending to show either manslaughter or justifiable homicide they need not be defined in the charge. *Brittain v. State*, 35 App. 406, 37 S. W. 758.

In the absence of evidence tending to show coercion, an instruction that if defendant poisoned her child at the persuasion of her mother it is no excuse; held, correct. *Carlisle v. State*, 37 App. 108, 38 S. W. 991.

Where a person in an attempt to kill one, accidentally kills another, a general charge on implied malice is not sufficient; a charge applicable to the particular facts should be given. *Howard v. State* (Cr. App.) 58 S. W. 79.

Charge held to be applicable and to sufficiently submit the theory of accused. *Bass v. State*, 59 App. 186, 127 S. W. 1020.

A charge that if accused "in a sudden transport of passion," aroused without adequate cause, and not in defense of himself against an unlawful attack, shot and killed decedent with malice aforethought, he was guilty of "murder in the second degree," was sufficient, though it was unnecessary to use the phrase "sudden transport of passion" or "with malice aforethought." *Pratt v. State*, 59 App. 635, 129 S. W. 364.

A charge that, if one in the perpetration of or in the attempt to perpetrate a robbery upon another shall take the life of such other, he shall be guilty of murder, and that a murder committed under such circumstances is per se murder of the first degree, was erroneous as authorizing a conviction for murder in the first degree without finding the existence of malice. *Grant v. State*, 60 App. 358, 132 S. W. 350.

Under the facts held that a refusal to charge that, if the killing occurred, not on a previously formed design, but on a subsequently formed design, they should attribute it to the latter, and not to the original, design was error. *Mayhew v. State* (Cr. App.) 144 S. W. 229, 39 L. R. A. (N. S.) 671.

A charge that if accused killed decedent as alleged he should be convicted of murder is erroneous as authorizing a conviction whether the killing was upon malice, or in self-defense, or constituted manslaughter under adequate cause. *Kincaid v. State* (Cr. App.) 145 S. W. 597.

The words "mitigate, excuse or justify," have a well-understood meaning, and, in the absence of a request, it is not necessary for the court to define them. *Kelly v. State* (Cr. App.) 151 S. W. 304.

Charge held erroneous as authorizing a conviction, though defendant may have acted in self-defense, or been guilty of no higher offense than manslaughter, or unintentional killing. *McDowell v. State* (Cr. App.) 151 S. W. 1049.

An instruction held not an insufficient charge on murder in the first degree, though failing to inform the jury that the killing must be unlawful, being correct in other particulars. *Crutchfield v. State* (Cr. App.) 152 S. W. 1053.

Charge held sufficient. *Crutchfield v. State* (Cr. App.) 152 S. W. 1053.

In a homicide case, the court in defining murder in the second degree need not define words "tend to mitigate, excuse or justify the acts" used therein, where it also charges fully on manslaughter and self-defense. *Hendricks v. State* (Cr. App.) 154 S. W. 1005.

A charge that clearly required the jury to believe beyond a reasonable doubt that defendant did not kill decedent in self-defense, but with express malice afore-

thought, sufficiently covered first and second degree murder. *Powdrill v. State* (Cr. App.) 155 S. W. 231.

Malice will not be implied from all killings, viz., manslaughter and negligent homicide; consequently, in a prosecution for homicide where there was evidence tending to reduce the crime to manslaughter, a charge that malice will be implied from an unlawful killing is improper. *Garcia v. State*, 70 App. 485, 156 S. W. 939.

Where the court, in a homicide case, after defining the different degrees of homicide, required the jury to find the facts, constituting each degree, to exist beyond a reasonable doubt, and to give the defendant the benefit of a reasonable doubt between the different degrees, it was not error to fail to charge the negative of the facts constituting each degree. *Borders v. State*, 72 App. 135, 161 S. W. 483.

In the trial for murder, defendant was entitled to a charge on the degrees of murder as they existed under the law in force when the offense was committed, though between such time and the trial the degrees had been changed by statute. *James v. State*, 72 App. 457, 163 S. W. 61.

Where defendant, in a prosecution for murder, shot deceased, while attempting to recover mules that had strayed into an inclosed field belonging to deceased, and which deceased was seeking to impound, an instruction that the running at large of stock was prohibited, and that if defendant's mules had entered inclosed lands leased by deceased, without his consent, deceased had a lawful right to impound them, was not improper as being immaterial. *Barnett v. State* (Cr. App.) 176 S. W. 580.

An indictment alleged that R. unlawfully and with malice killed A., that accused before the killing unlawfully and with malice advised, commanded, and encouraged R. to kill M., and promised a reward and favor to him for killing M., and that R. while attempting to kill M. killed deceased, believing that he was shooting at M. and thereby "by mistake" killed deceased. The court charged correctly as to murder, malice, etc., and then charged that if R., with malice towards M. and with intent to kill him, shot and killed deceased, believing that deceased was M., and if accused prior to the commission of the offense with malice towards M. encouraged and promised a reward to R. to kill M. and R. was thereby induced to try to kill M., but, in trying to kill him, shot and killed deceased, believing that he was M., accused should be found guilty of murder in the second degree. The court further charged that if the jury believed or had a reasonable doubt that R., when he shot and killed deceased, knew or believed that it was some one other than M., they should find accused not guilty, though they believed beyond a reasonable doubt that accused encouraged and offered R. a reward to kill M. Held, that, though the charge did not use the word "mistake," when read as a whole it did not authorize a conviction on proof of less or different facts than those alleged. *Cooper v. State* (Cr. App.) 177 S. W. 975.

38. — *Corpus delicti*.—See notes to art. 1084, ante.

39. — *Intent and malice*.—Failure to explain malice aforethought is fundamental error. *Griffin v. State*, 26 App. 157, 9 S. W. 459, 8 Am. St. Rep. 460; *Crook v. State*, 27 App. 198, 11 S. W. 444; *Cahn v. State*, 27 App. 710, 11 S. W. 723; *Boyd v. State*, 28 App. 137, 12 S. W. 737; *Ainsworth v. State*, 29 App. 600, 16 S. W. 652; *Martinez v. State*, 30 App. 129, 16 S. W. 767, 28 Am. St. Rep. 895; *Callahan v. State*, 20 App. 275, 17 S. W. 257; *Ellis v. State*, 30 App. 601, 18 S. W. 139; *Smith v. State*, 31 App. 14, 19 S. W. 252; *Gonzales v. State*, 28 App. 130, 12 S. W. 733; *Angus v. State*, 29 App. 53, 14 S. W. 443; *Frizzell v. State*, 30 App. 42, 16 S. W. 751; *Jones v. State*, 5 App. 397; *Tooney v. State*, Id. 163; *Pharr v. State*, 7 App. 472; *Garza v. State*, 11 App. 345; *Holmes v. State*, Id. 223; *Babb v. State*, 12 App. 491; *Caruthers v. State*, 13 App. 339.

For a sufficient charge upon express malice, see *Jordan v. State*, 10 Tex. 479; *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Farrer v. State*, 42 Tex. 271; *Plasters v. State*, 1 App. 673; *Cox v. State*, 5 App. 493.

For other decisions discussing charges upon implied malice, see *Perry v. State*, 44 Tex. 473; *Reynolds v. State*, 14 App. 427; *Turner v. State*, 16 App. 378; *Stanley v. State*, Id. 392; *Miles v. State*, 18 App. 156; *Neyland v. State*, 13 App. 536; *Ellison v. State*, 12 App. 557; *Taylor v. State*, 13 App. 184; *Turner v. State*, 16 App. 379; *Morgan v. State*, 16 App. 593; *Smith v. State*, 19 App. 95; *Whitaker v. State*, 12 App. 436.

Under the former law it was essential to explain the term implied malice, and to distinguish this species of malice from express malice. *Jones v. State*, 5 App. 397; *Pharr v. State*, 7 App. 472; *Villareal v. State*, 26 Tex. 107; *Shrivers v. State*, 7 App. 450.

The term is sufficiently expounded to the jury by a charge which without critical refinement, substantially explains its legal, in contradistinction to its ordinary signification. If the charge limits the meaning of the term to hatred, ill-will, or hostility, the error is not to the prejudice, but to the advantage of the defendant. *Harris v. State*, 8 App. 90.

For a sufficient charge explaining the term, see *Harris v. State*, 8 App. 90; *McKinney v. State*, Id. 626; *Bramlette v. State*, 21 App. 611, 2 S. W. 765, 57 Am. Rep. 622.

For a sufficient explanation of implied malice, see *Harris v. State*, 8 App. 90; *Hubby v. State*, Id. 597; *Douglass v. State*, Id. 520; *Brown v. State*, 4 App. 275; *Sharp v. State*, 6 App. 650.

For defective explanations of the term, see *Pickens v. State*, 13 App. 353; *Hayes v. State*, 14 App. 330.

That express malice may be evidenced by external circumstances, is a part of its definition, and a charge to that effect is not objectionable as being upon the weight of evidence. *Sharpe v. State*, 17 App. 486; *Douglass v. State*, 8 App. 520.

Where the court charges fully on the necessity of malice to constitute murder, failure to charge on malice in each instruction is not error. *White v. State*, 34 App. 153, 29 S. W. 1094.

In defining "sedate and deliberate" it is error to charge that "it does not mean that the mind must be absolutely unruddled." *Gaines v. State* (Cr. App.) 53 S. W. 626.

A general definition of malice aforethought is usually sufficient. *Simmons v. State* (Cr. App.) 146 S. W. 550.

Where accused claimed that the killing was accidental, a charge which required the jury to believe that accused fired his gun with intent to kill, and that he did unlawfully and with implied malice shoot and thereby kill deceased, sufficiently charges on the issue of intent to kill. *Vick v. State*, 71 App. 50, 159 S. W. 50.

Though the degrees of murder have been abolished, it is not error to define express and implied malice. *Brown v. State* (Cr. App.) 174 S. W. 360.

40. — Degrees under former law.—For charges on degrees of murder, see *Kemp v. State*, 13 App. 561; *Benavides v. State*, 31 Tex. 579; *Blake v. State*, 3 App. 581; *Parker v. State*, 22 App. 105, 3 S. W. 100; *Jenkins v. State*, 41 Tex. 123; *Plasters v. State*, 1 App. 673; *Garza v. State*, 3 App. 286; *Halbert v. State*, Id. 656; *Baker v. State*, 4 App. 223; *Pharr v. State*, 10 App. 485; *West v. State*, 7 App. 150; *Tooney v. State*, 5 App. 163; *Summers v. State*, 5 App. 365, 32 Am. Rep. 573; *Roach v. State*, 8 App. 478; *Sharpe v. State*, 17 App. 486; *Bright v. State*, 10 App. 63; *Pickett v. State*, 12 App. 86; *Conner v. State*, 23 App. 378, 5 S. W. 189; *Benevides v. State*, 14 App. 378; *Hill v. State*, 5 App. 2; *Holden v. State*, 1 App. 226; *Gatlin v. State*, 5 App. 531; *Edmondson v. State*, 41 Tex. 496; *Sanders v. State*, Id. 306; *Darlington alias Garlington v. State*, 40 App. 335, 50 S. W. 375; *May v. State*, 22 App. 595, 3 S. W. 781; *Bryant v. State*, 18 App. 107; *Johnson v. State*, Id. 385; *Jackson v. State*, Id. 586; *Rhodes v. State*, 17 App. 579; *Smith v. State*, 15 App. 139; *Darnell v. State*, Id. 70; *Gomez v. State*, Id. 327; *Davis v. State*, 14 App. 645; *Neyland v. State*, 13 App. 536; *Lum v. State*, 11 App. 483; *Hubby v. State*, 8 App. 597; *Taylor v. State*, 3 App. 387; *Washington v. State*, 1 App. 647; *O'Connell v. State*, 18 Tex. 343; *Boren v. State*, 32 App. 637, 25 S. W. 775; *Henry v. State* (Cr. App.) 30 S. W. 802; *Tate v. State*, 35 App. 231, 33 S. W. 121; *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456; *Howard v. State* (Cr. App.) 33 S. W. 225.

Art. 1141. Punishment.—The punishment for murder shall be death or confinement in the penitentiary for life or for any terms of years not less than five. [Id.]

See note under preceding article.

Punishment, and assessment thereof.—The question of what penalty shall be inflicted is peculiarly the province of the jury under the guidance of the trial court. *Calderon v. State*, 63 App. 639, 141 S. W. 251.

The court on appeal may not disturb the punishment assessed by the jury within its discretion conferred by law, on the ground that it is excessive. *Villa v. State*, 63 App. 537, 141 S. W. 104.

The death penalty may be assessed for murder committed upon implied malice, as well as upon express malice, where the evidence, from the circumstances attendant upon the crime, authorizes the infliction of so severe a punishment. *Subia v. State* (Cr. App.) 165 S. W. 466; *Lee v. State* (Cr. App.) 162 S. W. 843.

The infliction of the death penalty for homicide is authorized under the existing law. *Gomez v. State* (Cr. App.) 170 S. W. 711.

Under this law the jury may assess the death penalty where the evidence shows beyond a reasonable doubt an unlawful killing with malice aforethought, whether the malice is expressed or implied, and the court may not fix the punishment. *Williams v. State* (Cr. App.) 174 S. W. 1042.

— **Former law.**—The verdict must specify the degree of murder found. *Buster v. State*, 42 Tex. 315 (overruling *Holland v. State*, 38 Tex. 474). And see *Johnson v. State*, 30 App. 419, 17 S. W. 1070, 28 Am. St. Rep. 930; *Blocker v. State*, 27 App. 16, 10 S. W. 439; *Giles v. State*, 23 App. 231, 4 S. W. 886; *Isbell v. State*, 31 Tex. 138; *Colbath v. State*, 2 App. 391; *Brown v. State*, 3 App. 294; *Krebs v. State*, 3 App. 348; *Nettles v. State*, 5 App. 386; *Dubose v. State*, 13 App. 418; *Woolbridge v. State*, Id. 443, 44 Am. Rep. 708; *Sanders v. State*, 18 App. 372; *Armstead v. State*, 22 App. 51, 2 S. W. 627; *Lopez v. State*, 2 App. 204; *Charles v. State*, 13 App. 658; *Boothe v. State*, 4 App. 202; *Carroll v. State*, 24 App. 313, 6 S. W. 42; *Zwicker v. State*, 27 App. 539, 11 S. W. 633; *Martin v. State*, 36 App. 632, 36 S. W. 587, 38 S. W. 194; *McCloud v. State*, 37 App. 237, 39 S. W. 104; *Thomas v. State*, 43 App. 20, 62 S. W. 920, 96 Am. St. Rep. 834; *Murray v. State*, 46 App. 400, 78 S. W. 927; *Miller v. State*, 58 App. 600, 126 S. W. 864; *Orner v. State* (Cr. App.) 143 S. W. 935; *Bailey v. State* (Cr. App.) 144 S. W. 996; *Essery v. State*, 72 App. 414, 163 S. W. 17; *Marshall v. State* (Cr. App.) 166 S. W. 722, L. R. A. 1915A, 526; *Roberts v. State* (Cr. App.) 168 S. W. 100; *Taylor v. State* (Cr. App.) 169 S. W. 672.

On extent of punishment, see *Frye v. State*, 7 App. 94; *Taylor v. State*, 14 App. 340; *Drake v. State*, 5 App. 649; *Hunt v. State*, 7 App. 212; *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Wilson v. State*, 14 App. 524; *McInturff v. State*, 20 App. 335; *Gonzales v. State*, 31 App. 508, 21 S. W. 253; *Pollard v. State*, 58 App. 299, 125 S. W. 390.

On effect of changes in former laws, see *Walker v. State*, 7 App. 245, 32 Am. Rep. 595; *Simms v. State*, 8 App. 230; *Myers v. State*, 8 App. 321; *Shaw v. State*, 71 App. 630, 160 S. W. 103; *Johnson v. State*, 72 App. 178, 161 S. W. 1098.

Under a former statute it was not essential to the validity of the verdict that it should assess the punishment. *Murray v. State*, 1 App. 417; *Perry v. State*, 44 Tex. 473.

The verdict must assess the punishment. *Doran v. State*, 7 App. 385; *Woolbridge v. State*, 13 App. 443, 44 Am. Rep. 708.

— **Amelioration of punishment, and defendant's right of election.**—See art. 15 ante, and notes.

— Persons not punishable capitally.—See art. 35 ante, and notes.

Verdict in general.—See C. C. P. art. 763 et seq.

Judgment and sentence.—See C. C. P. art. 853 et seq., and notes.

Art. 1142. [712] [Repealed. See Art. 1140, ante.]

See Willson's Cr. Forms, 947, 948, 956.

Art. 1143. [713] Evidence of threats and deceased's character admissible, when.—Where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offense, unless it be shown that, at the time of the homicide, the person killed by some act then done manifested an intention to execute the threat so made. In every instance where proof of threats has been made, it shall be competent to introduce evidence of the general character of the deceased. Such evidence shall extend only to an inquiry as to whether the deceased was a man of violent or dangerous character, or a man of kind and inoffensive disposition, or whether he was such a person as might reasonably be expected to execute a threat made. [Act Feb. 12, 1858, p. 174.]

Threats by deceased.—When accused seeks to justify the homicide on the ground of threats against his own life, he is permitted to introduce evidence of such threats, whether communicated to him or not, but no threats will afford justification unless it be shown that at the time of the homicide, the person killed, by some act then done, manifested an intention to execute the threats so made. *Logan v. State*, 17 App. 50; *Allen v. State*, 17 App. 637; *Miles v. State*, 18 App. 156; *Thomas v. State*, 11 App. 315; *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302; *Johnson v. State*, 27 Tex. 758; *Lander v. State*, 12 Tex. 462; *Peck v. State*, 5 App. 611; *Irwin v. State*, 43 Tex. 236; *Stapp v. State*, 1 App. 734; *Carter v. State*, 8 App. 372; *Horbach v. State*, 43 Tex. 242; *Sims v. State*, 9 App. 586; *Penland v. State*, 19 App. 365; *Howard v. State*, 23 App. 265, 5 S. W. 231. See, also, *Dawson v. State*, 33 Tex. 491 (overruling *Pridgen v. State*, 31 Tex. 420); *Franklin v. State*, 34 App. 625, 31 S. W. 643; *Lynch v. State*, 24 App. 350, 6 S. W. 190, 5 Am. St. Rep. 888; *Hinton's case*, 24 Tex. 454; *Holt's case*, 9 App. 571; *Huddleston v. State*, 54 App. 93, 112 S. W. 64, 130 Am. St. Rep. 884; *Jay v. State*, 52 App. 567, 109 S. W. 131; *Mitchell v. State*, 50 App. 180, 96 S. W. 43; *Tankersley v. State*, 31 App. 595, 21 S. W. 767; *Reeves v. State*, 34 App. 433, 31 S. W. 332; *Pratt v. State*, 50 App. 227, 96 S. W. 8; *McDade v. State*, 27 App. 641, 11 S. W. 672, 11 Am. St. Rep. 216; *Tilmyer v. State*, 53 App. 562, 126 S. W. 870, 137 Am. St. Rep. 982; *Ware v. State* (Cr. App.) 152 S. W. 1074.

The exclusion of testimony to prove threats made by the deceased will not be error when the evidence in the case shows that such threats could not have afforded justification for the homicide. *Penland v. State*, 19 App. 365; *Ex parte Mosby*, 31 Tex. 566, 98 Am. Dec. 547.

Where a defendant waylaid and killed the deceased, evidence of previous threats by the deceased against the defendant, coupled with a movement on his part at the time of the killing, as if to draw a weapon, was held to be wholly immaterial. *Ex parte Mosby*, 31 Tex. 566, 98 Am. Dec. 547.

The mere expression of an opinion by the deceased that the accused was pursuing a line of conduct which would endanger and cost him his life, was held to be not a threat against the life of the accused. *Myers v. State*, 33 Tex. 525.

It is not practicable to fix on what the act manifesting the intention of the deceased to execute his threats shall be; but it must be some act reasonably calculated to induce the belief that the threatened attack has then commenced, to be then executed, and not a mere act of preparation to execute the threats at some other period of time, either speedy or remote. *Irwin v. State*, 43 Tex. 236.

The defendant, for the purpose of showing that his apprehension of danger was reasonable, is entitled to lay before the jury all circumstances which would go to show the character of the threats, the intention with which they were made, and the grounds of fear on which the defendant acted, and hence evidence of previous affrays and difficulties with the deceased, and of previous attacks, and threats made by him are admissible for the defendant. *Russell v. State*, 11 App. 238.

It is immaterial to the defendant's right to act upon the threat, whether it was seriously made or not, if some act was done by the deceased, which, viewed in the light of the threat, rendered it reasonable for the defendant to infer that the deceased was about to execute the threat, and the defendant did not know that the threat was not seriously made. *Wilson v. State*, 18 App. 576.

Where evidence of threats could not possibly benefit the defendant, it is not error to reject it. *Penland v. State*, 19 App. 365; *Allen v. State*, 17 App. 637; *Howard v. State*, 23 App. 265, 5 S. W. 231.

Proof of deadly threats made by the deceased against the accused, and that the deceased was a violent and dangerous character, and that the threats and the character of the deceased were known to the accused at the time of the homicide, can afford no justification for homicide without proof that, at the time of the homicide, the deceased did some act indicating a present intention to kill the accused, or do him serious bodily harm. Neither the evidence adduced on the trial nor that foreshadowed in the application for continuance laid a predicate for proof

of threats in this case, wherefore a continuance was properly refused. *Brooks v. State*, 24 App. 274, 5 S. W. 852.

Under a proper construction of this statute, the act done must manifest the immediate intention to execute the threat so made. It was not error, therefore, that in his charge upon this subject the trial judge interpolated the word "immediate" to qualify "intention." See the opinion in extenso on the question. *Lynch v. State*, 24 App. 350, 6 S. W. 190, 5 Am. St. Rep. 888.

If one accused of culpable homicide has been threatened by the deceased with death or serious bodily injury, and such threat has, prior to the homicide, been communicated to the defendant, and at the time of the homicide the deceased by any act manifested an intention to execute such threat, the defendant would be authorized to act upon appearances in resorting to any means to protect himself, and a killing under such circumstances would be justifiable homicide. In view of the proof in this case, the failure of the trial court to give this rule in charge to the jury was error. *Alexander v. State*, 25 App. 260, 7 S. W. 867, 8 Am. St. Rep. 438. And see *Harper v. State* (Cr. App.) 170 S. W. 721.

The defendant having introduced evidence of threats against his life, uttered by the deceased, a short time before the homicide, the state, over defendant's objection, was permitted to prove that, about a year before the homicide, the defendant told a witness that the "threats of John Collier (deceased) did not amount to any more than those of an old woman." Held, that objection to this proof was properly overruled. *Miller v. State*, 27 App. 63, 10 S. W. 445.

Uncommunicated threats are mainly admissible in evidence in case of doubt as to who commenced the difficulty, and who began the attack. *Pitts v. State*, 29 App. 374, 16 S. W. 189; *Stewart v. State*, 36 App. 130, 35 S. W. 985; *McMillan v. State* (Cr. App.) 143 S. W. 1174; *Kirklin v. State* (Cr. App.) 164 S. W. 1016; *Bankston v. State* (Cr. App.) 175 S. W. 1068.

That deceased had said he intended to have carnal intercourse with a woman defendant afterward married is too remote to be admitted in evidence. *Cockerell v. State*, 32 App. 585, 25 S. W. 421.

That just before the homicide defendant was told of threats made against him by deceased is admissible. *Reeves v. State*, 34 App. 483, 31 S. W. 382.

That deceased had some time previous to the killing tried to get defendant to help him kill a man, is inadmissible. *Ryan v. State* (Cr. App.) 35 S. W. 288.

Where deceased had made threats and had assaulted defendant before the killing, it was error to exclude evidence that defendant had sent a friend to deceased to get him to withdraw his threats and agree not to harm defendant, it being shown that a peace bond would not have any effect. *Schauer v. State* (Cr. App.) 60 S. W. 251.

Where appellant testified that the deceased attacked him and that he acted in self-defense, evidence of a conspiracy to which deceased belonged, and of threats made by the conspirators should have been admitted. *Hall v. State*, 42 App. 444, 60 S. W. 770.

Threats of third persons to have deceased kill accused are inadmissible, unless connection is shown between such persons and deceased, or there is some proof of conspiracy between them, or some evidence of their acting together therein. *Pol-lard v. State*, 58 App. 299, 125 S. W. 390.

Where threats alleged to have been made by decedent were communicated to and believed by accused, accused had the legal right to act on the communicated threats, and the fact that the threats were not made did not affect accused's legal right. *Lundy v. State*, 59 App. 131, 127 S. W. 1032.

The conduct of decedent at the time of the killing, to justify accused on the ground of threats made by decedent, must be such as to raise in the mind of accused the belief that decedent was about to carry the threats into execution. *Payton v. State*, 60 App. 475, 132 S. W. 127.

One is not limited in his right to "repel force with force." *Duke v. State*, 61 App. 19, 133 S. W. 432.

Where there was evidence that decedent intended to compel accused to leave the county because the latter killed his dog, evidence was admissible that accused was much alarmed and feared decedent, and contemplated leaving the county to avoid being injured by decedent. *Jackson v. State*, 63 App. 351, 139 S. W. 1156.

Where accused knew of the threats made by deceased and of the cause of the threats prior to the homicide, evidence of the reason for the threats was admissible. *Treadway v. State* (Cr. App.) 144 S. W. 655.

Where the deceased has made threats against the accused, his subsequent declarations of pacific intent, not communicated to the accused, are not admissible. *Johnson v. State* (Cr. App.) 148 S. W. 228.

Threats of themselves alone will not justify a killing, but if deceased raised from his seat with a knife, and defendant thought he was going to carry into effect previous threats to kill him, the right of self-defense arose. *Kelly v. State* (Cr. App.) 151 S. W. 304.

Threats made by one against another with the intention of provoking a difficulty on that occasion would not justify the other in killing him on another and different occasion before an act is done or word spoken. *Kelly v. State* (Cr. App.) 151 S. W. 304.

Where accused, relying on self-defense, had been informed of the fact that his life had been threatened by decedent, and he acted on that information when firing the fatal shot, the jury must view the case from his standpoint, and not from the standpoint as to whether the threats were or were not made. *Robbins v. State*, 70 App. 52, 155 S. W. 936.

Where a defendant has testified that the deceased was approaching her with a knife, saying that he was going to kill her, evidence of recent attempts by the deceased to kill or inflict serious injury upon her was admissible as bearing on her good faith in claiming that she then feared she would be killed. *Clay v. State*, 70 App. 451, 157 S. W. 164.

Threats by deceased to take accused's life were properly admitted as tending to shed light on his actions; there being a sharp conflict as to who was the aggressor. *Flores v. State*, 70 App. 232, 162 S. W. 883.

Where there was a sharp conflict as to which party was the aggressor, and accused introduced proof that deceased had threatened to take his life, accused's remarks shortly before the killing, showing ill will, and that accused was not afraid, were properly admitted. *Flores v. State*, 72 App. 232, 162 S. W. 883.

Where accused's evidence of communicated threats is denied, the question is whether or not accused had been told that threats had been made by deceased against him and he so believed, and not whether the threats had actually been made. *Eads v. State* (Cr. App.) 170 S. W. 145.

Threats by deceased, whether communicated to defendant or not, are admissible to explain the acts and conduct of the deceased at the time of the homicide. *Harper v. State* (Cr. App.) 170 S. W. 721.

As to conditional threats, see *Gilleland v. State*, 44 Tex. 356; *Knowles v. State*, 31 App. 383, 20 S. W. 829; *Slade v. State*, 29 App. 381, 16 S. W. 253.

For other decisions on the subject of threats in murder cases, see *Allen v. State*, 24 App. 216, 6 S. W. 187; *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 882; *Howard v. State*, 25 App. 686, 8 S. W. 929; *Ball v. State*, 29 App. 107, 14 S. W. 1012; *Bonner v. State*, 29 App. 223, 15 S. W. 821. And see *Reed v. State*, 32 App. 25, 22 S. W. 22; *Jennings v. State*, 60 App. 421, 132 S. W. 473; *Kemper v. State*, 63 App. 1, 138 S. W. 1025; *McMillan v. State* (Cr. App.) 143 S. W. 1174; *Lamb v. State* (Cr. App.) 169 S. W. 1158.

Where evidence was admitted that deceased had said he was going to kill defendant, which threats were communicated to defendant, it was error to refuse to permit evidence that deceased at the same time said it would not be the first man he had killed, as he had killed one in Oklahoma. *Hammons v. State* (Cr. App.) 177 S. W. 493.

Defendant having introduced evidence of uncommunicated threats of deceased against him, as bearing on the acts and conduct of deceased at the time of the homicide, as permissible where self-defense is in issue, the state, to rebut such evidence, may introduce evidence of statements of deceased, uncommunicated to defendant, made after the threats, and just before the homicide, to show a changed state of mind. *Howe v. State* (Cr. App.) 177 S. W. 497.

— **Threats against others.**—It is not permissible to prove threats made by deceased against another person than the defendant. *Drake v. State*, 5 App. 649; *Talbert v. State*, 8 App. 316. But see *Slade v. State*, 29 App. 381, 16 S. W. 253.

Threats by the deceased against some other person than the defendant can not justify the homicide. *Talbert v. State*, 8 App. 316.

Testimony as to a conversation with decedent some 30 minutes before the killing, in which he made threats against accused's brother, but did not mention accused, was not admissible. *Spencer v. State*, 59 App. 217, 128 S. W. 118.

Threats by deceased against one other than accused are inadmissible, where accused had never heard of any such threats. *Echols v. State* (Cr. App.) 170 S. W. 786.

Evidence of threats of the deceased that he would kill one jointly charged with the defendant with killing, deceased was not admissible on the trial of defendant alone; it not being shown that he had knowledge of such threats. *Hammons v. State* (Cr. App.) 177 S. W. 493.

Threats by assaulted party.—The rules governing the admissibility of threats made by deceased, and of the character of the deceased, are also applicable in prosecutions for assault with intent to murder. *Bingham v. State*, 6 App. 169; *Smith v. State*, 55 App. 628, 118 S. W. 146; *Bussey v. State* (Cr. App.) 153 S. W. 873.

On proof of threats by the prosecutor, the state may prove his general good reputation for peace. *Darnell v. State*, 58 App. 585, 126 S. W. 1122; *Rhea v. State*, 37 App. 138, 38 S. W. 1012, following *Horbach v. State*, 43 Tex. 242.

The character of the injured party, and threats made by him, are immaterial, unless they might have influenced the defendant's act. *Henderson v. State*, 12 Tex. 525; *Murray v. State*, 36 Tex. 642.

General reputation of prosecutor for being a dangerous man, at a time subsequent to time of alleged offense, not admissible. *Burks v. State*, 40 App. 170, 49 S. W. 389.

Threats against defendant's life by prosecutor may be proved, but such proof is not a justification unless prosecutor by some act manifested an intent to execute the threats. *Darnell v. State*, 58 App. 585, 126 S. W. 1122.

Character of deceased or person assaulted.—It is never competent for the prosecution in the first instance to prove that the person slain was of good or peaceable character. Such evidence, however, may be introduced by the prosecution in rebuttal, when the opposite has been testified to in behalf of the defense or where the defendant seeks to justify the homicide on the ground of threats made by the deceased. *Russell v. State*, 11 App. 288; *Graves v. State*, 14 App. 113; *Irwin v. State*, 43 Tex. 236; *Brooks v. State*, 24 App. 274, 5 S. W. 852; *Johnson v. State*, 28 App. 17, 11 S. W. 667; *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899; *Horbach v. State*, 43 Tex. 243; *Dorsey v. State*, 34 Tex. 651; *Roberts v. State*, 5 App. 141; *Williams v. State*, 14 App. 102, 46 Am. Rep. 237; *Moore v. State*, 15 App. 1; *Branch v. State*, Id. 96; *Creswell v. State*, 14 App. 7; *Miers v. State*, 34 App. 161, 29 S. W. 1074, 53 Am. St. Rep. 705; *Cornelius v. State*, 54 App. 173, 112 S. W. 1050; *Arrwine v. State*, 50 App. 477, 99 S. W. 97; *Hunter v. State*, 54 App. 224, 114 S. W. 124, 130 Am. St. Rep. 887; *Nelson v. State* (Cr. App.) 58 S. W. 108; *Jirou v. State*, 53 App. 18, 108 S. W. 656; *Canon v. State*, 59 App. 398, 128 S. W. 141; *Blocker v. State*, 61 App. 413, 135 S. W. 130; *Edwards v. State*, 61 App. 307, 135 S. W. 540; *Williams v. State*, 61 App. 356, 136 S. W. 771; *Williams v. State* (Cr. App.) 148 S. W. 763; *Hysaw v. State* (Cr. App.) 155 S. W. 941; *Wilson v. State*, 70 App. 355, 156 S. W. 1185.

Where there is evidence tending to show that in committing the homicide the defendant acted in self-defense, or under the reasonable apprehension that his life was in danger, or that he was in danger of some serious bodily harm, by reason of some act of deceased, then done, indicating an intention to kill or do serious bodily harm, or that he acted under the impulse of passion, without deliberation, he is entitled to prove, in explanation, extenuation, or justification of his acts, the general character of the deceased, as being that of a violent and dangerous man, or his general character in any other respect which would tend to determine the grade of the homicide by showing the intent actuating the defendant in its commission. *Williams v. State*, 14 App. 102, 46 Am. Rep. 237; *Moore v. State*, 15 App. 1. Such evidence is only admissible when it is shown that at the time of the homicide the deceased did some act indicating his purpose then to take the life of the defendant, or do him serious bodily harm. *Creswell v. State*, 14 App. 1; *Moore v. State*, 15 App. 1; *Stevens v. State*, 1 App. 591; *Roberts v. State*, 5 App. 141; *Hudson v. State*, 6 App. 565, 32 Am. Rep. 593; *Horbach v. State*, 43 Tex. 242; *Irwin v. State*, Id. 236; *Evers v. State*, 31 App. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811. Or when the circumstances of the case raise a doubt as to whether the defendant committed the homicide in self-defense. *West v. State*, 18 App. 640; *Creswell v. State*, 14 App. 1.

Evidence of the details of deceased's difficulties with others is inadmissible. *Johnson v. State* (Cr. App.) 167 S. W. 733; *Flores v. State*, 72 App. 232, 162 S. W. 883; *Harper v. State* (Cr. App.) 170 S. W. 721; *Echols v. State* (Cr. App.) 170 S. W. 786.

It is not competent for the defendant to prove that the general character of the deceased for honesty was bad. *Plasters v. State*, 1 App. 673.

The defense having proved that deceased was a man of violent and dangerous character, and the state having adduced contrary evidence, it was held that the defendant was entitled to introduce the records of another court to show that the deceased had at one time been convicted of manslaughter. *Brunet v. State*, 12 App. 521.

If the character of the deceased could not have affected the conduct of the defendant, evidence to prove such character is inadmissible. *Henderson v. State*, 12 Tex. 525; *Grissom v. State*, 8 App. 386.

An inquiry as to character must be limited to the general reputation of the deceased in the community of his residence, or where he is best known, and the witness must speak from this knowledge of his general character, and not from his own individual opinion. *Brownlee v. State*, 13 App. 255; *Marshall v. State*, 5 App. 273; *Roach v. State*, 41 Tex. 261; *Spangler v. State*, 41 App. 424, 55 S. W. 328.

The general character referred to means the general character of the deceased as a dangerous and violent man, or his general character in any other respect that would tend to determine the grade of the homicide by showing the intent actuating the defendant in its commission. *Williams v. State*, 14 App. 102, 46 Am. Rep. 237.

The rule laid down in *Horbach v. State*, 43 Tex. 242, defining the circumstances under which proof of the general character of the deceased may be put in evidence by a defendant upon a trial for murder, cannot be restricted to the one act of seemingly attempting to draw a pistol or other weapon. The reason of the rule applies with equal force to any act reasonably indicating a present purpose on the part of the deceased to kill, or do some serious bodily injury to the defendant. *Branch v. State*, 15 App. 96.

The defendant having proved acts of the deceased at the time of the homicide reasonably indicating danger to the defendant, and having also shown that the deceased was a violent, dangerous man, it was held that the defendant was entitled to further prove that the deceased carried deadly weapons about his person. *Lilly v. State*, 20 App. 1. See, also, *Horbach v. State*, 43 Tex. 242.

Independent of general reputation as to the character of the deceased, the defendant has the right to prove that he had received information of deceased's character from other sources. *Childers v. State*, 30 App. 160, 16 S. W. 903, 28 Am. St. Rep. 899. And see, also, on the subject, *Brooks v. State*, 24 App. 274, 5 S. W. 852; *Johnson v. State*, 28 App. 17, 11 S. W. 667; *Walker v. State*, 28 App. 503, 13 S. W. 860.

Evidence of the general reputation of deceased, acquired after the homicide, held, properly excluded. *Skaggs v. State*, 31 App. 563, 21 S. W. 257.

To show that he drew his pistol in self-defense, a witness testified that he knew defendant to be a professional pugilist and the champion of his class at the time defendant made the assault. *Warren v. State*, 31 App. 573, 21 S. W. 680.

Proof of general reputation of deceased and that defendant knew of such reputation is admissible. *Jones v. State*, 38 App. 87, 40 S. W. 807, 41 S. W. 638.

Evidence that deceased was not in the habit of carrying pistol or of using profane language not admissible. *McCandless v. State*, 42 App. 58, 57 S. W. 672.

It is not admissible to show deceased's character by isolated facts. *Nelson v. State* (Cr. App.) 58 S. W. 108.

After proof of communicated threats, the State may prove the good character of deceased, but not so as to uncommunicated threats. *Arnwine v. State*, 50 App. 254, 96 S. W. 4.

Where there is evidence of threats made by deceased and communicated to defendant, and evidence tending to show justification on part of defendant, testimony of character is admissible on either side. *Menefee v. State*, 50 App. 249, 97 S. W. 487.

There is no error in excluding evidence not showing of what offense deceased had been convicted, or that it was one bearing on his character for peace or violence. *Pollard v. State*, 58 App. 299, 125 S. W. 390.

The general character of deceased or the injured person may be proved, to show that defendant was justified in believing himself in danger of losing his life or of

sustaining serious bodily injury from deceased or the injured person. *Daniels v. State*, 58 App. 569, 126 S. W. 1153.

Accused testified that decedent attacked him without excuse, and swore he would cut him, and also testified that decedent had told him of how he had used his knife in various difficulties. Held, that accused could prove that decedent had assaulted others without apparent excuse, and on the morning of the killing had without excuse attacked two others with a knife. *Spencer v. State*, 59 App. 217, 128 S. W. 118.

Where there was no evidence showing that decedent was doing anything when he was killed, testimony as to decedent's reputation as a quarrelsome and violent man was offered, such testimony was properly excluded. *Spencer v. State*, 59 App. 217, 128 S. W. 118.

It was proper to exclude showing by one accused of assault with intent to murder that the assaulted person was quarrelsome and overbearing in his manner, turbulent, and dictatorial, especially in church matters; accused being permitted to prove the assaulted person's general reputation, and to show that he had more trouble than the average man, etc. *York v. State*, 64 App. 153, 142 S. W. 8.

In a prosecution for assault to murder a police officer, defendant was entitled to prove the officer's general reputation as being a violent and dangerous man, but could not prove that the officer had assaulted other parties at various times, and had killed one man within the preceding five years, for which he had never been indicted. *Lacoume v. State* (Cr. App.) 143 S. W. 626.

Evidence of a previous difficulty, in which deceased had committed a violent assault on another, and of which it was not shown defendant had any knowledge, was inadmissible. *Lubbock v. State* (Cr. App.) 147 S. W. 258.

Accused may show that he knew of his personal knowledge and from hearsay of several attacks made by decedent on third persons and that he had almost killed a person, to explain his condition of mind at the time of the homicide. *Smith v. State* (Cr. App.) 148 S. W. 699.

Where decedent and accused had quarrels and fights, and accused, on decedent getting the best of it, cut decedent with a pocketknife, inflicting fatal wounds, and it was not shown that decedent had made any threats against accused, evidence of decedent's good reputation as a peaceable and law-abiding man was inadmissible. *Dawson v. State*, 70 App. 8, 155 S. W. 266.

Evidence that deceased had been previously seen to carry a pistol, but not on the day or at the time of the alleged homicide, was inadmissible. *Hysaw v. State* (Cr. App.) 155 S. W. 941.

Isolated acts showing that deceased is a dangerous man are inadmissible, in the absence of proof of knowledge thereof on the part of accused at the time of or prior to the difficulty. *Smith v. State*, 70 App. 62, 156 S. W. 214. But see *Jones v. State* (Cr. App.) 153 S. W. 310.

Where accused claimed that he mistook deceased for A., with whom he had had trouble and for whom he had been warned to look out as he was armed and likely to kill him, the state was properly permitted to prove that A.'s reputation as a peaceable law-abiding citizen was good. *Wilson v. State*, 70 App. 355, 156 S. W. 1185.

Evidence of knowledge or information brought home to accused concerning the prior difficulty between his brothers and deceased held admissible. *Sorrell v. State* (Cr. App.) 169 S. W. 209.

Where, there was no offer to prove that, prior to the killing, decedent's wife had informed accused that her husband had served a two-year term in the penitentiary, accused was not entitled to prove such fact by decedent's wife. *Shaw v. State*, 72 App. 114, 161 S. W. 963.

Where accused, for the purpose of showing that deceased, a deputy sheriff, was a violent and dangerous man, introduced testimony that on one occasion he assaulted a witness, the state was properly permitted to prove that the witness was drunk and disorderly, that deceased acted simply as an officer in trying to quiet him. *Flores v. State*, 72 App. 232, 162 S. W. 883.

Where the defense was permitted to prove a statement by deceased that he would break accused's neck, though not communicated to accused, the state was properly permitted to show deceased's reputation as a peaceable, law-abiding citizen. *Berry v. State* (Cr. App.) 163 S. W. 964.

Where defendant claimed that he shot deceased in self-defense, he was entitled to show that deceased was a violent and dangerous man by proof of his general reputation, but if defendant's state of mind at the time of the killing was also in issue, he might then show specific communicated acts of violence on deceased's part. *Bullock v. State* (Cr. App.) 165 S. W. 196.

Where accused is entitled to show specific communicated acts of violence on deceased's part, the state may inquire into particulars of such acts to show that deceased was justified, and to rebut the claim that deceased was a violent and dangerous person. *Bullock v. State* (Cr. App.) 165 S. W. 196; *Hysaw v. State* (Cr. App.) 155 S. W. 941.

But where evidence of decedent's acts is confined to those committed at the very time of the killing, which are *res gestae* thereof, and they show him to be a violent and dangerous man, the state cannot rebut such evidence by proof of his reputation in those respects. *Bullock v. State* (Cr. App.) 165 S. W. 196.

The state may rebut evidence that deceased had been indicted for murder by showing that he was acquitted, and that he did not participate in the killing, although the details of the prosecution are inadmissible. *Johnson v. State* (Cr. App.) 167 S. W. 733.

Where accused claimed that he killed in self-defense, and testified that because of his knowledge of the numerous difficulties in which deceased had been engaged he regarded him as a dangerous man, the state may introduce evidence to show deceased's general reputation was that of a peaceable, law-abiding citizen. *Johnson v. State* (Cr. App.) 167 S. W. 733.

In a prosecution for manslaughter, where the defendant attacked the character of deceased as a peaceable citizen by testifying that certain persons told him that deceased was as bad a man as there was in that neck of the woods and would need to be watched, evidence supporting the character of deceased was admissible on behalf of the state. *Ghent v. State* (Cr. App.) 176 S. W. 566.

In a prosecution for murder, where the wife of deceased denied on cross-examination that she had told defendant that deceased was of a violent disposition, and that she at one time had kept him from killing her father, and defendant and his family testified that she had so told them, evidence by the father in rebuttal thereof was admissible. *Barnett v. State* (Cr. App.) 176 S. W. 580.

Where defendant, in a prosecution for murder, has introduced evidence that deceased had been engaged in difficulties in another state, as bearing on his character and disposition, evidence as to his general reputation in such other state is admissible in rebuttal. *Barnett v. State* (Cr. App.) 176 S. W. 580.

In a prosecution for murder, where defendant has pleaded self-defense and defense of his wife, based on threats, the general character of deceased as a violent and dangerous man, or a man of kind and inoffensive disposition, is admissible. *Barnett v. State* (Cr. App.) 176 S. W. 580.

In a prosecution for murder, after the introduction of evidence that deceased had made threats against defendant, proof of the general reputation of deceased as a peaceful and law-abiding citizen was admissible. *Barnett v. State* (Cr. App.) 176 S. W. 582.

Charge.—Where the issue of threats of deceased is raised the court should charge this article. *Knight v. State*, 55 App. 243, 116 S. W. 62; *Armsworthy v. State*, 48 App. 413, 88 S. W. 217.

The charge of the court is erroneous in that the instruction relating to the threats uttered by the deceased against the accused is disconnected from that portion of the charge which relates to self-defense, whereas it should have formed a part of the instruction on the law of self-defense, and should have been given in immediate connection with that issue. See the opinion in extenso on the subject. *Tillery v. State*, 24 App. 251, 5 S. W. 842, 5 Am. St. Rep. 582; *Mitchell v. State*, 50 App. 180, 96 S. W. 43; *Burnam v. State*, 61 App. 51, 133 S. W. 1045; *Ayers v. State*, 62 App. 428, 137 S. W. 1146; *Mayhew v. State* (Cr. App.) 144 S. W. 229, 39 L. R. A. (N. S.) 671; *Maclin v. State* (Cr. App.) 144 S. W. 951; *Ware v. State* (Cr. App.) 152 S. W. 1074. See, also, *Lyons v. State*, 71 App. 159, 159 S. W. 1070.

Where the only threats made were made during the difficulty, it was not necessary to charge on the law of threats. *Wilson v. State*, 71 App. 399, 160 S. W. 83; *Belcher v. State*, 71 App. 646, 161 S. W. 459; *Francis v. State* (Cr. App.) 175 S. W. 705.

It was held error to instruct the jury that there must have been "an effort, or demonstration to execute the threats" by the deceased in order to justify the defendant's action. *Miles v. State*, 18 App. 156.

Inasmuch as the so-called threat in this case was both conditional and had never been communicated to the defendant at the time of the homicide, the court properly refused to charge on threats. *Knowles v. State*, 31 App. 383, 20 S. W. 829.

Instructions as to the consideration to be given to uncommunicated threats, held proper. *Trotter v. State*, 37 App. 468, 36 S. W. 278.

Where charge upon threats is given it should be in affirmative form and not negative. *Sebastian v. State*, 42 App. 84, 57 S. W. 821.

It is error for charge to limit consideration of threats communicated to accused for the purpose of ascertaining the intent of deceased. *Sebastian v. State*, 42 App. 84, 57 S. W. 821.

The law does not define what "overt act" is necessary, and it is error for the court to limit the right of self-defense to any particular act of the deceased. If threats enter into the question an appropriate charge must be given presenting that phase, and the law does not require an actual attempt to execute the threat, before the demonstration to execute the threat can be relied upon. Any act of the deceased which the accused may have believed evidenced an intention to carry his threats into execution would be basis for his action on the theory of self-defense. *Swain v. State*, 48 App. 98, 86 S. W. 338; *Graves v. State*, 58 App. 42, 124 S. W. 676.

A charge which says: Some overt act which was calculated to induce the belief and which did induce the belief in the mind of the accused, reviewing the facts from the defendant's standpoint at the time, etc., was improper. It is best to follow the language of the statute and not try to improve on it. The jury might not have understood what an overt act meant. *Clark v. State*, 51 App. 519, 102 S. W. 1138.

Where just immediately before the killing deceased said, in reply to defendant's question whether he was drunk or crazy, that if defendant even thought he was drunk or crazy he would kill him, it is not required that the court charge threats under this article. *Rice v. State*, 51 App. 255, 103 S. W. 1156.

It is error for the court to charge that the jury must believe in the defendant's reasonableness of belief that deceased intended to inflict death or serious bodily injury, and to consider the strength of the parties and any real or apparent attempt of deceased to draw or use a knife or other deadly weapon before he could take advantage of this statute. The court should not go beyond the words of the statute. *Lockhart v. State*, 53 App. 589, 111 S. W. 1024.

Where there was evidence of threats before the killing, but not communicated to defendant, and evidence of threats at time of killing, there was no need to give substance of this article in charge to jury. *Dobbs v. State*, 54 App. 550, 113 S. W. 925.

Under this article charge in a prosecution for assault with intent to murder that if the party assaulted had made threats against the life of defendant, and when they met made a movement with his right hand as if to draw a weapon and used threatening language toward the defendant, causing him to have reasonable apprehension of death or serious bodily injury at the hands of the party assaulted, defendant had a right to use all necessary force to defend himself, was erroneous, since the statute does not define what acts shall justify the threatened party in using force to defend himself, and the court is not authorized to do so. *Graves v. State*, 58 App. 42, 124 S. W. 676.

Charge on threats should apply the law of threats to serious bodily injury as well as the law of threats to take life. *Lundy v. State*, 59 App. 131, 127 S. W. 1032.

Where the evidence of threats was confined to threats by decedent to kill accused or his son, a charge on self-defense, limiting the evidence to threats to kill accused or his son, as affecting the right of self-defense, was proper. *Owens v. State*, 63 App. 633, 141 S. W. 530.

It was not error to omit to instruct on uncommunicated threats, where it became an unimportant issue as to who began the difficulty, on proof that decedent abandoned it, and was shot in the back while leaving the place. *Lancaster v. State* (Cr. App.) 148 S. W. 307.

Refusal to charge that threats by deceased not communicated to accused should be considered held proper. *Carver v. State* (Cr. App.) 148 S. W. 746.

Where accused provoked the conflict a refusal to charge on the effect of uncommunicated threats was harmless. *Carver v. State* (Cr. App.) 148 S. W. 746.

It was proper to refuse to instruct that, to excuse accused's acts, it was not necessary that any threats by decedent were seriously made, if accused deemed them serious, where all threats testified to were seriously made, if made. *Burnam v. State* (Cr. App.) 148 S. W. 757.

Where accused testified to threats by deceased made to him personally and others communicated to him by third persons, it was proper for the court to present the question of threats from both viewpoints. *Williams v. State* (Cr. App.) 148 S. W. 763.

Where there is no pertinent or forcible evidence on the question of uncommunicated threats, and the evidence, if any, is weak, trivial, and remote, the refusal of an instruction thereon is proper. *Summers v. State* (Cr. App.) 148 S. W. 774.

A separate charge on threats in presenting the issue of self-defense held unnecessary. *Johnson v. State* (Cr. App.) 167 S. W. 733.

Where the evidence did not show that deceased made any threat against defendant, no charge on threats was called for. *Hicks v. State* (Cr. App.) 171 S. W. 755.

Charge on threats by deceased, approved. *Powell v. State*, 28 App. 393, 13 S. W. 599; *Self v. State*, 28 App. 398, 13 S. W. 602; *Lewis v. State*, 59 App. 51, 126 S. W. 1137; *Payton v. State*, 60 App. 475, 132 S. W. 127; *Edwards v. State*, 61 App. 307, 135 S. W. 540; *Shed v. State* (Cr. App.) 153 S. W. 125; *Brookins v. State*, 71 App. 101, 158 S. W. 521.

See case in which the court limited the right of self-defense as based alone upon threats, and acts manifesting an intention to execute them, and which was defective in failing to further instruct as to self-defense based upon reasonable appearance of danger. *Nalley v. State*, 30 App. 456, 17 S. W. 1084. See, also, *Lynch v. State*, 24 App. 350, 6 S. W. 190, 5 Am. St. Rep. 888; *Crook v. State*, 27 App. 198, 11 S. W. 444; *Green v. State*, 27 App. 244, 11 S. W. 114; *Smith v. State*, 31 App. 14, 19 S. W. 252.

Facts held to call for a charge on threats as affecting self-defense. *Young v. State*, 61 App. 303, 135 S. W. 127; *Jackson v. State*, 63 App. 351, 139 S. W. 1156; *Lee v. State* (Cr. App.) 148 S. W. 706; *Montgomery v. State* (Cr. App.) 151 S. W. 813; *Smith v. State*, 70 App. 62, 156 S. W. 214; *Rutherford v. State* (Cr. App.) 164 S. W. 383.

Threats against deceased as evidence of malice.—See notes to art. 1140, ante.

Art. 1144. [714] [Repealed. See art. 1140, ante.]

See Willson's Cr. Forms, 947, 948.

MURDER BY MOB VIOLENCE

Laws 1897, S. S., ch. 13, relating to the taking of life by mob violence was held unconstitutional in *Augustine v. State*, 41 App. 59, 52 S. W. 77, 96 Am. St. Rep. 765, and was omitted from the revised penal code.

CHAPTER SEVENTEEN

OF DUELING

Art.
1145. Dueling, etc., how punished.

Art.
1146. Homicide in, murder in the first degree.

Article 1145. [715] **Dueling, etc., how punished.**—Any person who shall, within this state, fight a duel with deadly weapons, or send or accept a challenge to fight a duel with deadly weapons,

either within the state or out of it, or who shall act as a second, or knowingly aid or assist in any manner those thus offending, shall be deemed guilty of a felony, and, upon conviction, shall be punished by confinement in the penitentiary not less than two nor more than five years.

Indictment.—Willson's Cr. Forms, 517-522.

Charge.—Charge on fighting a duel held not authorized by the facts. *Guerrero v. State*, 39 App. 662, 47 S. W. 655.

Art. 1146. [716] Homicide in, murder in first degree.—If, in any duel hereafter fought in this state, either of the combatants be killed, or receive a wound from which he afterwards dies within three months, the survivor shall be deemed guilty of murder in the first degree and be punished accordingly.

See arts. 1140, 1141, abolishing the degrees of murder.

Indictment.—Willson's Cr. Forms, 516.

CHAPTER EIGHTEEN

GENERAL PROVISIONS RELATING TO HOMICIDE

Art.	Means or instruments used must be considered.	Art.	If in sudden passion not with deadly weapon.
1147.	Means or instruments used must be considered.	1149.	If in sudden passion not with deadly weapon.
1148.	If injury be done in a cruel manner.	1150.	If evil or cruel disposition be exhibited.

Article 1147. [717] Means or instruments used must be considered.—The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears.

See arts. 51 and 1106, ante.

Cited, *Luttrell v. State*, 70 App. 183, 157 S. W. 157; *Paschal v. State* (Cr. App.) 174 S. W. 1057.

Deadly weapon.—A deadly weapon is one, which in the manner used is likely to produce death or great bodily harm. *McReynolds v. State*, 4 App. 327; *Coney v. State*, 2 App. 62; *Key v. State*, 12 App. 506; *Wilson v. State*, 15 App. 150; *Hilliard v. State*, 17 App. 210; *Howard v. State*, 18 App. 348; *Skidmore v. State*, 43 Tex. 93; *McDowell v. State*, 55 App. 596, 117 S. W. 831; *Pierce v. State*, 21 App. 540, 1 S. W. 463; *Peacock v. State*, 52 App. 432, 107 S. W. 346; *Briggs v. State*, 6 App. 144; *Witty v. State* (Cr. App.) 171 S. W. 229.

A pocketknife with a blade from 2 to 2½ inches long is not per se a deadly weapon. *Reeves v. State* (Cr. App.) 168 S. W. 860; *Price v. State*, 60 App. 91, 131 S. W. 319; *Jones v. State* (Cr. App.) 153 S. W. 310.

The testimony of medical witnesses as to the deadly character of the weapon used is competent evidence. *Waite v. State*, 13 App. 169; *Banks v. State*, Id. 182; *Thompson v. State*, 24 App. 383, 6 S. W. 296. But see *Ward v. State*, 70 App. 393, 159 S. W. 272.

Whether it is a deadly weapon is a matter of proof and depends, in some cases, on the manner of its use. *Hunt v. State*, 6 App. 663; *Pierce v. State*, 21 App. 540, 1 S. W. 463; *Jenkins v. State*, 30 App. 379, 17 S. W. 938.

A pistol used to strike with is not per se a deadly weapon; its character as such must be shown by evidence thereof or by the injury inflicted. *Stephenson v. State*, 33 App. 162, 25 S. W. 784.

The injuries themselves may be proof of the deadly character of the weapon where its character is not shown definitely by the evidence. *Walters v. State*, 37 App. 388, 35 S. W. 652.

The jury may infer the intent to kill where the weapon was a deadly one. *Franklin v. State*, 37 App. 113, 38 S. W. 802, 1016.

One need not be an expert to testify that a crowbar, 50 inches long and weighing 11 pounds, is a deadly weapon in the hands of a boy 15 years old. *Ashley v. State*, 58 App. 420, 126 S. W. 589.

A pistol, used as a firearm, is a "deadly weapon." *Hartfield v. State*, 61 App. 515, 134 S. W. 1180.

To permit the jury to determine whether the knife used was a deadly weapon, though there was no evidence stating in terms that it was a deadly weapon held not error. *Luttrell v. State*, 70 App. 183, 157 S. W. 157.

Evidence held to authorize a finding that a knife with which accused killed decedent was a deadly weapon. *Stewart v. State*, 71 App. 237, 158 S. W. 996.

Where the state claimed that defendant killed deceased with a 45-caliber pistol used as a club, which was offered in evidence, identified, and admitted to belong

to accused, the court having properly defined the term "deadly weapon," whether the pistol as so used was a deadly weapon was for the jury. *Girtman v. State* (Cr. App.) 164 S. W. 1008.

A carving knife, the handle of which was 5¼ inches long, the blade 9¾ inches long, 1½ inches wide at the butt, and tapering to a point and weighing 7 ounces, was a deadly weapon per se. *Jones v. State* (Cr. App.) 167 S. W. 1110.

Where a knife with which an assault has been committed had been identified, evidence of the county attorney as to its length, breadth, and weight, and that it was a deadly weapon, was admissible. *Jones v. State* (Cr. App.) 167 S. W. 1110.

A 32-caliber rifle, fired at a person from 75 to 100 yards away, is a deadly weapon as a matter of law, and on a trial for assault to murder it is proper to refuse to submit to the jury the question whether the weapon is a deadly weapon. *Catlett v. State* (Cr. App.) 169 S. W. 673.

Weapon or means used as evidence of intent.—See art. 51, ante.

Means or instruments used must be considered. *Nichols v. State*, 24 App. 137, 5 S. W. 661; *Boyd v. State*, 28 App. 137, 12 S. W. 737; *Bean v. State*, 25 App. 346, 8 S. W. 278. And see *Gatlin v. State*, 5 App. 531; *Gaitan v. State*, 11 App. 544; *Fitch v. State*, 37 App. 500, 36 S. W. 584; *Hardy v. State*, 36 App. 400, 37 S. W. 434; *Betts v. State*, 60 App. 631, 133 S. W. 251; *Crutchfield v. State* (Cr. App.) 152 S. W. 1053; *Dawson v. State*, 72 App. 68, 161 S. W. 469.

Where a deadly weapon is used in a deadly manner, the presumption of intent to kill is practically conclusive, but, if the weapon be not dangerous or be not used in a deadly manner, then the intent must be established by the facts. *Grant v. State* (Cr. App.) 143 S. W. 929; *Martinez v. State*, 35 App. 386, 33 S. W. 970; *McDowell v. State*, 55 App. 596, 117 S. W. 831; *Johnson v. State*, 42 App. 377, 60 S. W. 48; *Washington v. State*, 53 App. 480, 110 S. W. 751, 126 Am. St. Rep. 800; *Crow v. State*, 55 App. 200, 116 S. W. 53, 21 L. R. A. (N. S.) 497; *Betts v. State*, 57 App. 389, 124 S. W. 424; *Williams v. State*, 57 App. 492, 123 S. W. 1110; *Thomas v. State*, 57 App. 452, 125 S. W. 35.

When one uses an instrument calculated to produce death in a way to produce such a result the law presumes that the party intends to kill; but the homicide would not be presumed to be murder upon express malice, but express malice must be proved aliunde. *Murray v. State*, 1 App. 417.

On the issue of intent the character of the weapon used and the manner of its use may be proved. *Hatton v. State*, 31 App. 586, 21 S. W. 679.

When the homicide is not committed in the commission of a felony and no evil disposition is shown, there must have been an intent to kill to constitute murder, and the intent cannot be inferred from the killing with a stick two inches in diameter and four feet long. *Fitch v. State*, 37 App. 500, 36 S. W. 584.

When a person uses an instrument from which any reasonable person knows that death may result, and death does result, the law presumes that death was intended. *Ford v. State*, 64 App. 14, 142 S. W. 6.

The state was properly permitted to show that the knife used by accused had been recently sharpened, and had on the blade, next the handle, dust from a whetstone, as tending to show that the assault was premeditated; the parties having agreed to meet, as they did, to try and adjust matters. *York v. State*, 64 App. 153, 142 S. W. 8.

Testimony of a physician as to wounds inflicted on deceased held admissible on the issue of whether an intent to kill was manifest from the mode and manner of the use of a knife, though it had already been proved that deceased died from wounds inflicted by accused. *Dawson v. State*, 72 App. 68, 161 S. W. 469.

Charge.—Charge held correct. *Gatlin v. State*, 5 App. 531; *Henry v. State*, 38 App. 306, 42 S. W. 559; *Cornwell v. State*, 61 App. 122, 134 S. W. 221, Ann. Cas. 1913B, 71; *Beaure v. State*, 70 App. 19, 156 S. W. 625.

Where the weapon used was a pocket knife with blade from 2 to 2½ inches long and there was a conflict in the evidence as to the intent and purpose with which the knife was used, the court should have given this article in charge. *Hightower v. State*, 56 App. 248, 119 S. W. 693, 133 Am. St. Rep. 966; *Snowberger v. State*, 58 App. 530, 126 S. W. 878; *Jones v. State* (Cr. App.) 153 S. W. 310.

An instruction that if accused, with a leather belt, being a deadly weapon, or a weapon calculated to produce death by the manner in which it was used, struck and killed deceased, the jury should find him guilty, is not erroneous because the indictment did not allege that the belt was a deadly weapon, or became such from the manner of its use. *Lee v. State*, 44 App. 460, 72 S. W. 195. But see *Jackson v. State*, 33 App. 281, 26 S. W. 194, 622, 47 Am. St. Rep. 30, holding that on trial for robbery where it was not alleged that deadly weapons were used, it was error to charge the law in relation to the use of deadly weapons.

When the evidence does not show the size of the knife used in a homicide but indicates that it was a common pocket knife, the court should, under this article have charged the law of aggravated assault. *Wilson v. State*, 49 App. 50, 90 S. W. 315; *Dawson v. State*, 70 App. 8, 155 S. W. 266. And see *Reeves v. State* (Cr. App.) 168 S. W. 860.

Charge held incorrect. *Thomas v. State*, 57 App. 452, 125 S. W. 35; *Pool v. State*, 62 App. 360, 137 S. W. 666; *Grant v. State* (Cr. App.) 143 S. W. 929.

Where the assault is made without any apparent intention to kill with a weapon not reasonably calculated to effect that purpose the court should charge the law of manslaughter and aggravated assault as contained in this article and articles 1150. *Lee v. State*, 44 App. 460, 72 S. W. 195; *Huddleston v. State*, 70 App. 260, 156 S. W. 1168.

The preceding article and articles 1148 and 1150 apply to cases where the intention to kill evidently appears, or where it is evidenced by the cruel manner in which the injury was inflicted. Article 1149, applies to a case where there was no intention to kill, and the homicide was divested of an evil and cruel disposition.

Where the evidence makes the intention of the slayer at all doubtful, articles 1147, 1148, 1150 should not be given in charge without also giving in charge article 1149. *Dones v. State*, 8 App. 112; *Hill v. State*, 11 App. 456.

A charge should not give undue prominence to the presumption arising against a defendant from the character of the weapon, or the manner in which it was used. See an instance where such error was committed. *Bell v. State*, 17 App. 538; *Whitaker v. State*, 12 App. 436.

Where the charge is murder and the means used was a small rock, court should have instructed in accordance with this article and apply the charge to the facts. *Honeywell v. State*, 40 App. 201, 49 S. W. 586.

Where the real keynote in the case is the intent of the defendant with which the blow was struck, the court should go further than to give the mere abstract form of the statute. He should apply the law embodied in the statute to the facts. *Griffin v. State*, 40 App. 312, 50 S. W. 366, 76 Am. St. Rep. 718.

See a state of facts upon which it was held not to be error to omit to charge the rules of law declared in articles 1147 and 1149, although the court had charged the substance of article 1150. *Hartwell v. State*, 23 App. 88, 3 S. W. 715; *Johnson v. State*, 22 App. 206, 2 S. W. 609; *Orman v. State*, 24 App. 495, 6 S. W. 544; *Levy v. State*, 28 App. 203, 12 S. W. 596, 19 Am. St. Rep. 826; *Cochran v. State*, 28 App. 422, 13 S. W. 651; *Bracken v. State*, 29 App. 362, 16 S. W. 192; *Baltrip v. State*, 30 App. 545, 17 S. W. 1106.

On a trial for murder committed by striking deceased with a stick, a charge that when the instrument used, or the means in which it was used, was reasonably calculated to produce death, then the law presumes that such was the intent of the party, is erroneous, because it left the jury to infer intention from the mere fact that death followed the blow. *Shaw v. State*, 34 App. 435, 31 S. W. 361.

A charge which defines a deadly weapon to be one which from the manner used is calculated to produce death or serious bodily injury is not erroneous. *Henry v. State* (Cr. App.) 54 S. W. 593.

Where the instrument is not one not likely to produce death, then it becomes a controverted question of criminal intent that should be submitted by a proper charge to the jury; and it must appear from the evidence that the manner in which it was used made it evident that the defendant intended to kill, before the jury would be warranted in finding the defendant guilty of homicide. *Danforth v. State*, 44 App. 105, 69 S. W. 162.

Under this article a defendant is entitled to a charge that if the jury find the instrument used in the homicide was one not likely to produce death, in that event before they find the defendant guilty of any grade of felonious homicide, they must find from manner of use of instrument that defendant intended to take life of the person he killed. *Posey v. State*, 46 App. 190, 78 S. W. 690.

It is error to charge this article in a case of homicide committed by shooting with a pistol. This article only becomes a part of the law of the given case, when the intent is to be judged in part from the instrument used; that is if it is one not likely to produce death, it is not to be presumed that the death was designed, unless from the manner in which the instrument is used such intent evidently appears. *Burnett v. State*, 46 App. 116, 79 S. W. 551.

This article need not be given in charge unless the weapon used is not of a deadly character such as a club, a stick or a very small knife. When the instrument is a dirk knife, with a blade five and three-fourths inches long and about seven-eighths of an inch wide, sharp pointed, with a keen sharp edge on both sides, the blade fixed and rigid to the handle, with a guard between blade and handle, and is used with deadly effect, this article need not be given in charge because the instrument so used is a deadly weapon. *Connell v. State*, 46 App. 259, 81 S. W. 749.

When the defendant begins the difficulty with the evident purpose to kill deceased, and he uses a weapon, which of the size and in the manner used is a deadly weapon, the question of intent based on the character of the instrument is not in issue in the record to be charged upon under this article. *Baker v. State* (Cr. App.) 81 S. W. 1216.

This article relates to the character of weapon in connection with the intent of the party and a charge on this article is addressed to the evidence and a question of law can only arise from the record evidence in the case. *Jackson v. State*, 47 App. 557, 85 S. W. 11.

The record does not disclose the size or character of the knife with which the wound was inflicted. If the knife is not a deadly weapon the court should charge this and article 1149. *Brownlee v. State*, 48 App. 408, 87 S. W. 1155.

Pocketknives are not per se deadly weapons. They may or may not be. If the weapon is not ordinarily a deadly one, then in order to find homicide, the intent to kill must evidently appear from the manner of its use. Before the court is authorized to refuse an instruction under this article, the testimony must make it evident that the party intended to kill. *Craiger v. State*, 48 App. 500, 88 S. W. 212.

Where there is nothing in the evidence to show the size of the instrument used, outside of the statement that it was the "butt end of a black snake whip," or that it was a stick, it is not shown that it was a deadly weapon, and the court should have given this article in charge to the jury. *Coleman v. State*, 49 App. 82, 90 S. W. 501.

Where the evidence tends strongly to show that the knife was not in itself a deadly weapon the defendant's rights should have been adequately guarded by a charge presenting this issue. *Lucas v. State*, 49 App. 135, 90 S. W. 882.

Where the weapon used was a small one-bladed barlow pocket knife the court should have charged this article. *Thompson v. State*, 49 App. 384, 93 S. W. 111.

Where the knife is shown to have been a small pocket knife, and appellant and prosecuting witness were in a fight when the cutting was done, the court should have charged this article. *Johnson v. State*, 49 App. 429, 93 S. W. 736, 737.

Usually this article does not apply unless the intent is to be judged in part from the instrument used. It is necessary sometimes to give the statute in charge in order to properly guard the legal rights of a defendant. If the weapon be not one per se deadly in its character then the manner of its use may become a potent fact in regard to the intent. If there is an issue in the case as to whether the party intended to kill, or even if it was a deadly weapon that brought about the death, or if the weapon is not necessarily deadly but death does result, then it may be necessary to give this article in charge to guard defendant's rights in the case. *Campos v. State*, 50 App. 102, 95 S. W. 1043.

In the absence of testimony showing the deadly character of the weapon used the accused is entitled to have the question of intent presented as an issue to the jury. *Williams v. State*, 50 App. 269, 96 S. W. 47.

It was not error to give this article in charge in a case where the theory of the State was that the killing was intentional, while that of the defense was the gun was accidentally discharged, which killed deceased. *McKenzie v. State* (Cr. App.) 96 S. W. 933.

Where the weapon used in inflicting a wound which causes death is a brick-bat it may be that a charge on the character of the weapon as not being a deadly one is called for under this article. *Outley v. State* (Cr. App.) 99 S. W. 97.

A charge of this article is not called for if the weapon is of a non-deadly character; but if it is unquestionably of a deadly character then it is not error ordinarily to give it in charge. *Early v. State*, 51 App. 382, 103 S. W. 871, 123 Am. St. Rep. 889.

Where the evidence was that the defendant struck deceased with a "stick of stove-wood," the substance of this article should have been given in charge, with other charges in the case. *Washington v. State*, 53 App. 480, 110 S. W. 752, 126 Am. St. Rep. 800.

It is error to fail to instruct in a prosecution for murder with an iron pipe, half an inch in diameter and 30 inches long, that an intent to kill at time blow was struck must be shown to convict of homicide, the instrument used not being as a matter of law a deadly weapon. *Crow v. State*, 55 App. 200, 116 S. W. 54, 21 L. R. A. (N. S.) 497.

Where the weapon used was an ordinary pocket knife, the blade of which was $2\frac{1}{2}$ or 3 inches long, and the deceased was a man of superior strength, age and weight and in resisting the attack the defendant struck rather at random, the court should have given this article in charge. *McDowell v. State*, 55 App. 596, 117 S. W. 833; *Vinson v. State*, 55 App. 490, 117 S. W. 848.

Where the conviction is for an aggravated assault and not for assault with intent to murder no harm resulted to defendant in not giving this article in charge to the jury. *Halsford v. State*, 56 App. 118, 120 S. W. 194.

The charge, "If the means be such as are not likely to produce death, it is not to be presumed that death was designed, unless from the means adopted, and the surrounding circumstances at the time such intention evidently appears" is erroneous because the phrase "and the surrounding circumstances at the time" was improperly included. *Grant v. State*, 56 App. 411, 120 S. W. 484.

It is not necessary to define deadly weapons unless there is some question as to whether the weapons are of that character, considering the circumstances and the manner of their use. *Wheeler v. State*, 56 App. 547, 121 S. W. 166. See, also, *McGill v. State*, 60 App. 614, 132 S. W. 941.

The court having submitted, as a predicate for conviction in a murder case, the whipping of deceased by defendant with a belt worn by him, which was not a deadly weapon, it should have charged this article. *Betts v. State*, 57 App. 389, 124 S. W. 424.

Case in which this article should have been charged. *Snowberger v. State*, 58 App. 530, 126 S. W. 878.

Where the court charges on the presumption of intent from the use of a deadly weapon, it should give the substance of this article. *Coker v. State*, 59 App. 241, 128 S. W. 137.

Where it was to be inferred from the evidence that both parties used knives, but there was no description of the knife used, the court should have charged this article. *McGill v. State*, 60 App. 614, 132 S. W. 941.

Where, on a trial for assault to murder, the evidence showed that no serious injury was inflicted on prosecutor, and that accused used a small knife, the court should charge this article. *Ross v. State*, 61 App. 12, 133 S. W. 688.

Instruction in so far as it required that defendant must have been influenced by sudden passion imposed an element more burdensome on defendant, and not within this article and article 51, and was therefore erroneous. *Grant v. State* (Cr. App.) 143 S. W. 929.

Where accused denied having inflicted the fatal wound received by decedent in an affray, testimony for the defense that the knife used by him was short and small raised an issue as to the deadly character of the weapon, so as to require a charge thereon. *Blackshear v. State* (Cr. App.) 154 S. W. 564.

Where the instrument used was a matter of conjecture, where the depth of the wound was not shown, though a small pocket knife might have inflicted it, where there was no previous trouble between the parties, where the blow, if struck by defendant, was during a general fight, the court should have charged this article. *Huddleston v. State*, 70 App. 260, 156 S. W. 1168.

Art. 1148. [718] If injury be done in a cruel manner.—If any injury be inflicted in a cruel manner, though with an instrument not likely under ordinary circumstances to produce death, the

killing will be manslaughter or murder, according to the facts of the case.

Degree of offense.—If the injury were inflicted in a cruel manner, the law implies malice, notwithstanding the instrument used in inflicting the injury be one not likely to produce death. It is the cruel manner in which the act is committed that stamps it as malicious. *Whitaker v. State*, 12 App. 436; *Cook v. State*, 22 App. 511, 3 S. W. 749; *McCoy v. State*, 25 Tex. 33, 78 Am. Dec. 520; *Jordan v. State*, 10 Tex. 479; *Bell v. State*, 17 App. 538; *Garcia v. State*, 48 App. 523, 89 S. W. 647. And see *Betts v. State*, 60 App. 631, 133 S. W. 251; *Girtman v. State* (Cr. App.) 164 S. W. 1008.

In every case when it becomes a question whether or not there was an intention to kill on the part of the slayer suggested by the character of the weapon used not being deadly, it is the duty of the court to submit the issue of manslaughter; and if there is no intention to kill he should submit the issue of aggravated assault. *Johnson v. State*, 42 App. 377, 60 S. W. 49.

Art. 1149. [719] If in sudden passion not with deadly weapon.—Where a homicide occurs under the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide, unless it appear that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery.

Degree of offense.—See arts. 1022, 1026, ante, and notes.

If a homicide be committed under the influence of sudden passion by the use of means not in their nature calculated to produce death, and in the absence of an intention to kill, the circumstances not showing an evil or cruel disposition, the party killing would not be guilty of culpable homicide, but, self-defense apart, would be guilty of some grade of assault and battery. *Thompson v. State*, 24 App. 383, 6 S. W. 296; *Bean v. State*, 25 App. 346, 8 S. W. 278.

This article comprehends the law of a case in which there was no intention to kill, and when the homicidal act was divested of the elements of an evil and cruel disposition. Under it an offender may be prosecuted and convicted of any grade of assault and battery. *Hill v. State*, 11 App. 456. And see, also, *Thompson v. State*, 24 App. 383, 6 S. W. 296; *Boyd v. State*, 28 App. 137, 12 S. W. 737; *Wilson v. State*, 49 App. 50, 90 S. W. 312; *Lucas v. State*, 49 App. 135, 90 S. W. 880; *Terrell v. State*, 53 App. 604, 111 S. W. 152; *Crow v. State*, 55 App. 200, 116 S. W. 52, 21 L. R. A. (N. S.) 497; *Pool v. State*, 62 App. 360, 137 S. W. 666; *Kinslow v. State* (Cr. App.) 147 S. W. 249; *McDowell v. State* (Cr. App.) 151 S. W. 1049; *Reeves v. State* (Cr. App.) 168 S. W. 860; *House v. State* (Cr. App.) 171 S. W. 206.

Art. 1150. [720] If evil or cruel disposition be exhibited.—Where the circumstances attending a homicide show an evil or cruel disposition, or that it was the design of the person offending to kill, he is deemed guilty of murder or manslaughter, according to the other facts of the case, though the instrument or means used may not in their nature be such as to produce death ordinarily.

Cited, *Girtman v. State* (Cr. App.) 164 S. W. 1008; *Paschal v. State* (Cr. App.) 174 S. W. 1057.

Deadly weapon.—See notes under arts. 1026, 1147, ante.

Offense.—When the evidence shows no evil or cruel disposition on the part of defendant, and the homicide was not committed in the perpetration of a felony, then in order to constitute a case of either murder or manslaughter the evidence must show an intent to kill. *Fitch v. State*, 37 App. 500, 36 S. W. 584.

Charge.—For facts requiring charge of this article, see *Lee v. State*, 44 App. 460, 72 S. W. 195; *Dones v. State*, 8 App. 112.

When the facts do not show an evil and cruel disposition the court should not charge on this point. *Griffin v. State*, 40 App. 312, 50 S. W. 366, 76 Am. St. Rep. 713.

When the main evidence was that accused killed deceased by striking on the head with a hoe, it was error for court to charge the jury that they might look to the cruelty evidenced by the manner of killing in passing upon the testimony. *Barnes v. State*, 42 App. 297, 59 S. W. 883, 96 Am. St. Rep. 801.

TITLE 16

OF OFFENSES AGAINST REPUTATION

<p>Chap. 1. Of libel. 2. Of slander. 3. Sending anonymous letters.</p>	<p>Chap. 4. Of false accusation and threats of prosecution. 5. Blacklisting.</p>
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CHAPTER ONE

OF LIBEL

<p>Art. 1151. "Libel" defined. 1152. Punishment. 1153. Publishing writing purporting to be done by another. 1154. "Maker" explained. 1155. "Publisher." 1156. "Circulating." 1157. The ideas the statement must convey. 1158. Mode of publication. 1159. A manuscript must be circulated. 1160. Editor, publisher, etc., prima facie guilty. 1161. But may avoid responsibility, how. 1162. Mechanical executor not guilty, unless. 1163. Actual injury not necessary. 1164. Intent to injure presumed. 1165. True statement concerning candidate not libel. 1166. Nor concerning qualifications of professional men.</p>	<p>Art. 1167. No criticism of any book, work of art, etc. 1168. The offense relates to persons only. 1169. Respecting religious systems, etc. 1170. Corporation cannot be libeled. 1171. Nor legislative or judicial proceedings, unless. 1172. Recorder of minutes, etc., not liable. 1173. But all members of the association who assent, are. 1174. Intent to injure not presumed, unless, etc. 1175. "Malicious" signifies what. 1176. Statement in legislative or judicial proceedings not included. 1177. Truth of the statement may be shown, when. 1178. Province of jury. 1179. This title relates only to penal action.</p>
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Article 1151. [721] "Libel" defined.—He is guilty of "libel" who, with intent to injure, makes, writes, prints, publishes, sells or circulates any malicious statement affecting the reputation of another in respect to any matter or thing pointed out in this chapter.

<p>1. Constitutionality. 2. What constitutes libel. 3. Publication. 4. Liability of newspaper corporation or members. 5. Indictment, information, and complaint.</p>	<p>6. — Innuendo. 7. — Proof and variance. 8. Evidence. 9. Charge. 10. Recognizance on appeal. 11. Civil liability.</p>
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1. **Constitutionality.**—The provisions of this chapter are not in derogation of the freedom of the press, nor violative of the constitutional provisions which secure to every person the right to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege, and which prohibit the enactment of any law curtailing the liberty of speech, or of the press. *Morton v. State*, 3 App. 510. Bill of Rights, Const., art. 1, sec. 8.

2. **What constitutes libel.**—See articles 1157, 1171, 1176, post, and notes thereunder.

A libelous article charging that the conductors of a city railroad, as a class, were foul characters, but not mentioning any conductor by name was properly alleged to affect the reputation of any one or more of the conductors of said railroad. *Jones v. State*, 38 App. 364, 43 S. W. 78, 70 Am. St. Rep. 751.

3. **Publication.**—See note under article 1156. The publication of a libel and its circulation is made when it is written, printed and sent and delivered, either to the person defamed, or to any other person. *Smith v. State*, 32 Tex. 594.

Depositing a libel in the postoffice for transmission to the party addressed, is a publication of it. *Coulson v. State*, 16 App. 189; *Smith v. State*, 32 Tex. 594.

As it was alleged, and some evidence was introduced to show, that the petition was published in a newspaper, and circulated from hand to hand, it was proper to charge that every person signing the paper, knowing that it was intended to be printed, or who signed it and delivered it to another, without knowing that it would be printed, would be guilty of circulating it; that signing and delivering it would be in itself a publication; and that if no protest or direction against its being printed was made by the signer, and it was afterwards printed by the person

to whom it was delivered, or by his authority,—it was no defense that the signer did not intend or direct its publication in the paper. *Cotulla v. Kerr*, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819.

When the defendant admitted writing the libelous matter it is immaterial whether or not he was responsible for its publication. *Noble v. State*, 38 App. 368, 43 S. W. 80.

Writing a letter and depositing it in the post office addressed to a party, is publication of it within the meaning of the law. *Mankins v. State*, 41 App. 662, 57 S. W. 952.

Putting a libelous letter in the mail is publication, regardless to whom it is addressed or whether it is addressed at all, and makes the writer guilty of libel. *Mankins v. State*, 41 App. 662, 57 S. W. 952.

4. **Liability of newspaper corporation or members.**—Members of a publishing corporation are not liable for a libelous publication by it alone. *Belo v. Fuller*, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75.

5. **Indictment, information, and complaint.**—Willson's Cr. Forms, 523.

Indictment held sufficient. *Morton v. State*, 3 App. 510.

For indictments held sufficient, see *Woody v. State*, 16 App. 252; *Morton v. State*, 3 App. 510. An indictment for libel must set out the libel in haec verba, and must show upon its face that it is so set out. The literal language of the libel must be set forth, although it may be indecent and obscene. The distinction between libel at common law, and libel as defined by this Code, is, that libel at common law is punishable because of its tendency to provoke a breach of the peace while under this Code it is punishable as well because of its tendency to injure the reputation of the person against whom it is directed. Such being the case, the indictment need only allege the intent to injure the person libeled, and need not allege the tendency and intent to provoke a breach of the peace. *Coulson v. State*, 16 App. 189; *Woody v. State*, Id. 252.

It is not essential that a complaint upon which an information is based begin "In the name and by the authority of the state of Texas." *Johnson v. State*, 31 App. 464, 20 S. W. 980.

To be sufficient the indictment should set out specifically one or more of the grounds stated in the statute. *Byrd v. State*, 38 App. 630, 44 S. W. 521; *Jones v. State*, 38 App. 364, 43 S. W. 78, 70 Am. St. Rep. 751.

It is not essential to an indictment that it allege the matter to be libelous or wickedly committed. *Baldwin v. State*, 39 App. 245, 45 S. W. 714. See, also, *Smith v. State*, 39 App. 320, 45 S. W. 1013.

In view of this article and article 1157, subd. 1, held, that an indictment for libel, alleging that defendant published a malicious statement concerning complainant, reciting that he was a United States federal guard, that he was a highwayman and cowardly assassin, and the murderer of a certain person who on the morning of March 19, 1906, was cowardly assassinated on a public highway, etc., sufficiently charged complainant with a penal offense, and was therefore sufficient. *Gonzales v. State*, 58 App. 141, 124 S. W. 937.

An indictment charged defendant with having published a malicious statement of and concerning one Villegas, affecting his reputation, in that he referred to a paper in which Villegas had proposed a ridiculous question as to who was the candidate of the People's Party for mayor, and then stated that Villegas was the heir to a fortune; had studied science; and had studied military affairs, learning only to do half a turn; had studied four years in law school, at the end of which time his father was compelled to purchase for him a law license, to which profession he could not dedicate himself, because he never knew what law was; that he was naturally stupid, and had not inherited the integrity and industry of his father; that he inherited his brother's wife and part of his fortune; and that, not wishing to hurt his modesty, of which he makes so much fuss, nothing would be said of his private life. Held, in view of articles 1151, 1157, 1165, and 1166 that the indictment charged no offense. *Aldama v. State* (Cr. App.) 163 S. W. 730.

6. — **Innuendo.**—If the indictment conveys the idea that the person has been guilty of a penal offense, or of conduct disgraceful to him as a member of society, it is not necessary to allege that the libelous language does charge him with a penal offense, or does bring him into disgrace as a member of society. *Mankins v. State*, 41 App. 662, 57 S. W. 952; *Lockhard v. State*, 43 App. 61, 63 S. W. 566; *Gonzales v. State*, 58 App. 141, 124 S. W. 937.

Information should state innuendo. *McKie v. State*, 37 App. 544, 40 S. W. 305.

An information which sets out an instrument denouncing a party as a "black-mailer, a liar and a scoundrel," "A person who is ashamed to have exposed the previous four years of his life," is insufficient. *Id.*

An indictment for libel without innuendo or explanatory allegations, but which contains allegations of inducement; a colloquium together with an allegation of publication and which sets out an instrument that needs no explanation is sufficient. *Squires v. State*, 39 App. 96, 45 S. W. 147, 73 Am. St. Rep. 904.

The office of an "innuendo" is to aver the meaning of the alleged libelous language published, but is available only to give point or meaning as explanatory of a matter sufficiently expressed before, but is not available to establish a new charge. *McCauley v. State*, 64 App. 183, 141 S. W. 975.

Defendant published in his newspaper an article calling attention to the adjournment of court; that crime had been permitted to go unpunished; that the officers drew fat salaries, and used the same to buy expensive bar fixtures for saloons that were owned and controlled by the county officials; that when "some good old soul gets so full of religion that he shouts 'Amen' in church" the county court is quick to judge him insane, but that gang that drank, interfered with peaceable citizens, etc., were seldom found in the jury room; that they did not believe in interfering with a man's personal liberty, unless he was crazy and dis-

turbed public worship by shouting "Amen" or "Glory Hallelujah." Held, that such statements were insufficient to justify an innuendo that they meant that the various officials controlling the county court had illegally sent a man to the asylum as insane who was in fact sane. *McCauley v. State*, 64 App. 183, 141 S. W. 975.

7. — **Proof and variance.**—Language charged must be proved. *Barnett v. State*, 35 App. 280, 33 S. W. 340.

It is sufficient to prove substantially the words charged as libelous and proof of additional words not altering the meaning of those alleged is no variance. *McArthur v. State*, 41 App. 635, 57 S. W. 848.

8. **Evidence.**—See article 1164, post, and notes thereunder, and, also, under article 1175, post.

Mailing a libelous letter is a publication, and upon proof of its writing and publication, malice and intent to injure are presumed, and it rests upon the defendant to bring it within the class of privileged communications. *Smith v. State*, 32 Tex. 594.

When the libelous matter consists of a charge that the person against whom it is uttered has been guilty of embezzlement, and is "a liar, swindler, and dead-beat," it is competent, under the latter allegation, to prove, in defense, the general reputation of the injured party. If the charge had been "embezzlement" simply, the inquiry should be restricted to his general character for honesty. *Leader v. State*, 4 App. 162.

Where the language used by defendant is ambiguous, testimony explaining what the witness understood by it is admissible. *Dickson v. State*, 34 App. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694.

Where State proves certain declarations of defendant as to motive of defendant in publishing the libel, it is not error to exclude other declarations made to other parties, when they constitute no part of those introduced by the State. *McArthur v. State*, 41 App. 635, 57 S. W. 849.

Proof is not admissible to show bad reputation of libelee in regard to trait of character charged against him. *McArthur v. State*, 41 App. 635, 57 S. W. 849.

The reputation of a person for truth and veracity cannot be proved when he is not a witness and his truth and veracity are not in issue. *McArthur v. State*, 41 App. 635, 57 S. W. 849.

In view of article 1151, and articles 1157, 1165, and 1166, post, defining libel in respect to statements affecting the reputation of candidates for office, professional men, etc., and making truth a defense to statements as to their qualifications, evidence in a prosecution for libel affecting reputation of a candidate held insufficient to sustain a conviction. *Aldama v. State* (Cr. App.) 163 S. W. 730.

9. **Charge.**—The charge held to present the law fairly and fully. *Morton v. State*, 3 App. 510.

10. **Recognizance on appeal.**—See notes under C. C. P. art. 919.

11. **Civil liability.**—See *Vernon's Sayles' Civ. St.* 1914, arts. 5595, et seq., and notes thereunder.

Art. 1152. [722] Punishment.—If any person be guilty of libel, he shall be punished by fine not less than one hundred nor more than two thousand dollars, or by imprisonment in the county jail not exceeding two years; and the court may enter up judgment and issue an order thereupon directing the sheriff to seize and destroy all the publications, prints, paintings or engravings constituting the libel as charged in the indictment or information.

Art. 1153. [723] Publishing writing purporting to be done by another.—If any person, with intent to injure the reputation of another, shall, without lawful authority, make, publish or circulate a writing purporting to be the act of some other person, and which comes within the definition of libel, as given in this chapter, he shall be punished in the same manner as if the act purported to be his own; and the rules with respect to libel apply also to the making and circulation of such false writing.

Indictment.—Willson's Cr. Forms, 524.

Art. 1154. [724] "Maker" explained.—He is the maker of a libel who originally contrived and either executed it himself by writing, printing, engraving or painting, or dictated or caused it to be done by others.

Art. 1155. [725] "Publisher."—He is the publisher of libel who, either of his own will or by the persuasion or dictation of another, executes the same in any of the modes pointed out as constituting a libel; but if any one by force or threats is compelled to execute such libel he is guilty of no offense.

Publication.—See notes under articles 1151, 1156.

Art. 1156. [726] Circulating.—He is guilty of circulating a libel who, knowing its contents, either sells, distributes or gives, or who, with malicious design, reads or exhibits it to others.

What is circulation.—See notes under article 1151.

Writing a letter and depositing it in the post office constitutes circulation. *Smith v. State*, 32 Tex. 594; *Coulson v. State*, 16 App. 189; *Mankins v. State*, 41 App. 662, 57 S. W. 950.

The publication of a libel and its circulation is made when it is written, printed and sent and delivered, either to the person defamed, or to any other person. *Smith v. State*, 32 Tex. 594.

Sale and distribution of a paper containing a libel constitutes circulation either at common law or under the penal code; circulation of a libel is an offense committed in any place where the libel is sold or distributed. *Belo v. Wren*, 63 Tex. 686.

Evidence held to show a "circulating" by reading and exhibiting a libelous statement to others with the intent to injure. *Woody v. State*, 16 App. 252.

It is not necessary that the letter be addressed or that the information allege the address. *Mankins v. State*, 41 App. 662, 57 S. W. 950.

Art. 1157. [727] The ideas the statement must convey.—The written, printed or published statement, to come within the definition of libel, must convey the idea either—

1. That the person to whom it refers has been guilty of some penal offense; or

Libelous charges.—To charge a person with being a "hiring murderer" if written and published is indictable. *Smith v. State*, 32 Tex. 594.

For writings held to be libels, see *Woody v. State*, 16 App. 252; *Morton v. State*, 3 App. 510.

Pen. Code, § 1172, provides that when any person, by virtue of his office, is required to record the proceedings of any religious body, he shall not be charged with libel for any entry so made; the following article provides that if a false statement is entered, which would be libelous if circulated by an individual, the one assenting to and directing such statement is guilty; and the next article provides that the statements are not to be presumed to have been made with intent to injure unless such fact appears. Held, that where a minister, required by a custom of his church to make entries of the names of parents of those baptized, knew that plaintiff had been acquitted of seduction in a suit by the mother of a bastard confirmed by him, yet he entered plaintiff's name as that of the bastard's father,—insisting on making the entry unless the mother would consent to its not being done,—the evidence showed malice, rendering defendant liable under the statute. *Kubricht v. State*, 44 App. 94, 69 S. W. 157, 58 L. R. A. 959, 100 Am. St. Rep. 842.

Where a minister, knowing that the plaintiff has been acquitted of seduction on a prosecution by the mother of a bastard, makes an entry on his church records imputing paternity of the child to plaintiff, the entry is a libel, within the statutes. *Kubricht v. State*, 44 App. 94, 69 S. W. 157, 58 L. R. A. 959, 100 Am. St. Rep. 842.

Indictment.—See notes under art. 1151, ante.

In view of this article and article 1151, it was held that an indictment for libel, alleging that defendant published a malicious statement concerning complainant, reciting that he was a United States federal guard, that he was a highwayman and cowardly assassin, and the murderer of a certain person who on the morning of March 19, 1906, was cowardly assassinated on a public highway, etc., sufficiently charged complainant with a penal offense, and was therefore sufficient. *Gonzalez v. State*, 58 App. 141, 124 S. W. 937.

2. That he has been guilty of some act or omission which, though not a penal offense, is disgraceful to him as a member of society, and the natural consequence of which is to bring him into contempt among honorable persons; or

Construction of article in general.—An information which charges that defendant wrote prosecutrix a letter, the substance of which was that he had seen her in an act of sexual intercourse with a man, is sufficient, without charging that the language used was calculated to bring her into disgrace, and the natural consequence of which was to bring her into contempt. *Mankins v. State*, 41 App. 662, 57 S. W. 950.

Indictment and proof.—It is not enough for an indictment to charge that defendant published a statement concerning prosecutor affecting his reputation and honesty, setting out the publication of five or six pages; but if it is claimed that it is libelous because conveying the idea that prosecutor has been guilty of some act which is disgraceful to him as a member of society, and the natural consequence of which is to bring him into contempt among honorable persons (art. 1157, subd. 2), the indictment should point out such part of the publication as is claimed to impute such an act, and allege that it does impute an act disgraceful to him, etc. *Nordhaus v. State* (Cr. App.) 40 S. W. 804.

On a trial for libel, where the words complained of by the prosecuting witness are: "I denounce him as a blackmailer, a liar, and a scoundrel; a person who is ashamed to have exposed the four years of his life previous to him coming to E. It was an unlucky moment for him when he brought the name of woman into the question,"—the information must by innuendo show that they refer to

some particular act disgraceful to the witness, and the natural consequence of which is to bring him into contempt. *McKie v. State*, 37 App. 544, 40 S. W. 305.

An indictment for libel in publishing that one of the conductors of a certain railroad caused a lady to be thrown to the ground while alighting from a street car, and imputing to all the conductors of such road disgraceful acts, the nature and consequence of which were to bring them into contempt, and which attributed to said conductors infamous characters, was sustained on proof of any of the allegations. *Jones v. State*, 43 S. W. 78, 38 App. 364, 70 Am. St. Rep. 751.

An indictment for libel setting out that the publication, which might convey several different meanings, was made with intent to injure prosecutor, and that it was a malicious statement concerning him, which affected his reputation, is sufficient, as it must set forth that it conveyed the idea of one or more of the specific grounds for libel mentioned in Pen. Code 1895, art. 1157. *Byrd v. State*, 33 App. 630, 44 S. W. 521.

3. That he has some moral vice, or physical or mental defect or disease, which renders him unfit for intercourse with respectable society, and such as should cause him to be generally avoided; or

4. That he is notoriously of bad or infamous character; or

Evidence.—Where an indictment charged that the libel represented B. as a man of notoriously bad and infamous character it was error to refuse to permit defendant to adduce evidence of the general character of B. in the community. *Leader v. State*, 4 App. 162.

5. That any person in office, or a candidate therefor, is dishonest, and therefore unworthy of such office, or that while in office he has been guilty of some malfeasance rendering him unworthy of the place.

Libelous charges.—The word “dishonest” here means some such want of honesty as would go to his personal integrity and would render him unfit to be trusted with official duties. *Squires v. State*, 39 App. 96, 45 S. W. 147, 73 Am. St. Rep. 904.

A publication in regard to a candidate, to be libelous, must impute to him lack or want of honesty, or unfitness for office. A statement that he is not true to his party, or that he is affiliating with another party, is not libelous. *Squires v. State*, 39 App. 96, 45 S. W. 147, 73 Am. St. Rep. 904.

Indictment.—An indictment charged defendant with having published a malicious statement of and concerning one Villegas, affecting his reputation, in that he referred to a paper in which Villegas had proposed a ridiculous question as to who was the candidate of the People's Party for mayor, and then stated that Villegas was the heir to a fortune; had studied science; and had studied military affairs, learning only to do half a turn; had studied four years in law school, at the end of which time his father was compelled to purchase for him a law license, to which profession he could not dedicate himself, because he never knew what law was; that he was naturally stupid, and had not inherited the integrity and industry of his father; that he inherited his brother's wife and part of his fortune; and that, not wishing to hurt his modesty, of which he makes so much fuss, nothing would be said of his private life. Held, in view of articles 1151, 1157, 1165, and 1166, that the indictment charged no offense. *Aldama v. State* (Cr. App.) 163 S. W. 730.

Evidence.—In view of articles 1151, 1157, 1165, and 1166, evidence in a prosecution for libel affecting reputation of a candidate held insufficient to sustain a conviction. *Aldama v. State* (Cr. App.) 163 S. W. 730.

Civil liability.—See *Vernon's Sayles' Civ. St.* 1914, arts. 5595, et seq., and notes thereunder.

Art. 1158. [728] Mode of publication.—A libel may be either written, printed, engraved, etched or painted, but no verbal defamation comes within the meaning thereof; and whenever a defendant is accused of libel by means of a painting, engraving or caricature, it must clearly appear therefrom that the person said to be defamed was, in fact, intended to be represented by such painting, engraving or caricature.

Art. 1159. [729] A manuscript must be circulated.—In order to render any manuscript a libel, it must be circulated or posted up in some public place.

See article 1156 and notes thereunder.

Art. 1160. [730] Editor, etc., prima facie guilty.—If the libel be in printed form, and issues or is sold in any office or shop where a public newspaper is conducted, or where books or other printed works are sold or printed, the editor, publisher and proprietor of such newspaper, or any one of them, or the owner of such shop,

is to be deemed guilty of making or circulating such libel until the contrary is made on the trial to appear.

Business manager.—In a criminal prosecution for libel, it was immaterial whether defendant was responsible for the publication of the article in question, on account of the fact that he was the financial manager of the paper in which it was published, where it appeared that he had admitted the writing of such article. *Noble v. State*, 33 App. 368, 43 S. W. 80.

Liability of newspaper corporation or members.—See note under article 1151, ante.

It is no defense to a prosecution for libel that defendant, a part owner of the newspaper in which it was published, protested against the publication, and only agreed to it on his partner agreeing to assume the responsibility therefor, where defendant then set the type for the article. *Baldwin v. State*, 45 S. W. 714, 39 App. 245.

Art. 1161. [731] But may avoid responsibility, how.—The editor, publisher or proprietor of a public newspaper may avoid the responsibility of making or publishing a libel by giving the true author of the same; provided, such author be a resident of this state and a person of good character, except in cases where it is shown that such editor, publisher or proprietor caused the libel to be published with malicious design.

Art. 1162. [732] Mechanical executor not guilty, unless.—No person shall be convicted of libel merely on evidence that he has made a manuscript copy of a libel or has performed the manual labor of printing it, unless it be shown positively that such person was actuated by a malicious design against the person defamed. But the person for whose account or by whose order it was printed shall be presumed to have known the intent of the publication, and shall be liable for the offense.

Art. 1163. [733] Actual injury not necessary.—It is sufficient to constitute the offense of libel if the natural consequence of the publication of the same is to injure the person defamed, although no actual injury to his reputation has been sustained.

Art. 1164. [734] Intent to injure presumed.—The intent to injure is to be presumed if such would be the natural consequence of the libel, though no actual proof be made that the defendant had such design; and in all trials of libel the jury are to judge from the facts proved relative to the malicious design of the defendant as to what penalty ought to be imposed under the restrictions herein prescribed.

Smith v. State, 32 Tex. 594.

Presumption and burden of proof.—When the libelous matter is published malice or intent to injure is presumed, and the burden of proof is thrown on the party charged to show that publication was made under such circumstances as to bring it within the class of privileged communications. *Smith v. State*, 32 Tex. 594.

The information need not charge that the acts were libelous nor that they were wickedly committed. *Baldwin v. State*, 45 S. W. 714, 39 App. 245.

Art. 1165. [735] True statement concerning candidate not libel.—It is no offense to make true statements of fact or express opinions as to the integrity or other qualifications of a candidate for any office or public place or appointment.

Const., art. 1, sec. 8; *Express Co. v. Copeland*, 64 Tex. 354.

Indictment.—An indictment charged defendant with having published a malicious statement of and concerning one Villegas, affecting his reputation, in that he referred to a paper in which Villegas had proposed a ridiculous question as to who was the candidate of the People's Party for mayor, and then stated that Villegas was the heir to a fortune; had studied science; and had studied military affairs, learning only to do half a turn; had studied four years in law school, at the end of which time his father was compelled to purchase for him a law license, to which profession he could not dedicate himself, because he never knew what law was; that he was naturally stupid, and had not inherited the integrity and industry of his father; that he inherited his brother's wife and part of his fortune; and that, not wishing to hurt his modesty, of which he makes so much fuss, nothing would be said of his private life. Held, in view of this and the following article and articles 1151 and 1157, that the indictment charged no offense. *Aldama v. State* (Cr.App.) 163 S. W. 730.

Evidence.—In view of this and the following article and articles 1151 and 1157, evidence in a prosecution for libel affecting reputation of a candidate held insufficient to sustain a conviction. *Aldama v. State* (Cr. App.) 163 S. W. 730.

Art. 1166. [736] Nor concerning qualifications of professional men.—It is no offense to publish true statements of fact as to the qualifications of any person for any occupation, profession or trade.

See note under article 1165, ante; Const., art. 1, sec. 8.

Art. 1167. [737] No criticism of any book, work of art, etc.—It is no offense to publish any criticism or examination of any work of literature, science or art, or any opinion as to the qualifications or merits of the author of such work.

Const., art. 1, sec. 8.

Art. 1168. [738] The offense relates to persons only.—To constitute libel, there must be some injury intended to the reputation of persons, and no publication as to the government, or any of the branches thereof, as such is an offense under the name of seditious writings or any other name.

Art. 1169. [739] Respecting religious systems, etc.—It is no libel to make publication respecting the merits or doctrines of any particular religion, system of morals or politics, or of any particular form of government.

Art. 1170. [740] Corporations can not be libeled.—It is no libel to make any publication respecting a body politic or corporate as such.

Art. 1171. [741] Nor legislative or judicial proceedings, unless, etc.—It is no libel to publish any statement respecting any legislative or judicial proceedings, whether the statement be in fact true or not, unless in such statement a charge of corruption is made against some person acting in a legislative or judicial capacity.

Freedom of the press.—Extent to which the freedom of the press may be restrained to protect private character from falsehood and slander, and prevent the publication of testimony libelous in its nature, required by the policy of the law to be kept absolutely secret. See *Belo v. Wren*, 63 Tex. 686; *Express Printing Co. v. Copeland*, 64 Tex. 354.

Privileged communications.—See *Vernon's Sayles' Civ. St.* 1914, art. 5597.

It rests upon the defendant to bring a libelous letter within the class of privileged communications. *Smith v. State*, 32 Tex. 594.

And see *Belo v. Wren*, 63 Tex. 686; *Runge v. Franklin*, 72 Tex. 585, 10 S. W. 721, 3 L. R. A. 417, 13 Am. St. Rep. 833; *Holt v. Parsons*, 23 Tex. 9, 76 Am. Dec. 49; *Cotulla v. Kerr*, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819; *Behee v. Railway*, 71 Tex. 424, 9 S. W. 449; *Railway Co. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. Rep. 794.

Art. 1172. [742] Recorder of minutes, etc., not liable.—Where any person by virtue of his office is required to record the proceedings of any department of the government or of any body corporate or politic, or of any association organized for purposes of business, or as a religious, moral, benevolent, literary or scientific institution, he can not be charged with libel for any entry upon the minutes or records of such department, body or association made in the course of his official duties.

Baptismal record.—This article makes a defendant liable if a false entry is made with malice. *Kubricht v. State*, 44 App. 94, 69 S. W. 157, 58 L. R. A. 959, 100 Am. St. Rep. 842.

A minister is guilty of libel if he enters the name of a man on the baptismal register of his church as the father of a bastard child when he knows that the imputed father has been acquitted of the crime of seducing the mother of the child, and he has been warned not to put the name there as the father of the child. *Kubricht v. State*, 44 App. 94, 69 S. W. 157, 58 L. R. A. 959, 100 Am. St. Rep. 842.

Art. 1173. [743] But all members of the association who assent are.—If any false statement be entered upon the minutes or record of proceedings of any corporate body or association included within the meaning of the preceding article, which would be libel if written, printed published or circulated by an individual, according to the previous articles of this chapter, the persons be-

ing members of such body or association, who assent to and direct such libelous statement to be made, are guilty of libel under the same rules as if the false statement had been written, published or circulated in any other manner than as a part of the record or proceedings of such body or association, subject, however, to the restrictions contained in the succeeding article.

For the acts of a body corporate as a defense to a civil action for entering a resolution adopted by the trustees of a church censuring plaintiff for defaulting as treasurer, see *Holt v. Parsons*, 23 Tex. 9, 76 Am. Dec. 49.

Art. 1174. [744] Intent to injure not presumed, unless, etc.—The libelous statement referred to in the preceding article is not to be presumed to have been made with intent to injure, from the mere fact that such would be the natural result thereof, unless it appear from other facts that the statement was in fact made with that intention.

Holt v. Parsons, 23 Tex. 9, 76 Am. Dec. 49.

Art. 1175. [745] "Malicious" signifies what.—The word "malicious" is used to signify an act done with evil or mischievous design, and it is not necessary to prove any special facts showing ill feeling on the part of the person who is concerned in making, printing, publishing or circulating a libelous statement against the person injured thereby.

Presumptions and evidence of malice.—See *Vernon's Sayles' Civ. St.* 1914, art. 5595, et seq.

Mailing a libelous letter is a publication, and upon proof of its writing and publication, malice and intent to injure are presumed, and it rests upon the defendant to bring it within the class of privileged communications. *Smith v. State*, 32 Tex. 594.

When the communication is not privileged, malice must be shown to authorize a recovery; but in such case negative facts may indicate the malice, as that the publication was false, and was made without legal excuse. The malice may be inferred from the fact of a false publication of libelous matter. When the publication is privileged, the malice so implied from the false and defamatory publication is deemed to have been met and rebutted, in which case, as before stated, malice in fact must be shown to warrant a recovery; and such malice is defined to be ill-will, bad or evil motive, or such gross indifference to the right of others as will amount to a wilful or wanton act. *Bradstreet Co. v. Gill*, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768.

For necessity of proving express malice in case of privileged communication in civil suit, see *Railway v. Richmond*, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. Rep. 794.

Evidence of the general rumor and conversation in the neighborhood in regard to the specific acts charged in the alleged libel is inadmissible to show want of malice in the publication. *Baldwin v. State*, 45 S. W. 714, 39 App. 245.

Charge.—In an action against a railroad company for libel in publishing plaintiff's name on the "blacklist" as an employé discharged for incompetency, it is error to instruct that the malice essential to such a libel is express malice, which means wicked intent, and that such intent must be proved like any other fact, and is never to be presumed, since the jury may infer the intent from the fact that the publication was false and injurious. *Behee v. Missouri Pac. Ry. Co.*, 71 Tex. 424, 9 S. W. 449.

Art. 1176. [746] Statement in legislative or judicial proceedings not included.—No statement made in the course of a legislative or judicial proceeding, whether true or false, although made with intent to injure and from malicious purposes, comes within the definition of libel.

Statement in judicial proceeding.—This is declaratory of the common law as to slander. And likewise under the statute all things said as well as all documents in judicial proceedings are absolutely privileged. *Lindsey v. State*, 18 App. 280.

Stockholders of a corporation filed a petition against the corporation, alleging that the president, with the approval of the directors, had been fraudulently conducting the management of the company, detailing the acts alleged to show a concerted scheme to reduce the value of the company's stock, and buy it in, and control the company's affairs. Held that, as proceedings in courts are absolutely privileged, a director of the company, though not a party to the suit, could not maintain an action for alleged defamatory matter contained in the petition, though it was false and malicious, and made under color and pretense of a suit without right. *Runge v. Franklin*, 72 Tex. 585, 10 S. W. 721, 3 L. R. A. 417, 13 Am. St. Rep. 833.

Art. 1177. [747] Truth of statement may be shown, when.—In the following cases, the truth of any statement charged as libel may be shown in justification of the defendant:

1. Where the publication purports to be an investigation of the official conduct of officers or men in a public capacity.

2. Where it is stated in the libel that a person has been guilty of some penal offense, and the time, place and nature of the offense is specified in the publication.

3. Where it is stated in the libel that a person is of notoriously bad or infamous character.

4. Where the publication charges any person in office, or a candidate therefor, with a want of honesty, or of having been guilty of some malfeasance in office, rendering him unworthy of the place. In other cases, the truth of the facts stated in the libel can not be inquired into.

Truth as justification and proof thereof.—Where a private citizen was libeled as "a hireling, a murderer, and a coward," it was held that the truth of such charge could not be proved as a defense. *Smith v. State*, 32 Tex. 594.

It would seem that failure to sustain a plea of justification by truth of the alleged libel should not be considered as tending to show malice where the effect would deprive defendant of the benefit of inconsistent pleas. *Express Printing Co. v. Copeland*, 64 Tex. 354.

Where the libelous matter consisted of a charge that the person against whom it was uttered had been guilty of embezzlement, and was a "liar, swindler, and dead-beat," it was held competent, under the latter portion of said charge, to prove, in defense, the general reputation of the libeled party. But if the libel had charged "embezzlement" only, the inquiry should have been restricted to his general character for honesty. *Leader v. State*, 4 App. 162. See, also, *Johnson v. State*, 31 App. 456, 20 S. W. 985; *Johnson v. State*, 31 App. 464, 20 S. W. 980; *Johnson v. State*, 31 App. 569, 21 S. W. 541.

Where the article complained of was naturally susceptible of the construction given by the innuendoes, and its truth is denied in the complaint, an instruction which presented the question of the literal truth or falsity of the publication only, without reference to its effect or meaning, was properly refused. *Democrat Pub. Co. v. Jones*, 83 Tex. 302, 18 S. W. 652.

Where defendant charged injured party with fornication and drunkenness he should have been allowed to prove the truth of the matter charged. *Johnson v. State*, 31 App. 464, 20 S. W. 980.

Charge of the court held erroneous. *Johnson v. State*, 31 App. 464, 20 S. W. 980.

Proof of bad character of plaintiff in civil action for libel, see *Geo. Knapp & Co. v. Campbell*, 14 Civ. App. 199, 36 S. W. 765.

A defense of truth of a publication that a person was jailed on a charge of horse stealing is not made out by proof that he was so charged and was jailed on that charge, but the truth of the charge must be shown. *Dement v. Houston Printing Co.*, 14 Civ. App. 391, 37 S. W. 985.

For evidence admissible as to the truth of a libel in a prosecution for a killing of an editor for its publication, see *Williams v. State*, 40 App. 497, 51 S. W. 220.

Art. 1178. [748] Province of jury.—The jury in every case of libel are not only the judges of the facts and of the law, under the direction of the court, in accordance with the constitution, but they are judges of the intent with which a libel may have been published or circulated, subject to the rules prescribed in this chapter; and in rendering their verdict they are to be governed by a consideration of the nature of the charge contained in the libel, the general reputation of the person said to be defamed, and the degree of malice exhibited by the defendant in the commission of the offense.

Cited, *Baldwin v. State*, 39 App. 245, 45 S. W. 714.

Construction of law by jury.—While under this article the jury are the judges of the law and the evidence, they must construe the law, as in other cases, under the charge of the court as to the law. *McArthur v. State*, 41 App. 635, 57 S. W. 847.

Art. 1179. [749] This title relates only to penal action.—This title regulates the law with regard to libel when prosecuted as a penal offense, and is not intended to have any operation upon the subject so far as relates to civil remedies for the recovery of damages.

CHAPTER TWO

OF SLANDER

Art. 1180. Definition and punishment.	Art. 1181. Procedure in prosecution for.
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Article 1180. [750] Definition and punishment.—If any person shall, orally or otherwise, falsely and maliciously or falsely and wantonly impute to any female in this state, married or unmarried, a want of chastity, he shall be deemed guilty of slander, and, upon conviction, shall be fined not less than one hundred nor more than one thousand dollars; and the jury may, in addition thereto, find a verdict for the imprisonment of defendant in the county jail not exceeding one year.

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|---|--------------------------|
| 1. Nature and elements offense. | 6. — Innuendo. |
| 2. Slander of wife by husband. | 7. — Proof and variance. |
| 3. Privileged statement. | 8. Evidence. |
| 4. Words actionable per se. | 9. Charge of court. |
| 5. Indictment and information and proof thereunder. | 10. Verdict. |

1. Nature and elements offense.—If on a prosecution for slander an inquiry into the reputation of the female establishes that such reputation is bad, the defendant is entitled to an acquittal. *McMahan v. State*, 13 App. 220; *Shaw v. State*, 28 App. 236, 12 S. W. 741; *Crane v. State*, 30 App. 464, 17 S. W. 939.

Article 1180 does not include or apply to defamatory language used in a judicial proceeding. The extent and object of the enactment is merely to make it a penal offense to maliciously or wantonly impute to a female a want of chastity. A construction applying it to language used in a judicial proceeding would make the law violative of an established public policy; and such construction of a statute, when avoidable, will not be adopted. *Lindsey v. State*, 18 App. 280.

Slanderous words spoken about two persons, at the same time and before the same persons constitute separate offenses and when charged separately, each case may be prosecuted. *Collins v. State*, 39 App. 30, 44 S. W. 846.

2. Slander of wife by husband.—A charge by a husband, who had carnal intercourse with his wife before marriage, that another is the father of her child, is not ground for a conviction of slander it thus appearing that she was not chaste. *Baxter v. State*, 34 App. 516, 31 S. W. 394, 53 Am. St. Rep. 720.

Under our statute a husband may be prosecuted for slandering his wife. *Stayton v. State*, 46 App. 205, 78 S. W. 1072, 108 Am. St. Rep. 988.

3. Privileged statement.—Where, on a trial for imputing to a female a want of chastity, the evidence showed that accused and the father of prosecutrix were talking about a matter not relating to prosecutrix, and that during the conversation accused began the conversation touching the prosecutrix, and uttered the slanderous words, the language of accused was not privileged. *Richmond v. State*, 58 App. 435, 126 S. W. 596.

Statement of defendant to L., the father of the wife of defendant B., when, B. having left his wife, L. went to defendant and asked him what was the matter, that she was unchaste before she was married was not privileged; defendant being the originator of the false charge. *Davis v. State* (Cr. App.) 167 S. W. 1108, L. R. A. 1915A, 572.

4. Words actionable per se.—Since words imputing want of chastity are actionable per se only by force of article 1180, such words are actionable only where they are uttered falsely and maliciously, or falsely and wantonly, and the court properly so charged, especially where plaintiff alleged that the statements concerning her were false, malicious, and slanderous, inspired by malice, hatred and ill will, and were spoken wrongfully, maliciously, and oppressively. *Lehmann v. Medack* (Civ. App.) 152 S. W. 438.

5. Indictment and information and proof thereunder.—Willson's Cr. Forms, 525, 526.

An indictment for this offense must set forth, at least substantially, the words or acts constituting the alleged slander. It will not be sufficient to allege in general terms an imputation of a want of chastity. *Lagrone v. State*, 12 App. 426; *Melton v. State*, Id. 552; *Hammers v. State*, 13 App. 344; *McMahan v. State*, Id. 220; *Wiseman v. State*, 14 App. 74; *Conlee v. State*, Id. 222. It should also allege that the slander was perpetrated in the presence of some person or persons, and the better practice is to name such person or persons, or some of them. *McMahan v. State*, 13 App. 220; *Wiseman v. State*, 14 App. 74. For indictments held good, see *Patterson v. State*, 12 App. 458; *Humbarb v. State*, 21 App. 200, 17 S. W. 126.

A charge of slander set forth in the English language is not sustained by proof of words of similar import uttered in German. *Stichtd v. State*, 25 App. 420, 8 S. W. 477, 8 Am. St. Rep. 444.

Information must state specifically what was imputed to the female and who the female was. *Neely v. State*, 32 App. 370, 23 S. W. 798.

Indictment for slander based upon a statement of defendant that the prosecu-

trix was pregnant must negative that she was legitimately pregnant. *Clark v. State*, 32 App. 412, 24 S. W. 29.

An information held sufficient. *Kyle v. State*, 55 App. 360, 116 S. W. 598; *Conlee v. State*, 14 App. 222.

An indictment alleged that accused, on a date named, orally, falsely, and maliciously imputed to a female, to wit, P., a want of chastity, to wit, that accused, in the hearing of W. and others, falsely, maliciously, and wantonly said of and concerning P. that she was not a good woman, and that she showed herself in front of the drug store before men, meaning thereby and intending to convey the impression that said P. had demeaned herself in a lewd manner in front of the store and before men; that accused, in the hearing of W. and others, falsely, etc., said that three men named were paying attentions to her, the said P., meaning and intending to imply thereby that P. had theretofore had carnal intercourse with the said men, and that accused further said, in the presence and hearing of the said W. and others, that P. had gone to a party, and that a certain man stayed at the telephone office, which was in the same building as P.'s sleeping apartments, and that P. did not return to her home in the building till 2 o'clock a. m., and that such man did not get home until morning, meaning and intending to convey the impression that upon P.'s return at 2 o'clock she permitted the man to remain with her until morning, and while there had intercourse with her. Held, that the indictment was sufficient, under article 1180. *Curl v. State* (Cr. App.) 145 S. W. 602.

6. — **Innuendo.**—Innuendo is not only permissible, but is always proper when the language charged is ambiguous. *Berry v. State*, 27 App. 483, 11 S. W. 521; *Rogers v. State*, 30 App. 462, 17 S. W. 548. See, also, *Stichtd v. State*, 25 App. 420, 8 S. W. 477, 3 Am. St. Rep. 444; *Neely v. State*, 32 App. 370, 23 S. W. 798; *Whitehead v. State*, 39 App. 89, 45 S. W. 10; *Roberts v. State*, 51 App. 27, 100 S. W. 150.

In an indictment for slander, when ambiguous language is sought to be explained by innuendo, it is necessary to prove the innuendo as substantially as the slanderous words its meaning was intended to explain. *Riddle v. State*, 30 App. 425, 17 S. W. 1073; *Frisby v. State*, 26 App. 180, 9 S. W. 463.

An indictment for slander, charging that defendant "did falsely and maliciously impute a want of chastity to C., by saying that one H. was monkeying with C., and doing what he pleased with her, meaning that H. was having carnal knowledge of C.," is sufficient. *Dickson v. State*, 34 App. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694.

On prosecution for forgery it was held proper to admit testimony to prove the innuendos and explanations as alleged. *Daud v. State*, 34 App. 460, 31 S. W. 376.

The slanderous words charged were that defendant told that he saw prosecutrix and one B "getting there;" held, such expression was susceptible of the meaning that the parties were having carnal intercourse, proper averments by innuendo were made in this case and indictment was sufficient. *Whitehead v. State*, 39 App. 89, 45 S. W. 10.

An indictment alleging that accused imputed to a married woman that she "was not a respectable woman," without containing innuendo averments alleging what the language meant, and that as spoken and intended it meant that she was unchaste, does not state an offense under this article. *Woods v. State*, 58 App. 103, 124 S. W. 918.

The slanderous words being susceptible of the meaning alleged by the innuendoes, the innuendoes were proper; the meaning of the language not being obvious without them. *Curl v. State* (Cr. App.) 145 S. W. 602.

Any information charging, in the language of the statute, that defendant falsely, maliciously, and wantonly imputed a want of chastity to a married woman, naming her, in the presence and hearing of certain persons, by saying that her husband was not the father of the child recently born to her, but that its father was a certain other man, sufficiently imputed a want of chastity, without innuendo. *Hatcher v. State* (Cr. App.) 170 S. W. 725.

7. — **Proof and variance.**—See a variance between the allegata and the probata in this respect, held to be material and fatal to the conviction. *Conlee v. State*, 14 App. 222.

The state must prove the alleged slander substantially as alleged. *Humbard v. State*, 21 App. 200, 17 S. W. 126; *Conlee v. State*, 14 App. 222.

The name of the alleged slandered female must be sufficiently proved to identify, and unless this is done the proof will not only be held insufficient, but the variance between the allegation and the proof will be fatal. See an instance, *Humbard v. State*, 21 App. 200, 17 S. W. 126.

Where the indictment names two or more persons as present and hearing the slander the names must be proved as alleged. *Neely v. State*, 32 App. 370, 23 S. W. 798.

To warrant a conviction for slander it is essential that the slanderous language be proven as charged, the proof of other language of same meaning is not sufficient. A charge that defendant had stated that he had had carnal knowledge of a girl was not sustained by proof that he used certain vulgar terms meaning carnal knowledge. *Barnett v. State*, 35 App. 280, 33 S. W. 340.

Under an indictment which alleged that the slanderous language was uttered to B. and divers other persons not named, it need not be proven that any one other than B. was present at the time of the publication. *Collins v. State*, 44 S. W. 846, 39 App. 30.

There was no variance between the language, "—— is a whore, and I can prove it," in an indictment for slander, and the language, "—— is a dirty whore, and I can prove it, and is the cause of my wife leaving me," proven on the trial. *Kelley v. State*, 51 App. 151, 101 S. W. 230.

Under an indictment for slander, alleging that defendant said that he had carnal intercourse with a named woman, the admission of evidence that he said that he had a good time, or had a time with her, constitutes a fatal variance. *Hasley v. State*, 57 App. 400, 123 S. W. 596, 136 Am. St. Rep. 986.

Where an indictment for slander, in violation of article 1180, for imputing to a female a want of chastity, specifically selected the imputation and charged it, the state was bound thereby as to the imputation, and the court could not permit the jury to convict accused for the imputation of want of chastity otherwise than as alleged. *Woods v. State*, 58 App. 103, 124 S. W. 918.

On a trial for imputing to an unmarried female a want of chastity, and that she had gone to a town to submit to an abortion, the testimony of a witness that she had seen nothing in prosecutrix's actions at that town indicating that she was not a virtuous woman was inadmissible, because beyond the issues. *Richmond v. State*, 58 App. 435, 126 S. W. 596, 137 Am. St. Rep. 973.

In a prosecution for slander, the slanderous language must be proven substantially as alleged. *Adams v. State*, 62 App. 426, 138 S. W. 117.

Where the indictment for slander alleged that the words used by defendant were that "C. and W. had knocked the said Nona M. up and had left the country and that O. was keeping them posted," while the proof was that he said that "C. & W. had knocked the M. girls up and had left the country and that O. was keeping them posted," there was a fatal variance. *Simer v. State*, 62 App. 514, 138 S. W. 388.

In a prosecution for slander in imputing want of chastity to a female, it is not necessary to prove all of the language charged in the information, but only the imputation of unchastity. *McDonald v. State* (Cr. App.) 164 S. W. 831.

There was a fatal variance in a prosecution for slander in falsely imputing unchastity, where the information alleged that accused stated that the woman "was a woman of ill fame, and that eight different parties had intercourse with her," while the competent proof only showed that accused had upbraided the woman for her ill feeling because he had told her of bad reports concerning her. *McDonald v. State* (Cr. App.) 164 S. W. 831.

8. Evidence.—In a prosecution for slander in imputing unchastity to a female, accused need not establish beyond a reasonable doubt that her reputation for chastity was bad; it being sufficient if the jury believe from the evidence that it is bad. *McDonald v. State* (Cr. App.) 164 S. W. 831; *Ballew v. State*, 48 App. 46, 85 S. W. 1063; *Manning v. State*, 37 App. 180, 39 S. W. 118.

The law presumes the chastity of every woman, and it does not devolve upon the state to prove the chastity of the alleged slandered female. *Lagrone v. State*, 12 App. 426; *Collins v. State*, 39 App. 30, 44 S. W. 846; *Richmond v. State*, 58 App. 435, 126 S. W. 596, 137 Am. St. Rep. 973.

The prosecutrix having resided but few months in the county of the prosecution, her reputation in the county from which she removed was admissible and competent evidence. *Lum v. State*, 11 App. 483; *Coffelt v. State*, 19 App. 436; *Crane v. State*, 30 App. 464, 17 S. W. 939. And see *Mynatt v. Hudson*, 66 Tex. 66, 17 S. W. 396. See, also, on evidence in slander cases, *Frisby v. State*, 26 App. 180, 9 S. W. 463; *Berry v. State*, 27 App. 483, 11 S. W. 521.

The defendant may prove in justification: 1. That the particular imputation which he made against the female is true. 2. That her general reputation for chastity at the time he made the imputation was bad. But he can not be permitted to prove any other acts or conduct of the female indicating a want of chastity, except those specifically embraced in the imputation made by him. *Patterson v. State*, 12 App. 458; *McMahan v. State*, 13 App. 220.

It does not devolve upon the prosecution to prove the falsity of the imputation, but the prosecution must show that the imputation was made maliciously or wantonly. *McMahan v. State*, 13 App. 220.

If the imputation be general, as that the impugned female "is a whore," he would be entitled to prove specific acts of such female going to establish the truth of such imputation. *Wagner v. State*, 17 App. 554.

The imputation being "she is a whore," not "she was a whore," it was held to be not competent for the defendant to prove that prior to her marriage she had lived in adultery with her husband, but it was competent for him to prove that she practiced illicit intercourse with other men than her husband. *Wagner v. State*, 17 App. 554; *Duke v. State*, 19 App. 14.

In a prosecution for slander, by calling an unmarried female a whore, it was held competent for the defendant to prove that, shortly previous to the alleged slander, said female had had illicit carnal intercourse with a man, and that defendant, before he uttered the alleged slander, had been informed of that fact. Said act of illicit intercourse tended to establish that the female was a whore. *Duke v. State*, 19 App. 14.

When the imputed slander consists of a statement as to a specific act of carnal intercourse defendant should be allowed to prove prior acts of illicit intercourse between the same parties. *Wood v. State*, 32 App. 476, 24 S. W. 284.

Where the words are obviously defamatory, or are clear and unambiguous, whether defamatory or not, the court and jury, and not the witnesses, construe the words; and a witness cannot be asked how he understood the words, nor what impression was produced on his mind on hearing them, and the words are to be construed in their ordinary and usual sense. When the language is ambiguous and the words used are not ordinary, but are local, technical, or slang terms, evidence is admissible to explain their meaning. *Dickson v. State*, 34 App. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694.

On prosecution for slander, imputing to a woman want of chastity, evidence of unlawful commerce with men prior to the time of the alleged slander is admissible. *Van Dusen v. State*, 34 App. 456, 30 S. W. 1073. See, also, *Baxter v. State*, 34 App. 516, 31 S. W. 394, 53 Am. St. Rep. 720.

Statements made by defendant, similar to those alleged in the indictment, are admissible. *Manning v. State*, 37 App. 180, 39 S. W. 118.

Where, in a prosecution for slandering M., the words uttered incidentally involved the chastity of P., it was not error to exclude evidence that P.'s general reputation for chastity was bad, where the jury were not actuated by what was said about P., and found the least punishment for slandering the prosecutrix. *Collins v. State*, 39 App. 30, 44 S. W. 846.

Where the meaning of the language used was so manifest that it could have but one significance, it is not error to permit the witness to whom it was uttered to state what he understood the defendant to mean by the language used. *Collins v. State*, 44 S. W. 846, 39 App. 30.

Statements made by defendant to other persons made after the alleged slanderous words are admissible to show the animus of defendant. *Whitehead v. State*, 39 App. 89, 45 S. W. 10.

In a prosecution for criminal slander by charging a female with unchastity and lascivious conduct in the hearing of a certain person, evidence that accused used substantially the same language concerning the female's conduct in a conversation with another than charged in the indictment, and reflected on prosecuting witness' chastity to others, was admissible to show accused's intent when she uttered the slanderous words charged in the indictment. *Curl v. State* (Cr. App.) 145 S. W. 602.

On prosecution for slandering defendant's wife by charging misconduct with S., circumstances tending to show preparation on the part of S. for the commission of the offense are admissible as tending to show the commission of such offense. *Elder v. State* (Cr. App.) 151 S. W. 1052.

Under articles 1180 and 1181 evidence is admissible that the woman had told accused, before his interview with her husband in which accused told him that she was unchaste, that she had had intercourse with others than her husband. *McDonald v. State* (Cr. App.) 164 S. W. 831.

In a prosecution for slander in imputing unchastity to a female, evidence of abusive statements made by accused concerning the female was admissible to show ill will and malice. *McDonald v. State* (Cr. App.) 164 S. W. 831.

In a prosecution for slander in imputing unchastity to a female, accused need not establish the truth of the alleged slanderous statement; it being sufficient as a defense that the jury believe its truth, or have a reasonable doubt of its truth. *McDonald v. State* (Cr. App.) 164 S. W. 831.

To sustain a conviction for slander, it is only necessary to prove substantially what is alleged in the indictment. *Hill v. State* (Cr. App.) 173 S. W. 1022.

Evidence held to sustain a conviction for slander imputing unchastity to a female public school teacher. *Hill v. State* (Cr. App.) 173 S. W. 1022.

9. **Charge of court.**—It is not error to charge, in the language of the statute, that the law presumes the chastity of every woman. *Collins v. State*, 44 S. W. 846, 39 App. 30.

In case of slander the court should charge that unless the jury find from the evidence that the imputation was maliciously and wantonly made, notwithstanding it was shown to be false, they should acquit the defendant. *Stayton v. State*, 46 App. 205, 78 S. W. 1072, 108 Am. St. Rep. 988.

In a prosecution for slander by imputing to a woman a want of chastity, a requested charge that, in order to convict, the jury must believe beyond a reasonable doubt not only that the alleged false words were uttered by defendant, but that such words were uttered maliciously or wantonly; that the expression "maliciously" meant that the words were so uttered as to imply an evil intent or legal malice, or without reasonable grounds for believing that they were true, or that the woman had a bad reputation for chastity, or was unchaste; and that the expression "wantonly" meant that the words were uttered regardless of consequences, in a reckless manner, or under such circumstances as evinced a wicked and mischievous intent, and without excuse—should have been given, as it is a part of the statutory definition of slander. *Rainwater v. State*, 46 App. 496, 81 S. W. 38.

A charge giving to the jury in the alternative the terms "falsely and maliciously," or "falsely and wantonly," and authorizing a conviction in case defendant used expressions in either sense, being the language of the statute, was correct; and the fact that the indictment charged that defendant used the language falsely and maliciously and wantonly did not change the rule. *Kelley v. State*, 51 App. 151, 101 S. W. 230.

Where the general reputation for chastity of the slandered female is in issue article 1181, post, should be given in charge. It is reversible error to refuse to give it upon request. *Dobbs v. State*, 55 App. 483, 117 S. W. 800.

Article 1181 limits inquiry into the reputation of the female to the time of the uttering of the slander, or at least to a time reasonably approximating the date of such uttering; and, where evidence of her good reputation long after the alleged uttering was given, accused was entitled to a charge that the reputation must relate to the reputation at the time of the alleged slanderous words. *Richmond v. State*, 58 App. 435, 126 S. W. 596, 137 Am. St. Rep. 973.

In a criminal prosecution for slander, the accused is entitled to a special charge defining "wantonly" and "wilfully" as mentioned in the statute. *Roberts v. State* (Cr. App.) 143 S. W. 614.

Where, in a prosecution for slandering defendant's wife by charging her with improper intimacy with S., defendant did not deny speaking the language charged, but claimed it was true, and there was evidence justifying a reasonable man in believing that his wife had been unduly intimate with S., it was error to refuse to charge that, before accused could be convicted, the jury must find beyond a reasonable doubt that the statements were false, and that they were maliciously and wantonly made. *Elder v. State* (Cr. App.) 151 S. W. 1052.

In a prosecution for a violation of article 1180, where the complaint and information were in the words of the statute, the refusal of a requested special

charge that, unless accused made the statements alleged wantonly and falsely, he should be acquitted is properly refused; for he was guilty if he falsely and maliciously made them. *Ethridge v. State* (Cr. App.) 169 S. W. 1152.

10. **Verdict.**—A verdict in criminal slander, “We, the jury, find the defendant, C., guilty according to the law and evidence of the case, and affix the fine to the lowest limit, which is \$100,” is sufficient. *Curl v. State* (Cr. App.) 145 S. W. 602.

Art. 1181. [751] Procedure in prosecution for.—In any prosecution under this chapter, it shall not be necessary for the state to show that such imputation was false, but the defendant may in justification show the truth of the imputation, and the general reputation for chastity of the female alleged to have been slandered may be inquired into.

See notes under preceding article and *Kelly v. State*, 37 App. 641, 40 S. W. 803; *Jackson v. State*, 42 App. 497, 60 S. W. 963; *West v. State*, 44 App. 417, 71 S. W. 967; *Bowers v. State*, 45 App. 185, 75 S. W. 299; *Kyle v. State*, 55 App. 357, 116 S. W. 596.

CHAPTER THREE

SENDING ANONYMOUS LETTERS

<p>Art. 1182. Prohibited, penalty for so doing. 1183. Definition of.</p>	<p>Art. 1184. Two or more persons concerned in, either may be compelled to testify.</p>
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Article 1182. Prohibited, penalty for so doing.—If any person shall send, or cause to be sent, deliver, or cause to be delivered, to any other person any anonymous letter or written instrument of any character whatsoever, reflecting upon the integrity, chastity, virtue, good character or reputation of the person to whom such letter or written instrument is sent or addressed, or of any other person, or wherein the life of such person is threatened, said person so sending such letter or written instrument shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than two hundred and fifty dollars nor more than one thousand dollars, and by imprisonment in the county jail for not less than one month nor more than twelve months. [Act 1909, p. 138.]

What constitutes offense.—Article 1182 is violated where the writer of the letter himself delivers it to the person to whom it is addressed, in view of Code Cr. Proc. 1911, art. 25, requiring its provisions to be liberally construed to attain the object intended; Rev. St. 1911, art. 5502, subd. 6, requiring the court to look to the intention of the Legislature; Pen. Code 1911, art. 9, requiring that Code and all other criminal laws to be construed according to the plain import of the language without regard to the usual distinction between penal and other laws; and article 10, providing that words specially defined shall be understood in that sense, and other words in the sense in which they are understood in common language. *Bradfield v. State* (Cr. App.) 166 S. W. 734.

Complaint and information.—Under article 1182, making it a misdemeanor to send an anonymous letter “reflecting” on the integrity, chastity, etc., of any person, a complaint and information charging the sending of a letter which “reflects” upon a person named was not defective. *Bradfield v. State* (Cr. App.) 166 S. W. 734.

A complaint and information for sending an anonymous letter reflecting upon a person’s integrity, chastity, etc., need not contain the letter, in view of Code Cr. Proc. 1911, art. 453, requiring only such certainty as will enable accused to plead the judgment in bar of another prosecution; article 460, providing that it shall be sufficient to charge the offense in ordinary and concise language and with such certainty as will give defendant notice of the offense charged and enable the court to pronounce judgment; and article 474, providing that it is sufficient to use other words conveying the same meaning as the words used in a statute or including the sense of the statutory words. *Bradfield v. State* (Cr. App.) 166 S. W. 734.

Evidence.—Mere proof that accused delivered to prosecutrix an anonymous stamped and sealed letter reflecting on her chastity does not support a conviction of the crime of delivering an anonymous letter to a female reflecting on her virtue and chastity, but it must be shown that he knew the contents of the letter, which cannot be presumed from the mere fact that he delivered the letter. *Sims v. State*, 71 App. 44, 158 S. W. 287.

On a trial for delivering to a 15 year old girl an anonymous letter reflecting on her integrity, chastity, etc., evidence that on the night before the delivery of the letter accused was seen hugging and kissing such girl was properly excluded,

in the absence of any showing that this was with her consent or permission, as otherwise such conduct would not have reflected on her. *Bradfield v. State* (Cr. App.) 166 S. W. 734.

Art. 1183. Definition of.—By an anonymous letter or written instrument, within the meaning of this law, is meant where the sender of such letter or written instrument withholds his or her full and true name from the same, or where no name is signed thereto, or where a fictitious name is signed thereto, or where any description of such sender instead of a name is used, such as “a friend,” or “a true friend” or the like. [Id., p. 138.]

Art. 1184. Two or more persons concerned in, either may be compelled to testify.—If two or more persons are concerned in the composition or sending of any anonymous letter or written instrument, as hereinbefore prohibited by this law, then either of such persons shall be compelled to testify thereto; and the fact that such testimony will incriminate such person shall not exempt such person from testifying in regard thereto; provided, that where such person has been compelled to testify in regard thereto as above stated, then, in that event, when such person has testified fully, fairly and truthfully in regard thereto, then such person shall not be prosecuted under this law for the particular offense about which such person has so testified. [Id., p. 138.]

CHAPTER FOUR

OF FALSE ACCUSATION AND THREATS OF PROSECUTION

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| Art. | Art. |
| 1185. Combination to falsely accuse another. | 1188. Publishing another as a coward. |
| 1186. To extort money. | 1189. “Whitecapping” defined, punishment for. |
| 1187. Threats of prosecution to extort money. | |

Article 1185. [752] Combination to falsely accuse another.—If any two or more persons shall combine falsely to accuse another of an offense, and shall, in pursuance of such combination, make such accusation before a court or magistrate, or in any newspaper or other public print, or by the circulation of hand bills, or in any other public manner, by writing, they shall be punished by fine not exceeding two thousand dollars, or by imprisonment in the county jail not exceeding two years.

Indictment.—Willson’s Cr. Forms, 530, 531.

Art. 1186. [753] To extort money.—If the purpose of such combination be to extort money or any pecuniary advantage, the punishment shall be by fine not to exceed two thousand dollars, and imprisonment in the penitentiary not to exceed three years.

Offense as felony.—Where money is extorted from one through threats to prosecute him for a criminal offense it is a felony. *Williams v. State*, 51 App. 1, 100 S. W. 149, 150.

Indictment.—Willson’s Cr. Forms, 532.

Art. 1187. [754] Threats of prosecution to extort money.—If any person, with intent to extort money, or any pecuniary advantage, shall threaten to accuse another of a felony, before any court, or to publish any other statement respecting him which would come within the meaning of libel, he shall be punished in the manner set forth in article 1185. //

See article 1466, post.

Indictment.—Willson’s Cr. Forms, 533.

Where extortion by threats of criminal prosecution before a certain justice is alleged, and threats to prosecute before another justice are proved, the variance is fatal. *Strange v. State*, 33 App. 315, 26 S. W. 406.

Art. 1188. [755] Publishing another as a coward.—If any person shall, in any newspaper or hand bill, or by notice posted up in any place, publish another as a coward, or use toward him other opprobrious language, he shall be fined in an amount not exceeding two hundred dollars; and, if such publication or posting be in consequence of a refusal to fight a duel, the punishment shall be by fine of not less than five hundred nor more than one thousand dollars.

Indictment.—Willson's Cr. Forms, 534.

Art. 1189. "Whitecapping" defined, punishment for.—Any person who shall post any anonymous notice, or make any threats or signs, or skull and cross bones, or shall, by any other method, post any character or style of notice or threat to do personal violence or injury to property on or near the premises of another, or who shall cause the same to be sent with the intention of interfering in any way with the right of such person to occupy said premises, or to follow any legitimate occupation, calling or profession, or with the intention of causing such person to abandon such premises, or precincts, or county, in which such person may reside, shall be deemed guilty of the offense of whitecapping, and, upon conviction therefor, shall be punished by confinement in the state penitentiary for any period of time not less than two years nor more than five years. [Act 1899, p. 215.]

Notice and sign within statute.—Under indictment charging sending whitecapping letter to "Jim Owes" such a letter addressed to "Jim Owens" was properly admitted. *Dunn v. State*, 43 App. 25, 63 S. W. 571.

If the notice or sign is sent with the intention of interfering with the person's right to occupy his premises, or intent to frighten him, thereby causing such person to abandon such premises or causing said person by frightening to cease to occupy his premises then and in that event, the intent of the person being to interfere with the possession and occupancy of his premises by frightening him, it would be within the letter and spirit of the statute regardless of whether said notice contained a threat to do personal violence. A notice and sign as follows: "Jim Owens went to Hell June 20, 1900," and a drawing of a coffin and scaffold from which a body is suspended by the neck, is clearly a notice to prosecutor that he would be hanged June 20, 1900, and innuendo averments in the indictment are unnecessary. *Dunn v. State*, 43 App. 25, 63 S. W. 573.

Indictment.—Willson's Cr. Forms, 714, 744.

CHAPTER FIVE

BLACKLISTING

Art.	Art.
1190. What constitutes discrimination against persons seeking employment.	1194. Same prohibited.
1191. Penalty for violating preceding article.	1195. Penalty for.
1192. Prosecutions under, what is prima facie proof.	1196. Exceptions, when.
1193. "Blacklisting" defined.	1197. Servant or employé not to be coerced.
	1198. Penalty for.
	1199. Witness summoned and examined, when.

Article 1190. What constitutes discrimination against persons seeking employment.—Either or any of the following acts shall constitute discrimination against persons seeking employment:

1. Where any corporation, or receiver of the same, doing business in this state, or any agent or officer of any such corporation or receiver, shall blacklist, prevent, or attempt to prevent, by word, printing, sign, list or other means, directly or indirectly, any discharged employé, or any employé who may have voluntarily left said corporation's service, from obtaining employment with any other person, company, or corporation, except by truthfully stating in writing, on request of such former employé, the reason why such employé was discharged, or why his relationship to such company ceased.

2. Where any corporation, or receiver of the same, doing business in this state, or any officer or agent of such corporation or receiver, shall by any means, directly or indirectly, communicate to any other person or corporation any information in regard to a person who may seek employment of such person or corporation, and fails to give such person in regard to whom the communication may be made, within ten days after demand therefor, a complete copy of such communication, if in writing, and a true statement, if by sign or other means not in writing, and the names and addresses of all persons or corporations to whom said communication shall have been made.

3. Where any corporation, or receiver of the same, doing business in this state, or any agent or employé of such corporation or receiver, shall have discharged an employé, and such employé demands a statement in writing of the cause of his discharge, and such corporation, receiver, agent or employé thereof fails to furnish a true statement of the same to such discharged employé within ten days after such demand, or where any corporation or receiver of the same, or any officer or agent of such corporation, or receiver, shall fail, within ten days after written demand for the same, to furnish to any employé voluntarily leaving the service of such corporation or receiver, a statement in writing that such employé did leave such service voluntarily, or where any corporation or receiver of the same doing business within this state, shall fail to show in any statement under the provision of this law the number of years and months during which such employé was in the service of the said corporation or receiver in each and every separate capacity or position in which he was employed, and whether his services were satisfactory in each such capacity or not, or where any such corporation or receiver shall fail, within ten days after written demand for the same, to furnish to any such employé a true copy of the statement originally given to such employé for his use in case he shall have lost, or is otherwise deprived of the use of, the said original statement.

4. Where any corporation, or receiver of same, doing business in this state, or any agent or officer of the same, shall have received any request, notice or communication, either in writing or otherwise, from any person, company or corporation, preventing or calculated to prevent the employment of a person seeking employment, and shall fail to furnish to such person seeking employment, within ten days after a demand in writing therefor, a true statement of such request, notice or communication, and, if in writing, a true copy of same, and, if otherwise than in writing, a true statement thereof, and a true interpretation of its meaning, and the names and addresses of the persons, company or corporation furnishing the same.

5. Where any corporation, or receiver of the same, doing business in this state, or any officer or agent of such corporation or receiver, discharging an employé, shall have failed to give such employé a true statement of the causes of his discharge within ten days after a demand in writing therefor, and shall thereafter furnish any other person or corporation any statement or communication in regard to such discharge, unless at the request of the discharged employé.

6. Where any corporation, or receiver of same, doing business in this state, or any officer or agent of such corporation or receiver shall discriminate against any person seeking employment on account of his having participated in a strike.

7. Where any corporation, or receiver of the same, doing business in this state, or any officer or agent of such corporation, or receiver, shall give any information or communication in regard to a

person seeking employment, having participated in any strike, unless such person violated the law during his participation on such strike, or in connection therewith, and unless such information is given in compliance with subdivision 1 of article 1190. [Act 1909, p. 160.]

Constitutionality.—This article does not violate the fourth amendment of the federal constitution, or the state constitution, forbidding unreasonable searches and seizures. *St. Louis Southwestern R. Co. v. Hixon* (Civ. App.) 126 S. W. 338; *St. Louis Southwestern R. Co. of Texas v. Griffin* (Civ. App.) 154 S. W. 583.

This article does not deny to corporations the due process of law guaranteed by the fifth and fourteenth amendments of the federal constitution, and article 1, § 19, of the Texas Constitution. *St. Louis Southwestern R. Co. v. Hixon* (Civ. App.) 126 S. W. 338; *St. Louis Southwestern R. Co. of Texas v. Griffin* (Civ. App.) 154 S. W. 583.

This article does not deprive corporations of the equal protection of the laws under the state and federal constitutions. *St. Louis Southwestern R. Co. v. Hixon* (Civ. App.) 126 S. W. 338; *St. Louis Southwestern R. Co. of Texas v. Griffin* (Civ. App.) 154 S. W. 583.

This article, though retroactive, is not invalid as an *ex post facto* law, under Const. U. S. art. 1, § 9, subd. 3, and article 1, § 10, subd. 1, and Const. Tex. art. 1, § 16. *St. Louis Southwestern R. Co. v. Hixon* (Civ. App.) 126 S. W. 338.

This article does not impair the obligation of contracts under Const. U. S. art. 1, § 10, subd. 1, and Const. Tex. art. 1, § 16. *Id.*

This article does not deny to corporations liberty of speech under the first amendment of the federal constitution and Const. Tex. art. 1, § 8. *Id.*

This statute is constitutional. *St. Louis Southwestern R. Co. of Texas v. Hixon* (Civ. App.) 126 S. W. 338; *St. Louis Southwestern R. Co. of Texas v. Griffin* (Civ. App.) 154 S. W. 583.

The impairment of a corporation's right to discharge employes by the statute cannot be sustained as an exercise of the police power to deal with the real needs of the people in their health, safety, comfort, or convenience. *St. Louis Southwestern R. Co. of Texas v. Griffin* (Sup.) 171 S. W. 703.

The "liberty to speak" or write secured by Const. art. 1, § 8, includes the corresponding right to be silent, and this right is infringed by the provisions of the statute for compelling a corporation to give a discharged employe a statement of the cause of discharge. *St. Louis Southwestern R. Co. of Texas v. Griffin* (Sup.) 171 S. W. 703.

The impairment of a corporation's right to discharge employes at will without cause by the statute is violative of its constitutional right of liberty of contract, which right includes the corresponding right to accept a contract proposed. *St. Louis Southwestern R. Co. of Texas v. Griffin* (Sup.) 171 S. W. 703.

The impairment of a corporation's right to discharge employes without cause by the statute is a denial of the equal protection of the laws secured by Const. U. S. Amend. 14. *St. Louis Southwestern R. Co. of Texas v. Griffin* (Sup.) 171 S. W. 703.

The statute requiring railroad companies to furnish discharged employes with a statement of the cause of their discharge, and to furnish employes voluntarily leaving the service with a statement to that effect showing whether their services were satisfactory, is unconstitutional. *Galveston, H. & S. A. Ry. Co. v. State* (Civ. App.) 175 S. W. 1096.

Retroactive operation.—A railroad employe, who is discharged before this article takes effect, and also makes his demand for a service letter before it takes effect is within the article, where the railroad does not act on the demand until after it takes effect. *St. Louis Southwestern R. Co. v. Hixon* (Civ. App.) 126 S. W. 338.

This article, subs. 1, 3, is retroactive in operation, and includes employes discharged before the act took effect. *Id.*

Excuse.—A railroad corporation is not excused from liability for making false statements in a service letter given under this article on the ground that such statements are privileged. *St. Louis Southwestern R. Co. of Texas v. Griffin* (Civ. App.) 154 S. W. 583.

"True statement."—"True statement," as used in this article, means that the employer shall fairly, honestly, and in good faith, state the grounds or cause of discharge. *St. Louis S. W. R. Co. of Texas v. Griffin* (Civ. App.) 154 S. W. 583.

Sufficiency of statement.—Under this article a railroad employe, who is discharged without sufficient cause, and on demand receives a service letter stating that he was discharged for insubordination, has a good cause of action for damages. *St. Louis Southwestern R. Co. of Texas v. Hixon* (Civ. App.) 126 S. W. 338.

Where a brakeman refused to handle cars when directed so to do, on the ground that it was dangerous, and was discharged therefor, and a service letter was given him, in response to his written demand, which was never circulated by the company, and there was nothing to question its good faith in its statement that he had been guilty of insubordination, he had no cause of action against it because of the letter. *St. Louis, S. F. & T. R. Co. v. Inman* (Civ. App.) 137 S. W. 1153.

Indictment.—Willson's Cr. Forms, 527.

Art. 1191. Penalty for violating preceding article.—Every person violating any of the provisions of the preceding article shall be guilty of a misdemeanor, and, upon conviction, shall be punished

by imprisonment in the county jail for not less than one month nor more than one year. [Act 1907, p. 143.]

Indictment.—Willson's Cr. Forms, 527.

Art. 1192. Prosecutions under, what is prima facie proof.—In prosecutions for the violation of any of the provisions of this law, evidence that any person has acted as the agent of a corporation in the transaction of its business in this state shall be received as prima facie proof that his act in the name, behalf or interest of the corporation, of which he was acting as the agent, was the act of the corporation. [Id., p. 143.]

Indictment.—Willson's Cr. Forms, 527.

Art. 1193. "Blacklisting" defined.—He is also guilty of "blacklisting" who places, or causes to be placed, the name of any discharged employé, or any employé who has voluntarily left the service of any individual, firm, company or corporation on any book or list, or publishes it in any newspaper, periodical, letter or circular, with the intent to prevent said employés from securing employment of any kind with any other person, firm, corporation or company, either in a public or private capacity. [Act 1901, p. 264.]

Indictment.—Willson's Cr. Forms, 527.

Art. 1194. Same prohibited.—No corporation, company, or individual shall blacklist or publish, or cause to be blacklisted or published, any employé, mechanic or laborer discharged by such corporation, company or individual, with the intent and for the purpose of preventing such employé, mechanic or laborer from engaging in or securing similar or other employment from any other corporation, company or individual. [Id., p. 264.]

Indictment.—Willson's Cr. Forms, 527.

Art. 1195. Penalty for.—If any officer or agent of any corporation, company or individual, or other person, shall blacklist or publish, or cause to be blacklisted or published, any employé, mechanic or laborer discharged by such corporation, company or individual, with the intent and for the purpose of preventing such employé, mechanic or laborer from engaging in or securing similar or other employment from any other corporation, company or individual, or shall in any manner conspire or contrive by correspondence or otherwise, to prevent such discharged employé from procuring employment, as provided in articles 1193 and 1194, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than two hundred and fifty dollars, or be imprisoned in the county jail not less than thirty nor more than ninety days or both. [Id., p. 264.]

Art. 1196. Exceptions, when.—But this law shall not be construed as prohibiting any corporation, company or individual, from giving in writing, on application from such discharged employé, or any corporation, company or individual who may desire to employ such discharged employé, a truthful statement of the reason for such discharge; provided, that said written cause of discharge, when so made by such person, agent, company or corporation, shall never be used as the cause for an action for libel, either civil or criminal, against the person, agent, company or corporation so furnishing same. [Id., p. 264.]

Indictment.—Willson's Cr. Forms, 527.

Art. 1197. Servants or employés not to be coerced.—It shall be unlawful for any person or persons, corporation or firm, or any agent, manager or board of managers, or servant, of any corporation or firm in this state to coerce or require any servant or employé to deal with or purchase any article of food, clothing or merchandise

of any kind whatever, from any person, association, corporation or company, or at any place or store whatever. And it shall be unlawful for any such person or persons, or agent, manager, or board of managers, or servants, to exclude from work, or to punish or blacklist any of said employés for failure to deal with any such person or persons, or any firm, company or corporation, or to purchase any article of food, clothing or merchandise whatever at any store or any place whatever. [Act 1903, p. 89.]

Indictment.—See Willson's Cr. Forms, 527-529.

Art. 1198. Penalty for.—Any person or persons, company or corporation, or association, or any agent, manager or managers, or servant of any company, corporation or association, described in the foregoing article, who shall violate any of the provisions of the preceding article, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than two hundred dollars for each offense. [Id., p. 89.]

Art. 1199. Witness summoned and examined, when.—Upon the application of the attorney general, or of any district or county attorney, made to any justice of the peace in this state, and stating that he has reason to believe that a witness, who is to be found in the county of which such justice of the peace is an officer, knows of a violation of any of the provisions of this chapter, it shall be the duty of the justice of the peace to whom such application is made, to have summoned and to have examined such witness in relation to violations of any of the provisions of this chapter, said witness to be summoned as provided for in criminal cases. The said witness shall be duly sworn, and the justice of the peace shall cause the statements of the witness to be reduced to writing and signed and sworn to before him; and such sworn statement shall be delivered to the attorney general, district or county attorney, upon whose application the witness was summoned. Should the witness, summoned as aforesaid, fail to appear or to make statements of the facts within his knowledge, under oath, or to sign the same after it has been reduced to writing, he shall be guilty of contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned in the county jail until he shall make a full statement of all the facts within his knowledge with reference to the matter inquired about. Any person so summoned and examined shall not be liable to prosecution for any violation of the provisions of this chapter about which he may testify fully and without reserve. [Act 1907, p. 143.]

TITLE 17

OF OFFENSES AGAINST PROPERTY

Chap.	Chap.
1. Of arson.	13. Illegal marking and branding and other offenses relating to stock.
2. Of other wilful burning.	14. Offenses relating to estrays.
3. Of malicious mischief [cruelty to animals, trespass, etc.].	15. Offenses against labels, trade-marks, etc.
4. Of infectious diseases among animals and bees.	16. Offenses relating to the protection of stock raisers in certain localities.
5. Of cutting and destroying timber.	17. Embezzlement.
6. Of burglary.	18. Of swindling and the fraudulent disposition of mortgaged property.
7. Of offenses on board of vessels, steamboats and railroad cars.	1. Swindling.
8. Of robbery.	2. Fraudulent disposition of mortgaged property.
9. Of theft in general.	19. Of offenses committed in another country or state.
10. Of theft from the person.	
11. Theft of animals.	
12. Miscellaneous provisions relating to the recovery of stolen animals and the detection and punishment of thieves.	

CHAPTER ONE

OF ARSON

Art.	Art.
1200. Definition of.	1206. Except, when.
1201. "House" defined.	1207. Owner may destroy, except when.
1202. Offense complete, when.	1208. Exceptions.
1203. "Design" the essence of the offense.	1209. Part owner cannot burn.
1204. Intent presumed, when.	1210. Punishment.
1205. Explosions included.	1211. Burning a state building.
	1212. Attempt at arson.

Article 1200. [756] Definition of.—"Arson" is the wilful burning of any house included within the meaning of the succeeding article of this chapter.

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| 1. Nature and elements of offense in general. | 6. — Identity of defendant. |
| 2. House. | 7. — Confessions. |
| 3. Indictment. | 8. — Other offenses. |
| 4. Evidence. | 9. — Expert testimony. |
| 5. — On trial of accomplice. | 10. Charge of court. |

1. **Nature and elements of offense in general.**—Arson has ever been regarded as an offense against the security of the habitation rather than the property, and the actual title and true ownership can rarely be a matter for material inquiry in prosecutions for this offense. The landlord himself may commit it on the house occupied by, or in possession of, the tenant, for during the lease the house is the property of the tenant; and so the true owner may be held liable for the offense, although the contract of purchase be simply executory, and for default he may re-enter and repossess the premises by action for title and possession. The court will not inquire into the tenure or interest of the occupier or person in possession of the house, if, in fact, it is occupied or possessed by such person. *Tuller v. State*, 8 App. 501.

2. **House.**—See article 1201 and notes thereunder.

3. **Indictment.**—Willson's Cr. Forms, 535.

See, also, notes under following articles.

An indictment charging that the burning was "wilful" need not more specifically allege the design and intent. *Thomas v. State*, 41 Tex. 27; *Tuller v. State*, 8 App. 501.

An indictment for this offense, in addition to charging the arson, alleged that a child was in the house at the time the house was burned, and that said child was seriously injured by the fire. Held, that the allegation as to the child did not make the indictment duplicitous, but was a proper allegation in view of article 1222, post. *Beaumont v. State*, 1 App. 533, 28 Am. Rep. 424. Where the indictment is against the owner for burning his own house, it must allege ownership of the house in the accused, and the particular facts which bring such burning within some one of the exceptions specified in article 1208, post. *Tuller v. State*, 8 App. 501; *Baker v. State*, 25 App. 1, 8 S. W. 23, 8 Am. St. Rep. 427; *Mulligan v. State*, 25 App. 199, 7 S. W. 664, 8 Am. St. Rep. 435; *Rogers v. State*, 26 App. 404, 9 S. W. 762; *Kelley v. State*, 44 App. 187, 70 S. W. 20.

In the first count of an indictment for arson the appellant was charged with burning his own house, which was "then and there insured." In the second count it was charged that he burned his own house, endangering thereby the safety of houses belonging to other persons. The locus in quo is described in both counts

as "a certain house then and there occupied, owned, and controlled by him, the said Baker." Held, that this allegation is sufficient, inasmuch as the words "then and there" have definite reference to the date and the county previously alleged in the counts. It was not necessary that the first count should allege the amount of the insurance nor the company in which the house was insured. Nor was it necessary that the second count should allege who were the owners of the houses alleged to have been endangered by the burning of the defendant's house, provided they were not the property of the defendant himself. *Baker v. State*, 25 App. 1, 8 S. W. 23, 8 Am. St. Rep. 427.

Indictment described the burned building as "the house of Mary Gandy there situate in the town of Granbury, said Hood county, Texas, and the said house being then and there held and occupied by C. M. Rogers for and as the agent of J. M. Rogers, said Rogers having theretofore, on or about the second day of November, 1886, rented and leased said house from the said Mary Gandy by and through J. M. Skipper as the agent of her, the said Mary Gandy." The defense excepted to the indictment on the grounds that the description of the house was uncertain, and the averments of its ownership and occupancy uncertain, inconsistent, and repugnant. Held, that the exceptions were correctly overruled, and that it would have sufficed to have described the building as the house of C. M. Rogers, or a house occupied by C. M. Rogers, situated in the town of Granbury, in Hood county, state of Texas. The averments of the ownership of Mary Gandy and the lease to J. M. Rogers were unnecessary and required the state to prove them, but their redundancy does not vitiate the indictment. *Rogers v. State*, 26 App. 404, 9 S. W. 762.

Where an indictment for arson describes the house alleged to have been burnt as occupied by defendant and one H. as tenants, there is no variance if the evidence shows that the owner of the house rented it to defendant, and that H. jointly occupied it under an agreement with defendant. *Woolsey v. State*, 30 App. 346, 17 S. W. 546.

Ownership was properly alleged in one in possession under an oral gift from his father. *Wyley v. State*, 34 App. 514, 31 S. W. 393.

Though, under *Sayles' Ann. Civ. St.* 1897, arts. 2968, 2969, providing that all property acquired by either husband or wife during marriage shall be deemed common property, and that during coverture it may be disposed of only by the husband, a house purchased by the husband with his earnings after marriage, and the deed taken in the name of the wife, is community property, an indictment for a criminal burning of the house properly alleged the ownership to be in the husband, and proof that the property was purchased with the husband's earnings, and that the deed was taken in the name of the wife did not establish a variance. *Finckard v. State*, 62 App. 602, 138 S. W. 601.

Under article 1200, and articles 1207, and 1208, an indictment charging accused with procuring another to burn his house, which was insured, need not allege that the person who set fire to the house knew that it was insured. *Arnold v. State* (Cr. App.) 168 S. W. 122.

Though defendant burned G.'s house with his consent, the indictment need not, as in an indictment against G., negative the conditions which would save him from guilt, but the indictment merely charging that defendant burned G.'s house, and such consent, a matter of defense, appearing in the evidence, the state could in rebuttal negative such conditions. *Crowder v. State* (Cr. App.) 177 S. W. 501.

4. Evidence.—See notes under following articles.

Evidence of similar crimes, motive, etc., see C. C. P. art. 783 et seq.

Evidence held to sustain a conviction. *Williams v. State*, 41 Tex. 209; *Davis v. State*, 15 App. 594; *Smith v. State*, 23 App. 357, 5 S. W. 219, 59 Am. Rep. 773; *Bluman v. State*, 33 App. 43, 21 S. W. 1027, 26 S. W. 75. Contra, *Tuller v. State*, 8 App. 501; *McMahon v. State*, 17 App. 321; *Brown v. State* (Cr. App.) 150 S. W. 436; *Landers v. State*, 39 App. 671, 47 S. W. 1008.

It was held competent for the prosecution, for the purpose of proving malice on the part of the defendant toward the alleged injured party, to show that prior to the arson there had been difficulties between the defendant and the owner of the burned property, and that the defendant was the aggressor in such difficulties. *Davis v. State*, 15 App. 594.

In a trial for arson the defense objected to the admission of oral evidence adduced by the state to prove the alleged ownership of the burned house, but the objection was overruled and the testimony admitted. It appears, however, that the same fact was proved by other evidence, to which no objection was made by the defense, and that the defendant occupied the house under a lease from the owner. Held, that in view of this proof there was no material error in overruling the objection to the oral proof of the ownership. *Rogers v. State*, 26 App. 404, 9 S. W. 762.

Defendant's stepdaughter was allowed to testify that defendant struck her with a stick, and she took refuge in the house that was burned. Held competent to show motive. *Oliver v. State*, 33 App. 541, 28 S. W. 202.

Where, in a prosecution for arson, there was positive testimony connecting accused with the attempt to burn the house, together with other testimony tending strongly to show an alibi, and other testimony raising the issue of sanity, a judgment of conviction will not be reversed for insufficiency of the evidence. *Glaser v. State*, 60 App. 379, 131 S. W. 1097.

While parol evidence is inadmissible to prove title to real estate, in a prosecution for arson it is sufficient to prove possession of the property by parol, since the offense is directed against the possession rather than against the absolute ownership. *Allen v. State*, 62 App. 501, 137 S. W. 1133.

But where the building was unoccupied parol evidence of ownership was admitted. *Goldsmith v. State*, 46 App. 556, 81 S. W. 710.

In a prosecution for arson, evidence of witness that he pointed out to the sheriff

the team driven by defendant to the place where the burning occurred was admissible. *Allen v. State*, 62 App. 501, 137 S. W. 1133.

The admission of testimony as to contents of building was proper when it was shown that the defendant knew the contents, and must have known what would be the consequence of setting fire to it, and not giving the alarm until too late to save the property. *Anderson v. State*, 71 App. 27, 159 S. W. 847.

In a prosecution for arson, evidence, consisting of circumstances and a confession, held sufficient to authorize the jury to find that the defendant was a principal in the commission of the offense. *Anderson v. State*, 71 App. 27, 159 S. W. 847.

In a prosecution of accused as an accomplice to arson, evidence that on the night of the fire, when witness first discovered it, he could smell coal oil very strong, and could see that it had been used there, was admissible. *Thomason v. State*, 71 App. 439, 160 S. W. 359.

Evidence was not admissible, in a prosecution for burning a house in which accused lived, that witness saw accused with a certain dress on which she made since the fire, unless it were shown that the particular dress was included by accused in her statement of loss from the fire. *McClary v. State* (Cr. App.) 165 S. W. 572.

5. — On trial of accomplice.—See notes under article 89, ante.
6. — Identity of defendant.—See notes under C. C. P. art. 783.
7. — Confessions.—See notes under article 89, ante, and C. C. P. arts. 809, 810.
8. — Other offenses.—See notes under C. C. P. art. 783.
9. — Expert testimony.—See notes under C. C. P. art. 783.
10. Charge of court.—See *Jones v. State*, 5 App. 130.

Facts on which held error to refuse to instruct that an explosion did not come within definition of arson unless it set the house on fire and not merely the parts detached by the explosion. *Landers v. State*, 39 App. 671, 47 S. W. 1008.

Evidence held to require a charge on whether the house was burned or was merely scorched. *Moore v. State*, 51 App. 468, 103 S. W. 188.

Where the property burned was shown to be the property of A., and was so charged in the indictment, and there is no question in the record of his ownership, a charge that accused was alleged to have burned a certain house "as charged in the indictment" is sufficient, though it did not state that the house was the property of A. *Allen v. State*, 62 App. 557, 137 S. W. 1133.

In a prosecution for arson, a number of witnesses testified that B. and another had carried goods from accused's house on the evening before it was burned, and accused testified that he did not know where they were until some time after they were removed; and the removal of such goods from accused's house was relied on by the state as an incriminating fact. Accused requested an instruction that, if the jury believed that B. and another, whose name was unknown, in fact removed the goods from accused's house without his knowledge, they should acquit. Held, that it was error not to call to the jury's attention the facts embodied in the charge requested. *Brown v. State* (Cr. App.) 150 S. W. 436.

Art. 1201. [757] "House" defined.—A "house" is any building, edifice or structure inclosed with walls and covered, whatever may be the materials used for building.

Smith v. State, 23 App. 357, 5 S. W. 219, 59 Am. Rep. 773; *Mulligan v. State*, 25 App. 199, 7 S. W. 664, 8 Am. St. Rep. 435.

What constitutes house.—A jail is a house within this article. *Smith v. State*, 23 App. 357, 5 S. W. 219, 59 Am. Rep. 773.

A "building" ceases to be such when torn down; one could not be convicted of arson for burning the materials of a crib after tearing it down. *Mulligan v. State*, 25 App. 199, 7 S. W. 664, 8 Am. St. Rep. 435.

A gin set upon posts, the lower part used for the engine and the upper part which was entirely inclosed with walls used for the gin-house proper, is a "house" within the meaning of this statute. *Caddell v. State*, 50 App. 380, 97 S. W. 706.

Sufficiency of definition in relation to perjury.—A prosecution for perjury in swearing he did not see a gaming table in a "house" was not sustained by evidence that defendant did see such table in a structure attached to a saloon, enclosed on the four sides but not above. *Waul v. State*, 33 App. 228, 26 S. W. 199.

Indictment and proof.—Inasmuch as the law vests title of schoolhouses in the county judge, as trustee, it is sufficient to prove character of building and who was county judge at the time. *Hester v. State* (Cr. App.) 51 S. W. 933.

Charge of court.—Where there was no question that the house which was burned was a ginhouse, a definition by the court in its charge that a "house" is any building, edifice, or structure inclosed with walls and covered, whatever be the material used for the building, was sufficient and not misleading, and was in accord with this article. *Allen v. State*, 62 App. 501, 137 S. W. 1133.

Art. 1202. [758] Offense complete, when.—The burning is complete when the fire has actually communicated to a house, though it may be neither destroyed nor seriously injured.

Smith v. State, 23 App. 357, 5 S. W. 219, 59 Am. Rep. 773; *Delany v. State*, 41 Tex. 601.

House smoked or scorched.—Evidence showing that the walls of the house were smoked and scorched is not sufficient to support conviction. *Woolsey v. State*, 30 App. 346, 17 S. W. 546.

Art. 1203. [759] "Design" the essence of the offense.—It is of no consequence by what means the fire is communicated to a house, if the burning is with design. It may be by setting fire to any combustible material communicating therewith, by an explosion, or by any other means.

Art. 1204. [760] Intent presumed, when.—When fire is communicated to a house by means of the burning of another house, or some combustible matter, it shall be presumed that the intent was to destroy every house actually burnt; provided there was any apparent danger of such destruction.

Setting fire to prison to escape.—In *Delaney v. State*, 41 Tex. 601, it was held that if a prisoner in jail sets fire to the door, with the intent to burn off the lock so as to effect his escape, or burns a hole in the floor for the same purpose, it is not arson. But, if he communicates the fire to the building without such definite purpose, but with intent to create an alarm, and thus effect his escape in the confusion, being at the same time indifferent whether the building is consumed or not, it would be arson. But the doctrine of that case in so far as it holds that if a prisoner wilfully sets fire to the prison for the purpose of making his escape, with no design of burning the house down, it would not be arson, has been expressly overruled in *Smith v. State*, 23 App. 357, 5 S. W. 219, 59 Am. Rep. 773, where the question is fully discussed, and the *Smith* Case was followed in *Willis v. State*, 32 App. 534, 25 S. W. 123.

Art. 1205. [761] Explosions included.—The explosion of a house by means of gunpowder, or other explosive matter, comes within the meaning of arson.

Explosion.—By the force of a dynamite explosion, splinters of the ceiling of a house were scattered on the floor. Some of these splinters were on fire. Some of the paper between the tin roofing and rafters also burned. Held, that on a trial under an indictment charging defendant with the burning of the house, but not drawn under this article it was error to refuse an instruction that the explosion did not come within the definition of "arson," unless it resulted in setting the house on fire, in contradistinction to the burning of the parts of the house blown off and detached therefrom. *Landers v. State*, 47 S. W. 1008, 39 App. 671.

Indictment.—In order to support a conviction under this article the indictment should allege the blowing up of the house. *Landers v. State*, 39 App. 671, 47 S. W. 1008.

Art. 1206. [762] Except, when.—A house, blown up or otherwise destroyed for the purpose of saving another house from fire, is not within the meaning of arson.

Art. 1207. [763] Owner may destroy, except when.—The owner of a house may destroy it by fire or explosion without incurring the penalty of arson, except in the cases mentioned in the succeeding article.

See notes under the following section.

Indictment.—Willson's Cr. Forms, 536.

Art. 1208. [764] Exceptions.—When a house is within a town or city, or when it is insured, or when there is within it any property belonging to another, or when there is apparent danger by reason of the burning thereof, that the life or person of some individual, or the safety of some house belonging to another will be endangered, the owner, if he burn the same, is guilty of arson, and shall be punished accordingly.

Possession as tenant.—One in possession of a house as tenant, who willfully burns it, is guilty of arson, though the elements of that crime by an owner, enumerated here, such as location of the building in a town or city, insurance, containing property of another, etc., do not exist. *Kelley v. State*, 44 App. 187, 70 S. W. 20.

House containing property of another.—Neither a part owner nor the exclusive owner, when the house contains property of another, can burn the house. *Mulligan v. State*, 25 App. 199, 7 S. W. 664, 8 Am. St. Rep. 435.

Insured property.—In a prosecution for the burning of a building to secure the insurance thereon, it must be shown, where the accused was not the owner, that he knew of the insurance, and that he burned the building at the instigation of the owner or some one else to defraud the insurance company. *Moore v. State* (Cr. App.) 146 S. W. 183.

Under this article, it is not necessary that the property was burned with intent to defraud the insurance company, and therefore the state need not prove that the insurance policy was valid or was issued by a company authorized to do business within the state. *Arnold v. State* (Cr. App.) 168 S. W. 122.

Indictment and proof thereunder.—Willson's Cr. Forms, 536.

To charge an owner or occupant under any of the exceptions contained in the statute subjecting him to liability the indictment must be so framed as to bring the case within some exception. *Tuller v. State*, 8 App. 501.

Under Pen. Code Tex. art. 1209, denouncing the burning of a house by a part owner, a tenant in possession of a house under a lease is a part owner; and an indictment against him for arson in burning the building must allege such tenancy, and the particular facts making the burning arson, under this section, as that there was property of another in the house, or that the life of some person was endangered by the burning. *Mulligan v. State*, 25 App. 199, 7 S. W. 664, 8 Am. St. Rep. 435.

An indictment charging that defendant burned his own house, thereby endangering the safety of houses belonging to other persons, is sufficient without giving the names of such other persons. *Baker v. State*, 25 App. 1, 8 S. W. 23, 8 Am. St. Rep. 427.

An indictment charging that defendant burned his own house, the said house being at the time insured, is sufficient, without alleging the facts in relation to the insurance. *Baker v. State*, 25 App. 1, 8 S. W. 23, 8 Am. St. Rep. 427.

Arson may be committed by the tenant in possession as against the owner of the estate in fee, and an allegation of the facts setting forth his status as a tenant in possession and alleging in whom lies the fee title will be sufficient without further alleging the elements of arson committed by the owner. *Kelley v. State*, 44 App. 187, 70 S. W. 20.

Under this and the preceding article and article 1200, an indictment charging accused with procuring another to burn his house, which was insured, need not allege that the person who set fire to the house knew that it was insured. *Arnold v. State* (Cr. App.) 168 S. W. 122.

Nor was it necessary to allege by whom or by what authority the house was insured; an allegation in the language of the statute that it was insured being sufficient. *Arnold v. State* (Cr. App.) 168 S. W. 122.

Where an indictment, charging the defendant with procuring another to burn his insured house, alleged that the other maliciously set fire to the house, and that the defendant paid the other a certain sum of money in another county, the state need not prove the malice, or the payment of the exact sum, or that the payment was in the named county, which allegations were not necessary to constitute the offense, since the rule that, when a person, place, or thing necessary to be alleged in an indictment is particularly described, it must be proved as described does not apply to allegations, which are mere surplusage. *Arnold v. State* (Cr. App.) 168 S. W. 122.

Though defendant burned G.'s house with his consent, the indictment need not, as in an indictment against G., negative the conditions which would save him from guilt, but the indictment merely charging that defendant burned G.'s house, and such consent, a matter of defense, appearing in the evidence, the state could in rebuttal negative such conditions. *Crowder v. State* (Cr. App.) 177 S. W. 501.

Evidence.—In order to convict one accused of burning a building to obtain the insurance, proof of guilt must be made beyond a reasonable doubt. *Moore v. State* (Cr. App.) 146 S. W. 183.

Evidence that the defendant was an agent of the insurer and procured the issuance of the policy to the one who subsequently assigned it to him, that he took the policy to the company's agent and had it transferred by the agent to himself after the assignment, that practically as part of the same transaction he hired another to burn the property in order that he might collect the insurance, and thereafter attempted to collect the amount of the policy and accepted a part thereof in settlement, was sufficient foundation to justify the admission of the policy and assignment in evidence. *Arnold v. State* (Cr. App.) 168 S. W. 122.

Art. 1209. [765] Part owner can not burn.—One of the part owners of a house is not permitted to burn it.

Art. 1210. [766] Punishment.—If any person be guilty of arson, he shall be punished by confinement in the penitentiary not less than five nor more than twenty years.

See post, arts. 1222 and 1223.

Excessive punishment.—The maximum penalty of twenty years under the former statute held not severe under the evidence in the case. *Davis v. State*, 15 App. 594.

Art. 1211. [767] Burning a state building.—If any person shall wilfully burn the capitol building of the state, the treasury building or comptroller's office, the supreme court building, the executive mansion or the general land office, he shall be punished by confinement in the penitentiary for life.

Indictment.—Willson's Cr. Forms, 537.

Art. 1212. [768] Attempt at arson.—If any person shall, by any means calculated to effect the object, attempt to commit the offense of arson, he shall be punished by confinement in the penitentiary not less than two nor more than seven years.

Attempt defined.—To "attempt" is to make an effort to accomplish some object; to try, to endeavor, to use exertion for some purpose. It necessarily implies an

exertion, or effort. An attempt to commit a crime is an endeavor to accomplish it, carried beyond mere preparation, but falling short of the ultimate design, in any part of it. *Lovett v. State*, 19 Tex. 174.

An attempt to commit a crime is an intent to do it accompanied by some act toward it, but falling short of the commission of the crime. *Watts v. State*, 30 App. 533, 17 S. W. 1092.

Indictment.—Willson's Cr. Forms, 538.

An indictment charging that a person on or about a certain date did then and there unlawfully, wilfully, and maliciously and with intent and by means calculated to effect the object attempt to set fire to and burn a certain house situated in Johnson county, to wit, that he did then and there unlawfully, wilfully, and maliciously pour a quantity of kerosene oil, a highly inflammable and combustible liquid, upon the floor and billiard and pool tables in such house and set fire to it, with intent to burn the house, sufficiently charges attempted arson. *Woods v. State* (Cr. App.) 150 S. W. 633.

CHAPTER TWO

OF OTHER WILFUL BURNING

Art.	Art.
1213. Rules of arson applicable.	1221. Burning personal property of another.
1214. Burning of other buildings, hay, lumber, etc.	1222. Punishment double in case of personal injury.
1215. Ship, or other vessel, or boat.	1223. When death ensues, murder.
1216. Offense complete, when.	1224. Attempt at other wilful burning.
1217. Bridge burning.	1225. Wilfully firing grass in inclosure of another.
1218. Burning woodland or prairie.	1226. Wilfully firing grass with intent to injure.
1219. Offense complete, when.	
1220. Burning personal property insured.	

Article 1213. [769] Rules of arson applicable.—The rules and definitions, contained in the preceding chapter with respect to arson, apply also to wilful burnings under the provisions of this chapter, where they are not clearly inapplicable.

Art. 1214. [770] Burning other buildings, hay, lumber, etc.—If any person shall wilfully burn any building, not coming within the description of a house, as defined in the preceding chapter, or shall wilfully burn any stack of corn, hay, fodder, grain or flax, or any pile of boards, lumber or wood, or any fence or other inclosure, the property of another, he shall be punished by confinement in the penitentiary not less than two nor more than five years, or by fine not exceeding two thousand dollars.

Burning fence.—For evidence held insufficient to sustain a conviction for burning a fence, see *Pipe v. State*, 3 App. 56.

Indictment.—Willson's Cr. Forms, 539, 540.

Art. 1215. [771] Ship, or other vessel, or boat.—If any person shall wilfully burn any ship or other vessel, or any boat of any kind whatsoever, he shall be punished by confinement in the penitentiary not less than two nor more than seven years, or by fine not exceeding two thousand dollars.

Indictment.—Willson's Cr. Forms, 541.

Art. 1216. [772] Offense complete, when.—This offense is complete only when some person other than the person offending has an interest in the property by insurance or otherwise at the time the burning takes place.

Art. 1217. [773] Bridge burning.—If any person shall wilfully burn any bridge, which, by law or usage, is a public highway, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years, or by fine not exceeding five thousand dollars. [Act Feb. 12, 1858, p. 177.]

Indictment.—Willson's Cr. Forms, 542.

Art. 1218. [774] Burning woodland or prairie.—If any person shall wilfully or negligently set fire to, or burn, or cause to be burned, any woodland or prairie, not his own, he shall be punished by

fine not less than fifty nor more than three hundred dollars. [Act April 14, 1883, p. 102.]

Indictment.—Willson's Cr. Forms, 543.

For an indictment held good, see *State v. White*, 41 Tex. 64.

Art. 1219. [775] Offense complete, when.—The offense named in the foregoing article is complete where the person offending sets fire to his own woodland or prairie and the fire communicates to the woodland or prairie of another.

Art. 1220. [776] Burning personal property insured.—If any person, with intent to defraud, shall wilfully burn any personal property owned by himself, which shall be at the time insured against loss or damage from fire, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1858, p. 178.]

Indictment.—Willson's Cr. Forms, 544.

Evidence.—Proof that defendant's clerk forbade the removal of goods from the store is incompetent, in the absence of any evidence that defendant authorized him to do so, other than the statement of a person that he was told by defendant to desist from carrying out goods. 33 App. 43, 21 S. W. 1027, reversed. *Bluman v. State*, 33 App. 43, 26 S. W. 75.

It was error to permit a witness to testify that defendant could have saved some of his goods, had he tried, it not appearing that he knew what defendant could do. 33 App. 43, 21 S. W. 1027, reversed. *Bluman v. State*, 33 App. 43, 26 S. W. 75.

It was error to admit evidence of the amount of goods saved from a house that was burned at the same time as defendant's store. 33 App. 43, 21 S. W. 1027, reversed. *Bluman v. State*, 33 App. 43, 26 S. W. 75.

Art. 1221. [777] Burning personal property of another.—If any person shall wilfully burn any personal property belonging to another, the punishment for which is not otherwise provided for in this chapter, he shall be fined not exceeding two thousand dollars.

Indictment.—Willson's Cr. Forms, 545.

Where an indictment is framed under this article it is not necessary to allege the value of the property burned. *Stanton v. State*, 45 App. 168, 74 S. W. 771

Art. 1222. [778] Punishment doubled in case of personal injury.—If any bodily injury less than death is suffered by any person by reason of the commission of any of the offenses named in this and the preceding chapter, the punishment may be increased by the jury so as not to exceed double that which is prescribed in cases where no such injury is suffered.

Indictment.—Willson's Cr. Forms, 546.

An indictment was neither duplicitous or improper under this article because it alleged that a little child was in the house burned and received bodily injuries. *Beaumont v. State*, 1 Tex. 533, 28 Am. Rep. 424.

Art. 1223. [779] When death ensues, murder.—Where death is occasioned by any of the offenses described in this and the preceding chapter, the offender is guilty of murder.

See, ante, Murder.

Art. 1224. [780] Attempts at other wilful burning.—If any person shall, by any means calculated to effect the object, attempt to commit any of the offenses enumerated in this chapter, he shall receive such punishment as may be assessed by the jury, not to exceed one-half of the penalty which would have been affixed in case the offense attempted had been actually committed; provided, that, when the punishment shall be confinement in the penitentiary in no case shall the lowest term be less than two years. [Act Feb. 12, 1858, p. 178.]

See art. 1212, ante, and note thereunder.

Indictment.—Willson's Cr. Forms, 547.

Art. 1225. [781] Wilfully firing grass in inclosure of another.—Any person who shall wilfully fire any grass within any inclosure, not his own, in this state, with intent to destroy the grass in such pasture, or any part thereof, or any person who shall fire the grass on the outside of any inclosure with the intent to destroy the grass

in such inclosure, by the communication of said fire to the grass within, shall be deemed guilty of a felony, and, upon conviction, punished by confinement in the state penitentiary for a term of not less than two nor more than five years. [Act Feb. 7, 1884, pp. 66-67.]

Proof of ownership or title by possession.—See note under art. 1200.

Ownership or title by possession is always made by parol evidence. A mere possessory title in some one other than defendant was all that the state was required to prove. The proof of ownership here held sufficient. *Phillips v. State*, 17 Tex. 169.

Indictment.—Allegation of ownership in general, see note under art. 1200.

An indictment under the old law charging a burning of prairie on December 1 was good without stating that it was between July 1 and February 15 succeeding, the time limits of the former statute. *State v. White*, 41 Tex. 64.

An indictment almost literally in the language of the statute, and alleging that the offense was committed in Parker county and that the grass fired was the grass in T's pasture inside his inclosure and that defendant set fire to said grass unlawfully and wilfully with intent to destroy it, sufficiently charged venue and was sufficient generally. While it might not have been necessary to charge ownership other than as not being in defendant, the specific allegation of ownership was not a defect. *Phillips v. State*, 17 App. 169.

Art. 1226. [782] Wilfully firing grass with intent to injure, etc.—If any person shall wilfully, and with intent to injure the owner or owners of the stock grazing thereon, set fire to any grass upon land not his own, with intent to destroy the same, he shall be confined in the state penitentiary for a period not less than one year nor more than three years. [Id.]

CHAPTER THREE

MALICIOUS MISCHIEF, [CRUELTY TO ANIMALS, TRESPASS, ETC.]

Art.		Art.	
1227.	Wilfully sinking vessels, etc.	1249.	When horses, mules, cattle, etc., are prohibited from running at large.
1228.	Destroying telegraph or obstructing message.	1250.	Herding stock in half mile of residence.
1229.	Obstructing railway track, etc.	1251.	Each hour a separate offense.
1230.	Killing animal to injure owner.	1252.	Wilful destruction of irrigation canal.
1231.	Cruelty to animals.	1253.	Obstructing or injuring county drain.
1231a.	Same; feeding and watering animals impounded.	1254.	Cut, destroy or injure levee.
1231b.	Same; care of poultry or birds confined.	1254a.	Destroying or defacing corner, line, mark, etc., in connection with levee.
1231c.	Same; member of Humane Society may require arrests to be made.	1255.	Entering upon inclosed land of another to hunt or take fish.
1231d.	Same; definition of terms.	1255a.	Hunting on enclosed and posted lands containing 2000 acres or more.
1231e.	Same; repeal.	1255b.	Same; punishment; proviso.
1231f.	Same; pending prosecutions.	1255c.	Same; necessity of posting.
1232.	Using animals without consent of owner.	1255d.	Same; repeal.
1233.	Removing buoy, etc.	1255e.	Same; does not authorize hunting in enclosed farms.
1234.	Robbing orchards, gardens, etc.	1256.	Same; counties exempted.
1235.	Destroying fruit, corn, etc.	1257.	Preventing the moving, etc., of railroad trains.
1236.	Introducing Johnson grass.	1258.	Each day a separate offense.
1237.	Requisites of indictment.	1259.	Wilfully injuring railroad, etc.
1238.	Injuring, etc., baggage.	1259a.	Taking or driving motor vehicle belonging to another.
1239.	Throwing stones or firing at railway cars, etc.	1259b.	Removing tools and parts from motor vehicle with intent to steal the same; receiving same.
1240.	Injuring fence, leaving open gates, etc.	1259c.	Meddling with or injuring motor vehicle.
1241.	Where stock law adopted, what constitutes offense.	1259d.	Peddlers, etc., refusing to leave premises on request of owner.
1242.	Wantonly and wilfully, etc., cutting, etc., fence.		
1243.	Unlawful to remove party fence.		
1244.	Notice of intention to remove.		
1245.	Notice requiring removal.		
1246.	Dogging stock when fence insufficient.		
1247.	"Insufficient fence" defined.		
1248.	Removing rock, earth, etc., from premises of another.		

Article 1227. [783] Wilfully sinking vessels, etc.—If any person shall wilfully and maliciously cast away, sink or destroy, in any

way other than by fire, any vessel or boat which, together with its cargo, if any, shall be of the value of one hundred dollars or more, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years, or by fine not exceeding two thousand dollars. If the life of any person is lost by such act, the offender is guilty of murder. [Act Feb. 12, 1858, p. 178.]

Malice and intent.—Intent is an essential element of crimes coming within the purview of this chapter and must be proved. *Owens v. State*, 25 App. 552, 8 S. W. 658; *Brewer v. State*, 28 App. 565, 13 S. W. 1004; *McMahan v. State*, 29 App. 348, 16 S. W. 171.

Indictment.—Willson's Cr. Forms, 548.

Malicious mischief as offense per se.—No such an offense as malicious mischief per se is known to the law. *Koritz v. State*, 27 App. 53, 10 S. W. 757. See, also, *Hooks v. State*, 25 App. 601, 8 S. W. 803; *Jamison v. State*, 27 App. 442, 11 S. W. 483; *White v. State*, 27 App. 638, 11 S. W. 643; *Yarbrough v. State*, 28 App. 481, 13 S. W. 775.

Art. 1228. [784] Destroying telegraph or obstructing message.—If any person shall intentionally break, cut, pull or tear down, misplace, or in any other manner injure any telegraph or telephone wire, post, machinery or other necessary appurtenance to any telegraph or telephone line, or in any way wilfully obstruct or interfere with the transmission of messages along such telegraph or telephone line, he shall be punished by confinement in the penitentiary not less than two nor more than five years, or by fine not less than one hundred nor more than two thousand dollars. [Act Feb. 10, 1885, p. 10.]

See notes under article 1227, ante.

What constitutes offense.—To constitute an offense under this article there must have been a breaking, cutting, etc., of some wire, post, machinery or other necessary appurtenances in such manner as to interfere with the transmission of messages along the line. The fact that the wire cut was a dead wire, does not bring the offense within the meaning of this article. *Southwestern Tel. & Tel. Co. v. Priest et al.*, 31 Civ. App. 345, 72 S. W. 242.

Indictment and evidence.—Willson's Cr. Forms, 549, 551.

An information charging that accused unlawfully and wilfully injured and destroyed "certain personal property, to wit, did cut, injure, and pull up posts that were to be used as a phone line," the same belonging to specified persons, "without the consent of any of the parties interested in said property, the property injured, cut, and destroyed by" accused being under the value of \$50, is sufficient. *Craighead v. State*, 117 S. W. 128, 55 App. 386.

Evidence held to sustain a conviction for wilfully injuring telephone posts in a public road. *Craighead v. State*, 55 App. 386, 117 S. W. 128.

Where one accused of wilfully destroying telephone poles claimed he believed them to be on his land, instead of in an abutting road, and contended that the fence on the south side of the road was on his land, the state could show he previously told witness that the fence on the north side encroached four feet on his land, and that, pursuant to accused's instructions, witness placed the poles six feet from the fence. *Craighead v. State*, 117 S. W. 128, 55 App. 386.

In a trial for wilfully destroying telephone posts, witness could testify that the posts belonged to him and the other prosecuting witnesses. *Craighead v. State*, 117 S. W. 128, 55 App. 386.

Art. 1229. [785] Obstructing railroad tracks, etc.—If any person shall wilfully place any obstruction upon the track of any railroad, or remove any rail therefrom, or displace or interfere with any switch thereof, or in any way injure such road, or shall do any damage to any railroad, locomotive, tender or car, whereby the life of any person might be endangered, he shall be punished by imprisonment in the penitentiary not less than two nor more than seven years. If the life of any person be lost by such unlawful act, the offender is guilty of murder. [Act March 8, 1887, p. 14.]

See notes under 1227, ante; see post, article 1259.

Nature and elements of offense.—It must appear how the obstruction might or would have endangered human life, as this is the gist of the offense. *Bullion v. State*, 7 App. 462.

Under the statute making it an offense to wilfully obstruct a railroad track, it is immaterial whether the railroad company is a legal corporation or not. *Clay v. State* (Cr. App.) 146 S. W. 166.

Principals.—See notes under article 74, ante.

Indictment.—Willson's Cr. Forms, 552, 554.

Indictment need not allege the names of the persons whose lives were endangered. *Barton v. State*, 28 App. 483, 13 S. W. 783. But it should allege that the obstruction was such as to endanger life. 10 Cr. L. Mag. 391.

An indictment charging defendant with placing grease and soap on a railroad track with intent to wreck a train which was being operated, and that he did thereby damage said road and endanger the lives of the employes who were then operating the train, is sufficient. *Tuller v. State*, 58 App. 571, 126 S. W. 1158.

The indictment need not allege that the railroad company was legally incorporated. *Clay v. State* (Cr. App.) 146 S. W. 166.

Evidence.—Evidence held insufficient to show that human life was endangered by the act committed. *Bullion v. State*, 7 App. 462.

To show motive the state was properly allowed to prove that the defendant, soon after the offense charged, placed another obstruction at a contiguous point on the track. The charge of the court should, however, have restricted this proof to its legitimate function. *Barton v. State*, 28 App. 483, 13 S. W. 783.

Where defendants introduced evidence to show that the obstruction was inadvertently placed evidence that they placed another similar obstruction on the same track at a short distance from the first one, on the same evening, was admissible to negative the idea of inadvertence. *Stanfield v. State*, 43 App. 10, 62 S. W. 917.

Evidence on which held that the court should have instructed on the probability of the guilt of others than defendant. *Kirby v. State*, 49 App. 517, 93 S. W. 1030.

Charge of court.—Where defendants were on trial for placing an obstruction on a railroad track, and one testified that he was 200 or 300 yards distant at the time the obstruction was placed on the track, and was urging the other to keep away, he was entitled to a charge that, if the jury should find this to be true, he should be acquitted. *Stanfield v. State*, 43 App. 10, 62 S. W. 917.

Where there is evidence of defendant's placing grease on a railroad track in two places, one where human life was endangered and one where it was not, the court should instruct the jury to consider the evidence as to the placing of the grease in the latter place only for the purposes of showing motive or intent. *Tuller v. State*, 58 App. 571, 126 S. W. 1158.

In a prosecution for the statutory offense of placing an obstruction upon a railroad track, it is not necessary that the court by instruction define what is meant by obstruction, as that term is defined by the statute itself. *Clay v. State* (Cr. App.) 146 S. W. 166.

In a prosecution for obstructing a railroad track, a charge that, if there was a reasonable doubt as to whether the defendant was on the ground where the offense was committed at the time of its commission, defendant should be acquitted, was not objectionable as placing upon the defendant the burden of proving an alibi. *Clay v. State* (Cr. App.) 146 S. W. 166.

Art. 1230. [786] Killing animal to injure owner.—If any person shall wilfully kill, maim, wound, poison or disfigure any horse, ass, mule, cattle, sheep, goat, swine, dog or other domesticated animal, or any domesticated bird, of another, with intent to injure the owner thereof, he shall be fined not less than ten nor more than two hundred dollars. And in prosecutions under this article, the intent to injure may be presumed from the perpetration of the act. [Act Feb. 12, 1858, p. 178.]

See notes under article 1227, ante.

Explanatory.—In revising (1879) the words "or other domesticated animal, or any domesticated bird," were added.

Nature and elements of offense.—It is well-settled law that if an animal be killed or injured by a person in the necessary protection of his property, after he has ineffectually used ordinary care to otherwise protect such property, such killing or injury will not be deemed either "wilful or wanton," within the meaning of the Penal Code. *Farmer v. State*, 21 App. 423, 2 S. W. 767.

Where a person has a good fence around his premises, and another's cattle, which are fence-breakers, break through it, he has a right to shoot them to protect his crop. *Huffman v. State*, 110 S. W. 749, 53 App. 489.

That defendant carried the hogs killed to the owner was no defense. *Wallace v. State*, 30 Tex. 758.

To constitute this offense the act must have been done "wilfully," that is, with evil intent, with legal malice, without legal justification, and the evidence must show such wilfulness to sustain a conviction. *Newton v. State*, 3 App. 245; *Lane v. State*, 16 App. 172; *Farmer v. State*, 21 App. 423, 2 S. W. 767.

Defendant killing male sheep as the only means of preventing their access to his herd of ewes was not guilty of a wilful or wanton killing, whatever his civil liability. *Thomas v. State*, 14 App. 200.

Though the hog law be in force in a locality, where malicious mischief is committed by the killing of hogs of another, within an insufficient inclosure belonging to the person committing it, he may be convicted, if the proof shows that he either wantonly or wilfully committed the act. *Gerdes v. State* (Cr. App.) 34 S. W. 268. "Wilful" and "wanton" defined in charge approved. *Henderson v. State*, 53 App. 533, 111 S. W. 736.

For discussion of necessity of showing malice, and meaning of "wilful" in this connection, see *Caldwell v. State*, 55 App. 164, 115 S. W. 597, 131 Am. St. Rep. 809.

Distinguished from other offenses.—See notes under articles 1231 and 1246, post. The distinction between the offense denoted in this article and theft is, that

a wilful killing with intent to injure the owner of the property completes the former, while to constitute the latter there must exist the additional fraudulent intent to deprive the owner of the value of the property and to appropriate it to the use of the offender. *Martin v. State*, 44 Tex. 172; *Thompson v. State*, 30 Tex. 356.

This article is distinguished from article 1231 in that it is for the protection of the owner, whereas article 1231 is for the protection of the animal or bird. *Turman v. State*, 4 App. 586; *Irvin v. State*, 7 App. 78.

Defence under alibi.—Where, in a prosecution for maliciously shooting a dog, defendant pleaded an alibi, he could not set up either actual or apparent danger from the dog, or his vicious habits, in justification. *Atchison v. State*, 44 App. 551, 72 S. W. 998.

Jurisdiction.—See notes under C. C. P., art. 106.

Indictment and information and proof thereunder.—Willson's Cr. Forms, 564.

Description of animals in indictment for theft, see notes under article 1353 et seq.

Where the indictment charged the defendant with killing a bull, it was held that the state need not prove the brand on the animal. It is sufficient if the ownership of the animal be proved, and this may be done by other evidence than that of a recorded brand. *Nutt v. State*, 19 Tex. 340. The evidence must clearly establish that the act occurred before indictment. *Branch v. State*, 41 Tex. 622. Under art. 679, before it was amended, it was held that where the indictment charged the killing of a horse, and the proof showed the animal killed was a gelding, the charge was not supported by the evidence. *Gholston v. State*, 33 Tex. 342. But as the article now reads, an allegation that the animal was a horse, would be sustained by proof that it was a gelding. *Johnson v. State*, 16 App. 402; *Valesco v. State*, 9 App. 76.

Under the original article 679, the penalty was regulated by the amount of the injury done to the owner, and it was therefore held that it was necessary to allege in the indictment the amount of such injury. *Nicholson v. State*, 3 App. 31; *Uecker v. State*, 4 App. 234; *Thomas v. State*, 42 Tex. 236; *State v. Heath*, 41 Tex. 426; *Street v. State*, 7 App. 5. But such allegation is not now essential, as the penalty is not regulated or affected by the amount of the injury done. *Shaw v. State*, 23 App. 493, 5 S. W. 317. It need not be alleged that the animal, etc., killed, etc., was a "domesticated animal," if it was one specifically named in the statute. An information which charged the wounding of "a hog," was held sufficient, without further description of the animal. *Rivers v. State*, 10 App. 177. When the animal was described as a "steer," the description was held to be sufficient. *State v. Lange*, 22 Tex. 591. The "color" or other particular description of the animal need not be alleged, but if alleged must be proved. *Benson v. State*, 1 App. 6. The act must be charged to have been done "wilfully." *Uecker v. State*, 4 App. 234.

Where the indictment charged that the defendant did "wound and kill" a certain animal, and the proof showed that the animal was wounded, but not killed, it was held that there was a fatal variance between the allegation and the proof. *Reid v. State*, 8 App. 430. But this decision seems to be in conflict with several others. See *Lancaster v. State*, 43 Tex. 519; *Phillips v. State*, 29 Tex. 233; *Johnson v. State*, 9 App. 249; *Hammel v. State*, 14 App. 326; *Hart v. State*, 2 App. 39.

Although, in a prosecution hereunder, the ownership of the animals need not be alleged, if such allegation is made, proof of ownership must correspond with the allegation. *McLaurine v. State*, 28 App. 530, 13 S. W. 992.

Indictments for malicious mischief (except under art. 1231) to be sufficient must allege the ownership or possession of the property injured to be in some person other than the accused. *Woodward v. State*, 33 App. 554, 28 S. W. 204.

In a prosecution for unlawfully poisoning animals with intent to injure the owner, the fact that the information charged that 9 head of mules and 4 head of mares were poisoned, and the evidence showed that only 12 carcasses were found, with one missing, was immaterial, since the gist of the offense was wilfully poisoning stock with intent to injure the owner, the number being immaterial. *Sands v. State* (Cr. App.) 164 S. W. 1014.

Evidence.—Evidence held to support conviction. *Henderson v. State*, 53 App. 533, 111 S. W. 736; *Sands v. State* (Cr. App.) 164 S. W. 1014; *Davis v. State* (Cr. App.) 170 S. W. 725.

Evidence held insufficient to sustain a conviction. *Scroggins v. State*, 36 App. 117, 34 S. W. 115; *Nicholson v. State*, 49 App. 102, 90 S. W. 1011; *Lane v. State*, 16 App. 172; *Owens v. State*, 25 App. 552, 88 S. W. 658; *High v. State*, 61 App. 432, 135 S. W. 135.

It is not necessary to prove malice toward the owner. And the fact that a person other than the owner authorized the act is not admissible evidence for the defense, unless such authority can be traced to the owner. And the fact that after killing the property the defendant carried the same to the owner, is no defense, the offense being complete by the killing. *Wallace v. State*, 30 Tex. 758. See evidence held insufficient to show evil intent. *Lane v. State*, 16 App. 172.

Malice is presumed from a wilful killing. *Wallace v. State*, 30 Tex. 758.

But not from the mere act of killing. *Newton v. State*, 3 App. 245.

Presumption of malice held rebutted by evidence. *Lane v. State*, 16 App. 172; *Farmer v. State*, 21 App. 423, 2 S. W. 767.

In prosecution for malicious mischief any evidence tending to rebut the charge of malice or going to show the animus of defendant is admissible. *Woodward v. State*, 33 App. 554, 28 S. W. 204.

Where there was no evidence that, at the time of shooting a dog, defendant was in any danger from the dog, which was within its owner's inclosure, and was not attempting to break therefrom, evidence of the dog's viciousness was inadmissible. *Atchison v. State*, 44 App. 551, 72 S. W. 998.

In a trial for malicious mischief in shooting a dog, evidence that the presence of dogs among defendant's sheep at the time of the killing would have frightened the sheep and caused the ewes, which were heavy with lambs, to lose them, was admissible to rebut the charge of malice and wantonness in shooting the dog. *Caldwell v. State*, 55 App. 164, 115 S. W. 597, 131 Am. St. Rep. 809.

In a prosecution for poisoning horses, evidence to show some one placed feed in the pasture belonging to prosecuting witness where his horses were some two or three weeks before they were poisoned, and that the tracks of the horse rode to the pasture corresponded with those of one frequently used by accused, was admissible. *Minor v. State*, 120 S. W. 860, 56 App. 431.

— **Confession.**—See notes under C. C. P., art. 809.

Charge of court.—It is not correct to instruct that it is an offense to wilfully kill, etc., "any animal." The instruction should be limited to any "domesticated animal," etc. *Achterberry v. State*, 8 App. 463. The charge should expound the legal signification of the word "wilfully," that is, that the act was done with an evil intent, with legal malice, without reasonable ground for believing such act to be lawful and without legal justification. *Thomas v. State*, 14 App. 200; *Shubert v. State*, 16 App. 645; *Lane v. State*, Id. 172; *Trice v. State*, 17 App. 43; *Owens v. State*, 19 App. 242; *Rose v. State*, Id. 470; *Yoakum v. State*, 21 App. 260, 17 S. W. 254; *Baker v. State*, 21 App. 264, 17 S. W. 144. Where the evidence tended to show that the act was committed in the necessary defense of defendant's property, it was held that the jury should have been instructed with reference to such defense, and should have been directed that the act of the defendant was not wilful, if committed in the necessary protection of his property from destruction or injury. *Thomas v. State*, 14 App. 200; *Lane v. State*, 16 App. 172. It was held not error to charge that the intent to injure may be presumed from the perpetration of the act, such presumption being expressly created by article 786 as amended. Before the amendment of said article, however, the intent to injure could not be presumed from the mere act of injuring. *Lane v. State*, 16 App. 172; *Newton v. State*, 3 App. 245. The charge should be confined to the case made by the indictment and the evidence. *Haynes v. State*, 10 App. 480.

Failure to define "wilful" was not reversible error, but such failure coupled with refusal of defendant's special requested instructions defining the word. *Browder v. State*, 30 App. 614, 18 S. W. 197.

Where the right of accused to defend his crop against damage by turkeys was an issue in the trial for the killing of the turkeys, it should have been submitted to the jury in the court's instructions. *Swinger v. State*, 51 App. 397, 102 S. W. 114.

Where an indictment charged in separate counts the offenses denounced by this and the following article, an instruction that, if accused wantonly maimed a domestic animal, he was guilty, and the jury should fix his punishment at a fine of not less than \$10 nor more than \$200, was erroneous, because authorizing the jury to find accused guilty under one article and authorizing the punishment prescribed by the other. *Johnson v. State*, 64 App. 108, 141 S. W. 524.

Art. 1231. Cruelty to animals.—Every person who overdrives, wilfully overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, unnecessarily or cruelly beats, or needlessly mutilates or kills, or carries in or upon any vehicle, or otherwise in a cruel or inhumane manner, or causes or procures to be done, or who having the charge or custody of any animal unnecessarily fails to provide it with proper food, drink or cruelly abandons it, shall, upon conviction be punished by fine of not less than ten dollars nor more than two hundred and fifty dollars. [Act 1901, p. 289; Act 1913, p. 168, ch. 88, § 1, superseding art. 1231, revised Pen. Code.]

See notes under article 1227, ante.

Explanatory.—In revising (1879), the word "or" was substituted for the word "and" between the words "wilfully" and "wantonly," and the word "disfigure" was inserted after the word "wound."

Nature and elements of offense.—See notes under article 1227, ante.

The killing of an animal which is in the habit of trespassing upon one's crop, during an act of trespass, to prevent a destruction of the crop, and not from wantonness, was held to not constitute this offense. *Branch v. State*, 41 Tex. 622. But it seems the act will in such case not be justified unless the crop was properly protected by a lawful fence. *Jones v. State*, 3 App. 228. See, also, upon this subject, *Thomas v. State*, 14 App. 200; *Lane v. State*, 16 App. 172.

In a prosecution for wilfully killing swine, defendant may show that the hogs were in his field, destroying his corn, at the time they were killed. *McMahan v. State*, 29 App. 348, 16 S. W. 171.

Defendant may also show that his field was surrounded by a good fence, although the hog law was in force in the county. *McMahan v. State*, 29 App. 348, 16 S. W. 171.

The evidence must show a wilful or a wanton act. *Farmer v. State*, 21 App. 423, 2 S. W. 767.

On prosecution hereunder for wantonly wounding a hog, which the evidence tends to show was shot by defendant while trespassing on his crop, it is competent for defendant to show that his fence was a lawful one, which, by the stock law prevailing in his locality, was not required to turn hogs. *Brewer v. State*, 28 App. 565, 13 S. W. 1004.

Ownership of the animal is immaterial. *Woodward v. State*, 33 App. 554, 28 S. W. 204.

One who wilfully and wantonly maims an animal on his own premises, may be convicted under this article. *Cryer v. State*, 36 App. 621, 37 S. W. 753, 38 S. W. 203.

Distinguished from other offenses.—See note to article 1246, post.

The apparent object in enacting these two articles was in article 1230 to protect the interests of the owner, while 1231 was to protect the animals. *Branch v. State*, 41 Tex. 624; *Turman v. State*, 4 App. 586; *Benson v. State*, 1 App. 6; *Rose v. State*, 1 App. 400.

The offenses under articles 1230 and 1231 are so different that an acquittal under one is no bar to a prosecution for the same act under the other. *Irvin v. State*, 7 App. 78.

If the animal, when killed by defendant, was within his enclosure and there was an insufficient fence around it, the killing was an entirely distinct offense from that defined in article 1231, being that defined by article 1246, which is not an offense included within that described in the article 1231. *Payne v. State*, 17 App. 40; *McRay v. State*, 18 App. 331.

Defendant who wounded another's hog and pursued it without "taking" it should have been indicted under this or the preceding section rather than for theft. *Minter v. State*, 26 App. 217, 9 S. W. 561. But where the animal is killed the indictment may be for theft. *Coombes v. State*, 17 App. 265.

Where the evidence raises the issue whether the hog was wounded in defendant's insufficiently fenced enclosure, the jury should be instructed that, if they find this to be the fact, a conviction cannot be had under article 1231, the punishment for such offense being provided by article 1246. *Brewer v. State*, 28 App. 565, 13 S. W. 1004.

A person may be convicted, under article 1231, for wilfully killing hogs on his own land although the hog law is in force, but a prosecution under article 1242 cannot be maintained. *Gerdes v. State* (Cr. App.) 34 S. W. 268.

Indictment.—Willson's Cr. Forms, 565.

Duplicity in indictment, see C. C. P. art. 481.

The indictment need not allege the ownership of the animal or bird. *Benson v. State*, 1 App. 6; *Rose v. State*, 1 App. 400; *State v. Brocker*, 32 Tex. 611; *Turman v. State*, 4 App. 586; *Darnell v. State*, 6 App. 482 (overruling *State v. Smith*, 21 Tex. 748). Under this article prior to its being amended, it was necessary to allege that the act was done both wilfully and wantonly. *State v. Rector*, 34 Tex. 565; *Branch v. State*, 41 Tex. 622. But as the article now reads it is sufficient to charge that it was committed either wilfully or wantonly. *Rountree v. State*, 10 App. 110; *Burgman v. State* (Cr. App.) 34 S. W. 111. It need not allege an intent to injure the owner. Article 1230 is intended for the protection of the owner of the animals or birds, while this article, 1231, is intended for the protection of the animals or birds themselves. *Turman v. State*, 4 App. 586. See art. 1230.

An information following the statute was sufficient without setting forth the facts constituting the offense of maiming. *Turman v. State*, 4 App. 586.

Charge in indictment that defendant did then and there "wilfully" wound a cow was sufficient without charging a wanton wounding. *Rountree v. State*, 10 Tex. App. 110.

"Hog" was a sufficient description of the animal; it need not be charged that it is a domesticated animal. *Rivers v. State*, 10 App. 177.

It is not essential that indictment allege ownership of the animal wantonly killed. And note rule of pleading and practice as to surplage in indictment. *McLaurine v. State*, 28 App. 530, 13 S. W. 992. And see, also, on indictment, *Minter v. State*, 26 App. 217, 9 S. W. 561; *Brewer v. State*, 28 App. 565, 13 S. W. 1004; *Browder v. State*, 30 App. 614, 18 S. W. 197.

In all cases of killing animals under articles 1231 and 1246, the court suggests a count under each article. *Cryer v. State*, 36 App. 621, 37 S. W. 753, 38 S. W. 203.

All the modes and means of committing the offense named in this article may be stated in the indictment without rendering it duplicitous. *Holman v. State* (Cr. App.) 90 S. W. 174.

Evidence.—In a prosecution for wantonly killing a dog, it was held that what the dog had done before the time of the killing could not be shown in evidence as a defense, so as to afford a legal excuse to the defendant to kill the dog at the time he did. *McDaniel v. State*, 5 App. 475. In a prosecution for wilfully and wantonly wounding a hog, it was held competent for the defendant to prove that the hog was deprecating on his premises, and that after such wounding he sent the owner its value. *Lott v. State*, 9 App. 206. In a trial for wantonly killing a horse, it was in proof that the animal was a bad fence breaker, and evidence tending to show that the killing was prompted by a desire on defendant's part to prevent the destruction of his crops, and not by a spirit of wantonness, it was held, to countervail the presumption of innocence and warrant a conviction, it was incumbent on the state to prove that defendant's crop was not properly protected against live stock. *Davis v. State*, 12 App. 11.

In a prosecution for wilfully and wantonly killing a cow, it was held that the defendant should have been permitted to prove that the animals with which the cow herded, were breachy, and in the habit of trespassing upon crops. It was proper evidence to be considered by the jury in determining whether the killing was wilful or wanton or done under circumstances sufficient to negative such motives. *Reedy v. State*, 22 App. 271, 2 S. W. 591. Where the evidence shows that the animal was killed, wounded, etc., while inside of cleared and cultivated land surrounded by an insufficient fence it shows a different offense than that denounced by article 1231. It shows the offense denounced by art. 1246, and in such

case a conviction can not be had under article 1231. *Payne v. State*, 17 App. 40; *McItay v. State*, 18 App. 331.

Charge of the court.—The charge of the court should explain to the jury the meaning of “wilfully,” and also “wantonly.” “Wilfully” means that the act was done with an evil intent,—with legal malice, without reasonable ground for believing it to be lawful, and without legal justification. “Wantonly” means that the act was committed regardless of the rights of another, in reckless sport, or under such circumstances as evince a wicked or mischievous intent, and without excuse. *Thomas v. State*, 14 App. 200. The charge should not make the guilt or innocence of the defendant depend upon whether or not he used greater force than was necessary in protecting his property where such issue was not raised by the evidence. In a proper case the charge should instruct that if it reasonably appeared to the defendant that his property was in danger of serious injury, he would be justified in killing the animal threatening such injury. *Farmer v. State*, 21 App. 423, 2 S. W. 767; art. 1230.

The word “wilful” should be explained in the charge in prosecutions under statutes using that word. *Sparks v. State*, 23 App. 447, 5 S. W. 135.

Where an indictment charged in separate counts the offenses denounced by this and preceding article, an instruction that, if accused wantonly maimed a domestic animal, he was guilty, and the jury should fix his punishment at a fine of not less than \$10 nor more than \$200, was erroneous, because authorizing the jury to find accused guilty under one article and authorizing the punishment prescribed by the other. *Johnson v. State*, 64 App. 108, 141 S. W. 524.

Where accused was charged under this article with having wilfully and wantonly killed a domestic animal, and the evidence was not conclusive that the killing was wilful or wanton, and the jury might have found that the act was within article 1246, imposing a penalty upon one who, being in charge of cultivated land surrounded by an insufficient fence, shall with firearms kill any animal within the inclosure, it was error for the court to refuse a requested charge that if the facts brought the case within the provisions of the latter article the jury should acquit. *Hobbs v. State* (Cr. App.) 170 S. W. 1100.

Art. 1231a. Same; feeding and watering animals impounded.—Every person who shall impound, or cause to be impounded in any pond or corral under the laws of this State or of any municipality in this State, any animal, shall supply to the same during such confinement a sufficient quantity of wholesome food and water, and in default thereof, upon conviction, be punished by fine or not less than five nor more than fifty dollars. [Act 1913, p. 168, ch. 88, § 2.]

Art. 1231b. Same; care of poultry or birds confined.—Every person who shall receive live fowls, poultry or other birds for transportation or to be confined on wagons or stands, or by the owners of grocery stores, commission houses, or other market houses, or by other persons when to be closely confined shall place same immediately in coops, crates or cages made of open slats or wire on at least three sides, and of such height, that the fowls can stand upright without touching the top, and shall have troughs or other receptacles easy of access at all times by the birds confined therein and so placed that their contents shall not be defiled by them, in which troughs or other receptacles clean water and suitable food shall be constantly kept; shall keep such coops, crates or cages in a clean and wholesome condition; shall place only such numbers in each coop, crate or cage as can stand without crowding one another, but have room to move around; shall not expose same to undue heat or cold; shall remove immediately all injured, diseased or dead fowls or other birds, and in default thereof shall, upon conviction, be punished by fine of not less than five nor more than two hundred dollars, or by both such fine and imprisonment, for each offense. [Id., § 4.]

Art. 1231c. Same; member of Humane Society may require arrests to be made.—Any member of the Texas State Humane Society may require the sheriff of any county, the constable of any precinct or the marshal or any policeman of any town or city, or any agent of said society authorized by the sheriff to make arrests for the violation of this Act, to arrest any person found violating any of the provisions of this Act, and to take possession of any animal cruelly treated in their respective counties, cities or towns. [Id., § 11.]

Art. 1231d. Same; definition of terms.—In this Act the word “animal” shall be held to include every living dumb creature; the

words "torture" and "cruelty" shall be held to include every act, omission or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted or allowed to continue, when there is a reasonable remedy or relief, and the words "owner" and "person" shall be held to include corporations, and the knowledge and act of agents and employes of corporations in regard to animals transported, owned, employed by or in custody of the corporation shall be held to be the knowledge and acts of such corporations. [Id., § 12.]

Art. 1231e. Same; repeal.—All Acts or parts of Acts in conflict with this Act are hereby repealed. [Id., § 13.]

Art. 1231f. Same; pending prosecutions.—Nothing in this Act shall be held to apply to or in any manner affect any indictment, trial, writ of error, appeal or other proceedings, judgment, or sentence in case of violation of the provisions of this Section by this Act repealed now pending in any court in this State, and the same shall be held, conducted and adjudged as provided by the law in force before this Act shall take effect. Any offense under the provisions of the Section by this Act repealed which shall have been committed before this Act takes effect shall be required to be prosecuted and punished in accordance with the law in force at the time of the commission of such offense. [Id., § 14.]

Art. 1232. [788] Using animals without consent of owner.—Any person who shall hereafter take and use, or take up and use, any horse, mare, gelding, mule, ox, cow, or any other dumb animal, the property of another, and without the consent of the owner thereof, shall be fined in any sum not less than ten nor more than one hundred dollars; provided, that nothing herein contained shall prevent a prosecution for the theft of such animal whenever the offense of which said party shall be guilty shall come within the meaning of that crime; provided, that this article shall not be construed as in any way to interfere with the laws regulating estrays. [Acts of 1879, p. 129; amended Act 1899, p. 319.]

See notes under article 1227, ante, and 1246, post.

Art. 1385, post, defines the specific offense of taking up and milking a cow.

Nature and elements of offense.—This article applies only to animals running at large. A horse saddled, bridled and hitched to a tree does not come within the article. *Cochran v. State*, 36 App. 115, 35 S. W. 968.

Indictment.—Willson's Cr. Forms, 566.

Evidence.—In a prosecution under an information charging defendant with wilfully and cruelly beating a horse, and also with taking up and using the horse without the consent of the owner, evidence held sufficient to justify a conviction for taking up and using the horse without the consent of the owner. *Sparkman v. State*, 61 App. 429, 135 S. W. 134.

Art. 1233. [789] Removing buoy, etc.—If any person shall wilfully and mischievously remove any buoy, beacon, light or any other mark or signal erected for the purpose of indicating the channel in any bay, river, lake or other navigable water within the state, or shall erect any false buoy, beacon, light or mark or signal to indicate the channel in any such bay, river, lake or other navigable water, with intent to mislead or deceive, he shall be punished by confinement in the penitentiary not less than two nor more than five years, or by fine not exceeding two thousand dollars; and, if death occurs by reason of such unlawful conduct, the offender is guilty of murder. [Act Feb. 12, 1858, p. 179.]

Indictment.—Willson's Cr. Forms, 567, 568.

Art. 1234. [790] Robbing orchards, gardens, etc.—If any person shall take or carry away from the farm, orchard, garden or vineyard of another, without his consent, any fruit, melons or gar-

den vegetables, he shall be fined in any sum not exceeding one hundred dollars. [Act April 4, 1874.]

Indictment.—Willson's Cr. Forms, 570.

Art. 1235. [791] Destroying fruit, corn, etc.—If any person shall wilfully and mischievously injure or destroy any growing fruit, corn, grain, or other like agricultural products, or if any person shall wilfully or mischievously injure or destroy any real or personal property of any description whatever, in such manner as that the injury does not come within the description of any of the offenses against property otherwise provided for by this Code, he shall be punished by fine not exceeding one thousand dollars; provided, that when the value of the property injured is fifty dollars or less, then, in that event, he shall be punished by fine not exceeding two hundred dollars. [Amended by Act March 22, 1889, p. 35.]

See notes under article 1227, *ante*.

Distinguished from other offenses.—An indictment under this article for cutting fences was bad, such injury being covered by article 1240. *White v. State*, 27 App. 638, 11 S. W. 643.

Nature and elements of offense.—Under this article, the injury must be wilful and malicious, and any evidence that would rebut those elements is admissible. *Adams v. State*, 47 App. 35, 81 S. W. 963.

It involves the actual ownership of and title to the property, and not the mere possessory right of the land, and trial and proof must be from the standpoint of actual ownership. *Adams v. State*, 47 App. 35, 81 S. W. 963.

One cannot be prosecuted under this article for cutting a small ditch on the land of another believing it to be his own, for the purpose of protecting his own land from an overflow. *Adams v. State*, 47 App. 35, 81 S. W. 965.

It has been held that tearing down and removing a house came within the meaning of this article. *Ritter v. State*, 33 Tex. 608. And injury to merchandise. *Rose v. State*, 19 App. 470. Destroying buggy harness. *Terry v. State*, 25 App. 714, 8 S. W. 934. But the statute then referred to "other agricultural product or property." See the case of *Murray v. State*, 21 App. 620, 2 S. W. 757, 57 Am. Rep. 623, where it was held that this article protects agricultural products or property only, and does not relate to any other kind of property, such as a railroad engine. The subject is fully discussed in said decision. See, also, the subsequent case of *Beeson v. State*, 23 App. 406, 5 S. W. 118; *Menges v. State*, 25 App. 710, 9 S. W. 49.

On a trial for malicious mischief in breaking the lock on a church door, it appeared that there was a difference among the membership of the church on certain matters, and that the prosecuting witness had locked the door in opposition to the wishes of the majority. Defendant, one of that majority, was an officer of the church, and acted under a reasonable claim of right to do so in breaking the lock. Held, that the charge could not be sustained. *Woodward v. State*, 33 App. 554, 28 S. W. 204.

In prosecutions for malicious mischief malice is the gravamen of the offense, without which it would be a mere trespass. *Woodward v. State*, 33 App. 554, 28 S. W. 204.

The value of the property furnishes the basis by which punishment is assessed, and not the amount of injury done; value is therefore a necessary element and must be alleged and proved. *Beaufire v. State*, 37 App. 50, 38 S. W. 608.

Carrying rubbish into a blacksmith shop and piling it up there was not an offense within this statute; there must be a destruction of, or injury to, the property. *Patterson v. State*, 41 App. 412, 55 S. W. 338.

Prosecutor sold land to accused and took notes with vendor's lien for payment. Accused built a house on the land. Prosecutor foreclosed his lien and the next day accused knocked down the house and removed it from the land. Until foreclosure sale the legal title was in accused, and he was not guilty under this article of wilfully injuring real estate of another. *Price v. State*, 49 App. 343, 92 S. W. 811.

Indictment and Information.—Willson's Cr. Forms, 571.

An indictment under this article, must allege the value of the property injured. *Beaufire v. State*, 37 App. 50, 38 S. W. 608; *Stanton v. State*, 45 App. 168, 74 S. W. 771.

An information charging one with wilfully breaking a lock on the door of a church building should allege that the rightful possession of the property was in some other person than the defendant. *Woodward v. State*, 33 App. 554, 28 S. W. 204.

The information need not exclude the idea that it is covered by some other provision of the penal code. *Adams v. State*, 47 App. 35, 81 S. W. 963; *Todd v. State*, 39 App. 232, 45 S. W. 596. But the nature of the injury should be stated so that it might be seen whether or not the injury came within the offenses "otherwise provided for." *Todd v. State*, 39 App. 232, 45 S. W. 596.

Allegation of ownership of the real property must be made in the complaint and the proof must respond thereto. The statute was intended to protect the owner against injury to his property, and not a mere possessory right to the property. Proof of ownership can be made by deeds or other evidence of title. *Adams v. State*, 47 App. 35, 81 S. W. 964, 965.

Evidence.—Where the offense alleged is the cutting a ditch upon real property, it is competent for State to prove that defendant began digging the ditch three or four days prior to the date alleged in the complaint. This was part of the *res gestæ* of the offense—being same ditch—and not another and distinct offense. *Adams v. State*, 47 App. 35, 81 S. W. 964.

In a prosecution for injuring a house belonging to prosecutor, evidence held insufficient to sustain a conviction. *Stephens v. State* (Cr. App.) 147 S. W. 255.

Art. 1236. [791a] Introducing Johnson grass.—If any person in this state shall knowingly, wilfully, and with intent to injure, sow, scatter or place, on any land, not his own, the seed or roots of Johnson grass or Russian thistle, or wilfully and knowingly sell or give away any oats, hay, straw, seed or grain, containing or intermixed with the seeds or roots of Johnson grass, to any one who is ignorant of the fact that such seeds or roots are so contained in or intermixed with such oats, hay, straw, seed or grain, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, he shall be punished by fine of not less than twenty-five dollars and not more than one thousand dollars. [Act 1895, p. 160.]

Indictment.—Willson's Cr. Forms, 589, 590.

Art. 1237. [791b] Requisites of indictment.—In prosecutions under the preceding article, it shall not be necessary for the indictment to allege the name of the owner of the land, nor shall it be necessary for the state to prove the name of such owner, but it shall be sufficient to allege and prove that the land was not the property of the person accused. [Id.]

Indictment.—Willson's Cr. Forms, 589.

Art. 1238. [792] Injuring, etc., baggage.—Any baggagemaster, express agent, stage or hack driver, or other common carrier, whose duty it is to handle remove, transfer or to take care of trunks, valises, boxes or other baggage while loading, transporting, unloading, transferring, delivering, storing or handling the same, whether or not in the employ of any transportation company or common carrier, who shall maliciously or carelessly or recklessly break, injure or destroy the said baggage, shall be deemed guilty of a misdemeanor, and, on conviction, be fined a sum not exceeding one hundred dollars; provided, that a prosecution for a misdemeanor as provided in this article shall not be a bar to a civil action for damages. [Act March 5, 1881, p. 17.]

Indictment.—Willson's Cr. Forms, 572.

Art. 1239. [793] Throwing stone or firing gun or pistol at railroad car, etc.—Any person who shall wilfully or maliciously throw a stone or other missile, or fire any gun, or pistol at, against, or into, any engine, tender, coach, passenger car, whether moving or not, or any other car of any moving train on any railway, or any railway depot, or any private residence, school house, church house, court house, store house, hotel, or other public or private building, public or private tent, sail-boat or steam-boat, in this state, shall be deemed guilty of a misdemeanor, and, on conviction therefor, shall be fined in any sum of not less than five dollars nor more than one thousand dollars, or be confined in the county jail for any term of not less than ten days nor more than two years. During such term, such convict may be put to hard labor. [Act March 22, 1889; amend. 1895, p. 161; amended, Act 1897, p. 41.]

Indictment.—Willson's Cr. Forms, 556.

Art. 1240. [794] Injuring fence, leaving open gates.—If any person shall break, pull down or injure, the fence of another without his consent, or shall wilfully and without the consent of the owner thereof open and leave open any gate leading into the inclosure of another, or shall knowingly cause any hogs, cattle, mules, horses or other stock to go within the inclosed lands of another without his consent, or shall tie or stake out, or cause to be tied or staked out,

to graze within any inclosed lands not his own and without the consent of the owner, any horse, mule or other animal, he shall be fined in any sum not less than ten nor more than one hundred dollars, and, in addition thereto, may be imprisoned in the county jail not exceeding one year. [Act April 23, 1873, pp. 41-42.]

See notes under article 1227, ante. See ante, article 834.

Repeal of statute.—This article was not repealed by the act of February 6, 1884, which is the succeeding article, 1242. *Roberts v. State*, 17 App. 148.

Distinguished from other offenses.—See note under art. 1235.

Where defendant owning a fence dividing his land from that of another withdrew the fence without the notice or consent mentioned in article 1244 leaving the neighbor's crops exposed to depredations and he thereupon connected the fence with his fence, defendant violated article 1240 by pulling down the connecting fence. *Jamison v. State*, 27 App. 442, 11 S. W. 483.

Nature and elements of offense.—One joint owner of a division fence has no legal right to break such fence to the injury of the other joint owner, and without the consent of such other joint owner. *Hurlbut v. State*, 12 App. 252; *Becker v. State*, 56 App. 92, 119 S. W. 96. But if no injury be done such other joint owner, it would be no offense to pull down the fence for a legitimate purpose. *Woodyard v. State*, 19 App. 516; *Becker v. State*, 56 App. 92, 119 S. W. 95; *Hurlbut v. State*, 12 App. 252.

It has been held that a joint owner is not justified in breaking a partition fence without the other's consent. *Becker v. State*, 56 App. 92, 119 S. W. 96.

The overseer of a public road is not only authorized, but required, to remove all obstructions therefrom, and if a fence is placed across his road he may remove it without violating this article. *Schott v. State*, 7 App. 616.

Any citizen would have the right to peaceably remove a fence erected across a public road. *Gowhenour v. State*, 33 App. 538, 28 S. W. 201. But where the road is not a public road, and is obstructed by a gate or fence, it would be a violation of this article to leave open the gate or pull down the fence. The owner of land over which a public road of the third class passes has the right to erect and maintain gates across such road, and it is a penal offense to leave open such gates, but it is not the offense denounced in the preceding article, but is the one denounced in article 834, ante, and a conviction can not be had therefor under an indictment brought under article 1242, post. *Jolly v. State*, 19 App. 76.

And if one using a way of necessity remove a fence to the extent of fixing it so that he could go in and out he was not liable under the statute. *Knudson v. State*, 56 App. 513, 120 S. W. 878.

A tenant has the right during the continuance of his lease, and when there is no stipulation in the lease contract forbidding to pasture his horses upon the leased land, after the crops have been gathered. *Coggins v. State*, 12 App. 109; *Jones v. State*, 18 App. 366.

And a tenant may, also, make an opening as a convenient passway in a fence, when such passway does not expose the growing crops of another to depredation. *Hooks v. State*, 25 App. 601, 8 S. W. 803.

This article is intended to protect growing crops from depredation, aside from the owner's action for damages and should be rigorously enforced. Its provisions extend such protection although the land is in one general inclosure, and the depredation is caused by the employee of a cotenant. *Cleveland v. State*, 8 App. 44; *Jones v. State*, 18 App. 366; *Jamison v. State*, 27 App. 442, 11 S. W. 483; *Becker v. State*, 56 App. 92, 119 S. W. 95.

In a trial for this offense, the inquiry in regard to possession should be confined to the actual, quiet, and peaceable possession, and should not extend to the rightful possession of the fence. *Behrens v. State*, 14 App. 121; *Carter v. State*, 18 App. 573; *Jenkins v. State*, 7 App. 146. *Arbuthnot v. State*, 38 App. 509, 34 S. W. 269, 43 S. W. 1024.

A party cannot be punished criminally for putting more cattle in the pasture than he is authorized by reason of the quantity of land owned by him therein. *Yarbrough v. State*, 37 App. 359, 39 S. W. 941.

A party is guilty who stakes his horse while engaged in hunting on said inclosed lands. *Daley v. State*, 40 App. 102, 48 S. W. 515.

This article applies to grazing as well as cultivated lands. *Daley v. State*, 40 App. 102, 48 S. W. 515.

The land need not be enclosed by fence entirely. If it is partly inclosed by the gulf or bayous, so as to be an inclosure that will hold stock, it is sufficient. *Daley v. State*, 40 App. 102, 48 S. W. 515.

If other parties have small tracts also in the inclosure, their want of consent need not be shown nor their ownership alleged. The statute refers to the possessory right and not to the title, and the main owner has the possession. *Daley v. State*, 40 App. 102, 48 S. W. 515.

Under our law a tenant in possession of leased premises is the owner thereof until the expiration of the lease, and may, during such time, make any legitimate use of the premises, such as opening a convenient passway in a fence, when such passway does not expose the growing crops of the owner of such fence to depredation by stock. *Govitt v. State*, 25 App. 419, 8 S. W. 478.

No such an offense as malicious mischief per se is known to the law. Recognition described the offense of pulling down fence of another as malicious mischief, and is not sufficient, wherefore appeal dismissed. *Koritz v. State*, 27 App. 53, 10 S. W. 757; *McLaren v. State*, 3 App. 680; *Killingsworth v. State*, 7 App. 28; *Waterman v. State*, 8 App. 671. See, also, *Hooks v. State*, 25 App. 601, 8 S. W. 803; *Jamison v. State*, 27 App. 442, 11 S. W. 483; *White v. State*, 27 App. 638, 11 S. W. 643; *Yarbrough v. State*, 28 App. 481, 13 S. W. 775.

For facts held insufficient to support a conviction for knowingly causing stock to go into the inclosed lands of another without consent of the owner, see *Yarborough v. State*, 37 App. 357, 39 S. W. 941.

This article making it a penal offense to leave a gate leading into the inclosure of another open, includes gates leading into pastures. *Hankins v. State*, 39 App. 261, 45 S. W. 807.

Where one rents land and pitches his crops and then abandons his rental contract and the landlord takes charge and tenant afterwards turns his stock on the growing crops he is guilty under this statute. *Gartrell v. State* (Cr. App.) 61 S. W. 488.

The possession of property under this article is a possessory right and not one of title and it is sufficient to allege ownership in the real owner although he was in possession only through an agent. The agent's possession was the owner's possession. *Barber v. State*, 42 App. 626, 63 S. W. 324.

If a party breaks, pulls down, or injures the fence of another without his consent he is guilty under this article. *Dennis v. State*, 43 App. 464, 66 S. W. 839.

It is immaterial in whom is the ownership of the land, the actual exclusive and peaceful possession thereof being in another than the accused. The party in possession can prosecute any one who injures the property. *Pate v. State*, 46 App. 483, 81 S. W. 738.

This article relates to all fences and is not circumscribed to fences around land for agricultural purposes. *McNeely v. State*, 50 App. 279, 96 S. W. 1083.

Where prosecutor was not in peaceable possession of land protected by a fence, which defendant was charged to have destroyed but was a trespasser in constructing the fence, prosecution could not be sustained against defendant for its destruction. *Farmer v. State*, 58 App. 171, 124 S. W. 925.

Where prosecutor was not in peaceable possession of land, protected by a fence which defendant was charged to have destroyed, but was a trespasser in constructing the fence, a criminal prosecution could not be sustained against defendant for its destruction. *Farmer v. State*, 58 App. 171, 124 S. W. 925.

It is not criminal for one in the actual quiet and peaceable possession of land upon which there is a fence to remove the fence, though his possession be unsupported by legal title. *Fitzsimmons v. State*, 62 App. 440, 138 S. W. 110.

A tenant of land as to which the landlord reserved no control who after some of the cotton crop had been gathered and after a severe storm had ruined nearly all of the cotton crop turned his stock in the inclosure, but kept them from what cotton was left, so that no injury was done to any crop, could not be convicted of knowingly turning stock into the inclosed land of another without his consent. *Thornton v. State*, 70 App. 45, 156 S. W. 210.

Where defendant was convicted under a count charging that he "broke, injured, and pulled down the fence of F. D.," and the theory of the state was not that he took down a gate, but that he advised and encouraged the act, he would not be guilty if he had nothing to do with the taking down of the gate, although he did afterward help carry the gate a few feet and hide it. *Meador v. State*, 72 App. 527, 162 S. W. 1155.

Where a person in possession of land under a claim of ownership, and those under whom she claimed, had been in possession for more than 20 years, the act of another in tearing down the fence on the premises as a step toward taking forcible possession was unlawful, regardless of whether he had any title capable of being established in a civil suit. *Johns v. State* (Cr. App.) 174 S. W. 610.

Indictment and information and proof thereunder.—*Willson's Cr. Forms*, 573, 576, 581, 586.

Allegation of sole ownership of a fence pulled down as being in M. was sufficient notwithstanding the evidence showed a joint ownership between M. and defendant's lessor. *Hurlbut v. State*, 12 App. 252.

A tenant in possession of leased premises is the owner thereof until the expiration of his lease, and where the indictment alleged the possession to be in the landlord, and the evidence showed it to be in the tenant, it was held a fatal variance. Where there is more than one owner of the fence, the want of consent to the breaking, etc., of each owner must be shown. *Brumley v. State*, 12 App. 609; *Zallner v. State*, 15 App. 23.

To charge the offense of pulling down and injuring a fence which belongs to two or more owners, an information must negative the consent of each and all the owners. *Govitt v. State*, 25 App. 419, 8 S. W. 478; *Keizewetter v. State*, 34 App. 513, 31 S. W. 395.

Evidence.—Evidence held insufficient to support a conviction for wilfully pulling down a fence, etc. *Govitt v. State*, 25 App. 419, 8 S. W. 478; *Oliver v. State* (Cr. App.) 37 S. W. 427.

Evidence held insufficient to sustain a conviction of accused for unlawfully breaking, pulling down, and injuring a fence belonging to complainant. *Farmer v. State*, 58 App. 171, 124 S. W. 925.

Where, in a prosecution for unlawfully pulling down a fence, defendant contended that he acted under a belief that he owned the land, evidence that he not only tore down the fence around the land claimed by him but also around another tract was properly admitted; testimony of extraneous crimes being admissible to show intent. *Johns v. State* (Cr. App.) 174 S. W. 610.

Jurisdiction.—In a prosecution for unlawfully pulling down a fence located on property of which another had possession, the fact that defendant claimed to own the land did not cause the question of title to be involved, so as to deprive the county court of jurisdiction. *Johns v. State* (Cr. App.) 174 S. W. 610.

Art. 1241. Where stock law adopted, what constitutes offense.—Any person who shall wilfully turn out, or cause to be turned out, on land not his own or under his control, or who shall wilfully fail

or refuse to keep up any stock, prohibited by law from running at large in any county or subdivision of any county in this state, in which the stock law has been adopted, or who shall wilfully allow such stock to trespass upon the land of another, in such county, or subdivision thereof, or who shall wilfully permit to run at large any stock of his own, or of which he is the agent, or of which he has the control, and not permitted to run at large in any county or subdivision of any county in this state, in which the stock law has been adopted, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by fine in any sum not less than five dollars and not more than fifty dollars. [Act 1897, p. 112.]

Stock laws referred to above, see Vernon's Sayles' Civ. St. 1914, arts. 7209-7255. For subsequent amendments, see Gen. Laws 1915, chapters 26, 92, 99, 133. See, post, art. 1249. See, also, notes under article 1227, ante.

Statute applicable to offense.—The first stock laws applied only to hogs, sheep, and goats, and when, in 1897, it was first made a penal offense to permit stock to run at large after the stock law had been adopted, only the law relating to hogs, sheep, and goats was in force. Thereafter the stock law was extended to horses and cattle, and by Acts 26th Leg. c. 128, as amended by Acts 30th Leg. c. 57, it was made an offense to permit such animals to run at large. The two provisions are found in Pen. Code 1911 as articles 1241, 1249; the first being Acts 25th Leg. c. 87, and the latter the act of 1899. Held, that only the act of 1899 applies to a violation of the stock laws by permitting horses and cattle to run at large, after the adoption of the stock law. *Neuvar v. State*, 72 App. 410, 163 S. W. 58.

Validity of election.—Neither the petition for the election, nor the order of the commissioners' court thereon, nor the notice of election, nor the proclamation of the county judge putting the same into operation, contained a particular description by metes and bounds of the territory to be affected by said election. Held, that such election was invalid. *Ex parte Gulledege*, 57 App. 156, 122 S. W. 21, citing *Cox v. State* (Cr. App.) 88 S. W. 812.

Information.—Willson's Cr. Forms, 582-584.

In a prosecution for violating the local stock law adopted by a county, it was essential to allege and prove the precedent steps, required by law, by which the local law was adopted. *Hill v. State*, 58 App. 79, 124 S. W. 940.

The information, in a prosecution for violating the local stock law, alleged that a petition was presented, asking that the commissioners' court order an election to determine whether horses, cattle, etc., be permitted to run at large in said county, and that at the next regular term the court passed an order directing an election, and that the county judge issued an order for the election and caused public notice thereof to be given, and that the election was held and the law adopted. Held, that the information was defective, for not directly alleging that the commissioners' court made an order directing an election to be held to determine whether horses, cattle, etc., should be permitted to run at large in the county. *Hill v. State*, 58 App. 79, 124 S. W. 940.

Evidence.—On a trial for permitting stock to run at large, evidence that accused's mare had been in the inclosed lands of witnesses several times is admissible to show that accused permitted the animal to run at large from time to time. *Black v. State*, 62 App. 77, 136 S. W. 478.

Charge of court.—Acts 1897, c. 87, § 1, and Acts 1907, c. 57, § 20a, are identical on the subject of failure to keep stock from running at large after the adoption of the stock law, and one charged with so permitting the stock to run at large cannot complain of a charge given under the law of 1897, where the stock law was in force at the time of the offense. *Black v. State*, 62 App. 77, 136 S. W. 478.

In a prosecution for violating the stock law, it was proper for the court to permit the jury to go back two years prior to the filing of the complaint. *Fisher v. State*, 71 App. 564, 160 S. W. 683.

— **Bill of exceptions.**—See notes under C. C. P., art. 744.

Art. 1242. [795] Wantonly and wilfully, etc., cutting, etc., fence.—Any person who shall wantonly or with intent to injure the owner, wilfully cut, injure or destroy any fence or part of a fence (without such fence is the property of the person so cutting or destroying the same) shall be deemed guilty of an offense, and, upon conviction therefor, shall be punished by confinement in the state penitentiary for a term not less than one nor more than five years. A fence, within the meaning of this law, is any structure of wood, wire, or of both, or of any other material, intended to prevent the passage of cattle, horses, mules, asses, sheep, goats or hogs; provided, however, that it shall constitute no offense for any person owning and residing upon land inclosed by the fence of another, who refuses permission to such person or persons so residing within said

inclosure free egress and ingress to their said land, for said person or persons to open a passage way through said inclosure. [Act Feb. 6, 1884, p. 34.]

See notes under article 1227, ante.

Distinguished from offense under article 1240.—This statute did not repeal article 1240, ante, but creates another and different offense. *Roberts v. State*, 17 App. 148.

Indictment.—Willson's Cr. Forms, 592.

Art. 1243. [796] Unlawful for owner of party fence to remove, etc.—Hereafter it shall be unlawful for any person who is a joint owner of any separating or dividing fence, or who is in any manner interested in any fence attached to, or connected with, any fence owned or controlled by any other person, to remove the same, except by mutual consent, or as hereinafter provided. [Act April 6, 1889, § 1.]

See notes under article 1227, ante.

Nature and elements of offense.—This and article 1244 are intended to prevent joint owners from separating their fences without proper notice when by separation or withdrawal of the fence injury would accrue to the party from whose fence it was withdrawn; that is, that it would leave his premises uninclosed. *Camp v. State*, 49 App. 396, 92 S. W. 845.

Indictment and information.—Indictment alleging that fence inclosed half a section, sufficiently names number of acres, as a section contains 640 acres. *Gibbs v. State*, 39 App. 478, 46 S. W. 645.

The information must allege that the fence was not removed within the ten days after the six months (notice) has expired. *Elkins v. State*, 40 App. 590, 51 S. W. 372.

Evidence.—Accused, who was prosecuted for unlawfully breaking, pulling down, and injuring the fence of an adjoining owner, had occupied his lot for a number of years, and the fence in question had been treated in some respects as a partition fence. The adjoining owner had never lived upon his lot, or made any use of it, while accused had improved his property, and had frequently repaired and rebuilt the fence. Held, that evidence by accused that he was familiar with what had always been accepted, since he had owned the property, by him and the other owners of the adjoining lot as the true boundary line, that the location had been fixed by an old post in the front line of the adjoining lot, that this post was some two or three feet over on the adjoining lot from the division fence, that the land on which the fence was situated was recognized by all concerned as his property, and evidence to the same effect by another witness, and a deed to his property, and, in connection therewith, evidence that the property conveyed to him formed one-half of the block in question, and that the center of said block was by actual measurement some five or six feet over on the adjoining lot from the division fence, and that this was the true division line between his property and the adjoining lot, was admissible. *Fitzsimon v. State*, 59 App. 540, 128 S. W. 903.

Art. 1244. [797] Notice of intention to remove.—Any person who is the owner or part owner of any fences connected with or adjoined to any fences, owned in part or in whole by any other person, shall have the right to withdraw or separate his fence or part of fence from the fence of any other person or persons in this state; that such person who desires to withdraw or separate such fence from the fence of any other person shall give notice in writing to such person, his agent, attorney, or lessee, of his intention to separate or withdraw his fence or part thereof for at least six months prior to the time of such intended withdrawal or separation. Any person, failing to comply with the provisions of this article, shall be fined in any sum not less than two dollars nor more than fifty dollars, and every ten days shall constitute a separate offense for the violation of this article. [Id., § 2.]

See notes under article 1227, ante.

Nature of offense in general.—To constitute this offense, the party removing the fence must do so without the consent of the other joint owner or owners and without giving the required written notice of his intention to remove it. *Warder v. State*, 29 App. 534, 16 S. W. 338.

Acts of exclusive owner without notice.—Under the statute even the exclusive owner of a division fence cannot lawfully withdraw or separate his fence from that of the contiguous proprietor without first giving at least six months' notice in writing of his intention. *Jamison v. State*, 27 App. 442, 11 S. W. 483; *Spears v. State*, 24 App. 537, 7 S. W. 245.

Acts after expiration of notice.—After the expiration of six months from the time the notice in writing is given an owner is not guilty of any offense in cutting

his fence loose from that of the adjoining fence owner. *Dennis v. State*, 43 App. 464, 66 S. W. 839.

Indictment.—Willson's Cr. Forms, 574.

Indictment must charge all the constituent elements of the offense. *Warder v. State*, 29 App. 534, 16 S. W. 338.

Art. 1245. [798] Notice requiring removal.—Any person who is the owner of any fence wholly upon his own land to which the fence of another is adjoined, or connected in any manner, may require the owner of any such fence to disconnect and withdraw the same back on his own land by first giving notice, in writing, for at least six months, to such person, his agent, attorney, or lessee, to disconnect and withdraw his fence back on his own land. Any person who shall negligently or wilfully fail to disconnect his fence and remove the same back upon his own land, after the expiration of said notice, shall be fined in any sum not less than ten nor more than fifty dollars; and each ten days' failure, after such notice shall constitute a separate offense for the violation of the provisions of this article. [Id., § 3.]

Indictment.—Willson's Cr. Forms, 575.

An information for failing to disconnect a fence from that of another and remove it must allege that the fence was not removed within 10 days after the expiration of 6 months after notice to remove it. *Elkins v. State*, 51 S. W. 372, 40 App. 589.

Art. 1246. [799] Dogging stock when fence insufficient.—Any owner, proprietor, lessee, or other person, in charge of cleared and cultivated land surrounded with an insufficient fence, or the agent or employé of such person, who shall, with fire-arms, dogs, or otherwise, maim, wound or kill any cattle, horses or hogs of another within such inclosure, or who shall cause or procure the same to be done, shall be fined not less than ten nor more than two hundred dollars. [Act Oct. 18, 1871, p. 10.]

See notes under article 1227, ante.

Nature and elements of offense.—Defendant could not justify killing hogs for trespassing on his crop unless the crop was properly protected against trespassing stock. *Jones v. State*, 3 App. 228.

A prosecution under this article cannot be maintained where the hog law is in force, since the hog law requires no fence against such stock, and furnishes a remedy to the owner of the premises by impounding of stock. *Gerdes v. State* (Cr. App.) 34 S. W. 268.

Distinguished from offenses under articles 1231 and 1232.—This is a different offense from that denounced by articles 1231 and 1232, ante. *Payne v. State*, 17 App. 40; *McRay v. State*, 18 App. 331; *Brewer v. State*, 28 App. 565, 13 S. W. 1004.

Indictment and information.—Willson's Cr. Forms, 587.

An information against a married woman for dogging stock on premises inclosed by an insufficient fence alleged ownership of the premises in such married woman, but failed to allege that such premises were her separate property; held, the complaint was insufficient. *Lucas et al. v. State*, 36 App. 397, 37 S. W. 427.

In all cases of killing animals under articles 1231 and 1246, the court suggests a count under each article. *Cryer v. State*, 36 App. 621, 37 S. W. 753, 38 S. W. 203.

When an indictment in what purports to be a count charges an offense under this article followed by a comma, and then charges what seems to be an offense under article 1231, ante, with nothing to show that it is a separate and distinct count, it is duplicitous and bad. *Porter v. State*, 48 App. 125, 86 S. W. 769.

Charge of court.—Where accused was charged under article 1231, ante, with having wilfully and wantonly killed a domestic animal, and the evidence was not conclusive that the killing was wilful or wanton, and the jury might have found that the act was within article 1246, it was error for the court to refuse a requested charge that if the facts brought the case within the provisions of the latter article the jury should acquit. *Brewer v. State*, 28 App. 565, 13 S. W. 1004; *Hobbs v. State* (Cr. App.) 170 S. W. 1100.

Evidence.—Best evidence, see notes under C. C. P., art. 783, et seq.

Art. 1247. [800] "Insufficient fence" defined.—An "insufficient fence," as used in the preceding article, means a fence less than five feet high, or with openings or crevices in some part thereof sufficiently large for the passage of the animal so maimed, wounded or killed.

Evidence.—See note under art. 1231.

Art. 1248. [801] Removing rock, earth, etc., from premises of another.—If any person shall knowingly enter upon the land or

premises of another, and take or remove therefrom any rock, earth, sand, coal, slate or mineral of any description, without the consent of the owner of such land or premises, he shall be fined in any sum not exceeding one thousand dollars.

See notes under article 1227, ante.

Ownership of land.—A prosecution hereunder cannot be maintained where complainant's only title to the land from which sand is alleged to have been taken is an unauthorized lease from the state. *Dean v. State*, 34 App. 474, 31 S. W. 378.

Indictment.—Willson's Cr. Forms, 588.

Evidence.—Where the indictment charged accused with entering on the Commons of a county under the control of the mayor of a city and, without consent, removing earth and sand therefrom, while the mayor testified that he had the care of the property by virtue of his office as mayor, and there was no proof that the property was in the city, a conviction was unauthorized for want of sufficient evidence. *Haworth v. State* (Cr. App.) 168 S. W. 859.

Where on a trial for entering on the Commons of a county and removing therefrom earth and sand, the evidence showed that a deed executed in 1859 apparently vested the title in the county; that in 1873 a third person went into possession and erected a mill and houses, and fenced the land, and that he and those holding under him, including accused, had peaceable and adverse possession until 1912, when the city asserted title, which accused refused to concede, the issue involved one of title which cannot be tried in the criminal courts. *Haworth v. State* (Cr. App.) 168 S. W. 859.

Art. 1249. When horses, mules, etc., are prohibited from running at large.—If any person or persons shall knowingly permit any horses, mules, jacks, jennets, and cattle to run at large in any territory in this state where the provisions of the laws of this state have been adopted prohibiting any of such animals from running at large, such person or persons shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than five dollars nor more than two hundred dollars. [Act 1907, p. 123.]

See art. 1241, ante. See notes under article 1227, ante.

Statute applicable to offense.—The first stock laws applied only to hogs, sheep, and goats, and when, in 1897, it was first made a penal offense to permit stock to run at large after the stock law had been adopted, only the law relating to hogs, sheep, and goats was in force. Thereafter the stock law was extended to horses and cattle, and by Acts 26th Leg. c. 128, as amended by Acts 30th Leg. c. 57, it was made an offense to permit such animals to run at large. The two provisions are found in Pen. Code as articles 1241, 1249; the first being Acts 25th Leg. c. 87, and the latter the act of 1899. Held, that only the act of 1899 applies to a violation of the stock laws by permitting horses and cattle to run at large, after the adoption of the stock law. *Neuvar v. State*, 72 App. 410, 163 S. W. 58.

Defense to prosecution.—In a prosecution for a violation of the stock law, where accused's land and the place where he allowed his animals to run at large was clearly within the limits of the subdivision which adopted the law, the fact that the description of that subdivision was not accurate, and omitted a strip of territory leaving a hiatus between the two parts, was no defense. *Neuvar v. State*, 72 App. 410, 163 S. W. 58.

Complaint.—Where a complaint charged accused with violating the stock law prohibiting stock from running at large in justice precinct No. 6, in Fayette county, Tex., alleging that the law had been adopted and was in force in such precinct, when, in fact, it was not in force there, except within the territory outside an incorporated town, the complaint was fatally defective. *Ex parte Stein*, 61 App. 320, 135 S. W. 136.

The complaint does not fail to charge an offense because using "wilful" where the statute uses "knowingly"; the words being synonymous, and "wilful" being of more extensive meaning (citing *Words and Phrases*, vol. 8, pp. 7468-7481, 7835, 7836; vol. 5, pp. 3937-3939). *Ex parte Cowden* (Cr. App.) 168 S. W. 539.

Evidence.—On a trial for permitting stock to run at large, evidence that accused's mare had been in the inclosed lands of witnesses several times is admissible to show that accused permitted the animal to run at large from time to time. *Black v. State*, 62 App. 77, 136 S. W. 478.

Under Rev. St. 1911, art. 7233, providing that the petition for an election to prevent horses and cattle from running at large shall set forth clearly the classes of animals which the petitioners desire not to run at large, and, if the petition be for a subdivision of any county, the subdivision shall be particularly described, incorporated towns, included either within the subdivision or within the county, become subject to the stock law, if it is adopted, and hence, in a prosecution for violating the stock law, evidence of ordinances of an incorporated town included in the subdivision is admissible. *Neuvar v. State*, 72 App. 410, 163 S. W. 58.

Charge of court.—Acts 1897, c. 87, § 1, and Acts 1907, c. 57, § 20a, are identical on the subject of failure to keep stock from running at large after the adoption of the stock law, and one charged with so permitting the stock to run at large cannot complain of a charge given under the law of 1897, where the stock law was in force at the time of the offense. *Black v. State*, 62 App. 77, 136 S. W. 478.

Art. 1250. [802] Herding stock in half mile of residence.—If any person shall herd any drove of horses, mules, cattle, sheep, goats, or hogs, numbering more than five head, upon any land not his own, and within one-half mile of the residence of any citizen of this state, whenever the owner, lessee or legal representative of such land shall forbid such herding, and shall fail, neglect or refuse to remove such drove at once upon the request of such owner, lessee or legal representative; or whenever any person shall herd any such drove of horses, mules, cattle, sheep, goats or hogs upon the inclosed lands or pasture of another, or cause the same to be so herded, without the consent of such owner, lessee or legal representative, he shall be fined in any sum not exceeding one hundred dollars; provided, that this article shall not apply to droves which are driven through pastures, by the usual route of travel through such pastures, in the most direct and practicable route to any named point of destination, traveling at the greatest practicable speed, and where there is no public road leading to the point of destination; and provided, further, that no person shall be authorized, under the provisions of this article, to drive any drove or herd of stock of any kind into any inclosure belonging to another, for the purpose of grazing or holding such drove or herd of stock for any length of time whatever, without the consent of the owner, lessee or person in charge of such inclosure. This article shall not apply to herds or droves of stock while being held for shipment; provided, that the owner or agent of such stock shall pay the owner of the premises so herded upon, reasonable pasturage and all damages done by said stock. [Act March 13, 1885, p. 29; amended, Act 1897, p. 183.]

See notes under article 1227, ante.

Historical.—The preceding article was originally enacted by Act June 2, 1873, p. 186, and as adopted in the Revised Code (1879) reads as follows:—

“Art. 690. If any person shall herd any drove of horses or cattle, numbering more than twenty-five head, upon land not his own and within one half mile of the residence of any citizen of this state, and shall fail, neglect, or refuse to remove such drove at once upon the request of such citizen, he shall be fined not exceeding one hundred dollars.”

By Act April 4, 1881, p. 104, it was amended so as to read as follows:—

“Art. 690. If any person shall herd any drove of horses, cattle, sheep, goats, or hogs, numbering more than twenty-five head, upon any land not his own, and within one half mile of the residence of any citizen of this state, or if any person shall herd any drove of sheep or goats, numbering more than twenty-five, upon any land not his own, whenever the owner, lessee, or legal representative of such land shall forbid such herding, and shall fail, neglect, or refuse to remove such drove at once upon request of such citizen, owner, lessee, or legal representative, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding one hundred dollars.”

Nature and elements of offense.—Parties driving stock through pasture consisting partly of lands leased from the State held not to violate this article, because Pen. Code 1895, art. 508 gave them this right. *Broyles v. State*, 41 App. 553, 55 S. W. 966.

Indictment and information.—Willson's Cr. Forms, 591.

See *Caldwell v. State*, 2 App. 53. But *Linney v. State*, 5 App. 344, is not applicable, the statute being different.

Art. 1251. [803] Each hour a separate offense.—Each hour of delay, after notice given or request made, shall constitute a separate offense under the preceding article. [Act June 2, 1873, p. 18.]

Art. 1252. [803b] Wilful destruction of irrigating canal, etc.—Any person who shall wilfully or maliciously injure or destroy any irrigation canal or its appurtenances, or any irrigation reservoir, dam, well, or any of the appurtenances thereto to the extent of fifty dollars, or if said injury shall amount in value to fifty dollars, shall be deemed guilty of a felony, and for each offense shall be punished by confinement in the state penitentiary for not less than two nor more than ten years. [Act 1895, p. 25.]

Explanatory.—The act from which this article was derived was embraced in Title 73, chapter 2 of the Rev. St. 1911. That chapter was repealed by Acts 1913, ch. 171, § 101, and its subject matter, both civil and criminal, re-enacted. The criminal features of the new act are included in this compilation as arts. 837a-837p,

ante. It would seem, therefore, that the above article (1252) is wholly superseded. See, also, art. 837, ante, which is an earlier enactment of the irrigation law. Art. 837, however, was amended in 1899.

Indictment.—Willson's Cr. Forms, 378.

Art. 1253. Obstructing or injuring county drain.—Any person who shall wrongfully or purposely fill up, cut, injure or destroy or in any manner impair the usefulness of any canal, drain, ditch or water-course or other work constructed, repaired or improved, under the provisions of this Act [arts. 2567–2625, Vernon's Sayles' Civ. St. 1914] for the purpose of drainage or protection from an overflow of water, shall be deemed guilty of a misdemeanor, and upon conviction may be fined in any sum not exceeding one hundred dollars or imprisonment in the county jail not exceeding two months. [Act 1907, p. 88; Act 1911, p. 258, ch. 118, § 40, superseding art. 1253, revised Pen. Code.]

See art. 836, ante, and note thereunder.

Indictment.—Willson's Cr. Forms, 380.

Art. 1254. Cut, destroy or injure levee.—Any person or persons who shall wrongfully or purposely cut, injure, destroy, or in any manner impair the usefulness of any levee or other reclamation improvement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars; or by imprisonment in the county jail for a period not exceeding one year; or by both such fine and imprisonment. [Act 1909, p. 152; Act 1915, p. 244, ch. 146, § 40, superseding art. 1254, revised Pen. Code.]

Art. 1254a. Destroying or defacing corner, line, mark, etc., in connection with levee.—Any person or persons who shall wilfully destroy or deface any corner, line, mark, bench mark or other object fixed or established in connection with the work herein authorized, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not less than thirty days, or by both such fine and imprisonment. [Act 1915, p. 244, ch. 146, § 41.]

Art. 1255. [804] Entering upon inclosed land of another to hunt or take fish.—Any person who shall enter upon the inclosed land of another without the consent of the owner, proprietor or agent in charge, and therein hunt with firearms, or therein catch or take any fish from any pond, lake, tank or stream, or in other manner depredate upon the same, shall be punished by fine not less than ten nor more than one hundred dollars. Provided, that this article shall not apply to inclosures including two thousand acres or more in one inclosure. [Act March 31, 1885, p. 80; Act 1893, p. 87; Act 1903, p. 159.]

See notes under 1227, ante.

Adoption in Code of 1911 as implied repeal of article 1255a omitted therefrom.—Acts 26th Leg. c. 102 (article 1256a, post), applicable to inclosures of 2,000 acres or more, prohibited hunting upon inclosed and posted land without the consent of the owner, under penalty of not more than \$200, and by section 4 provided that it should not repeal the law as to inclosures of 2,000 acres or less. Pen. Code, arts. 1255, 1256, and Acts 28th Leg. c. 103, amending article 1255, not applying to inclosures of 2,000 acres or more, provided a penalty of not less than \$10 or more than \$100. The codifying commission provided by the Legislature of 1899 brought forward in the Penal Code of 1911 the act of 1903 as article 1255, and entirely omitted the act of 1899; and in 1911 the Code was enacted by bill providing in section 1 "that the following titles, chapters, and articles shall hereafter constitute the Penal Code of the state of Texas," and in section 4 that "nothing in this act shall be construed or held to repeal * * * any law or act passed by this Legislature at its regular session," and no other acts were specifically exempted from repeal. The Penal Code so adopted contained no express repeal of the act of 1899 and no provision dealing with the subject of that act. Held, that the adoption of the Code did not impliedly repeal the act of 1899, and that it was still in full force and effect. *Berry v. State* (Cr. App.) 156 S. W. 626.

Validity of amendment.—The act of 1903 being an amendment to this article was proper and said act of 1903 is valid. *Ex parte Cox*, 53 App. 240, 109 S. W. 370.

Nature of offense in general.—One hunting with firearms on inclosed land of prosecutor without his consent, under the mistaken belief that he is on the land of a third person, who has not given him permission to hunt, but who is his friend and will not object, is not guilty of the crime of hunting with firearms on the land of prosecutor. *Armstrong v. State*, 70 App. 596, 157 S. W. 1194.

Distinguished from offense under article 1256a.—As Pen. Code, art. 1255 was not repealed by Acts 26th Leg. c. 102 (article 1256a post), and as Acts 26th Leg. c. 102, was not repealed by Acts 28th Leg. c. 103, which amended art. 1255, the law in 1903 prohibited hunting within inclosed and posted lands containing less than 2,000 acres without the consent of the owner, under penalty of not less than \$10 nor more than \$200, and hunting within inclosed lands containing more than 2,000 acres under fine not exceeding \$200; the distinction in the two later acts being that inclosed lands of less than 2,000 acres need not be posted, while inclosures of 2,000 acres or more should be posted. *Berry v. State* (Cr. App.) 156 S. W. 626.

Information.—Willson's Cr. Forms, 577-580.

An information charging that accused unlawfully entered upon the inclosed and posted lands of a corporation named, without its consent or the consent of its manager, and therein hunted with firearms, did not state an offense under this article, it not alleging that the land in question was used for either agricultural or grazing purposes. *Partridge v. State* (Cr. App.) 170 S. W. 717.

Inclosing land of another.—By act of Feb. 7, 1884, pp. 68, 69, it is made an offense to knowingly make or permit to remain any fence on and around the land of another, without the written consent of the owner, etc. See the act in full, ante, art. 854.

Art. 1255a. Hunting on enclosed and posted lands containing 2000 acres or more.—That it shall be unlawful for any person or persons knowingly to hunt with fire-arms or dogs upon the enclosed and posted lands of another without the consent of the owner thereof where such lands are in use as agricultural lands or for grazing purposes, having cattle, horses, sheep or goats herding or grazing thereon. By enclosed lands is meant any structure for fencing either of wood or iron, or a combination of wood and iron, or wood and wire, or partly enclosed by a fence of iron or wood, or wood and iron, or wood and wire, and partly by water or streams, canon, brush, or rock or bluffs, or any of the islands; provided, same are used for pasturage or cultivation as designated herein; provided, the State shall prove in the trial of any case under this act, before a conviction shall be had, that all the lands in said enclosure is owned or leased by the owner or proprietor of such enclosure; where such lands are subject to purchase or lease; provided, that proof of ownership or lease may be made by oral testimony. [Act 1899, p. 173, ch. 102, § 1.]

Explanatory.—This article and the following articles (1256b-1256f) were omitted from the Revised Criminal Statutes of 1911, and are inserted in view of the decision of the Court of Criminal Appeals in *Berry v. State* (Cr. App.) 156 S. W. 626.

See notes under articles 1227 and 1255, ante.

Implied repeal.—In view of article 4 ante, it was held, that the adoption of the Code of 1911, omitting this statute, but without expressly repealing it did not impliedly repeal it, and that it was still in full force and effect. *Berry v. State* (Cr. App.) 156 S. W. 626.

Distinguished from offense under article 1255.—As Pen. Code, art. 1255, ante, was not repealed by Acts 26th Leg. c. 102, article 1256a and as Acts 26th Leg. c. 102, was not repealed by Acts 28th Leg. c. 103, which amended art. 1255 the law in 1903 prohibited hunting within inclosed and posted lands containing less than 2,000 acres without the consent of the owner, under penalty of not less than \$10 nor more than \$200, and hunting within inclosed lands containing more than 2,000 acres under fine not exceeding \$200; the distinction in the two later acts being that inclosed lands of less than 2,000 acres need not be posted, while inclosures of 2,000 acres or more should be posted. *Berry v. State* (Cr. App.) 156 S. W. 626.

Information.—An information charging that accused unlawfully entered upon the inclosed and posted lands of a corporation named, without its consent or the consent of its manager, and therein hunted with firearms, did not state an offense under this article; it not alleging that the land in question was used for either agricultural or grazing purposes. *Partridge v. State* (Cr. App.) 170 S. W. 717.

Art. 1255b. Same; punishment; proviso.—That any person who shall knowingly, without the consent of the owner or agent enter the enclosed and posted lands of another and shall, with fire-arms or dogs, hunt on such lands, shall be deemed guilty of a misdemean-

or, and upon conviction thereof shall be punished by a fine not more than two hundred dollars; providing further, that nothing in this act shall prohibit any bona fide traveler, while traveling along a public road in an enclosure, from killing game within a distance of four hundred yards on either side of said road. [Id., § 2.]

See note under art. 1255a.

Art. 1255c. Same; necessity of posting.—No person shall be liable to the penalty prescribed in the preceding article [art. 1255b] unless the owner or proprietor of such enclosure shall at each entrance thereto keep a notice in a conspicuous place, with the word "posted" plainly marked thereon, which shall constitute posting within the meaning of this act. [Id., § 3.]

See note under art. 1255a.

Art. 1255d. Same; repeal.—Nothing in this act shall be construed to repeal the present law relating to enclosures of two thousand acres or less. [Id., § 4.]

See note under art. 1255a.

Art. 1255e. Same; does not authorize hunting in enclosed farms.—Nothing in this act shall be held to authorize any person to hunt in any enclosure which is a farm, or in which are growing crops, without the consent of the owner or lessee of such enclosure. [Id., § 5.]

See note under art. 1255a.

Art. 1256. Same; counties exempted.—That the following counties be and the same are hereby exempted and the provisions of this Act shall not affect or be operative therein or in any county thereof, viz: Upton. That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed. [Act 1899, ch. 102, § 6; Act 1903, ch. 123; Act 1905, ch. 71a; Act 1907, ch. 93; Act 1909, ch. 23; Act 1909, p. 135, ch. 80; Act 1911, p. 90, ch. 50, § 1, superseding art. 1256, revised Pen. Code.]

Explanatory.—Act 1909, p. 135, ch. 80, had reference to Act 1899, ch. 102, omitted from the revision of 1911, and inserted in this compilation as arts. 1255a-1255e, and not to Act 1903, p. 159, from which art. 1255 was constructed. In view of the decision in *Stevens v. State*, 70 App. 565, 159 S. W. 505, art. 1256, as it appeared in Rev. Pen. Code, is omitted from this compilation, and Act 1911, ch. 50, amendatory of Act 1909, p. 135, ch. 80, is inserted in its place, but in its proper relation.

Art. 1257. [806] Preventing the moving, etc., of railroad trains.—Any person or persons who shall, by force, threats, or intimidation of any kind whatever, against any railroad engineer or engineers, or any conductor, brakeman, or other officer or employé employed or engaged in running any passenger train, freight train, or construction train, running upon any railroad in this state, prevent the moving or running of said passenger, freight or construction train, shall be deemed guilty of an offense, and, upon conviction thereof, each and every person so offending shall be fined in a sum not less than one hundred dollars nor more than five hundred dollars, and also imprisoned in the county jail for any period of time not less than three months nor more than twelve months. [Act March 30, 1887, pp. 72-73.]

Indictment.—Willson's Cr. Forms, 553.

Art. 1258. [807] Each day a separate offense.—Each day said train or trains mentioned in the preceding article are prevented from moving on their road, as specified in the preceding article, shall be deemed a separate offense, and shall be punished as prescribed in the preceding article. [Id.]

Indictment.—Willson's Cr. Forms, 553.

Art. 1259. [808] Wilfully injuring railroad, etc.—Any person who shall wilfully injure any railroad, locomotive engine, or tender, or baggage, passenger or freight car of any railroad in this state, so

as to prevent the use of same, shall be punished by fine in any sum not less than one hundred dollars, and imprisoned in the county jail not less than three nor more than twelve months. [Id.]

See notes under article 1227, ante.

Constitutionality.—Bill of Rights, art. 1, § 13, prohibiting excessive fines, is not violated by this article, because it does not provide a maximum punishment. *Hamilton v. State* (Cr. App.) 153 S. W. 134.

Indictment.—Willson's Cr. Forms, 555.

Art. 1259a. Taking or driving motor vehicle belonging to another.—Whoever purposely takes, drives or operates, or purposely caused to be taken, driven or operated upon the public road, highway or other public place, any motor vehicle, bicycle, buggy, carriage or other horse driven vehicle, without the consent of the owner thereof shall, if the value of such motor vehicle, bicycle or other vehicle is thirty-five (\$35.00) dollars or more, be imprisoned in the county jail for not less than six months nor more than one year, or if the value is less than that sum, be fined not more than two hundred dollars (\$200.00), or imprisoned not more than thirty days, or both. [Act 1913, p. 187, ch. 100, § 1, amended; Act 1915, p. 160, ch. 105, § 1.]

Offenses punishable.—The theft of a \$1,200 automobile is punishable under this article and not under the statute relating to the theft of property worth over \$50, by which a penitentiary sentence is authorized, in view of article 1342, post, providing that the articles of the Code prescribing the penalty for theft of property worth over \$50 do not apply to the theft of any particular property where the punishment is specially prescribed. *Sparks v. State* (Cr. App.) 174 S. W. 351.

This article cannot be construed to be applicable only to cases of mere temporary taking and use, so as to render the general statute covering theft of property worth over \$50 applicable to the stealing of a \$1,200 automobile, under which a penitentiary sentence could be imposed; the special act being wholly unambiguous in language, especially in view of article 10, ante, providing that words specially defined shall be understood in that sense, and of article 1344, post, defining the word "steal" to include "theft." *Sparks v. State* (Cr. App.) 174 S. W. 351.

The theft of an automobile valued at \$300 is punishable under this article, and not under the statute relating to the theft of property valued at more than \$50, for which a penitentiary sentence is authorized. *Howard v. State* (Cr. App.) 174 S. W. 824.

Jurisdiction.—The theft of an automobile is a misdemeanor not triable in the district court. *Greenwood v. State* (Cr. App.) 174 S. W. 1049.

Art. 1259b. Removing tools and parts from motor vehicle with intent to steal the same; receiving same.—Whoever shall maliciously or with intent to steal or without authority from the owner, unlawfully removes from any motor vehicle or bicycle any portion of the running or steering gear, pump, or any tire, rim, robe, cover, tube, clock, casing, radiator, fire-extinguisher, tool, lamp, starter, battery, coil, spring, gas or oil tank, bell or any signal device, speedometer, license, number, horn, box, basket, trunk or carrier, shield, hood, oiler, gauge, grease-cup, chain, lock, nut, bracket, valve, bolt, rod, cap, screws, wire, spark-plug, pipe, carbureter, magneto, fan, belt, cylinder, switch, brake, electric bulbs, or any device, emblem or monogram thereon or any attachment, fastenings or other appurtenances, or any other part or parts attached to said motor vehicle which are necessary in the use, control, repair or operation thereof, or whoever knowingly buys, receives or has in his possession, any of such articles or any part thereof so unlawfully removed as aforesaid, shall be imprisoned in the county jail not less than six months nor more than one year. [Act 1913, p. 187, ch. 100, § 2.]

Art. 1259c. Meddling with or injuring motor vehicle.—Whoever purposely and without authority from the owner, shall start or cause to be started, the motor of any motor vehicle, or whoever purposely and maliciously shall shift or change the starting device or gears of a standing motor vehicle to a position other than that in which they were left by the owner or driver of said motor vehicle, or whoever shall purposely cut, mark, scratch or damage the chassis, running gear, body, sides, top, robe, covering or upholstering of

a motor vehicle, the property of another, or shall purposely destroy any part thereof with or by any liquid or other substance, or shall cut, mash, mark, or in any other way destroy or damage the cylinder, radiator, steering gear, fire-extinguisher, fan, belt, valve, pipe, wire, cap, lamp, gas or oil tank, cup, signal, device, clock, chain, tool, coil, spring, speedometer, starter, battery, spark-plug, brake, tool box, oiler, pump, switch, nut, casing, tire, rim, tube, box, basket, trunk, or carrier, rod, bolt, shield, fender, bracket, gauge, glass, hood, lock, cap, screw, carbureter, magneto, license, number, electric bulb or any device, emblem, monogram or any other attachment, fastening or appurtenance of a motor vehicle, without the permission of the owner thereof, or whoever purposely shall drain or start the drainage of any radiator or oil tank upon a motor vehicle without permission of the owner thereof, or whoever purposely shall put any metallic or other substance or liquid in the radiator, carbureter, oil-tank, grease cup, oilers, lamps or machinery of a motor vehicle, with the intent to injure or damage the same or impede the working of the machinery, or whoever shall maliciously tighten or loosen any bracket, bolt, wire nut, screw, or other fastening on a motor vehicle, or whoever shall purposely release the brake upon a standing motor vehicle, with the intent to injure said machine, shall, upon conviction thereof, be imprisoned in the county jail for not less than six months or more than one year. [Id., § 3.]

Art. 1259d. Peddlers, etc., refusing to leave premises on request of owner.—If any person in this State, pursuing the business or occupation of a peddler, hawker, or itinerant vendor of goods, wares and merchandise, shall enter upon the premises owned or leased by another, and shall wilfully refuse to leave such premises, after having been notified by the person, or the agent of the person, owning or in possession of such premises, to leave such premises, he shall be guilty of a misdemeanor, and on conviction, he shall be fined in any sum not less than one dollar nor more than twenty-five dollars. [Act 1913, p. 142, ch. 76, § 1.]

CHAPTER FOUR

OF INFECTIOUS DISEASES AMONG ANIMALS AND BEES

Art. 1260.	Failing to confine horses with glanders or farcy.	Art. 1267a.	Selling or buying sheep affected with scab.
1261.	Sell or trade or offer to sell or trade animal affected with glanders.	1267b.	"Scab" defined.
1262.	Driving sheep affected with scab or other contagious disease.	1267c.	Importing sheep affected with scab.
1263.	Using horse with glanders or farcy.	1267d.	Moving sheep affected with scab from one county to another.
1264.	Penalty for riding or driving infected animals, etc.; cumulative of other laws.	1267e.	Moving sheep affected with scab within county.
1265.	Permitting sheep with scab to run at large.	1267f.	Driving sheep affected with scab across land of another.
1265a.	Failure to dip sheep affected with scab.	1267g.	Driving sheep affected with scab over public road.
1265b.	Arrest of persons violating preceding article.	1267h.	Penalty for violation of preceding articles.
1265c.	Refusing to permit examination.	1267i.	Penalty for violation of art. 1267b.
1265d.	Same; dismissal of cause or trial of complaint; defense; costs.	1268.	Persons refusing to permit sheep to be examined.
1265e.	Compensation of constable; witnesses, etc., costs.	1269-1274.	[Superseded.]
1266.	Certificate as to condition of sheep imported or moved from one county to another; provisos; penalty for violations.	1275.	Penalty for violation of this law.
1267.	[Superseded.]	1276.	Penalty for violation by owners.
		1277.	Wool growers may pay inspectors.
		1278.	Counties exempt.
		1279.	[Superseded.]
		1280.	Importation of sheep with scab.

Art.	Art.
1281. Bringing infected animal into the state.	1288a. State entomologist; duties and powers; assistants and inspectors; annual report.
1282. Obstructing live stock commissioner.	1288b. Power to deal with diseases, prohibiting shipments into state.
1283. Permitting infected animal to run at large.	1288c. Bees shipped into state to be accompanied by certificate of official entomologist of state of shipment; shipper to file certified copy; evidence in lieu of certificate; confiscation, etc.
1284. Penalties.	1288d. Carriers not to accept shipments except under regulations.
1284a. Powers of Live Stock Sanitary Commission; quarantine regulations; inspection and dipping of sheep affected with scab; refusal of owner to permit dipping; cost of dipping and recovery thereof from owner; inspectors; compensation.	1288e. Authority to declare protective quarantine, etc.
1284aa. Live Stock Sanitary Commission to establish quarantine; unlawful to transport diseased animals, rules and regulations; State Veterinarian; entry on premises to make inspection; seizure of animals moved in violation of law.	1288f. Authority to place restrictive quarantine, etc.
1284b. Cattle may be moved under rules and regulations of live stock sanitary commission.	1288g. Queen bees not to be sold without copy of certificate, etc.
1284c. Special quarantine districts for particular diseases; unlawful to remove cattle; methods of eradicating diseases; dipping live stock.	1288h. Violation of provisions, etc., a misdemeanor; prosecutions; injunctions; duties of attorney general and district attorneys; production of documents; witnesses; duties of sheriffs and constables, etc.
1284d. Owners in special quarantined area to treat live stock.	1288i. Entomologist to publish directions, rules and information, etc.
1284e. Duties of commissioners' court; disinfection of premises.	1288j. Bees affected with foul brood, etc., to be reported by owner, etc.
1284f. Penalty for violation of act.	1288k. Power to transfer bees to movable frame hives, etc.
1284g. Failure to dip animals.	1288l. Penalty for sale or shipment of infected bees.
1284h. Tick eradication; election.	1288m. Exposing honey, etc., infected with foul brood.
1285-1288. [Amended.]	1288n. Preventing inspection or detection of disease.
	1288o. Disposition of fines.

Article 1260. [809] Failing to confine horses with glanders or farcy.—If any person shall wilfully and knowingly fail, neglect or refuse to place and keep in secure confinement, separate and apart from all other stock, any animal of the horse or ass species, diseased with glanders or farcy, belonging to him or subject to his control, he shall be fined not less than twenty-five nor more than two hundred dollars, or imprisoned in the county jail not less than ten days nor more than three months. [Act Aug. 19, 1876, p. 211.]

See art. 1263.

Indictment.—Willson's Cr. Forms, 593.

Art. 1261. Sell or trade or offer to sell or trade animal affected with glanders.—If any person or persons shall trade or sell, or offer to trade or sell, any animal of the horse or ass species, known or suspected to be affected with glanders, he shall be fined in any sum not less than five nor more than one hundred dollars, or imprisoned in the county jail not less than ten days nor more than ninety days. [Act 1897, p. 216.]

Indictment.—Willson's Cr. Forms, 595.

Art. 1262. Driving sheep affected with scab or other contagious diseases.—If any person owning or controlling sheep affected with the scab, or other infectious or contagious disease, shall drive or permit to be driven, such sheep over or along any public road or highway in this state, or shall drive such sheep so affected, or direct or permit such sheep so affected to be driven, on or over the inclosed lands of another without first obtaining the written consent of the owner or person in charge of such inclosed lands, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall

be fined in any sum not less than one hundred dollars nor more than five hundred dollars. [Act 1897, ch. 125, § 1; Act 1909, p. 114.]

Explanatory.—This article is superseded, in so far as it relates to sheep scab, by Act 1911, ch. 5, §§ 5, 6 (arts. 1267f, 1267g, post). The article is still operative as to “other infectious or contagious disease.”

Art. 1263. [810] Using horse with glanders or farcy.—If any person shall ride, drive or in any manner use any animal of the horse or ass species diseased with glanders or farcy, knowing the same to be so diseased, he shall be punished as prescribed in the preceding article. [Act Nov. 8, 1866, p. 102.]

See art. 1260.

Explanatory.—This article, when carried into the revised Penal Code, had been superseded by Act April 12, 1892 (art. 1264, post). See *Stevens v. State*, 70 App. 565, 159 S. W. 505.

Indictment.—Willson's Cr. Forms, 594.

Art. 1264. [811] Penalty for riding or driving infected animals, etc.; cumulative of other laws.—Any person who may drive, lead or ride any animal infected with said diseases of glanders or farcy, knowing them to be so infected, on, along or across any public highway in this state, or allow any such animal so diseased (knowing them to be so diseased and owning such animal) to run at large on the open range of any county in this state, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than ten dollars nor more than two hundred dollars. [Act April 12, 1892, 22d Leg., S. S.]

See art. 1263 and note thereunder.

Art. 1265. [812] Permitting sheep with scab to run at large.—If any person, owning or controlling sheep affected with the scab or other infectious or contagious disease, shall permit such sheep to run at large or in charge of any one beyond the limits of his own land, he shall be fined not exceeding one thousand dollars. [Act Dec. 28, 1861, p. 21.]

Explanatory.—This article may be in part superseded by Act 1911, ch. 5, §§ 1-8 (arts. 1267a-1267i, post). It is still clearly operative, however, as to “other infectious or contagious diseases.” It may also be operative as to permitting sheep affected with scab “to run at large,” etc., since there is no specific denunciation of that act in the later provisions above referred to.

Effect of exemptions in article 1278.—As to the effect of exemptions contained in article 1278, see *Harold v. State*, 16 App. 157.

Indictment.—Willson's Cr. Forms, 596.

Art. 1265a. Failure to dip sheep affected with scab.—Any person having knowledge or notice of the existence of scab on any sheep owned or in charge of such person, who shall fail or refuse to dip in some preparation known to be effectual in curing scab, all flocks of sheep in which one or more such animals are so infected, within twenty days after such knowledge or notice has been received, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than one hundred nor more than two hundred dollars; provided, that every successive twenty days of failure or refusal to dip such sheep, under the provisions of this section, shall be considered a separate offense. [Act 1897, p. 179, ch. 125, § 2.]

Explanatory.—The above act, comprising arts. 1265a-1265e was omitted from the revised Pen. Code, and, in view of the decision in *Berry v. State* (Cr. App.) 156 S. W. 626, it is included in this compilation. It is apparently not in conflict with any other act contained in this chapter of the Pen. Code.

Art. 1265b. Arrest of persons violating preceding article.—For the purpose of determining the existence of scab, under the provisions of this act, and to serve notice on persons as provided in Section 2 [art. 1265a], the justice of the peace having jurisdiction, upon complaint of any person owning or having charge of sheep, supported by affidavit, as to his belief that a flock of sheep within such jurisdiction are infected with scab, shall forthwith issue order to a

constable or some peace officer of his county, directing such officer to summon to his aid two persons having knowledge of scab, and to proceed with such persons and examine the sheep so designated, and to notify in writing the owner or person in charge of said sheep, of the result of such examination, and to return to the court of issue such order, showing how he has executed the same. [Id., § 3.]

Art. 1265c. Refusing to permit examination.—Any person refusing to permit the examination provided for in Section 3 of this Act [art. 1265b], or to place the sheep in pens for such purpose, shall be deemed guilty of a misdemeanor, and upon conviction thereof, punished by fine of not less than one hundred nor more than two hundred dollars. [Id., § 4.]

Art. 1265d. Same; dismissal of cause or trial of complaint; defense; costs.—Upon return of the order provided for in Section 3 of this Act [art. 1265b] the Justice of the Peace shall, if it states said sheep are not infected, or that they have been dipped, within ten days next preceding such examination, dismiss such cause. But if such order states said sheep are infected with scab and have not been dipped within the ten preceding days, said Justice of the Peace shall issue warrant of arrest forthwith, against the owner or person having said sheep in charge, and proceed as in other misdemeanor cases; provided, should defendant show, by competent testimony, that such infected sheep were held only on his own or accustomed range, and that he had dipped all flocks so infected, as provided in this act, within twenty days after receiving notice, or within ten days next preceding the serving of such notice, he shall upon payment of all accrued costs be discharged. [Id., § 5.]

Art. 1265e. Compensation of constable, witnesses, etc.; costs.—The constable or other peace officer and the person summoned to assist, shall receive as compensation for services performed under the provisions of this act, and for attendance at court as witnesses in such cases, the sum of two dollars and fifty cents per day for each day actually and necessarily so engaged, and such fees shall be taxed as costs against the owner of such sheep; and execution shall be issued; provided, in all cases where it is found such sheep are not infected or have been dipped within the ten days next preceding the examination so made, the costs and fees shall be taxed against the person who made the complaint, and execution shall so issue. [Id., § 6.]

Art. 1266. Certificate as to condition of sheep imported or moved from one county to another; provisos; penalty for violations.—It shall be unlawful to import into this state, or to move from one county to another, or to move from their accustomed range onto lands owned or leased by any person, without permission of such person, any flock of sheep in which one or more of such animals are infected with scab; and any person moving from one county into an adjoining county, with sheep, shall, before crossing the boundary line of said adjoining county, notify the county judge of said county wherein he proposes to enter or cross, and the said county judge shall appoint two competent persons, well versed in the knowledge of the scab disease, to examine said flock or flocks; and, if the same shall be found free of scab, or other infectious disease, then said sheep shall be allowed to proceed through said county; and the county judge shall receive the sum of two dollars and fifty cents for his services; and the said persons so appointed by him shall receive the sum of two dollars per day for their services. Said money to be paid by the party owning said sheep. Any person violating any of the provisions of this law shall be deemed guilty of a

misdemeanor, and, upon conviction thereof, shall be fined in any sum of not less than fifty dollars and not more than one hundred dollars for each such offense. Provided, that this law shall not apply to any person en route from his ranch for the purpose of delivery of his sheep at a railroad shipping point, or any point designated by the buyer thereof; provided, that said party can show a written contract signed by himself and the party to whom he has sold said sheep, specifying the place of delivery; said contract being witnessed by two reputable and creditable persons, citizens of the county in which said sheep were sold; provided, that the person desiring to import into this state, or to move from one county to another, any flock of sheep, shall not be required to have said sheep examined, except in the first county through which he proposes to pass with said sheep; and he shall indicate to the persons making the examination the destination of said sheep; and the county judge of said county making the examination shall issue to the owner or persons in charge of said sheep a certificate showing said sheep to be free from scab and other infectious diseases, which certificate shall be good for one continuous journey of not exceeding thirty days. [Act 1905, p. 222.]

Explanatory.—This article is to some extent superseded by Act 1911, ch. 5, §§ 1-8 (arts. 1267a-1267i, post). The provision as to the method of determining the existence of scab does not seem to be in conflict with the later act, and is apparently still effective.

Indictment.—Willson's Cr. Forms, 600-602, 604.

Art. 1267. [Superseded. See art. 1267g.]

Indictment.—Willson's Cr. Forms, 598.

Art. 1267a. Selling or buying sheep affected with scab.—That from and after the taking effect of this Act it shall be unlawful for any person, firm or corporation to sell or buy any sheep affected with scab. [Act 1911, p. 7, ch. 5, § 1.]

Explanatory.—Sec. 18, Acts 1911, ch. 5, makes an appropriation to pay the expenses of the State Sheep Inspector; section 19 provides that the act shall take effect July 1, 1911; and section 20 repeals Title 111, Rev. St. 1895, and all other laws and parts of laws in conflict.

Art. 1267b. "Scab" defined.—Scab in this Act is defined to be a disease or itch caused from a bug or parasite which works itself into the wool and flesh of the sheep, causing a crusted sore, injuring the wool and causing same to fall from the animal. [Id., § 1a.]

Art. 1267c. Importing sheep affected with scab.—That from and after the taking effect of this Act it shall be unlawful for any person, firm or corporation to import into this State any sheep affected with scab. [Act Dec. 28, 1861, p. 21; Act 1897, ch. 125, § 1; Act 1905, p. 222; Act 1911, p. 7, ch. 5, § 2.]

See art. 1266 and note thereunder.

Art. 1267d. Moving sheep affected with scab from one county to another.—That from and after the taking effect of this Act it shall be unlawful for any person, firm or corporation to move from one county to another in this State any sheep affected with scab. [Act 1897, ch. 125, § 1; Act 1905, p. 222; Act 1911, p. 7, ch. 5, § 3.]

See art. 1266 and note thereunder.

Art. 1267e. Moving sheep affected with scab within county.—That from and after the taking effect of this Act it shall be unlawful for any person, firm or corporation to move from one part of any county in this State to any other part of the same county any sheep affected with scab. [Act 1911, p. 7, ch. 5, § 4.]

See arts. 1265a-1267d, ante.

Art. 1267f. Driving sheep affected with scab across land of another.—That from and after the taking effect of this Act it shall be unlawful for any person, firm or corporation to drive or cause to

be driven on or across the lands of another any sheep affected with scab. [Act 1897, ch. 125, § 1; Act 1905, p. 222; Act 1911, p. 7, ch. 5, § 5.]

See art. 1266 and note thereunder.

Art. 1267g. Driving sheep affected with scab over public road.—That from and after the taking effect of this Act it shall be unlawful for any person, firm or corporation to drive along or over a public road any sheep affected with scab. [Act 1876, p. 227; Act 1897, ch. 125, § 1; Act 1905, p. 222; Act 1911, p. 7, ch. 5, § 6.]

See arts. 1262 and 1266 and notes thereunder.

Art. 1267h. Penalty for violation of preceding articles.—Any person, whether acting for himself or as agent for another person, firm or corporation, who shall violate Section 1, 3, 4, 5, or 6 of this Act [arts. 1267a, 1267c–1267g] shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not less than one hundred dollars and not more than two hundred dollars. [Act 1911, p. 7, ch. 5, § 7.]

Art. 1267i. Penalty for violation of art. 1267b.—Any person, whether acting for himself or as agent or employé of any other person, firm or corporation, who shall in person or by agent violate any of the provisions of Section 2 of this Act [art. 1267b] shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than five hundred and not more than two thousand dollars. [Id., § 8.]

Art. 1268. Persons refusing to permit sheep to be examined.—Any person who shall refuse to permit his sheep to be examined for scab or other infectious diseases, or to place the sheep in pen for such purpose, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than fifty dollars nor more than one hundred dollars. [Act 1905, p. 223.]

See art. 1266, ante, and note under art. 1275, post.

Indictment.—Willson's Cr. Forms, 605.

Arts. 1269–1274. [Superseded by art. 1284a, post.]

Indictment or information.—Willson's Cr. Forms, 603.

An information under this section must allege that defendant had knowledge of the inspection, the date he acquired such knowledge, and that he failed to cure the sheep within the twenty days after that date. *Hand v. State*, 37 App. 310, 39 S. W. 676.

Art. 1275. [819] Penalty for violation of this law, etc.—Any inspector of sheep or his deputy who shall fail to comply with any of the provisions of this chapter, or who shall wilfully or with intent to harass, vex or put to expense, any owner or person in charge of sheep, notify such owner or person in charge that his flock is diseased, or who shall unlawfully demand or receive any fee or compensation where none is allowed by law, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than fifty nor more than two hundred dollars; and thereupon the office shall be deemed vacant, and the commissioners' court may appoint another inspector for such county. [Act 1883, ch. 54, § 12; Act 22d. Leg., p. 140, § 7.]

Explanatory.—Inasmuch as Act 1915, ch. 111, which largely supersedes the act from which the above article was taken, does not contain any penal provisions directed at sheep inspectors, this article may be still operative as to inspectors appointed under the new act. It should be noted, however, that the denunciation as to failure of duty relates to those duties pointed out in "this chapter" of the Penal Code. The new act does not make any reference to existing provisions of the Penal Code, and hence does not make the new provisions a part of "this chapter" of that Code. It may be argued from this that the coercive measure in the old act cannot be applied to the new. The other provisions of the above article, however, do not seem to carry this restriction, and may apply to the new inspectors.

Indictment.—Willson's Cr. Forms, 606–609.

Art. 1276. [820] Penalty for violation by owners.—Any owner or person in charge of sheep who shall wilfully and knowingly violate any of the provisions of this chapter, when the penalty is not otherwise provided by this chapter, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than fifty nor more than two hundred dollars. [Act 1883, ch. 54, § 13; Act 22d. Leg., p. 140, § 8.]

Explanatory.—What is said in the note to the next preceding article may be, to some extent, applicable to this article, but there are other provisions, such as arts. 1262, 1265, 1266, that can, without question, carry this penal clause.

Indictment.—Willson's Cr. Forms, 604, 610.

Art. 1277. [821] Wool growers may pay inspectors, etc

Explanatory.—The subject-matter of art. 1277, Penal Code of 1911 (art. 821, Penal Code 1895), was made up from Act 22d Leg. p. 140, § 9. The same provision was carried into Rev. Civ. St. 1895, as art. 5363, within Title 111. "Title 111 of the Revised Statutes of Texas" was repealed by Act 1911, ch. 5, § 20. This, of necessity, worked a supercession of the corresponding provision in the Penal Code. See notes under arts. 1278 and 1284a.

Art. 1278. [822] Counties exempt.—The counties of Freestone, Gonzales, Morris, Titus, Cass, Marion, Bowie, Red River, Trinity, San Jacinto, Polk, Anderson, Van Zandt, Cameron, Collin, Colorado, Grimes, Houston, Webb, Encinal, Hunt, Hopkins, Ellis, Dallas, Rockwall, Denton, Fannin, Henderson, Brazos, Smith, Panola, Gregg, Lamar, Wood, Rains, Limestone, Cooke, Brown, Comanche, Cherokee, Mills, Montgomery, Shelby, Lee, Bureson, Rusk, Lavaca, Milam, Wise, Upshur, Robertson, Camp, Parker, Franklin, Navarro, Karnes, Wilson, Atascosa, Harrison, San Augustine, Sabine, Fayette, Austin, Leon, Madison, Hill, Bosque, Waller, Fort Bend, Washington, Guadalupe, Caldwell, Hays, Tarrant, Johnson, Clay, Montague, Erath, Hood, Somervell, Bastrop, Harris, Harrison, Orange, Jefferson, Hardin, Liberty, Chambers, Newton, Tyler, Jasper, Kaufman, Nacogdoches, De Witt, Victoria, Jackson, Calhoun, Refugio, Goliad and Aransas counties are exempted from the provisions of this chapter. [Act 1883, ch. 54, § 16; Act 1885, ch. 14; Act 1891, p. 140, § 10; Act 1897, ch. 68; Act 1901, ch. 107; Act 1903, p. 117.]

See note under article 1265, ante.

Explanatory.—This article would seem to be wholly superseded by Act 1915, ch. 111 (art. 1284a, post). The article was numbered 822 in the revised Penal Code of 1895. It was taken, for the purpose of that Code, from Act 1891, p. 140, § 10. The same section of the act of 1891 was utilized to make up art. 5364, Rev. St. 1895. A reference to the act of 1891 will show that it was merely a limitation of the counties of the state in which the inspection law was to apply. In constructing the Penal Code of 1895 the revisers overlooked this fact, and changed the language so that it read "provisions of this chapter" instead of "provisions of this act." The effect of this change was to exempt the counties named from all the provisions of the chapter of the Penal Code in which art. 822 appeared, though such chapter contained many provisions wholly independent of the act of 1891. The legislature, in 1897, observed this mistake, and, in amending art. 822, Penal Code 1895, changed the language so that it read "from the provisions of articles 813 to 821 inclusive, of this chapter." This legislative appreciation of the situation was again forgotten, however, since, in 1903, the legislature, in amending the list of counties, again fell into the same error, and reverted to the former language: "provisions of this chapter," and that language was carried into the revision of 1911. The legislature has acted on this provision as it appeared in the Civil Statutes (Rev. St. 1895, art. 5364). In 1901 it amended the provision (Acts 1901, ch. 107) and in 1911 (Acts 1911, ch. 5) repealed it, by repealing and re-enacting Title 111, of Rev. St. 1895, of which art. 5364 was a part. As the civil and criminal provisions were derived from the same source, it would seem to follow that an express repeal of one of the provisions would result in an implied repeal or a supercession of the other. In view of the doubt in the situation the provision is continued in this compilation.

Art. 1279. [823] [Superseded by art. 1267g, ante.]

Indictment.—Willson's Cr. Forms, 597.

Art. 1280. [824] Importation of sheep with scab.—If any person shall drive or cause to be driven into this state from any other

state or country, any sheep affected with scab or any other infectious or contagious disease, knowing the same to be so affected, he shall be fined not exceeding one thousand dollars. [Act Dec. 23, 1861, p. 21.]

See article 1265.

Explanatory.—This article, in so far as it relates to scab, has been, since its enactment in 1861, superseded by many acts of the legislature. See arts. 1266, 1267c, ante. But as the article also relates to "other infectious or contagious disease" it is perhaps still operative in that respect.

Indictment.—Willson's Cr. Forms, 599, 600, 602.

Art. 1281. [824a] Bringing infected animal into the state.—Any person who shall knowingly bring into this state any domestic animal which is infected with any contagious or infectious disease, or any animal which has been exposed to any contagious or infectious disease, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than five hundred nor more than five thousand dollars. [Act 1893, p. 72.]

Indictment.—Willson's Cr. Forms, 611.

Art. 1282. [824b] Obstructing live stock commissioner.—Any person who owns or is in possession of live stock, which is reported to be affected with any infectious or contagious disease, who shall refuse to allow the state live stock sanitary commissioners to examine such stock, or shall hinder or obstruct the said commissioners in any examination of, or in any attempt to examine, such stock, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars. [Id.]

See arts. 1284a-1284h, post, and arts. 7312-7324, Vernon's Sayles' Civ. St. 1914.

Indictment.—Willson's Cr. Forms, 612.

Art. 1283. [824c] Owner permitting infected animal to run at large.—Any person who shall have in his possession any domestic animal affected with any contagious or infectious disease, knowing such animal to be affected, who shall permit such animal to run at large, or who shall keep such animal where other domestic animals, not affected by or previously exposed to such disease, may be exposed to its contagion or infection, or who shall ship, drive, sell, trade, or give away, such diseased animal or animals which have been exposed to such infection or contagion, or who shall move or drive any domestic animal in violation of any direction, rule, regulation, or order of the live stock sanitary commission of Texas establishing and regulating live stock quarantine, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars for each of such exposed or diseased domestic animals which he shall permit to run at large, or sell, ship, drive, trade or give away in violation of the provisions of this article; provided, that any owner of a domestic animal, which has been affected with or exposed to any contagious or infectious disease, may dispose of the same, after having obtained from the state live stock sanitary commissioners a bill of health for such animal or animals. [Id.]

See arts. 1284a-1284h, post, and arts. 7312-7324, Vernon's Sayles' Civ. St. 1914.

Information.—Willson's Cr. Forms, 613.

An information, charging that accused, after cattle owned by him had been duly quarantined by an inspector for the live stock sanitary commission, and after the inspector had ordered him to confine the cattle, which were affected with a contagious and infectious disease, and not to remove or permit them to be removed from the premises where they then were, knowingly and unlawfully drove and moved them and permitted them to go from such premises on other premises, in violation of the order and regulation of the inspector, did not charge an offense, since, while the law authorizes the commission to establish rules and regulations, to establish quarantine, etc., it does not authorize an inspector to do so, and the

information did not charge a violation of any rule or regulation of the commission, but merely a violation of the order of the inspector. *Rhea v. State*, 70 App. 258, 156 S. W. 643.

Verdict.—Where one of the counts submitted attempted to charge a violation of the rules and regulations of the live stock sanitary commission, while the others charged violations of article 1283, and the verdict found accused guilty of "breaking the laws of the live stock sanitary commission," the verdict could not, for the purpose of upholding a conviction, be applied to the counts charging a violation of article 1283, since, while a verdict general in its terms may be applied to any count submitted, a verdict which makes a specific finding as to the count under which accused is found guilty cannot be so applied. *Rhea v. State*, 70 App. 258, 156 S. W. 643.

Art. 1284. [824d] Penalties.—Except as otherwise provided in this law, any person who shall violate, disregard, or evade, or attempt to violate, disregard or evade, any of the provisions of this law, or who shall violate, disregard, or evade, or attempt to violate, disregard, or evade, any of the rules, regulations, orders, or directions of the live stock sanitary commission, establishing and governing quarantine, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one hundred nor more than five thousand dollars.

Explanatory.—The above provision constitutes section 13 of Acts 1893, p. 70, relating to the Live Stock Sanitary Commission, and, hence, it applies only to the three preceding articles.

Art. 1284a. Powers of Live Stock Sanitary Commission; quarantine regulations; inspection and dipping of sheep affected with scab; refusal of owner to permit dipping; cost of dipping and recovery thereof from owner; inspectors; compensation.—It shall be the duty of the Commission provided for in Article 7312 [Rev. St. 1911] to protect the domestic animals of this state from all contagious or infectious diseases of a malignant character, including cholera in hogs, whether said diseases exist in Texas or elsewhere; and for this purpose they are hereby authorized and empowered to establish, maintain and enforce such quarantine lines and sanitary rules and regulations as they may deem necessary. It shall also be the duty of said Commission to co-operate with livestock quarantine commissioners and officers of other states and territories, and with the United States Secretary of Agriculture, in establishing such interstate quarantine lines, rules and regulations as shall best protect the livestock industry of this state against Texas or splenic fever and scabbies in sheep. It shall be the duty of said Commission upon receipt by them of reliable information of the evidence among the domestic animals of the state of any malignant disease, including scabbies in sheep and cholera in hogs, to go at once to the place where any such disease is alleged to exist and make a careful examination of the animals believed to be affected with any such disease, and ascertain, if possible, what, if any, disease exists among the livestock reported to be affected and whether the same is contagious or infectious; and if said disease is found to be of a malignant contagious or infectious character, they shall direct and enforce such quarantined lines and sanitary regulations as are necessary to prevent the spread of any such disease. And no domestic animal infected with disease, or capable of communicating same, shall be permitted to enter or leave the district, premises or grounds so quarantined, except by authority of the Commission. The said Commission shall also, from time to time, give and enforce such directions and prescribe such rules and regulations as to separating, feeding and caring for such diseased and exposed animals as they shall deem necessary to prevent the animals so affected with such disease from coming in contact with other animals not so affected. And the said Commissioners are hereby authorized and empowered to enter upon any grounds or premises, to carry out the provisions of this Act. If scab or scabbies are found in any flock of sheep when same

is inspected, which inspection shall be made whenever the Commission may receive information by notification by any citizen or otherwise that scab probably exists, any member of said Commission, or an inspector appointed by said Commission, shall have the power, and he is hereby given the power, to inspect and dip said sheep at the owner's expense; and if any owner or owners shall refuse to permit said sheep to be dipped after having been examined and condemned by said Commission, he shall be fined in any amount not less than fifty dollars, nor more than two hundred dollars, and if any owner or owners shall refuse to pay the actual cost of said dipping, the Commission, as hereinbefore provided, shall have the right to bring civil action against such owner or owners, in the county where said sheep are so inspected, for the sum or sums actually paid out as the expense of said inspection and dipping; provided, that in case the Live Stock Sanitary Commission shall not have sufficient number of inspectors to execute the provisions of this law, then the Commission may appoint a resident sheep inspector to serve in one or more counties whenever it is necessary to do so, provided the Commissioners Court in said county or counties shall agree to pay the salary of said inspector, or their pro rata of said salary based upon the number of sheep in each county as shown by the tax roll of said counties, where the duties of inspector are performed in more than one county. Said inspectors shall be paid a salary of not less than twenty-five dollars per month nor more than one hundred dollars per month. Such inspectors shall be practical and experienced sheepmen; they shall be under the exclusive control of the Livestock Sanitary Commission, and shall be subject to removal by said Livestock Sanitary Commission, or either of said Commissioners, whenever said Commission or Commissioners shall deem necessary to do so. [Act 1883, ch. 54; Act 22d Leg., p. 140; Act 1911, ch. 5; Act 1913, ch. 169, § 1; Act 1913, ch. 176, §§ 1-3; Act 1915, p. 167, ch. 111, § 1, amending art. 7314, Rev. St. 1911.]

Explanatory.—Acts 1915, ch. 111, does not, in its body, expressly repeal Act 1911, ch. 5, or any part thereof. Its title however recites, among other things, that one of the purposes of the new act is the "repealing the present law passed by the Thirty-Second Legislature relative to appointing inspectors, and the eradication of scab." It contains no more than the usual general repealing clause. It would seem, therefore, that the act of 1915 supersedes, if it does not repeal, that part of the act of 1911 dealing with the subject of county and state inspectors.

Validity.—Acts 33d Leg. c. 169, authorizing the Governor and sanitary commission to fix quarantine lines to prevent the spread of Texas fever, etc., is not a delegation of legislative authority which renders it invalid, for the act prescribes that when the Governor and commission deem it necessary to protect live stock such lines shall be established. *Smith v. State* (Cr. App.) 168 S. W. 522.

Quarantine line fixed before law went into effect.—The Governor and the sanitary commission, which was required by Rev. St. 1911, art. 7322, to fix quarantine lines to prevent the spread of Texas fever, etc., so as to conform to the federal quarantine line, and was created long prior to the passage of Acts 33d Leg. c. 169, authorizing the Governor and commission to fix a different line, may, between the date of passage and the time the new act went into effect, fix a new line which would become effective at the same time that the act became effective. *Smith v. State* (Cr. App.) 168 S. W. 522.

Art. 1284aa. Live Stock Sanitary Commission to establish quarantine; unlawful to transport diseased animals; rules and regulations; State Veterinarian; entry on premises to make inspection; seizure of animals moved in violation of law.—[It shall be the duty of the Commission provided for in Article 7312 (Rev. St. 1911) to protect the domestic animals of the State from all contagious, infectious diseases of a communicable character, whether said diseases exist in Texas or elsewhere; and for this purpose it is hereby authorized and empowered to establish, maintain and enforce such quarantine lines and sanitary rules and regulations as it may deem necessary. It shall also be the duty of said Commission to co-operate with the live stock sanitary commission and officers of other

states and with the United States Secretary of Agriculture in establishing such interstate quarantine lines, rules and regulations as shall best protect the live stock industry of this State against Texas splenic fever and other contagious, infectious and communicable diseases of live stock.] It shall also be the duty of said Live Stock Sanitary Commission to quarantine any district, county or part of county within this State when it shall determine the fact that cattle or other live stock in such district, county or part of county, are affected with any contagious, infectious or communicable disease, or with the agency of transmission of such diseases, and to give written or printed notice of the establishment of such quarantines to the proper officers of railroads and express companies doing business in or through such quarantine district, county or part of county within this State, and to publish notice of the establishment of such quarantine in such newspapers in the quarantine district, county or part of county as the Live Stock Sanitary Commission may select, or give notice in such other ways as it deems necessary. And no railroad or express company shall receive for transportation or transport from any quarantine district, county or part of county in this State into any other district, county or part of county within this State, any cattle or live stock except as hereinafter provided. Nor shall any person, company, or corporation deliver for transportation to any railroad or express company, any cattle or other live stock of or from a quarantined area except as hereinafter provided. Nor shall any person, company or corporation drive on foot or cause to be driven on foot or transport in private conveyance or cause to be transported in private conveyance, from a quarantined district, county or part of county into any other district, county or part of county of this State any cattle or other live stock, except as hereinafter provided. It shall be the duty of the Live Stock Sanitary Commission of Texas, and it is hereby authorized and directed, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, treatment, handling and method and manner of delivery and shipment of cattle and other live stock from a quarantined district, county or part of county into any other district, county or part of county in this State, and the Live Stock Sanitary Commission of Texas shall give notice of such rules and regulation by proclamation issued by the Governor, and the said Live Stock Sanitary Commission of Texas is hereby especially empowered with the authority to employ a State Veterinarian, and assistant State Veterinarians in time of emergency, and inspectors or other persons as it may deem necessary to the performance of the duties imposed upon said Commission. The Live Stock Sanitary Commission, the State Veterinarian, Assistant State Veterinarians, and inspectors acting under authority or direction of the Commission, are hereby empowered and it is made their duty to enter upon premises of any person, or persons, company or corporation, within the State, for the purpose of inspecting, quarantining or disinfecting premises or live stock thereon. Whenever any person shall move any animal which is quarantined or which is by law or by the rules and regulations of the Live Stock Sanitary Commission prohibited from being so moved, across any quarantine line, out of any quarantined district, or of quarantined premises in violation of the law or of the rules and regulations of the Live Stock Sanitary Commission or without its consent, the said Commission, the chairman thereof, or any inspector acting under his direction, shall be authorized (authorized) and empowered to seize such animal or animals and call to their aid the sheriff of the county in which they may be found or through which they may have moved, in violation of law or the rules and regula-

tions of the Live Stock Sanitary Commission, and it will be the duty of said sheriff to return such animal or animals to the place, county or quarantined area from which so moved. [Act 1913, p. 353, ch. 169, § 1.]

Explanatory.—The words in brackets are superseded by art. 1284a. Act 1913, ch. 169, § 9 repeals art. 7322, Revised St.

Art. 1284b. Cattle may be moved under rules and regulations of Live Stock Sanitary Commission.—That cattle or other live stock may be moved from a quarantined district, county or part of county, or from quarantined premises into any other district, county, part of county, or premises, under and in compliance with the rules and regulations of the Live Stock Sanitary Commission, as proclaimed by the Governor, but it shall be unlawful to move or allow to move any cattle or other live stock from any quarantined district, county, part of county or premises, to any other district, county, part of county or premises, in manner, method or conditions other than those prescribed by the Live Stock Sanitary Commission and proclaimed by the Governor. [Id., § 2.]

Art. 1284c. Special quarantine districts for particular diseases; unlawful to remove cattle; methods of eradicating diseases; dipping live stock.—It is further [further] provided that the Live Stock Sanitary Commission shall have the power, and it is hereby made its duty to as far as possible eradicate Texas or splenic fever, the scabies, anthrax, tuberculosis, hog cholera, glanders and other infectious, contagious or communicable diseases of live stock, and for this purpose it is empowered to establish special quarantined districts, where such diseases or the infection of such diseases are known to exist, and notice of the establishment of such special quarantined districts shall be given as provided for in Article 7314. [Rev. St. 1911.] The Live Stock Sanitary Commission shall have power to quarantine premises or pastures located in such special quarantined districts, and the domestic live stock thereon situated in such quarantined districts, or elsewhere when, to their knowledge, such pastures or premises or the live stock located thereon are infected with or have been exposed to a contagious, infectious or communicable disease or the infection thereof, and no live stock shall be moved to or from such special quarantined district, pastures or premises, in a manner, method or other condition other than those prescribed by the Live Stock Sanitary Commission. It will be the duty of the Live Stock Sanitary Commission to prescribe methods for dipping or otherwise treating or disinfecting such premises and the live stock thereon, as in their opinion are necessary for the eradication of the disease or the infection of the disease for which they are quarantined and when any person, company or corporation, owning, controlling or caring for such live stock, shall fail or refuse to dip or otherwise treat such live stock or disinfect premises at such time and in such manner as directed by the Live Stock Sanitary Commission, then the Live Stock Sanitary Commission shall have power to call upon the sheriff of the county in which such live stock are found, and it will be the duty of said sheriff, together with the inspector, to dip or otherwise treat such live stock in a manner and at such time as the Live Stock Sanitary Commission shall direct; and the said sheriff shall keep said cattle in his custody subject to such quarantine instruction as he shall receive from such officers. No officer who shall seize such live stock for dipping or treatment shall be liable to the owner thereof for damages for such taking, or by reason of such dipping or treatment; provided, the dipping or treatment has been done in accordance with the methods approved by the said Live Stock Sanitary Commission. [Id., § 3.]

Art. 1284d. Owners in special quarantined area to treat live stock.—It shall be the duty of any person in any county who is the owner or caretaker of any live stock located in a special quarantined area established under the authority of Section 3 of this Act [art. 1284c], known by the live stock inspector to be infected with ticks (*Margaropus Analatus*) or scabies infection are exposed to infection or agent of transmission of any other infectious, contagious or communicable disease to treat such live stock and at such times and in such manner as shall be directed by the Live Stock Sanitary Commission. [Id., § 4.]

Civil penalty.—See Vernon's Sayles' Civ. St. 1914, art. 7317.

Art. 1284e. Duties of commissioners' court; disinfection of premises.—It shall be the duty of the commissioners court to co-operate with and assist the Live Stock Sanitary Commission in protecting the live stock of their respective counties from all contagious, infectious or communicable diseases, whether such exists within or outside of the county, and in other ways protecting the live stock interest of their counties. It shall be the duty of said commissioners' court to co-operate with the Live Stock Sanitary Commissioner [Commission] and the officers working under the authority or direction of said Commission in the suppression and eradication of contagious, infectious or communicable diseases. Provided, when it becomes necessary to disinfect any premises under order of the Live Stock Sanitary Commission, the county judge shall have such disinfecting done at the expense of the county, and in no case shall the owner, or lessee or tenant of the premises be held answerable to any of the provisions of this Act by reason of the fact that the county fails to disinfect the premises, as herein provided. [Id., § 5.]

Art. 1284f. Penalty for violation of act.—Any person, company or corporation violating any of the provisions of this Act, or any of the rules or regulations prescribed to the Live Stock Sanitary Commission, shall be deemed guilty of a misdemeanor and on conviction shall be punished by a fine of not less than fifty nor more than one thousand dollars. [Id., § 6.]

Art. 1284g. Failure to dip animals.—Any person, company or corporation owning, controlling or caring for any domestic animals affected with or known to have been exposed to any contagious or infectious disease or the agency or transmission thereof, who shall fail or refuse to dip or otherwise treat such live stock at such time and in such manner as directed by the Live Stock Sanitary Commission, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty dollars nor more than one thousand dollars. [Id., § 7.]

Art. 1284h. Tick eradication; election.—It shall be the duty of the commissioners court of any county lying and being situated south or east of the Federal quarantine line to order an election in said county when petitioned to do so by seventy-five resident land owners of the county for the purpose of determining whether the county shall take up the work of tick eradication in said county. Said election to be ordered not less than thirty days nor more than sixty days after the filing of said petition. At said election the ballots shall have printed upon them, "For Tick Eradication in _____county," and "Against Tick Eradication in _____county." The officers of said election shall hold said election and make returns thereof as provided by law, in case of other elections as nearly as may be. Said returns shall be made returnable to the county judge of the county. The commissioner's court shall meet

and canvass said returns as soon as practicable after such election and if they shall find that a majority of all the votes were in favor of tick eradication under the direction of the Live Stock Sanitary Commission, they shall so certify and cause publication of same to be made in a newspaper published in said county. The county judge shall so notify the Live Stock Sanitary Commission and upon receipt of such notice from the county judge of the county so holding such election, the Live Stock Sanitary Commission shall cause to be issued a supplemental proclamation signed by the Governor proclaiming a quarantine around said county, and the citizens of said county, in co-operation with, and under the direction of, the Live Stock Sanitary Commission, shall begin the work of tick eradication within thirty days of the issuance of the said supplemental proclamation. Should the commissioner's court find that a majority of the votes cast were against tick eradication, then the county judge shall so notify the Live Stock Sanitary Commission and on and after such notice by the county judge of the county judge of the county holding such election the Live Stock Sanitary Commission shall be denied the right to take up the work of tick eradication in said county, and the provisions of this Act with reference to tick eradication and the establishment of special quarantines in reference thereto shall not be in effect in said county. [Id., § 8.]

See Const. art. 16, § 23, Vernon's Sayles' Civ. St. 1914, vol. 1, p. lxxv.

Arts. 1285-1288. [Amended. See post, arts. 1288a-1288o.]

Indictment.—Willson's Cr. Forms, 728, 729.

Art. 1288a. State entomologist; duties and powers; assistants and inspectors; annual report.—That for the purpose of carrying out the provisions of this Act, the entomologist of the Agricultural Experiment Station of the Agricultural & Mechanical College of Texas shall be the State Entomologist of this State, and as such it shall be his duty to enforce the provisions of this Act and to issue such rules, regulations, etc., as are hereinafter required. As State Entomologist he shall receive no fees or remuneration other than his regular salary as Entomologist of the Experiment Station and State Entomologist; provided, that he may be reimbursed for necessary expenses incurred in discharge of his duties as State Entomologist. He shall employ such assistants and inspectors as may be necessary, subject to the approval and confirmation of the Director and Governing Board of the Texas Agricultural Experiment Station. He shall make an annual report to the Director and Governing Board of the Experiment Station, such report giving a detailed account of all funds received and disbursed, and for what purpose, as well as a full report upon all prosecutions, etc., made under the provisions of this Act. [Act 1903, ch. 126, amended; Act 1913, p. 96, ch. 51, § 2.]

Art. 1288b. Power to deal with diseases; prohibiting shipments into state.—The said State Entomologist shall have full and plenary power to deal with all contagious or infectious diseases of honey bees which, in his opinion, may be prevented, controlled or eradicated; and shall have full power and authority to make, promulgate and enforce such rules, ordinances, orders and regulations, and to do and perform such acts as, in his judgment, may be necessary to control, eradicate or prevent the introduction, spread or dissemination of any all contagious diseases of honey bees as far as may be possible, and all the rules, ordinances, orders and regulations of said State Entomologist shall have the force and effect of law in so far as they conform to the General Laws of this State and the United States. The State Entomologist, in the exercise of the power and authority herein delegated, shall have authority to prohibit the shipment or bringing into this State of any honey bees, honey, honey-

comb, or articles or things capable of transmitting contagious or infectious diseases of bees, from any state, territory or foreign country, except under such rules and regulations as may be adopted and promulgated by said State Entomologist. [Id., § 3.]

Art. 1288c. Bees shipped into state to be accompanied by certificate of official entomologist of state of shipment; shipper to file certified copy; evidence in lieu of certificate; confiscation, etc.—All honey bees shipped or moved into this State shall be accompanied by a certificate of inspection signed by the State Entomologist or State Foul Brood Inspector of the state or country from which shipped. Such certificate shall certify to the apparent freedom of the bees, and their combs and hives, from contagious and infectious diseases and must be based upon an actual inspection of the bees themselves within a period of sixty days preceding date of shipment. The shipper of such bees is hereby required to file with the State Entomologist at College Station, Texas, at least ten days in advance of such shipment, a certified copy of said certificate, together with the names and addresses of both consignor and consignee; provided, that when honey bees are to be shipped into this State from other states or countries wherein no official apiary inspector or state entomologist is available, the State Entomologist of Texas may issue permit for such shipment upon presentation of suitable evidence showing such bees to be free from diseases. Shipments of bees arriving at points within this State, not accompanied by the certificate herein described, shall be subject to confiscation and destruction by the State Entomologist or his assistants. This requirement shall not apply to shipments of live bees in wire cages, when without combs or honey. [Id., § 4.]

Art. 1288d. Carriers not to accept shipments except under regulations.—It shall be unlawful for railroad companies, express companies and other common carriers to accept for shipment, between points within this State, any honey bees, used honey combs, used bee hives or fixtures, except under such regulations and provisions as the State Entomologist shall prescribe. [Id., § 5.]

Art. 1288e. Authority to declare protective quarantine, etc.—The State Entomologist shall have authority to declare a protective quarantine in any district, county, precinct or other defined area wherein foul brood or other contagious disease of bees is not known to exist, or wherein any disease of bees is being eradicated in accordance with the provisions of this Act, said quarantine to prohibit the movement or shipment, into said district, county, precinct or other area, of any bees, honey, appliances or other things capable of transmitting the disease or infection, except under such rules and regulations as he shall prescribe. [Id., § 8.]

Art. 1288f. Authority to place restrictive quarantine, etc.—The State Entomologist shall have authority when, in his opinion, public welfare and necessity require it, to place a restrictive quarantine upon any district, county, precinct or other defined area wherein are located any honey bees infected with contagious or infectious disease, said quarantine to prohibit the movement or shipment therefrom of any bees, honey, appliances or other things capable of transmitting the infection, except under such rules and regulations as he shall prescribe. [Id., § 9.]

Art. 1288g. Queen bees not to be sold without copy of certificate, etc.—Queen bees and their attendant bees shall not be sold or offered for sale in this State unless accompanied by a copy of a certificate from a State or Government entomologist or apiary inspector to the effect that the apiary from which said queen bees are ship-

ped has been inspected within the preceding twelve months and found apparently free from contagious and infectious diseases, or by a copy of a statement by the beekeeper made before a notary public or other officer having a seal that the bees are not diseased to the best belief of affiant and that the honey used in making the candy contained in the queen cage has been diluted and boiled for at least thirty minutes in a closed vessel. [Id., § 10.]

Art. 1288h. Violation of provisions, etc., a misdemeanor; prosecutions; injunctions; duties of attorney general and district attorneys; production of documents; witnesses; duties of sheriffs and constables, etc.—Any person, firm or corporation violating any of the provisions of this Act, or violating any of the rules, quarantines, orders or regulations of the State Entomologist issued in accordance with the provisions of this Act, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined in any sum not less than twenty-five nor more than two hundred dollars. All prosecutions under this Act shall be commenced and carried on in any county of the State affected by the violation of said orders, quarantines, rules or regulations, and the said State Entomologist may enjoin any threatened or attempted violation of his orders, quarantines, rules or regulations in any court of competent jurisdiction, or take any other civil proceedings necessary to carry out and enforce the provisions of this Act. It shall be the duty of the Attorney General and the various county and district attorneys to represent said State Entomologist whenever called on to do so; and said State Entomologist, in the discharge and enforcement of the duties and powers herein delegated, shall have the authority to compel the production for examination by said State Entomologist, or any one designated by him, of all books, papers and documents in the possession of any person; to take testimony, and compel the attendance and examination under oath of witnesses; and it is hereby made the duty of the various sheriffs and constables throughout the State to serve all papers, orders, summons and writs, that may be delivered to them by said State Entomologist and to protect the State Entomologist or his assistants or inspectors in the discharge of their duties, as herein defined whenever called upon to do so. The said State Entomologist is authorized when necessary to apply to any court of competent jurisdiction for the necessary writs and orders to enforce the provisions of this Article, and in such cases he shall not be required to give bond. [Id., § 11.]

Art. 1288i. Entomologist to publish directions, rules and information, etc.—For the purpose of disseminating knowledge regarding honey bees and their diseases, the State Entomologist shall publish methods and directions for treating, eradicating or suppressing contagious or infectious diseases of honey bees, including the rules and regulations provided for in Sections 2, 3, 5, 8 and 9 [arts. 1288a, 1288b, 1288d–1288f] and such other information as he shall deem of value or necessity to the beekeeping interests of the State. [Id., § 12.]

Art. 1288j. Bees affected with foul brood, etc., to be reported by owner, etc.—If any owner of, or any person having control or possession of any honey bees in this State, knows that any bees so owned or controlled are affected with American foul brood, or any other contagious or infectious disease, or knows of any other bees so diseased, it shall be and is hereby made his duty to at once report such fact to the State Entomologist at College Station, Texas, setting out in his said report all the facts known with reference to said infection. [Id., § 13.]

Art. 1288k. Power to transfer bees to movable frame hives, etc.—The State Entomologist shall have full power in his discretion to order any owner or possessor of bees dwelling in hives without movable frames, or not permitting of ready examination, to transfer such bees to a movable frame hive within a specified time. In default of such transfer the State Entomologist may destroy, or order destroyed, such hives, together with the honey, frames, combs and bees contained therein, without recompense to the owner, lessee or agent thereof. [Id., § 14.]

Art. 1288l. Penalty for sale or shipment of infected bees.—If any owner or keeper of any diseased colonies of bees shall barter, give away, sell, ship or move any infected bees, honey or appliances, or shall expose any other bees to the danger of infection of the disease, or shall refuse or neglect to make report as provided in Section 13 of this Act [art. 1288j], he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five nor more than two hundred dollars. [Id., § 17.]

Art. 1288m. Exposing honey, etc., infected with foul brood.—It shall be unlawful for any person, firm or corporation to expose, on their own premises or elsewhere, any honey, hives, frames, combs, brood or appliances known to be infected by foul brood or other dangerous disease of bees, in such a manner that honey bees may have access to same; and it shall be unlawful to sell, offer for sale, barter, give away, ship or distribute any honey taken from a colony or colonies of bees infected with foul brood or other infectious or contagious disease. Violation of this Section shall be deemed a misdemeanor and any person, firm or corporation convicted thereof shall be fined in any sum not less than twenty-five nor more than two hundred dollars. [Id., § 18.]

Art. 1288n. Preventing inspection or detection of disease.—Any one who shall seek to prevent any inspection of bees, honey or appliances under the direction of the State Entomologist, in accordance with this Act, or who shall seek or attempt to prevent the discovery or treatment of diseased honey bees, or who shall attempt to intimidate the State Entomologist, his assistants or inspectors, or otherwise interfere with them in the lawful discharge of their duties as herein defined shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined in any sum not less than twenty-five nor more than two hundred dollars. Prosecutions under the provisions of this Section shall be instituted in any county of the State in which the offense is committed. [Id., § 19.]

Art. 1288o. Disposition of fines.—All fines collected for prosecutions under the provisions of this Act shall be paid to the State Treasurer, to become a part of the fund for carrying out the provisions of this Act. [Id., § 20.]

CHAPTER FIVE

OF CUTTING AND DESTROYING TIMBER

Art.	Art.
1289. Punishment for.	can timber without consent of owner.
1290. "Timber" and "owner" include what.	1297. Person floating timber shall brand same.
1291. Procedure in prosecutions.	1298. Shall have brand recorded.
1292. Modes of proving ownership.	1299. Shall make report of logs cut, etc.
1293. Road repairs, etc., not included.	1300. Certificate of clerk evidence of ownership.
1294. If the offense is theft, punishable as such.	1301. Offenses and punishment—definitions.
1295. Destroying pecan or walnut timber.	1302. Venue.
1296. Gathering pecans or injuring pe-	

Article 1289. [825] Punishment for.—If any person, without the consent of the owner, shall knowingly cut down or destroy any tree or timber upon any land not his own, or shall knowingly, and without such consent, carry away any such timber, he shall be fined not less than ten nor more than five hundred dollars.

What constitutes offense.—If defendant purchased the land from another and believed it to be his he was not guilty. *Lackey v. State*, 14 App. 164.

Subletting without consent of the landlord being forbidden by *Vernon's Sayles'* Civ. St. 1914, art. 5489, one can be convicted of carrying timber off the land of another, though he purchased it in good faith of one to whom the premises had been sublet without consent of the owner; he having been informed of the facts by the owner's son, and forbidden to remove the timber, and being bound to know the law. *Lindley v. State* (Cr. App.) 44 S. W. 165.

The defendant to be convicted under this article must knowingly cut timber on land not his own. If he mistakenly believes that the land is his he cannot be convicted. *Allsup v. State* (Cr. App.) 62 S. W. 1062.

Indictment and evidence thereunder.—*Willson's Cr. Forms*, 614.

An indictment charging that defendant did then and there unlawfully, knowingly and wilfully, without the consent of the owner thereof, cut down, destroy and carry away trees and timber upon land not his own, to wit upon land known as the M. survey, held sufficient. *Leggett v. State*, 25 App. 535, 8 S. W. 660.

Where an indictment charges defendant with knowingly cutting timber on a certain survey, evidence that the land was not in such survey is fatal to conviction, though it was not necessary to allege in the information the name of the survey. *Evans v. State* (Cr. App.) 40 S. W. 988.

Charge of court.—For a charge correctly defining "timber" see *Wilson v. State*, 17 App. 393; ante, art. 1290. Where the evidence showed that the title to the land was in dispute, and that the defendant had purchased the timber from one of the disputants, it was held that the court should have instructed the jury that if they believed from the evidence that the defendant purchased the timber, believing it to be the property of the person from whom he purchased it, and made such purchase in good faith, he would not be guilty of this offense. *Lackey v. State*, 14 App. 164. Where the evidence showed that the land from which the timber was cut was in the possession of the defendant as well as of the alleged owner thereof, the court should have instructed the jury that if they believed from the evidence that at the time of cutting the timber the defendant had notorious possession and use of the land, evidence that another person also had notorious possession and use thereof would not be sufficient proof that the defendant was not the owner of the land. *White v. State*, 14 App. 449. Where the facts demand it, the court should instruct the jury that the husband has the legal right to use, manage, and control the land of the wife, and to cut timber therefrom. *White v. State*, 14 App. 449.

Where the issue was ownership of the land—the determination depending on the dividing line of certain surveys—a requested charge that if there was a reasonable doubt as to whether or not the timber was cut on the survey under which prosecutor claimed, defendant should be acquitted, should have been given. *Mann v. State*, 47 App. 250, 83 S. W. 195.

Art. 1290. [826] "Timber" and "owner" include what.—The word "timber," as used in the preceding article, includes rails or other articles manufactured from timber; and the word "owner" includes the state and any corporation, public or private, owning lands within this state.

"Timber" defined.—The word "timber," as used in this article, is that sort of wood which is proper for building, or for tools, utensils, furniture, carriages, fences, ships, and the like, usually said of fallen trees, but sometimes of those standing. Wood suitable only for fuel does not come within the meaning of the word "timber." *Wilson v. State*, 17 App. 393. Before the enactment of this article, "fence rails" were held not to be "timber" within the meaning of article 1289. *McCauley v. State*, 43 Tex. 374.

State as "owner."—Before the adoption of this article it was held that it was no offense to cut timber from state lands (*Hart. Dig.* 493). *State v. Howard*, 21 Tex. 416. And see art. 24.

Indictment.—*Willson's Cr. Forms*, 614.

Art. 1291. [827] Procedure in prosecutions.—In any prosecution under article 1289, the indictment or information need not allege the name of the owner of the timber, but it shall be sufficient for it to state that the timber was not the property of the accused; and it shall be sufficient to describe the land by the name of the owner, or of the original grantee, or by any name or names by which it may be commonly known in the neighborhood in which the alleged offense was committed.

Indictment or information.—*Willson's Cr. Forms*, 614.

See, also, note under article 1296, post.

Where the indictment charges defendant with the cutting and carrying away proof of either cutting or carrying away is sufficient. *Welsh v. State*, 11 Tex. 368.

Before the revision of 1879, it was not necessary for the indictment to describe the lands by metes and bounds, or by the name of the original grantee, but only by the name of the owner. Indictment held sufficient which charged that accused cut and carried away timber "upon land not his own." *State v. Warren*, 13 Tex. 45.

The indictment may charge conjunctively that the defendant cut down and carried away the timber, and proof that he did either will support the charge. It must be alleged that the act was "knowingly" committed. To allege merely that it was "unlawfully" committed will not be sufficient. *State v. Stalls*, 37 Tex. 440; *Welsh v. State*, 11 Tex. 368. Nor is it sufficient to charge that the act was done "willfully." *State v. Arnold*, 39 Tex. 74.

— **Proof and variance.**—A variance between the complaint and the information as to ownership will be fatal. *Calvert v. State*, 8 App. 538. See, also, *Leggett v. State*, 25 App. 535, 8 S. W. 660.

Failure to prove venue as alleged is fatal. *Leggett v. State*, 25 App. 535, 8 S. W. 660.

Art. 1292. [828] Modes of proving ownership.—Upon the trial of any case coming within the provisions of article 1289, the state may prove the ownership of the land to be in some person other than the defendant by either of the following modes:

1. By the copy of a grant duly certified from the general land office.

2. By a deed, or a copy of a deed, or other evidence of title, duly certified, from the office of the clerk of the county court of the county where the prosecution is pending.

3. By a certificate from the comptroller's office, or from the assessor and collector of the county, that some person other than the defendant pays taxes on the land.

4. By verbal testimony of title, or of notorious use and possession of the land by some person other than the defendant; and such proof shall be held sufficient until contradicted by competent evidence on the part of the defendant that he is the owner of the land. [Act Feb. 12, 1858, p. 179.]

Evidence.—Prima facie proof is all that is requisite to throw on the defendant the onus of proving license or superior title. But the burden is upon the state to prove prima facie that the timber was knowingly cut, etc., by the defendant from land not his own. *Belverman v. State*, 16 Tex. 130; *White v. State*, 14 App. 449. But the state is not required to prove that the defendant committed the act without the consent of the owner. It is for the defendant to show that he had the consent of the owner. *Welsh v. State*, 11 Tex. 368. Proof of possession is sufficient prima facie proof of ownership and such proof may be made by parol. *Phillips v. State*, 17 App. 169; *May v. State*, 15 App. 430. Admissions of the defendant that the ownership was as alleged in the indictment sufficiently proves that fact. *Welsh v. State*, 11 Tex. 368. But the declarations of a third person as to ownership are not evidence. *Belverman v. State*, 16 Tex. 130.

Evidence held insufficient to establish ownership in another than defendant. *White v. State*, 14 App. 449.

Charge held erroneous as shifting the burden of proof on defendants. *Matthews v. State* (Cr. App.) 42 S. W. 375.

Art. 1293. [829] Road repairs, etc., not included.—Nothing in the foregoing articles of this chapter contained shall render any person guilty of an offense who cuts or uses timber for the purpose of making or repairing any public road or bridge passing over or immediately adjacent to the land on which such tree or timber may be found, or who uses a reasonable amount of wood standing outside of an inclosure for the purpose of making fires while traveling upon the road.

Art. 1294. [830] If the offense is theft, punishable as such.—Nothing contained in the foregoing articles of this chapter shall exempt a person from the penalty affixed to the offense of theft whenever timber is taken in such manner as to come within the definition of that offense.

Art. 1295. [831] Destroying pecan or walnut timber.—If any person shall cut down or otherwise destroy or injure any pecan or walnut tree on land not his own without authority in writing from the owner of such pecan or walnut tree, he shall be punished by fine

of not less than twenty-five nor more than fifty dollars. [Act April 20, 1871, p. 42.]

Indictment.—Willson's Cr. Forms, 615.

Art. 1296. Gathering pecans or injuring pecan timber without consent of owner.—Any person who shall, hereafter, gather any pecan nuts upon inclosed land not owned, leased or controlled by him, unless it be made to appear in defense that it was done by the consent of the owner, lessor or person in control, or any person who shall cut, destroy, or injure any pecan timber upon lands not his own, unless it be made to appear in defense that it was done with the consent of the owner thereof, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than five dollars and not more than three hundred dollars, or by imprisonment in the county jail not more than three months, or by both such fine and imprisonment. [Act 1897, p. 53.]

Indictment.—Willson's Cr. Forms, 616, 617.

An indictment which alleges want of consent of owner is good. *Burrows v. State* (Cr. App.) 101 S. W. 232.

Art. 1297. [832] Person floating timber shall brand same.—Any person engaged in floating or rafting timber upon the waters of any river or creek of this state shall have a log brand with which to brand every log or stick that he may float or haul and put into the waters for sale or market, the same to be distinctly branded. [Act April 7, 1879, p. 81, § 1.]

Indictment.—Willson's Cr. Forms, 618.

Art. 1298. [833] Shall have brand recorded.—He shall have said brand recorded in every county in which he cuts any of said timber, and in the county where he proposes to sell or market said timber, by the county clerk, in a book to be kept by said clerk for that purpose, for which said clerk shall receive a fee the same as is by law allowed for recording stock brands. [*Id.*, § 2.]

Indictment.—Willson's Cr. Forms, 618.

Art. 1299. [834] Shall make report of logs cut, etc.—Any persons who float any logs or timber in this state shall, on the first day of April, first day of July, first day of October and the first day of January of each year, or within fifteen days of such dates, make a written report, under oath, showing the number of logs cut or floated during the next preceding three months, the survey or surveys of land from which they were cut or carried, and the number cut from each, and a description of the brand placed thereon, and shall file the same with the county clerk of the county in which the timber was cut; and such clerk shall record the same in a book kept for that purpose, and index it, and receive therefor the sum of fifty cents from the party presenting the same; provided, this act shall not apply to pickets, post, rails or firewood. [*Id.*, § 3.]

Art. 1300. [835] Certificate of clerk evidence of ownership.—A certificate, under the hand of the county clerk, containing a description of a log brand and the name of the owner thereof, with a transfer on the back of it, signed and acknowledged by such owner or proved as other instruments for record, shall be prima facie evidence that the person to whom the transfer is made owns the logs described thereon. [*Id.*, § 5.]

Art. 1301. [836] Offenses and punishment; definitions.—Any person who shall buy or sell any timber or log floating or that has been floated in this state, before the same has been branded, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not more than ten dollars for each log or piece of timber so purchased, sold or traded for. Any person who shall float any unbranded log or timber for market, or who shall fail to make the reports required

by this act, or any person who shall brand any log or timber of another without his authority, or any person who shall deface any brand on any log or timber otherwise than when it is in the act of being sawed or manufactured into lumber or other commodity for use in building, or any person not an employé of the owner, who shall, without the written consent of the owner, take into possession any branded or unbranded log or timber cut for floating or sawing, or any sawed timber, lumber or shingle, floating in any of the waters of this state, or deposited upon the banks of any river or stream in this state, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by fine not exceeding two hundred dollars for each offense. By "lumber" is meant lumber attached or bound together in some way for floating, and not loose lumber, and by "shingles" is meant shingles in bunches or bundles, and not loose shingles. [Id., § 5.]

See Willson's Cr. Forms, 618-623.

Art. 1302. [837] Venue.—The courts of the county in which the timber or lumber was deposited in the water, or in which it was unlawfully taken into possession or unlawfully defaced, sold, purchased or branded, as the case may be, shall have jurisdiction of the violation of the act or omission complained of or constituting an offense under this chapter. [Id., § 6.]

CHAPTER SIX OF BURGLARY

Art.	Art.
1303. "Burglary" defined.	1313. Burglary of private residence at night, distinct offense.
1304. Same subject.	1314. "Private residence" defined.
1305. "Burglary of private residence" defined.	1315. Burglary with explosives.
1306. "Entry" defined.	1316. Punishment for same.
1307. Further defined.	1317. Other offenses committed after entry punishable.
1308. "Breaking" defined.	1318. Same subject.
1309. "House" defined.	1319. Actual breaking necessary in case of domestic.
1310. "Day time" defined.	1320. Attempt at burglary, how punished.
1311. Punishment.	1321. "Attempt" defined.
1312. Punishment for burglary of private residence.	

Article 1303. [838] "Burglary" defined.—The offense of burglary is constituted by entering a house by force, threats or fraud, at night; or in like manner by entering a house at any time, either day or night, and remaining concealed therein, with the intent in either case of committing a felony or the crime of theft. [Act Aug. 21, 1876, p. 231; amended, Act 1897, p. 65.]

See notes under article 1304, post.

Indictment.—Willson's Cr. Forms, 624-628, 630.

Art. 1304. [839] Same subject.—He is also guilty of burglary who, with intent to commit a felony or theft by breaking, enters a house in the daytime.

1. Nature and elements of offense in general.	12. ——— Joinder of counts and election.
2. Felony.	13. ——— Proof and variance.
3. Intent.	14. Presumption and burden of proof.
4. What constitutes "house."	15. Admissibility of evidence—In general.
5. Breaking and entry.	16. ——— Evidence in general and criminal cases.
6. Nonconsent.	17. ——— Declarations, admissions and hearsay.
7. Principals and accomplices.	18. ——— Other offenses.
8. Burglary of private residence distinguished.	19. ——— Confession.
9. Burglary and theft in same transaction.	20. ——— Opinion evidence.
10. Indictment in general.	21. ——— Demonstrative evidence.
11. ——— Allegations as to ownership and occupancy.	22. ——— Testimony of accused.

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| <p>23. — Acts and declarations of conspirators.</p> <p>24. — Best and secondary evidence.</p> <p>25. — Evidence of character or reputation.</p> <p>26. — Knowledge or means of knowledge of witness.</p> <p>27. — Examination, impeachment and corroboration of witnesses in general.</p> <p>28. — Harmless error in the admission of evidence.</p> <p>29. — Cure of error.</p> <p>30. Sufficiency of evidence.</p> <p>31. Questions for jury.</p> <p>32. Instructions in general.</p> <p>33. — Conformity to indictment.</p> <p>34. — Possession of stolen property and explanation.</p> <p>35. — Instructions in criminal cases in general.</p> <p>36. — Instructions as to burden of proof and reasonable doubt.</p> <p>37. — Instructions on weight of evidence.</p> <p>38. — Instructions as to circumstantial evidence.</p> | <p>39. — Instructions as to accomplice testimony.</p> <p>40. — Instructions as to principals.</p> <p>41. — Instructions as to confessions.</p> <p>42. — Limiting evidence.</p> <p>43. — Instructions as to insanity, intoxication and burden of proving defenses.</p> <p>44. — Alibi.</p> <p>45. — Harmless error.</p> <p>46. — Necessity of exceptions to charge.</p> <p>47. Argument of counsel.</p> <p>48. Comments on failure of defendant to testify.</p> <p>49. Reopening case for further evidence.</p> <p>50. Requisites and sufficiency of verdict.</p> <p>51. Misconduct of jury.</p> <p>52. Commitment of juveniles to reformatory.</p> <p>53. Agreements not to prosecute.</p> <p>54. Disqualification of prosecuting attorney.</p> <p>55. Liability of children for offenses.</p> |
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1. **Nature and elements of offense in general.**—There are three modes by which a burglary may be committed: 1. By force. 2. By threats. 3. By fraud. There are three separate and distinct kinds of burglary contained in the statutory definition: 1. An entry made at night with the intent to commit felony or theft. 2. An entry in the daytime and remaining concealed in the house until night, with like intent. 3. An entry in the daytime with like intent. *Conoly v. State*, 2 App. 412; *Howard v. State* (Cr. App.) 178 S. W. 506. The entry need not be by all three. *Howard v. State* (Cr. App.) 178 S. W. 506.

On a trial for burglary with intent to commit theft, where defendant claimed that he was employed by a third party to assist him in taking and carrying away the goods from the house alleged to have been burglarized, held, that if, at the time of his employment, or during the interval elapsing before the store was entered, he either knew or had reasonable grounds to believe that the transaction in which he was engaged was dishonest, he would be guilty; or if, originally honest, he was put upon notice that the entry was fraudulent, his good faith at the inception of the enterprise would afford him no protection. *Connors v. State*, 31 App. 453, 20 S. W. 981.

Where defendant broke into a room under the exclusive control of another, the fact that he was an inmate of the house did not prevent the breaking from constituting burglary. *Hofland v. State*, 47 App. 623, 85 S. W. 798.

A railway porter, authorized or required to be in and around a passenger depot, did not commit burglary in breaking open a drawer in a public telephone booth located in the waiting room and stealing money therefrom. *Love v. State*, 52 App. 84, 105 S. W. 791.

In a prosecution for forcibly breaking and entering another's house in the night and taking property therefrom, it is sufficient that the person alleged to own the house had possession, charge, and control thereof and jointly owned it with another; it not being essential that he have the exclusive possession and control of the house. *Clark v. State*, 58 App. 181, 125 S. W. 12.

Nighttime "burglary" is properly defined as entering a house by force at nighttime with the intent of committing the crime of theft. *Griffith v. State*, 62 App. 642, 138 S. W. 1016.

One who forcibly enters a house and commits the crime of theft does not have to remain there until night to have his act constitute the offense of burglary. *Overstreet v. State* (Cr. App.) 150 S. W. 899.

A defendant is guilty of burglary and larceny of oats from a barn, even though he bought the oats from the owner's brother, who broke open the barn for him, if he knew at the time of the transaction that the brother had no authority to sell the oats. *Wilson v. State*, 71 App. 330, 158 S. W. 1114.

2. **Felony.**—Defendants, at night, burglarized, or attempted to burglarize, a store. They were armed to resist arrest. When detected by decedent and a third person they were asked to halt but made no inquiry of the object, and when called to halt a second time they shot and killed decedent. Neither of defendants knew, or could have known, that decedent and the third person did not have a warrant for their arrest. Held, that under articles 1303, and 1320, making a felony to commit the offense of burglary or to attempt to commit burglary, and C. C. P. 1911, art. 259, authorizing a peace officer or any other person to arrest without warrant when a felony is committed within his view, the issue of murder was raised. *Stewart v. State* (Cr. App.) 174 S. W. 1077.

3. **Intent.**—It is not material whether the intent with which the house was entered was actually carried into effect; or only demonstrated by the attempt, or by some overt act, to be decided by the jury from the facts in evidence. *Wilburn v. State*, 41 Tex. 237.

The intent with which the entrance was made is the essential element of burglary. The intent must be to commit a felony or theft. *Collins v. State*, 20 App. 197; *State v. Robertson*, 32 Tex. 159; *Allen v. State*, 18 App. 120. And such in-

tent must exist at the very time the house is entered. *Harris v. State*, 20 App. 652. And in case of burglary with intent to commit theft, such intent must be to permanently appropriate the property intended to be stolen. *Wilson v. State*, 18 App. 270, 51 Am. Rep. 309; *Schultz v. State*, 30 App. 94, 16 S. W. 756. But it is not material whether the intent is actually carried into effect. *Wilburn v. State*, 41 Tex. 237.

Breaking into an empty house and taking therefrom doors and window sash which were attached to the house at the time of the entry was burglary, as the act of severance converted such articles into chattels and the taking was theft. *Alvia v. State*, 42 App. 424, 60 S. W. 551.

In prosecution for burglary with intent to commit rape the state must prove the specific intent of defendant to have carnal intercourse with the female by the use of the force necessary to accomplish that purpose. *Mitchell alias Smith v. State*, 33 App. 575, 28 S. W. 475.

Article 1307 is but an addition to articles 1303 and 1304, and under the three articles, burglary may consist of entering a house by force, etc., or in entering a house and remaining therein with the intent to commit a felony, or by the discharge of firearms into a house with the intent to injure the person therein, and the intention need not be to commit a felony. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

To constitute burglary, an entry by force must be made with intent to commit theft. *Hollis v. State* (Cr. App.) 153 S. W. 853.

If the wrecking of saloons was for the purpose of stealing goods from them, all present and engaging in it would be guilty of burglary, but if the breaking was actuated only by a mob and riot spirit, with no intent to appropriate the property, there was no burglary. *Jobe v. State*, 72 App. 163, 161 S. W. 966.

The breaking of a show window of a store and the taking of shoes therefrom clearly showed that the breaking was for the purpose of committing the crime of theft. *Lewis v. State*, 72 App. 377, 162 S. W. 866.

4. What constitutes "house."—See article 1303 and notes.

5. Breaking and entry.—See as to what constitutes, articles 1306-1308, 1310, post, and notes thereunder.

When burglary is committed in the nighttime it is not necessary that there should be an actual breaking. *Alexander v. State*, 31 App. 359, 20 S. W. 756.

Breaking out of a store by one who entered and concealed himself during business hours without breaking, was not burglary. *Edwards v. State*, 36 App. 387, 37 S. W. 438.

An entry at night into a store during business hours with intent to conceal one's self held not a burglarious entry. *Edwards v. State*, 36 App. 387, 37 S. W. 438.

Construing 1303 and articles 1307 and 1308 together, where the evidence showed that the defendant inserted his hand through a glass already broken it was not burglary unless he intended to commit a felony. *Jones v. State*, 48 App. 336, 87 S. W. 1157.

An entry whether by night or day to constitute burglary must be by breaking and if in the day by breaking externally it must be an actual breaking. *Bates v. State*, 50 App. 568, 99 S. W. 551; *Newman v. State*, 55 App. 273, 116 S. W. 577.

An indictment charging accused with burglary followed the language of the statute, and the evidence showed that accused was in the house just before it was closed, and was later found moving around therein by the night watchman and arrested, and accused testified that he went into the house during the day looking for employment, and fell asleep, and found himself locked up when he awoke. Held that, to constitute burglary under the statute, accused must have entered the house in the daytime or night by force, threats, or fraud, and remained concealed with intent to commit a felony or theft therein, and the facts shown do not constitute burglary; not showing that accused entered by force, threats, or fraud. *Malley v. State*, 58 App. 425, 126 S. W. 598.

The term "breaking" required by article 1304, to constitute burglary, refers to breaking in the daytime, so that the removal of money from a house in the daytime through a window found open is not burglary. *Winkler v. State*, 58 App. 564, 126 S. W. 1134.

The essential ingredient of burglary is the felonious entry, and the intent may be to commit any felony or the crime of theft. *Polk v. State*, 60 App. 462, 132 S. W. 134.

Under the statute defining burglary at night, an actual breaking is not required, and it only requires, that an entry shall be made by force, such as opening a door that is shut, whether latched or not. *Jones v. State*, 60 App. 426, 132 S. W. 476.

While the possession of goods taken from a burglarized house is sufficient to justify a conviction for burglary where accused offers no explanation, proof of an actual breaking is essential. *Williams v. State* (Cr. App.) 156 S. W. 938.

6. Nonconsent.—The entry of a room or house with the free consent of the proprietor or occupant is not burglarious. *Turner v. State*, 24 App. 12, 5 S. W. 511.

It is not necessary to show non-consent of one who owned an interest in the property but who was not in possession. *Hurley v. State*, 35 App. 282, 33 S. W. 354.

Where the owner of a house was connected with the original design to break the house, and left the key thereof at a designated point for the purpose of enabling his confederates to induce accused to enter the house, this would authorize an acquittal in a prosecution for burglary on the ground that the owner had consented. *Bird v. State*, 49 App. 96, 90 S. W. 651, 122 Am. St. Rep. 803.

7. Principals and accomplices.—See notes under articles 74 and 79, ante.

8. Burglary of private residence distinguished.—One cannot now be prosecuted under article 1303 for burglarizing a private residence as article 1305 has

been added to the statutes making this a separate and distinct offense from burglary as defined in articles 1303 and 1304. *Harvey v. State* (Cr. App.) 61 S. W. 492.

A conviction cannot be had under article 1305, relating to burglary of a private dwelling, where the burglarized house is not alleged to be a private dwelling; that article and article 1312, relating to burglary in private residences, covering a distinct offense from that defined by article 1303 and article 1304—article 1312 providing that nothing in articles 1305 or 1312 shall repeal articles 1303 and 1304. *Malley v. State*, 58 App. 425, 126 S. W. 598.

The offenses described in this and article 1305 are distinct offenses, and a conviction cannot be had under article 1303, if the house burglarized was a private residence. *Alinis v. State*, 63 App. 272, 139 S. W. 980.

A building burglarized consisted of a storehouse in which a restaurant was conducted. The storehouse was divided into three rooms. The first was used as a dining room, the middle room for cooking, and the rear room was occupied by prosecutor and his wife as a bedroom. The room entered, and from which the property was stolen, was the cookroom. Held, that the premises did not constitute a "private residence," and that accused was properly prosecuted under article 1304, and not under article 1305, providing that the entry of a private residence, either in the day or night, shall constitute burglary. *Alinis v. State*, 63 App. 371, 140 S. W. 227.

9. Burglary and theft in same transaction.—See articles 1317 and 1318, post, and notes.

Where a party is charged in separate indictments for burglary and theft committed after the burglarious entry, he may be convicted of both offenses. *Loakman v. State*, 32 App. 563, 25 S. W. 22; *Rust v. State*, 31 App. 75, 19 S. W. 762; *Shepherd v. State*, 42 Tex. 501; *Robertson v. State*, 6 App. 669; *Struckman v. State*, 7 App. 581; *Howard v. State*, 8 App. 447; *Smith v. State*, 22 App. 350, 3 S. W. 238, holding a different doctrine, are overruled.

See, also, *Miller v. State*, 16 App. 417; *Turner v. State*, 22 App. 42, 2 S. W. 619; *Williams v. State*, 24 App. 69, 5 S. W. 838.

10. Indictment in general.—Willson's Cr. Forms, 630.

See, also, notes under articles 1305 and 1307, post.

Application of verdict to count supported by evidence, see C. C. P., 770 and notes.

See *Gonzales v. State*, 12 App. 657; *Alexander v. State*, 31 App. 359, 20 S. W. 756; *Jester v. State*, 26 App. 369, 9 S. W. 616.

The "intent" with which the act was committed must be expressly averred. *Reeves v. State*, 7 App. 276; *Black v. State*, 18 App. 124. And the particular offense intended to be committed must be described in the indictment, with all its statutory ingredients. A general charge that the entry was with intent to commit a felony, although the felony be named, will not be sufficient. And so it is insufficient to allege that the intent was to commit theft. The statutory elements of the offense intended to be committed must be set forth with the same completeness and particularity as would be requisite in an indictment for such intended offense. *Portwood v. State*, 29 Tex., 47, 94 Am. Dec. 258; *State v. Williams*, 41 Tex. 98; *Wilburn v. State*, Id. 237; *White v. State*, 1 App. 211; *Conoly v. State*, 2 App. 412; *Webster v. State*, 9 App. 75; *Rodriguez v. State*, 12 App. 552; *Reed v. State*, 14 App. 662; *Treadwell v. State*, 16 App. 643; *Taylor v. State*, 23 App. 639, 5 S. W. 141; *Williams v. State*, 24 App. 69, 5 S. W. 838; *Coleman v. State*, 26 App. 252, 9 S. W. 609; *Brown v. State*, 7 App. 619; *Allen v. State*, 18 App. 120. But where the indictment is for burglary with intent to commit theft it is not necessary to describe the property intended to be stolen, or to specify it. *Black v. State*, 18 App. 124; *Washington v. State*, 17 App. 197; *Summers v. State*, 9 App. 396; *Neiderluck v. State*, 23 App. 38, 3 S. W. 573; *Martin v. State*, 1 App. 525; *Coleman v. State*, 2 App. 512. Nor in such case need the value of the property intended to be stolen be alleged. *Green v. State*, 21 App. 64, 17 S. W. 262; *Sullivan v. State*, 13 App. 462; *Collins v. State*, 20 App. 197. In such case also an allegation that the property intended to be stolen was "then and there being found" sufficiently charges that said property was in the house entered. *Sullivan v. State*, 13 App. 462. It must be alleged that the property was taken or intended to be taken from the possession of the owner thereof, or from the possession of some one holding the same for him. *Reed v. State*, 14 App. 662; *O'Brien v. State*, 27 App. 448, 11 S. W. 459. And "without the consent of the owner." *Treadwell v. State*, 16 App. 643. And when there are two or more owners, the want of consent of each must be alleged. *Taylor v. State*, 23 App. 639, 5 S. W. 141. But see *Willis v. State*, 33 App. 168, 25 S. W. 1119; *Hurley v. State*, 35 App. 282, 33 S. W. 354. The indictment may properly charge conjunctively that the offense was committed by all three of the means named in the statute, viz., force, threats, and fraud, or it may allege only one of said means, but the evidence and charge of the court must be confined to the means alleged. *Buntain v. State*, 15 App. 485; *Sullivan v. State*, 13 App. 462; *Weeks v. State*, Id. 466; *Lott v. State*, 17 App. 598; *Summers v. State*, 9 App. 396; *Shepherd v. State*, 42 Tex. 501; *Hobbs v. State*, 44 Tex. 353. But some one or more of the means named must be alleged. *Hamilton v. State*, 11 App. 116; *Brown v. State*, 7 App. 619. Where a burglary with intent to commit rape was charged, and the allegation was "to commit the crime of rape upon the person of her the said Rachel P.," etc., it was held there need be no allegation that Rachel was a woman. *State v. Williams*, 41 Tex. 98. Nor is it necessary in such case to allege that the female intended to be raped was in the house. *Burke v. State*, 5 App. 74. It need not be alleged that the offense was committed "feloniously" or "burglariously." *Reed v. State*, 14 App. 662; *Sullivan v. State*, 13 App. 462; *Jones v. State* (Cr. App.) 55 S. W. 491. Where an indictment charged the entry to have been effected by "breaking," it was held not bad for not charging that it was effected in the nighttime, or by entering in the daytime and remaining concealed, etc. Such an indictment is good for a daylight breaking, but to sustain a conviction in such case the evidence must prove an actual breaking.

Summers v. State, 9 App. 396. An indictment which charges an entry by force, but does not aver that the entry was at night, or that it was made in the daytime by the defendant who remained concealed in the house until night, charges a daylight burglary. *Bravo v. State*, 20 App. 188. But where the indictment charges that the defendant did "break and enter" the house, a conviction may be had thereunder, whether the offense was committed in the daytime or in the nighttime, if the proof shows that the breaking and entry were effected by force applied to the house; but proof that force was used, but not upon the building, would not support a conviction under such an indictment. *Carr v. State*, 19 App. 635, 53 Am. Rep. 395; *Martin v. State*, 21 App. 1, 17 S. W. 430; *Newman v. State*, 55 App. 273, 116 S. W. 577; *Walker v. State*, 55 App. 546, 117 S. W. 797. An indictment which described the house entered, as "a certain house then and there occupied and controlled by" a named person, was held to sufficiently designate the house. *Sullivan v. State*, 13 App. 462. For indictments held good, see *Mace v. State*, 9 App. 110. *Summers v. State*, Id. 396; *Lawson v. State*, 13 App. 264; *Ross v. State*, 16 App. 554.

It is not essential to allege that the entry was without consent of the owner or occupant of the house or of one authorized to give such consent. *State v. Williams*, 41 Tex. 98; *Summers v. State*, 9 App. 396; *Taylor v. State*, 23 App. 639, 5 S. W. 141; *Smith v. State*, 22 App. 350, 3 S. W. 238; *Black v. State*, 18 App. 124; *Langford v. State*, 17 App. 445; *Buntain v. State*, 15 App. 485; *Reed v. State*, 14 App. 662; *Mace v. State*, 9 App. 110; *Sullivan v. State*, 13 App. 462, overruling on this point *Brown v. State*, 7 App. 619.

Both burglary and theft may be charged in the same indictment and in the same count, but in such case a conviction cannot be had for both offenses. *Black v. State*, 18 App. 124; *Hobbs v. State*, 44 Tex. 353; *Turner v. State*, 22 App. 42, 2 S. W. 619; *Miller v. State*, 16 App. 417; *Dunham v. State*, 9 App. 330; *Howard v. State*, 8 App. 447; *Shepherd v. State*, 42 Tex. 501.

And in such case the indictment may be bad for the burglary and good for the theft, and conviction had for the latter offense. *Dunham v. State*, 9 App. 330; *Jester v. State*, 26 App. 369, 9 S. W. 616.

An indictment for burglary in the nighttime with intent to commit theft, alleging entry by force, was sufficient, without alleging an entry by means of breaking. *Bradford v. State*, 62 App. 424, 138 S. W. 118; *Garner v. State*, 31 App. 22, 19 S. W. 333.

The felonious intent ought to be alleged according to the facts of each case. *State v. Robertson*, 32 Tex. 159.

Indictment for burglary held insufficient in that it did not specifically charge an intent to commit theft or a felony. *West v. State*, 35 Tex. 89.

To charge burglary at night it is sufficient to charge that the entrance was by breaking without charging that it was by force, fraud or threats. Breaking necessarily includes force and an entrance could not be made by breaking without force, though it might be made by force without breaking. *Mathews v. State*, 36 Tex. 675.

Indictment held to set forth sufficiently the act alleged as well as the intent with which it was alleged to have been committed with all the particularity the law required. *Johnson v. State*, 1 App. 146.

The better practice is to allege the time of the burglary, that is whether it was committed in the day time or in the night time. *Conoly v. State*, 2 App. 412.

Where an indictment for burglary also charges theft of specific articles after the entry, it is not necessary to set forth the essential terms of theft in charging the intent. *Williams v. State*, 24 App. 69, 5 S. W. 838; *Bigham v. State*, 31 App. 244, 20 S. W. 577; *Coates v. State*, 31 App. 257, 20 S. W. 585. It need not be alleged in terms that a "house" was burglarized. *Bigham v. State*, 31 App. 244, 20 S. W. 577.

The indictment charged conjointly burglary with intent to commit theft without alleging the elements of intended theft and that theft was committed. There being evidence of actual theft, the indictment was held sufficient to support a conviction. *Williams v. State*, 24 App. 69, 5 S. W. 838.

A conviction for burglary cannot be sustained on an indictment alleging that defendant "then and there, by force, break and enter a house," omitting the essential word "did." *Jester v. State*, 26 App. 369, 9 S. W. 616.

Indictment is sufficient to charge the burglary of a railway car if it alleges that the said car was occupied and controlled by a certain named person, and that the burglarious entry was made with the fraudulent intent to take, etc., otherwise alleging all the elements of theft. The ownership of the car need not be alleged. Evidence that other cars of the same general description were burglarized would not vitiate the indictment for uncertainty, but might require the state to elect the one upon which a conviction would be sought. See the opinion for the charging part of an indictment held sufficient to charge the burglary of a railway car. *Hamilton v. State*, 26 App. 206, 9 S. W. 687.

Indictment must allege that the entry was made with the intent to commit felony or the crime of theft. *Hammons v. State*, 29 App. 445, 16 S. W. 99.

Indictment held sufficient to charge burglary with intent to murder. *Stinnett v. State*, 32 App. 526, 24 S. W. 908.

Indictment is sufficient if it alleges that the entry was burglarious and without the consent of the occupant. *Puyland v. State*, 33 App. 382, 26 S. W. 621.

An indictment for burglary instead of using the phrase "then and there" to fraudulently take, etc., charged the breaking, and coupled it with the charge of intent to steal by the conjunction "and"; held, sufficient. *Smith v. State*, 36 App. 442, 37 S. W. 743.

An indictment charging the taking of property belonging to two owners without "their" consent, was insufficient, since "their" refers to the owners collectively, and the consent of each must be negatived. *Young v. State*, 42 App. 301, 59 S. W. 890.

It is not necessary under an indictment for the burglary of a house other than a private residence, at night, to allege that such house was not a private residence. *Gilford v. State*, 48 App. 312, 87 S. W. 699.

A burglary committed in the day time is not within the purview of article 1305, and the indictment need not allege that the house is a private residence. *Reyes v. State*, 51 App. 420, 102 S. W. 422.

The use of the words "a private residence" in an indictment drawn under article 1304 does not render it vicious. The words may be considered descriptive, and if so must be proved as alleged. *Martinez v. State*, 51 App. 584, 103 S. W. 931.

An indictment charging that defendant by force, threats and fraud burglariously and fraudulently broke and entered a house was sufficient to charge either a day time or a night time burglary. *Montgomery v. State*, 55 App. 502, 116 S. W. 1160; *Walker v. State*, 55 App. 546, 117 S. W. 797.

Where burglary is committed by force, the indictment need not allege whether it was committed in the day or the night time. *Vargas v. State*, 60 App. 196, 131 S. W. 594.

An indictment for burglary with intent to steal need not allege some value of the property intended to be stolen. *Gilder v. State*, 61 App. 16, 133 S. W. 883.

The averment, in an indictment for burglary with intent to steal, of the want of consent of prosecutor, is necessary, and the facts must show a want of consent. *Moray v. State*, 61 App. 549, 135 S. W. 569.

An indictment for burglary, alleging that the defendant broke and entered a house with fraudulent intent to take from said house corporeal property therein being and belonging to a designated owner, and to appropriate the same to her own use, is insufficient, as it contains no allegation that the stolen goods were taken without the consent of the owner. *Fox v. State*, 61 App. 544, 135 S. W. 570.

In a prosecution for burglary with intent to commit theft, it is not necessary that the indictment allege the value of the property, and that the court's charge require the jury to find that the property had specific value. *Bradford v. State*, 62 App. 424, 138 S. W. 118.

An indictment for burglary, alleging that the offense was committed on April 19, "One Thousand Nine Hundred and ———," and anterior to the presentment of the indictment, which was filed August 30, 1910, showed on its face that the offense was barred by limitations prior to the return of the indictment, and was therefore insufficient. *Bradford v. State*, 62 App. 424, 138 S. W. 119.

An allegation of the date of burglary at night charged in an indictment is material only on the question of limitation, provided the offense is charged to have been committed before the return of the indictment. *Hogan v. State* (Cr. App.) 143 S. W. 184.

An indictment alleging the breaking and entering of a house by force, threats, and fraud need not allege whether the offense was committed in the daytime or nighttime, since such an indictment is sufficient to cover either a daytime or nighttime burglary. *Stephens v. State* (Cr. App.) 154 S. W. 1001.

An indictment for breaking and entering a house need not allege what property was stolen, its value, nor the character of the house, unless it was intended to charge specifically that it was a private residence. *Stephens v. State* (Cr. App.) 154 S. W. 1001.

Where a burglarious entry is alleged to have been by force and breaking, the want of the owner's consent to the entry need not be specifically alleged. *Dennis v. State*, 71 App. 162, 158 S. W. 1008.

Where burglary is charged to have been committed with the intent to commit some specific crime, the indictment, in addition to alleging the burglary, must also allege each element of the crime intended to be committed. *Robinson v. State*, 71 App. 561, 160 S. W. 456.

It is not fatal to an indictment for burglary that it is alleged defendant broke and entered the car with intent to take "corporeal property," omitting "personal"; it being in the same count alleged he took from it corporeal personal property, with intent to appropriate it to his own use and deprive the owner of its value. *Howard v. State* (Cr. App.) 178 S. W. 506.

An indictment, simply charging burglary, without stating whether committed by day or night, is sufficient for daytime burglary. *Howard v. State* (Cr. App.) 178 S. W. 506.

11. — Allegations as to ownership and occupancy.—Where the property stolen or the burglarized premises belonged to two persons, it is sufficient to allege ownership in one of them. *Coates v. State*, 31 App. 257, 20 S. W. 585; *Skaggs v. State*, 56 App. 79, 119 S. W. 106; *Cogshall v. State* (Cr. App.) 58 S. W. 1011.

Where an indictment for burglarizing a fruit stand charged it to be occupied by a person managing the business in the absence of the owner, it was immaterial so far as the indictment was concerned that the owner's mother and sister assisted in making sales and carrying on the business. *Willis v. State*, 33 App. 168, 25 S. W. 1119.

Where indictment alleged ownership and possession of house to be in C., and evidence showed that C. was sheriff and held goods in such house under writ of attachment, held, he was special owner of the house, the indictment was sufficient and was supported by the evidence. *Linhart v. State*, 33 App. 504, 27 S. W. 260. Allegation as to ownership of car, see *Pyland v. State*, 33 App. 382, 26 S. W. 621.

The house burglarized was the house of one D., who kept chickens therein; J. looked after the chickens for D., and J.'s wife was to have a part of the increase; held, the indictment alleging ownership in D. was sufficient. *Daggett v. State*, 39 App. 5, 44 S. W. 148, 842.

Where I. rented a house containing two rooms and rented one of the rooms to S., ownership of such room was properly alleged in I. *Reed v. State*, 34 App. 597, 31 S. W. 404.

An indictment describing the house as "occupied S.," instead of occupied by S. was held bad in *Scroggins v. State*, 36 App. 117, 35 S. W. 968.

Indictment alleging only special ownership in person from whom goods were taken; held, sufficient. *Humphrey v. State* (Cr. App.) 40 S. W. 489.

Possession was properly alleged to be in the person having the exclusive possession, care and control of the burglarized structure where he slept and lived, though he did not own the land upon which it was erected. *Favro v. State*, 39 App. 452, 46 S. W. 932, 73 Am. St. Rep. 950.

Where the property belongs to a corporation, ownership may be alleged to be in person having actual charge, control and possession. *McAnally v. State* (Cr. App.) 57 S. W. 832.

Ownership of a room in a school dormitory and of the goods therein in the personal possession and charge of the occupant, should be alleged in her. *Mays v. State*, 50 App. 391, 97 S. W. 703.

Under C. C. P. art. 469, an indictment for burglary of a house belonging to a husband with intent to commit larceny therein, may allege that personal property belonging to the wife and which was stolen was in the possession of the husband, and that it was taken without his consent. *Smith v. State*, 53 App. 643, 111 S. W. 939.

12. — **Joinder of counts and election.**—See notes under C. C. P. art. 481.

Jurisdiction of district court after dismissal of count for burglary joined with count for misdemeanor, see C. C. P. art. 89 and notes.

13. — **Proof and variance.**—The means used in effecting the entrance must be proved as charged in the indictment. Thus, if force alone be charged, the evidence must be confined to, and must show an entrance by that means. *Summers v. State*, 9 App. 396; *Hamilton v. State*, 11 App. 116; *Sullivan v. State*, 13 App. 462; *Weeks v. State*, Id. 466; *Buntain v. State*, 15 App. 485; *Lott v. State*, 17 App. 598. Where the indictment charged a burglary by "breaking and entering," but did not charge that the means used was either force, threats, or fraud, and did not charge whether the offense was committed in the daytime or in the nighttime, it was held that such indictment was sufficient to support a conviction for burglary by day or night, if the proof showed that the means used was force applied to the building; but if the burglary was in the daytime, no other force, except such as was applied to the building, would support a conviction. *Carr v. State*, 19 App. 635, 53 Am. Rep. 395; *Martin v. State*, 21 App. 1, 17 S. W. 430. Where the burglary charged is with intent to commit theft, the value of the property intended to be stolen need not be proved. *Green v. State*, 21 App. 64, 17 S. W. 262; *Sullivan v. State*, 13 App. 462; *Collins v. State*, 20 App. 197.

The intent with which the house was entered must be proved as alleged in the indictment. *Hamilton v. State*, 11 App. 116; *State v. Robertson*, 32 Tex. 159.

Where an indictment for burglary with intent to commit theft unnecessarily designates the particular property defendant intended to steal, a conviction may be had, although the evidence shows that defendant knew nothing about such articles, if it clearly appears that he entered the house with the intent to commit theft. But where the indictment charges the theft of specific articles, the proof must correspond with the allegation or there will be a fatal variance. *Black v. State*, 18 App. 124.

Where W. had the exclusive care, control and management of the burglarized house, it was proper to allege the ownership in him, though the evidence showed that it belonged to another. *Alvia v. State*, 42 App. 424, 60 S. W. 551.

The court is inclined to the opinion that an allegation that a house burglarized in the daytime was a private residence was descriptive of the house and must be proved. *Martinez v. State*, 51 App. 584, 103 S. W. 930.

By force, threats, and fraud, although it fails to charge that the offense was committed by day or by night, will support a conviction if the proof shows that the entry was effected by actual force in the nighttime applied to the building. The occupancy of the owner's agent or clerk during the temporary absence of the owner is the occupation of the owner. *Buchanan v. State*, 24 App. 195, 5 S. W. 847.

To constitute a nocturnal burglary, under the statutes of this state, the house must have been entered by force, threats, or fraud. The indictment in this case charges that the defendant "did by force, in the nighttime, break and enter the house," etc. Held, that to authorize a conviction under this indictment, it devolved upon the state to prove beyond a reasonable doubt that the accused entered the house by applying actual "force" to the building. In failing to so charge the jury, and in refusing to give a special instruction in substantial compliance with the rule announced, the trial court erred. There was not only a total absence of evidence on this trial tending to show an entry by breaking or by force, as alleged in the indictment, but the proof was positive that the entry was made through an open door. Held insufficient to support the conviction for burglary. *Melton v. State*, 24 App. 287, 6 S. W. 303.

Indictment for burglary charged that the house was entered by force at night. To warrant a conviction, it devolved upon the state to establish by affirmative proof the entry as alleged. *Jones v. State*, 25 App. 226, 7 S. W. 669.

Indictment charging a nocturnal burglary will authorize a conviction only upon proof that the burglary was committed in the nighttime. Instruction that the jury could convict upon proof that the accused committed the burglary either in the nighttime or daytime was material error. *Guynes v. State*, 25 App. 584, 8 S. W. 667. See, also, *Turner v. State*, 24 App. 12, 5 S. W. 511; *Jones v. State*, 25 App. 226, 7 S. W. 669; *Coleman v. State*, 26 App. 252, 9 S. W. 609; *Painter v. State*, 26 App. 454, 9 S. W. 774.

Indictment alleged the ownership of the house to be in E. W. Bullard. The ownership of the house was proved as alleged, and it was further proved that the said E. W. Bullard permitted his son to store corn in the said house. Held, that

such proof does not amount to a variance between the allegation and the proof. *Painter v. State*, 26 App. 454, 9 S. W. 774.

The indictment described the money taken with unnecessary minuteness, but this having been done, it devolved upon the state to adduce proof in support of the allegation. *Coffelt v. State*, 27 App. 608, 11 S. W. 639, 11 Am. St. Rep. 205.

The indictment charged that the defendant took the money. The proof shows that, being put in fear of his life by the demonstrations and threats of the defendant and another, the injured party, when ordered to do so, delivered the money. Held, that such a delivery is a taking under our law. *Coffelt v. State*, 27 App. 608, 11 S. W. 639, 11 Am. St. Rep. 205.

Where indictment charges burglary with intent to commit rape, the specific intent must be proved. *Walton v. State*, 29 App. 163, 15 S. W. 646; *Allen v. State*, 18 App. 120; *Mitchell v. State*, 33 App. 575, 23 S. W. 475; *Mitchell v. State*, 32 App. 479, 24 S. W. 280.

Where indictment charges in one count burglary at night and in another in the daytime, and the evidence shows breaking, the hour of entry is immaterial. *Smith v. State*, 34 App. 124, 29 S. W. 775.

When the person named as the owner of the stolen goods had exclusive control of them it is immaterial whether he was general or special owner. *Smith v. State*, 34 App. 124, 29 S. W. 775.

When ownership was alleged in a special owner it was held competent to permit the State to prove the want of consent of the general owner. *Lega v. State*, 36 App. 33, 34 S. W. 926, 35 S. W. 381.

Where indictment charges burglary with intent to commit theft, and evidence shows that he took nothing, but that he went into a room where a woman was sleeping, pulled up her gown and put his hand on her privates, the intent with which he entered the house was rape. *Ford v. State* (Cr. App.) 54 S. W. 763.

An indictment for burglary of community property must allege the ownership to be in the husband, and where it alleges it to be in the wife there is a variance. *Jones v. State*, 47 App. 126, 30 S. W. 530, 122 Am. St. Rep. 650.

Evidence that the house burglarized was a private dwelling where a family resided, constituted a variance from an indictment charging merely the night time burglary of a house. *Martinus v. State*, 47 App. 528, 84 S. W. 831, 122 Am. St. Rep. 709.

Where an indictment for burglary charges the entry without consent of the occupant of a house, occupancy is equivalent to possession, and embraced a chicken house on the premises of the prosecutor. *Moore v. State*, 48 App. 400, 88 S. W. 230.

Evidence that the proprietor of the house burglarized was merely a tenant was not a variance from an indictment alleging ownership and occupancy in him. *Johnson v. State*, 48 App. 339, 88 S. W. 813.

Where it appeared that the burglar entered the owner's room for the purpose of committing theft, evidence of the taking of a lodger's watch from the room of the latter was not a variance from an indictment alleging that the house was in the possession of and under the control of the owner, and that the burglar entered the same with the intent to steal personal property belonging to the owner. *Johnson v. State*, 48 App. 339, 88 S. W. 813.

A variance as to the initials of the alleged owner and occupant of the burglarized house held fatal. *Williams v. State*, 49 App. 105, 90 S. W. 876.

Where the indictment charged that the house was occupied by W, and that the entry was with intent to steal his property while the evidence showed that the house was occupied by W, and L, and that the entry was with intent to steal property in the possession of L, there was a variance. *Roberson v. State*, 51 App. 335, 101 S. W. 800.

Where the indictment merely alleges a burglary as denounced by articles 1303 and 1304, and the evidence shows a burglary of a private residence as denounced by article 1305, the variance is fatal to a conviction. *Sedgwick v. State*, 57 App. 420, 123 S. W. 702.

Under article 1333, providing that it is not necessary, to constitute "theft," that possession and ownership of the property be in the same person, and that one has possession who exercises actual care, control, and management of the property, whether lawfully or not, an allegation, in an indictment for breaking and entering a house with intent to take personalty, that such property belonged to a certain person, was supported by proof that he had the exclusive care, control, and management of the property. *Clark v. State*, 58 App. 181, 125 S. W. 12.

An indictment charging accused with burglary followed the language of the statute, and the evidence showed that accused was in the house just before it was closed, and was later found moving around therein by the night watchman and arrested, and accused testified that he went into the house during the day looking for employment, and fell asleep, and found himself locked up when he awoke. Held that, to constitute burglary under the statute, accused must have entered the house in the daytime or night by force, threats, or fraud, and remained concealed with intent to commit a felony or theft therein, and the facts shown do not constitute burglary; not showing that accused entered by force, threats, or fraud. *Malley v. State*, 58 App. 425, 126 S. W. 598.

An indictment for burglary in the ordinary form, under this article, is not sustained by proof of burglary of a private residence, since such burglary is expressly made a distinct offense, and indictment therefor should be under article 1305. *Rodgers v. State*, 59 App. 146, 127 S. W. 834.

Where an indictment charged defendant with burglarizing a house occupied by six persons, naming them, and the evidence showed occupancy by only five of them, there was a fatal variance. *Grantham v. State*, 59 App. 556, 129 S. W. 839.

There is no fatal variance between an indictment for burglary alleging that accused entered the house of prosecutor with intent to steal personal property be-

longing to him and the evidence that accused stole property belonging to a member of the family of prosecutor. *Polk v. State*, 60 App. 462, 132 S. W. 134.

An averment in an indictment for burglary with intent to steal that accused entered the house of prosecutor with intent to take his goods must be proved, and where there is a total absence of proof that the goods taken were taken without prosecutor's consent the conviction must be set aside. *Moray v. State*, 61 App. 547, 135 S. W. 569.

An indictment alleging specifically that a burglary occurred on the 12th day of February is supported by evidence showing that it was committed within the limitation and prior to the presentment of the indictment. *Brown v. State* (Cr. App.) 143 S. W. 183.

Under an indictment for burglary of a store alleged to belong to the prosecuting witness, proof that it was the store of the witness and his son was not error, where the witness testified that he was in charge of it. *Whorton v. State* (Cr. App.) 151 S. W. 300.

Where the indictment alleged that the burglarized storehouse was owned and occupied by M. and contained property owned by him, proof that M. and another had possession and control of the burglarized house and property therein did not constitute a variance. *Powers v. State*, 72 App. 290, 162 S. W. 832.

Though the indictment did not specifically allege that a suit of clothes and a target gun were stolen from a house by accused, who was charged with burglary, a witness may testify that such property was taken. *Prata v. State* (Cr. App.) 172 S. W. 974.

14. Presumptions and burden of proof.—Where two or more persons may be owners of property, the state may allege ownership in either and is only required to prove the want of consent of the alleged owner. If the others had given consent, this is a matter accused may prove. *Skaggs v. State*, 56 App. 79, 119 S. W. 106.

It is not essential that the state should prove the nonconsent of the owner, etc. *Buchanan v. State*, 24 App. 195, 5 S. W. 847.

There should be some evidence of guilty conduct besides the bare possession of the stolen property before the presumption of burglary will be superadded to that of the larceny. *Jackson v. State*, 28 App. 370, 13 S. W. 451, 19 Am. St. Rep. 839.

When it is certain that the parties entering the house did so for the purpose of theft and that they did steal property in the house it is not necessary to prove that they were afterward seen in possession of the property. *Goldsmith v. State*, 32 App. 112, 22 S. W. 405. The mere knowledge of the owner that entry is being made is not proof of consent. *Robinson v. State*, 34 App. 71, 29 S. W. 40, 53 Am. St. Rep. 701.

In a burglary case, where the burglarious entry was alleged to have been made with intent to commit the crime of theft, the want of consent of the owner of the property must be alleged and proved, and it may be shown by circumstances which would absolutely exclude every reasonable presumption that the owner gave his consent. *Brown v. State*, 58 App. 336, 125 S. W. 915.

In a burglary case, where accused gives an explanation of his recent possession of the stolen goods, the burden is upon the state to disprove such account to the satisfaction of the jury, and, if such explanation put in evidence is shown to be false, a conviction can be had. *Hawthorn v. State*, 62 App. 114, 136 S. W. 776.

Where it is shown that accused broke and entered a house, it may ordinarily be presumed that he did so with intent to commit theft, though at the time he was detected he had not appropriated any property. *Vickery v. State*, 62 App. 311, 137 S. W. 687, Ann. Cas. 1913C, 514.

In a trial for breaking into W.'s house with intent to commit rape upon R., the state was not bound to show that the entry was made without W.'s wife's consent, though it appeared that W. was absent at the time. *Alsop v. State* (Cr. App.) 153 S. W. 624.

See, also, on question of intent and presumption, *Alexander v. State*, 31 App. 359, 20 S. W. 756. Also, see *Carr v. State*, 24 App. 562, 7 S. W. 328, 5 Am. St. Rep. 905.

15. Admissibility of evidence—In general.—See notes under article 1307, post.

Recent unexplained possession of property burglariously taken is admissible against the defendant, to be considered by the jury with other facts and circumstances in evidence. *Prince v. State*, 44 Tex. 480; *Payne v. State*, 21 App. 184, 17 S. W. 463. Also his explanation of such possession is admissible in his behalf. *Bond v. State*, 23 App. 180, 4 S. W. 580.

Where the case was one of circumstantial evidence, evidence of the finding in defendant's possession of goods from the burglarized store and keys fitting one of the doors of the burglarized house was admissible. *Lynne v. State*, 53 App. 386, 111 S. W. 151.

Proof that some of the stolen property was found in the house of a third person cannot be considered against defendant, unless it is proved that the two acted together in the commission of the burglary, and that the third person had personal and exclusive possession, unexplained, and under a claim of ownership. *Jackson v. State*, 28 App. 143, 12 S. W. 701.

Where a conspiracy between K. and defendant was shown, evidence of the finding of some of the stolen property at K.'s house, shortly after the burglary, was admissible against defendant, though neither he nor K. was present. *Jackson v. State*, 23 App. 370, 13 S. W. 451, 19 Am. St. Rep. 839.

Evidence that the tracks trailed from the scene of the burglary correspond with those of defendant's horse is admissible. *Goldsmith v. State*, 32 App. 112, 22 S. W. 405.

On trial for robbery it was held competent for the State to prove by the sheriff that at the time of the commission of the offense he held an execution against defendant. Such evidence tended to show defendant's financial condition and hence

to show his motive for committing the offense. *Armstrong v. State*, 34 App. 248, 30 S. W. 235.

The admission of evidence regarding the theft of property and specifying the articles taken from the house at the time the burglary was committed, held not error. *Hays v. State*, 36 App. 533, 38 S. W. 171.

Evidence that stolen goods were found under an outhouse on the lot of defendant's father shortly after the burglary was admissible. *Lamater v. State*, 42 S. W. 304, 38 App. 249.

Defendant charged with burglarious entry into a house with intent to commit the crime of theft. Before trial on the burglary case he pleaded guilty to the theft; held, such plea was admissible against him on the trial of the burglary case. *Johnson v. State*, 39 App. 625, 48 S. W. 70.

On trial for burglary evidence of a pistol taken from the burglarized house and found on a co-defendant is admissible. *Terry v. State*, 39 App. 628, 47 S. W. 654.

Evidence that one who was in jail when the burglary was committed and who subsequently escaped therefrom with defendant, was subsequently found in possession of property stolen from the burglarized house, was admissible against defendant. *Riding v. State*, 40 App. 452, 50 S. W. 698.

In a prosecution for burglary, evidence that the goods alleged to have been stolen were found in defendant's sleeping room was admissible to show possession of the goods by defendant. *Gass v. State* (Cr. App.) 56 S. W. 73.

A chattel mortgage executed by defendant three years before the burglary was improperly admitted, it not being shown how it was or could be pertinent to the issue. *Denton v. State*, 42 App. 427, 60 S. W. 670.

Where one of the owners of property stolen, though a witness, fails to give direct and positive testimony of his want of consent to the taking, it will not be inferred from the other circumstances. *Wisdom v. State*, 42 App. 579, 61 S. W. 926.

On a trial of an indictment for burglary, alleging that it was committed with the intent to steal, without describing the property taken from the house burglarized, evidence that certain articles were stolen from the house at the time of the burglary is admissible on the question of intent. *Moseley v. State*, 43 App. 559, 67 S. W. 414.

The house having been entered by the unlocking of the door, evidence that defendant, who on the day after the burglary sold an article taken from the house, which he claimed to have bought from another, had in his pocket seven or eight keys, some of which were skeleton keys, is admissible as a circumstance. *McCoy v. State*, 48 App. 30, 85 S. W. 1072.

Testimony that a watch found in defendant's possession belonged to the occupant of a room in the burglarized house was admissible to identify defendant and connect him with the burglary and to show the intent with which the burglary was committed. *Johnson v. State*, 43 App. 339, 88 S. W. 813.

On a prosecution for burglary, the owner of the burglarized premises being a witness, his want of consent to the taking of the property stolen must be proved by him. *Caddell v. State*, 49 App. 133, 90 S. W. 1013, 122 Am. St. Rep. 806.

Evidence that witness, on the night prior to the burglary, went to the building, carefully examined the lock, and tried the door to see if the same was securely fastened, was properly admitted. *Tally v. State*, 49 App. 91, 90 S. W. 1113.

While the want of consent of the owner of property stolen may be proved in a prosecution for burglary by circumstantial evidence, such evidence cannot be resorted to, if positive or direct proof is available. *Brown v. State*, 58 App. 336, 125 S. W. 915.

In a prosecution for burglary, it may be shown that a witness, by direction of defendant or on information received from him, obtained money from certain persons with whom defendant had left it, and turned it over to the sheriff, who returned it to the prosecutor, though the particulars of what occurred between the witness and the persons from whom the money was so obtained are immaterial. *Winkler v. State*, 58 App. 564, 126 S. W. 1134.

A witness may state that he measured tracks on the ground, and may state the character of such tracks, and describe the peculiarity of shoes worn by accused. *Boyman v. State*, 59 App. 23, 126 S. W. 1142.

Where, on a trial for the burglary of a store, the evidence showed that a daughter of accused had been in business, and that many articles seized at her home where accused lived were merchandise which she had left over after quitting business, it was error to permit the state to prove by the sheriff that, when he went to her home to get the goods to carry them to the store, the daughter did not claim any of the goods, nor sue to recover them, because her action was not a circumstance against accused. *Elkins v. State*, 59 App. 157, 127 S. W. 833.

In a burglary case, evidence of a witness that she had a trunk in the burglarized house on the day the clothing alleged to have been stolen was taken from the house, that when she left in the morning the trunk was locked, and, when she returned in the evening, the lock had been broken off the trunk, was admissible as part of the *res gestæ*, and as a circumstance to show that somebody had been in the house. *Kubacak v. State*, 59 App. 165, 127 S. W. 836.

Evidence that the house was closed up, the windows down, and the doors closed, and that it was left in that condition in the morning of the alleged burglary, and when persons returned in the evening they found articles gone, and found where the trunk of one of the occupants had been broken open, was sufficient to show circumstantially that somebody had been in the house, and testimony thereafter offered of a witness that he did not give his consent for accused or any one else to break open the house and get the goods alleged to have been stolen was admissible. *Kubacak v. State*, 59 App. 165, 127 S. W. 836.

In a prosecution for burglary, testimony by the officer who arrested defendant that he found on the premises occupied by the defendant three pistols and a lot

of cartridges hidden in the barn was admissible. *Bowen v. State*, 60 App. 595, 133 S. W. 256.

Where, on a trial for burglary, the state's evidence showed that accused was at the place of the burglary on the night of its commission, and that he was in a city 30 miles distant early in the morning following, and that he met his mother at the train that morning and took charge of a trunk that she had checked at the place of the burglary which contained stolen goods, evidence of the movement of trains between the place of the burglary and the distant city, and that accused's mother checked a trunk to the distant city the morning after the burglary, was admissible. *Spencer v. State*, 61 App. 60, 133 S. W. 1049.

Accused and S. lived in D. about 30 miles from T. where the burglary was committed, while S.'s mother lived in T. The state's evidence was that accused and S. boarded the train at D. about 6 o'clock in the evening of the night of the burglary, saying that they were going to T., and they were seen in T. that night, accused being in the burglarized store that night. Between 3 and 5 o'clock the next morning, they were seen in D. and S. remarked, in accused's presence, upon being refused some money for which he asked another, that they would have plenty of money in the morning as "we have the goods." Freight trains passed between T. and D. between the hours accused and S. were seen in the two places, the trains going about five or six miles an hour through T. The morning after the burglary, S.'s mother went from T. to D. checking a trunk for D. and accused and S. met her at the train and S. gave an expressman a check for a trunk, and thereafter accused had the trunk taken to an alley and removed therefrom to a house where it was found with the clothes stolen from the burglarized store. One witness positively identified the trunk checked by S.'s mother at T. as that in which the goods were found. Held, that evidence by the expressman that the trunk hauled by him looked like that found in the house and had the same kind of a rope around it, and that S.'s mother got off the train at D. the morning after the burglary about the time the trunk check was given to him, as well as evidence by the station agent that the trunk in which the goods were found looked like that checked by him, as well as the evidence as to S.'s statement about having plenty of money, and the freight trains passing through D. the night of the burglary, and that accused and S. were in T. on that night, was admissible; every circumstance, however slight, bearing on the commission of the offense, being admissible, if relevant, in a case dependent on circumstantial evidence. *Holland v. State*, 61 App. 201, 134 S. W. 693.

Under an indictment charging burglary with intent to commit theft, without specifically alleging that the property found in defendant's possession was stolen from the burglarized house, evidence that a portion of the stolen property was found in defendant's possession was admissible, not only to show intent, but also to connect accused with the offense charged. *Alinis v. State*, 63 App. 371, 140 S. W. 227.

In a prosecution for burglary with intent to steal, evidence that defendant offered witness a case of eggs, alleged to have been stolen, at less than the market price is admissible. *Johnson v. State*, 63 App. 465, 140 S. W. 347.

In a prosecution for burglarizing a barn and stealing harness, a witness testified that, after the burglary, he received a telephone from a saloon, asking if he wanted to buy a set of harness, and that he did not know who the two men at the phone were, but told them he could not come to the saloon, when he was told to call up D., which he did, and accused and D. came to his barn, and, when he told them to bring the harness, D. said that they might be seen, and was told to bring it in the back way, and that accused and D. brought the harness, which was that stolen, in the back way, and witness purchased it. The evidence also showed that accused was with D. at the saloon. Held, that the evidence was admissible, as tending to show that accused and D. had burglarized the barn. *Myers v. State* (Cr. App.) 144 S. W. 1134.

That accused was found in possession of a ring stolen from the burglarized house was admissible though his possession was five months after the burglary. *Moray v. State* (Cr. App.) 145 S. W. 592.

In a prosecution for burglary of a dwelling house, a witness testified that a ring belonging to her which was lying on the dresser in her room in the burglarized house was stolen on the night of the burglary, and that she afterwards got it back from G., and identified it before the jury. G. testified that he got the ring from accused when he was arrested, and delivered it to such witness. Held, that the evidence of such witness was admissible. *Moray v. State* (Cr. App.) 145 S. W. 592.

Evidence that a purse with money in it which was on the machine in the room in which the occupant was asleep when the burglar entered it was found under the porch empty the next day was admissible in a prosecution for burglary with intent to commit theft. *Moray v. State* (Cr. App.) 145 S. W. 927.

In a prosecution for burglary of a private dwelling with intent to commit theft in which the owner testified that the purse stolen contained a silver dollar, two quarters, and a nickel, evidence was admissible that accused had on his person when arrested silver money consisting of those pieces in addition to a dime. *Moray v. State* (Cr. App.) 145 S. W. 927.

In a prosecution for burglary, evidence was properly admitted that, when accused was arrested, he was going directly east on W. street, and not towards his boarding house on West Elm street. *Moray v. State* (Cr. App.) 145 S. W. 927.

In a prosecution for burglarizing a dwelling house in which the occupant had testified that she knew accused by his dress and clothing, but did not know whether he had on boots or shoes, a question, "If he had on boots, they were just like his pants?" was properly excluded. *Moray v. State* (Cr. App.) 145 S. W. 927.

Where, on a trial for burglary, the prosecutor testified that accused, when caught in the house burglarized, stated that he had just walked 30 miles, and was

tired and hungry, and wanted something to eat, the testimony of witnesses that accused was in a store in the town in the forenoon, on the day of the burglary in the afternoon, and that the witnesses fixed the date by stating that the store was burglarized that night, was admissible to prove the falsity of accused's statements and to fix the time of his presence in the store, and, where the court so limited the testimony, accused could not complain on the ground that the testimony proved that he was guilty of burglarizing the store. *Snodgrass v. State* (Cr. App.) 148 S. W. 1095.

In a prosecution for burglary, the officer who arrested the defendant was properly permitted to testify that when he made the arrest he took a revolver from the person of the defendant where such revolver was positively identified as one of the articles stolen from the house alleged to have been burglarized. *Overstreet v. State* (Cr. App.) 150 S. W. 899.

In a trial for burglary with intent to commit rape, it was not error to permit an occupant of the house to testify as to the condition of the room which accused entered through a window, as to mud being on the floor, etc. *Alsip v. State* (Cr. App.) 153 S. W. 624.

In a burglary trial it was proper to permit a witness for the state to testify that the house burglarized was his private residence, and to testify of whom his family consisted. *Alsip v. State* (Cr. App.) 153 S. W. 624.

In a prosecution for burglary, evidence that one of three keys found stuck in the mattress in defendant's room would unlock the door of the house alleged to have been broken was admissible, whether the keys were thereafter lost or not. *Hollis v. State* (Cr. App.) 153 S. W. 853.

In a prosecution for burglary, evidence of the general manager of the company whose building was entered, and of employes who had keys thereto, that defendant did not have their consent to enter, was admissible. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

In a prosecution for burglary of a building alleged to be the property of one H., who was shown to be the general manager of a coal company and in control of all its property, evidence that he was the general manager was admissible. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

Where on a trial for burglary the state showed by an accomplice that accused stated while in the building burglarized that he was trying to get some ribbon and had got some ribbon for his girl, and showed the larceny of ribbon, testimony that shortly after the burglary the girl accompanied by accused had ribbon of the kind stolen was admissible. *Holmes v. State*, 70 App. 423, 157 S. W. 487.

In a prosecution for burglary of a store, evidence by the owner that he thereafter received a box of knives of the same brand that he handled was admissible, where accused's accomplice had testified that the knives which accused stole and he and accused buried the day after the burglary were afterward removed by some one, and another witness testified that the knives returned to the owner were found under a schoolhouse near the burglarized store. *Pinkerton v. State*, 71 App. 195, 160 S. W. 87.

In a prosecution for burglarizing a store in the night, evidence that witness found the tracks of a buggy, horse, and men at the store and traced the tracks to a lot at the place in which accused lived, was admissible where such tracks were identified as being made by accused and those with him. *Pinkerton v. State*, 71 App. 195, 160 S. W. 87.

Where the only contested issue, in a prosecution for burglary, was whether the prosecuting witness had given defendant permission to enter her house and take the money therefrom, in order that he might leave town, evidence that, on the day after the alleged offense, defendant wrote the witness a postal card, stating where he had gone, when he would return, and that he had got the money, was material on that issue, and its exclusion was erroneous. *Lopez v. State* (Cr. App.) 167 S. W. 844.

16. — Evidence in general in criminal cases.—See note to C. C. P., art. 783.
17. — Declarations, admissions, and hearsay.—See notes under C. C. P. art. 783.
18. — Other offenses.—See notes under C. C. P. art. 783.
19. — Confession.—See notes under C. C. P. arts. 809 and 810.
20. — Opinion evidence.—See notes under C. C. P. art. 783.
21. — Demonstrative evidence.—See notes to C. C. P. art. 783.
22. — Testimony of accused.—See notes under C. C. P. art. 790.
23. — Acts and declarations of conspirators.—See notes to C. C. P. art. 783.
24. — Best and secondary evidence.—See notes to C. C. P. art. 783.
25. — Evidence of character or reputation.—See note to C. C. P. art. 783.
26. — Knowledge or means of knowledge of witness.—See note to C. C. P. art. 788.
27. — Examination, impeachment and corroboration of witnesses in general.—See *Vernon's Sayles' Civ. St.* 1914, art. 3687.
28. — Harmless error in the admission of evidence.—See notes to C. C. P. art. 938.
29. — Cure of error.—See notes to C. C. P. art. 783.
30. Sufficiency of evidence.—See note under articles 1310 and 1320, post.
Presumption of innocence and reasonable doubt, see C. C. P. art. 785 and notes.
Corroboration of accomplice, see C. C. P. art. 801, and notes.
Sufficiency of circumstantial evidence in general, see notes under C. C. P. art. 783.

Evidence held to sustain a conviction. *Pinkerton v. State*, 71 App. 195, 160 S. W. 87; *Rogers v. State*, 43 Tex. 406; *Langford v. State*, 17 App. 445; *Green v.*

State, 21 App. 64, 17 S. W. 262; Payne v. State, 21 App. 184, 17 S. W. 463; Waterhouse v. State, 21 App. 663, 2 S. W. 889; Smith v. State, 22 App. 350, 3 S. W. 238; Trent v. State, 31 App. 251, 20 S. W. 547; Brown v. State, 56 App. 87, 119 S. W. 312; Conley v. State, 55 App. 370, 116 S. W. 806; Bartley v. State, 47 App. 41, 83 S. W. 190; Archibald v. State, 47 App. 153, 83 S. W. 189; Scott v. State, 53 App. 332, 111 S. W. 657; Jackson v. State, 49 App. 215, 91 S. W. 789; Mullens v. State, 35 App. 149, 32 S. W. 691; Harraway v. State (Cr. App.) 40 S. W. 262; Skaggs v. State, 56 App. 79, 119 S. W. 106; Smith v. State, 53 App. 643, 111 S. W. 939; Martinez v. State, 51 App. 584, 103 S. W. 930; Reyes v. State, 51 App. 420, 102 S. W. 421; Smith v. State, 51 App. 427, 102 S. W. 406; Mayberry v. State, 52 App. 601, 108 S. W. 659; Shelton v. State, 52 App. 611, 108 S. W. 679; Ryan v. State, 53 App. 54, 108 S. W. 1180; Sedgwick v. State, 57 App. 420, 123 S. W. 702; Jones v. State, 58 App. 250, 124 S. W. 939; Doyle v. State, 59 App. 39, 126 S. W. 1131; Margray v. State, 60 App. 107, 131 S. W. 312; Probest v. State, 60 App. 608, 133 S. W. 263; Hayden v. State, 61 App. 211, 134 S. W. 703; Kinkead v. State, 61 App. 651, 135 S. W. 573; Kelly v. State, 61 App. 663, 136 S. W. 55; Waiemayer v. State, 62 App. 51, 136 S. W. 256; Fields v. State, 61 App. 639, 136 S. W. 460; Dixon v. State, 62 App. 53, 136 S. W. 462; Hawthorn v. State, 62 App. 114, 136 S. W. 776; Andrews v. State, 64 App. 2, 141 S. W. 220, 42 L. R. A. (N. S.) 747; Williams v. State, 64 App. 444, 142 S. W. 571; Hickman v. State (Cr. App.) 145 S. W. 914; Briscoe v. State (Cr. App.) 148 S. W. 565; Parker v. State (Cr. App.) 149 S. W. 108; Whorton v. State (Cr. App.) 151 S. W. 300; Coggins v. State (Cr. App.) 151 S. W. 311; Bellew v. State (Cr. App.) 151 S. W. 542; Walker v. State (Cr. App.) 151 S. W. 822; Hollis v. State (Cr. App.) 153 S. W. 853; Dennis v. State, 71 App. 162, 158 S. W. 1008; Hahn v. State (Cr. App.) 165 S. W. 218. Contra, Buntain v. State, 15 App. 485; Zollcoffer v. State, 16 App. 312; Ross v. State, Id. 554; Neiderlueck v. State, 23 App. 38, 3 S. W. 573; Grant v. State, 42 App. 275, 58 S. W. 1025; Bryant v. State, 53 App. 169, 108 S. W. 1184; Simmons v. State, 50 App. 527, 97 S. W. 1052; Menchaca v. State, 58 App. 198, 125 S. W. 20; Green v. State, 59 App. 6, 127 S. W. 549; Lawrence v. State (Cr. App.) 146 S. W. 928; Remlinger v. State (Cr. App.) 148 S. W. 316; Williams v. State, 70 App. 275, 156 S. W. 938.

To support a conviction for burglary, it devolves upon the state to prove beyond a reasonable doubt, not only the burglarious entry of the house, but the specific criminal intent alleged in the indictment. See the statement of the case for evidence held insufficient to support a conviction for burglary with intent to rape, because, even if sufficient to show the entry into the house, it is wholly insufficient to establish that specific intent. Coleman v. State, 26 App. 252, 9 S. W. 609; Mitchell v. State, 32 App. 479, 24 S. W. 280; Mason v. State, 47 App. 403, 83 S. W. 689.

Evidence held sufficient to support a conviction of burglary with intent to commit theft. Mullens v. State, 35 App. 149, 32 S. W. 691; Moore v. State, 52 App. 364, 107 S. W. 355; Johnson v. State, 63 App. 465, 140 S. W. 347.

Evidence held to sustain a conviction of burglary of a storehouse. O'Fallin v. State (Cr. App.) 169 S. W. 897; Powers v. State, 72 App. 290, 162 S. W. 832.

That a house was broken and entered in the night time by raising a window by one who failed to show any excuse, and that there was valuable property there to be taken, and no other known desired object, supported a finding that the intent was to steal. Franco v. State, 42 Tex. 276.

Where the evidence showed that the defendant took off his shoes and entered the house through an open door, without the consent of any one, it was held that it did not show an entry by means of fraud, that being the means charged in the indictment. Hamilton v. State, 11 App. 116.

Where the intent alleged was to commit a rape by force, and the evidence was that one of three females in the house was awakened by some one touching her foot, and screamed, and a man ran out of the house when she screamed, it was held insufficient to prove an intent to commit rape. Hamilton v. State, 11 App. 116.

To warrant an inference of guilt of theft from the circumstance of possession of recently stolen property, such possession must be personal and exclusive; must be unexplained, and must involve a distinct and conscious assertion of property by the defendant. Field v. State, 24 App. 422, 6 S. W. 200; Jackson v. State, 28 App. 370, 13 S. W. 451, 19 Am. St. Rep. 839; Jackson v. State, 28 App. 143, 12 S. W. 701. See the statement of the case for evidence which under this rule, is held insufficient to support a conviction for burglarious theft. Field v. State, 24 App. 422, 6 S. W. 200.

See the statement of the case for the substance of evidence held insufficient to support a conviction for burglary, inasmuch as it fails to establish an entry by force. Jones v. State, 25 App. 226, 7 S. W. 669.

Proof that a house was burglariously entered, and certain articles stolen therefrom, which were soon after found in the possession of defendant, who appropriated them to his own use, and made no explanation of his possession, will warrant a conviction. Morgan v. State, 25 App. 513, 8 S. W. 487.

The specific intent charged must be proved beyond a reasonable doubt by facts and circumstances which lead with reasonable certainty to the conclusion sought and not left to speculation and surmise. Mitchell v. State, 33 App. 575, 28 S. W. 475; Allen v. State, 18 App. 120.

For evidence of possession of stolen property held insufficient, see Green v. State (Cr. App.) 31 S. W. 386; Munson v. State, 34 App. 498, 31 S. W. 387.

Where a store was broken into late at night, after the owner was asleep and the lights extinguished, and defendant fled as soon as the occupants were aroused, an intent to steal might be inferred. Mullens v. State, 35 App. 149, 32 S. W. 691.

Instruction authorizing conviction on proof of possession of stolen goods, held erroneous. Franks v. State, 36 App. 149, 35 S. W. 977; Hayes v. State, 36 App. 146, 35 S. W. 983; Scott v. State (Cr. App.) 36 S. W. 276.

When the circumstances render it reasonably certain that defendant put the goods where they were found there may be a conviction without positive testimony as to his possession. *McDaniel v. State* (Cr. App.) 37 S. W. 324.

Evidence that the janitor of a public school had charge and control of the building and its contents from 4 p. m. until 8 o'clock the following morning during which time the burglary was committed, authorized the jury to find that he was the owner of books stolen therefrom as alleged, though the general property in the books was shown to be in the pupils. *Lamater v. State*, 38 App. 249, 42 S. W. 304.

Evidence held to show that a burglary was committed with intent to commit theft and not for the purpose of making an assault with intent to murder. *Pilot v. State*, 38 App. 515, 43 S. W. 112, 1024.

The mere possession of recently stolen property without evidence of a breaking is not sufficient to prove a burglary. *Strickland v. State* (Cr. App.) 78 S. W. 689; *Hollis v. State* (Cr. App.) 153 S. W. 853.

Unexplained possession of goods taken from a burglarized house is sufficient to connect the possessor with the burglary. *Nightengale v. State*, 50 App. 3, 93 S. W. 531.

Evidence, on a prosecution of an employé in the store claimed to have been broken into, held insufficient to sustain a conviction, his testimony that he was drunk, went to sleep, and was locked into the store, not being controverted. *Burrell v. State*, 50 App. 336, 97 S. W. 706.

Evidence of the identity of a fan, taken under circumstances constituting burglary, with a fan taken by defendant to a certain place, defendant making no explanation, but only a denial, warrants a conviction of burglary. *Hamilton v. State* (Cr. App.) 177 S. W. 496.

Evidence held insufficient to sustain a conviction as an accomplice to a burglary. *Hall v. State*, 52 App. 250, 106 S. W. 379.

Evidence that defendants were seen near the burglarized house a short time before, without positive identification of the goods alleged to have been taken, is insufficient to support a conviction. *Love v. State*, 58 App. 270, 124 S. W. 932.

In a prosecution for forcibly breaking and entering a house in the nighttime with intent to steal, evidence held to sustain a judgment of conviction. *Clark v. State*, 58 App. 181, 125 S. W. 12.

Where accused was not seen with the stolen property until 3½ months or more after the house from which the property was stolen was claimed to have been entered, the possession was too remote to come under the rule that, where accused is found in possession of the property shortly after the burglary, this will ordinarily justify the jury in believing him guilty. *Menchaca v. State*, 58 App. 198, 125 S. W. 20.

Where possession by accused of property stolen at the time of the burglary charged is relied on to connect accused with the burglary, the jury should acquit accused, where his explanation that he bought the goods was true, or where there was a reasonable doubt as to that fact. *Roberts v. State*, 60 App. 20, 129 S. W. 611.

Where a burglarious entry is shown, possession of the property stolen recently after the burglary is sufficient to connect the person in possession with the burglary, and unless he explains the possession the jury may find him guilty of burglary. *Roberts v. State*, 60 App. 20, 129 S. W. 611.

Where accused, charged with burglary, gave an account of his possession of the property stolen, showing that his possession was innocent, the state must show that his statement was false, or he must be acquitted; but where the state overcame his explanation, or where there was evidence of sufficient weight to authorize the jury to believe that his statement was untrue, a conviction was authorized. *Roberts v. State*, 60 App. 20, 129 S. W. 611.

Evidence, in a prosecution for the burglarious entry of a house, with the intent to commit rape, held to support a conviction. *Smith v. State*, 60 App. 81, 131 S. W. 313.

Where a house has been burglarized, evidence of accused's unexplained possession shortly afterwards of goods taken from the house is sufficient to sustain a conviction. *Hawthorn v. State*, 62 App. 114, 136 S. W. 776.

Evidence held to sustain a conviction of burglary of a house in the daytime, not at night. *Wright v. State*, 63 App. 664, 141 S. W. 228.

The state on a trial for burglary may, to justify a conviction, rely on recent possession by accused of property taken from the burglarized house, but where accused gives an account of his possession which is reasonable, and shows that he came into possession honestly or by any other means than by himself taking it from the house, or a principal in the transaction, the state, to justify a conviction, must overcome his explanation which can be done by circumstances of the transaction. *Williams v. State*, 64 App. 494, 142 S. W. 878.

Evidence held sufficient to sustain a conviction of burglary of a house in the nighttime with intent to steal. *Williams v. State* (Cr. App.) 143 S. W. 634; *Taylor v. State*, 52 App. 190, 107 S. W. 58.

Evidence held to sustain a conviction for burglarizing a dwelling house with intent to commit theft therein. *Moray v. State* (Cr. App.) 145 S. W. 927.

Where, on a trial for the burglary of a cornerrib, the evidence showed that accused had a sack of corn a night or two after the alleged burglary, and that he had not raised any corn of his own, but the owner of the crib did not show that he owned any corn, or had any in the crib, at the time of the alleged burglary, a conviction was not sustained by the evidence. *Gross v. State* (Cr. App.) 147 S. W. 579.

Evidence, in a prosecution for burglary of a saloon in the nighttime, and the taking of money, whisky, weapons, etc., held sufficient to sustain a conviction. *Turner v. State* (Cr. App.) 154 S. W. 992.

Evidence held insufficient to connect accused with the burglary for which he was tried. *Acosta v. State*, 70 App. 1, 155 S. W. 251.

Evidence which was purely circumstantial held sufficient to warrant a conviction for burglary and the larceny of oats from a barn. *Wilson v. State*, 71 App. 330, 158 S. W. 1114.

In a prosecution for burglary and the larceny of oats from a barn, where the theory of the defense was that he bought the oats from the owner's brother, evidence held sufficient to show that if he did purchase them, he knew that the brother had no authority to sell them. *Wilson v. State*, 71 App. 330, 158 S. W. 1114.

Evidence that a house was broken into and goods taken therefrom, that accused and his companion, when accosted by the officers, admitted the taking, or at least informed the officers where the goods were, accompanied the officers to such place, and turned the goods over to them, and that accused was wearing a stick-pin, which was one of the articles stolen, supported a conviction for burglary; there being no controversy as to an entry by force. *Kimball v. State*, 71 App. 482, 160 S. W. 380.

Two saloons having been raided at the same time, evidence merely that defendant had some whisky shortly after, and that he said it came from the raid, is insufficient to convict him of burglary of one of the places, though whisky of that kind was in such saloon; it not being shown the same kind was not in the other. *Jobe v. State*, 72 App. 163, 161 S. W. 966.

Evidence, in a prosecution for burglarizing a storehouse, held to show at most that M. and another had control and possession of the burglarized building. *Powers v. State*, 72 App. 290, 162 S. W. 332.

Evidence, in a prosecution for burglary, held sufficient to show defendant's criminating possession of goods taken from a store, though they were actually in the grip of another. *Lewis v. State*, 72 App. 377, 162 S. W. 866.

Evidence held to warrant a conviction of burglary of a private residence at night. *Curtis v. State* (Cr. App.) 176 S. W. 559.

Evidence, in a prosecution for burglary, held sufficient to show a nighttime burglary. *Lewis v. State*, 72 App. 377, 162 S. W. 866.

Where one at night, by stealth, enters the private residence of another, with no right to do so or legal excuse, the evidence of intent to steal, sufficient to support a conviction for burglary, may be slight and circumstantial, in the absence of anything to indicate that the entry was made with any other intent. *Black v. State* (Cr. App.) 165 S. W. 571.

Where the state relies for conviction of burglary only on recent possession of stolen property by accused to connect him with the burglary, such possession must be exclusive, or possession by accused and others who may have been connected with the burglary. *O'Fallin v. State* (Cr. App.) 169 S. W. 897.

In a prosecution for burglary, evidence held sufficient to show that accused broke in, and did not find the door open. *Brown v. State* (Cr. App.) 177 S. W. 1161.

In a prosecution for burglary, evidence held insufficient to support a conviction of breaking and entering a certain freight car with intent to commit theft while in a certain county. *Park v. State* (Cr. App.) 178 S. W. 516.

31. Questions for jury.—Where one count charged a daytime and the other a night time burglary of a private residence, and the evidence left it in doubt as to whether the house was entered in the night or in the daytime, but showed that it was entered at some time, and the jury convicted under the second count, defendant could not complain that the evidence was insufficient, as the jury had a right to select the count under which they would find a verdict. *Lewis v. State*, 52 App. 20, 105 S. W. 194.

Evidence on a prosecution for burglary held sufficient to go to the jury on the question of defendant being the perpetrator of the crime. *Griffith v. State*, 62 App. 642, 138 S. W. 1016.

Evidence on a prosecution for burglary held sufficient to go to the jury on the issue of the crime having been committed in the nighttime. *Griffith v. State*, 62 App. 642, 138 S. W. 1016.

32. Instructions in general.—See note under article 1310, post.

Where a blacksmith shop was burglarized and a brace taken therefrom, and the evidence tended strongly to show that the brace was not taken with intent to permanently appropriate it to the taker's use, but merely for the temporary purpose of using it in effecting an entry into a storehouse which was burglarized on the same night, it was material error to fail to charge that to constitute the intent to commit theft, there must have been an intent to appropriate the property permanently to the taker's use and benefit. *Wilson v. State*, 18 App. 270, 51 Am. Rep. 309.

Charge must be confined to the evidence. *Burgess v. State*, 33 App. 9, 24 S. W. 286; *Levine v. State*, 22 App. 683, 3 S. W. 660; *Niederluck v. State*, 23 App. 38, 3 S. W. 573.

An instruction defining the term "entry" as meaning every kind of entry but one made by the free consent of the occupant, or one authorized to give such consent, was not erroneous as authorizing a conviction, though there was no breaking, the court having defined "breaking" and stated the necessary elements of breaking to constitute the entry burglarious. *Montgomery v. State*, 55 App. 502, 116 S. W. 1160.

Where the indictment charged a burglary with intent to commit rape by fraud, the court charged, "fraud must consist in the use of some stratagem, as an attempt to have carnal intercourse with a woman when she is asleep." Held erroneous, because it announces in effect that an attempt to have carnal intercourse with a woman when she is asleep, per se, constitutes fraud, which is not correct, and because the stratagem referred to in art. 1066 of the Penal Code, applies only in case the woman is married. *King v. State*, 22 App. 650, 3 S. W. 342.

In burglary to commit rape the court must in effect charge the jury as to the character of the force necessary to accomplish rape, and instruct them that it is essential they should find that defendant intended to use such force before they would be authorized to convict. *Turner v. State*, 24 App. 12, 5 S. W. 511; *McCleavland v. State*, 24 App. 202, 5 S. W. 664; *Frown v. State*, 27 App. 330, 11 S. W. 412; *Walton v. State*, 29 App. 163, 15 S. W. 646; *Mitchell v. State*, 32 App. 479, 24 S. W. 280.

A special charge of the court was requested by the accused to the effect that if the jury found that there were large openings in said buildings, so situated as to admit of an easy entrance without force, and that the same could have been naturally used for said purpose and had been used for said purpose, and that at the time said property was taken an entry was made through either of said openings or unfinished ends, then the defendant is not guilty. Held, that the trial court did not err in refusing the said special charge, because, as the openings referred to were unusual places of entry, an entrance through either of them would be a burglarious entrance. *Painter v. State*, 26 App. 454, 9 S. W. 774.

Under an indictment charging a burglary by force, threats, and fraud, an instruction as to an entry effected by each of such means is reversible error where the evidence conclusively shows that it was accomplished by the use of force alone. *Miller v. State*, 28 App. 445, 13 S. W. 646.

Two joint defendants being on trial, the court charged that if the jury believed the "defendants T. and H., or either of them, did at nighttime by force enter a house, etc., with the fraudulent intent then and there to commit theft, then you should find them guilty of burglary, and assess their punishment," etc. Held, that the charge was erroneous in that it authorized a conviction of both defendants upon proof of the guilt of either. *Hays v. State*, 30 App. 472, 17 S. W. 1063.

Where an indictment for burglary contained two counts, one for a daytime and one for a nighttime burglary, and the evidence showed the burglary to have been committed in the nighttime, and also showed conclusively that the crime, if committed at all, was committed at night, held, that the court properly limited and restricted the jury, in their findings, to a nighttime burglary. *Coates v. State*, 31 App. 257, 20 S. W. 585. And on charge, see, also, *Serio v. State*, 22 App. 633, 3 S. W. 784; *Painter v. State*, 26 App. 454, 9 S. W. 774. On trial for burglary with intent to murder it is only necessary to define murder and malice. *Stinnett v. State*, 32 App. 526, 24 S. W. 908.

Appellant asked the court to instruct the jury "that the state must prove the want of consent of the wife and daughter of the proprietor in his absence." The indictment alleged the possession in one V., and the evidence supported the allegation. The instruction was properly refused. *Willis v. State*, 33 App. 168, 25 S. W. 1119. When the evidence tends to show that defendant, at the time the burglary was committed, was at a place several miles distant, the court should instruct the jury upon the law of alibi. *Conway v. State*, 33 App. 327, 26 S. W. 401.

When the indictment charges burglary at night, and the evidence is plain, it is not error to refuse a charge on "daytime." *Aguillar v. State*, 26 S. W. 405. Where the house had two rooms, and one was leased, it is proper to charge that the one retained by the lessor was her house. *Reed v. State*, 34 App. 597, 31 S. W. 404.

In instructing as to the force necessary to consummate a daytime burglary, it is not error to use the statutory illustrations, though there is no evidence that the particular character of the force contained in the illustrations was used. *Sparks v. State*, 34 App. 86, 29 S. W. 264.

Instruction as to entering and breaking; held, sufficient. *Peryda v. State* (Cr. App.) 35 S. W. 981.

An instruction to acquit if the intent to steal was formed after entering the house, based on the theory that the goods might have been taken when defendant in the evening entered the house for a legitimate purpose, was properly refused where the evidence showed that the property was stolen some hours later, and not at the time of the entry in the evening. *Riding v. State*, 40 App. 452, 50 S. W. 698.

In a prosecution for murder committed in the perpetration of a nighttime burglary, the court properly instructed on the law of nighttime burglary. *Hedrick v. State*, 51 S. W. 252, 40 App. 532.

Where there was testimony that the owner of the house entered consented to the entry and theft, a charge to acquit if this was the case was sufficient without charging as to accomplices, since the owner could not be an accomplice to a violation of his own possession. *Duke v. State*, 42 App. 3, 57 S. W. 652.

Where prosecution is based upon force actually applied to the house entered, yet if the evidence shows that the door of the house was open, it is error not to present a distinct substantive charge upon the law presenting his defense. A negative charge is not sufficient. *Duke v. State*, 42 App. 3, 57 S. W. 653, 654.

The charge need not define "an unusual place of entry." This is a question of fact for the jury. *Green v. State* (Cr. App.) 58 S. W. 100.

Where one count charged a day time and the other a night time burglary of a private residence, but the proof without controversy showed only a night time burglary, it was error to submit the question of a day time burglary. *Jones v. State*, 47 App. 126, 80 S. W. 530, 122 Am. St. Rep. 680.

An instruction, on a prosecution for burglarizing a car, to acquit if defendant entered it for the purpose of sleeping therein, and not with intent to commit theft, is erroneous as both these contingencies were not necessary to exonerate him from a charge of burglary, but either was enough. *True v. State*, 48 App. 631, 89 S. W. 1066.

A charge that if defendant entered the house on the invitation of another party, for the purpose only of sleeping there, he would not be guilty, was erroneous, as the court should have instructed that, if defendant entered the house for any

other than a fraudulent intent to steal, the jury must acquit. *Bird v. State*, 49 App. 96, 90 S. W. 651, 122 Am. St. Rep. 803.

Where, on a prosecution for burglary, it appeared that the owner was dead, it was not error for the court to instruct the jury that the owner's want of consent might be shown by circumstantial evidence. *Jackson v. State*, 49 App. 215, 91 S. W. 788.

Where it appeared that the burglary was committed in the nighttime, there was no reversible error in inserting in the charge the general statutory definition of burglary, without limiting the entry to one at night. *Jackson v. State*, 49 App. 215, 91 S. W. 788.

The court should define the term "force." *Watson v. State*, 49 App. 371, 92 S. W. 807.

In a case of daytime burglary it is necessary for the court to charge as to an actual breaking, because if the entry be accomplished in the day time by breaking externally, it must be an actual breaking. *Bates v. State*, 50 App. 568, 99 S. W. 551.

Where trousers which disappeared and were subsequently found in defendant's possession, were hung where no one outside the house could get them without getting a portion of his body into the house, or lifting them out with some instrument, an instruction that an entry might be made by the introduction of any instrument into the house for the purpose of taking personal property, and that an actual breaking was not necessary, but that there must be some degree of force however slight, and that the entry through an unusual place, such as a window, constituted force, was proper. *Hays v. State*, 51 App. 111, 100 S. W. 926.

On a prosecution for burglary committed in the nighttime, there was no error in refusing a requested instruction that, in order to convict the jury must find beyond a reasonable doubt that defendant entered the house in question by applying actual force to the building. *Hays v. State*, 51 App. 111, 100 S. W. 926.

Where, on a trial for burglary accompanied by the larceny of money of the value of about \$10, accused testified that he and his codefendant went to the house burglarized; that the codefendant knocked on the door, and said he thought he heard some one in the house call, saying "Come in"; and that the codefendant went in and committed the larceny, the court was required to charge on the theory that there was no breaking and that accused was guilty only of a misdemeanor for the larceny. *Stout v. State*, 51 App. 569, 103 S. W. 391.

In a trial for burglarizing a private residence in the nighttime, it was not improper to omit to define a nighttime burglary and a private residence, where it clearly appeared that the burglary occurred after dark, and that the building was a private residence. *Johnson v. State*, 52 App. 201, 107 S. W. 52.

It was proper to refuse to instruct that, if the house was in charge or control of one other than the prosecuting witness, stated in the indictment to be the owner, at the time of the burglary, defendant should be acquitted, since if both were in possession, occupying the house as a private residence, it was sufficient to charge the ownership in the prosecuting witness. *Johnson v. State*, 107 S. W. 52, 52 App. 201.

Where, in a trial for burglary with intent to commit rape, prosecuting witness testified that she was awakened by the presence of some one in her room, and observed at the foot of her bed some one who had raised the mosquito bar on the bed, and had his head and shoulders under it, with his hand on witness' foot, and that she screamed, and the intruder immediately fled, aggravated assault should have been given in charge. *Ballentine v. State*, 107 S. W. 546, 52 App. 369.

Where the evidence showed that prosecutor lived alone in a house; that he left it in the morning, closing the door; that there was no latch on the door; that he did not come back before noon, when he found his gun was missing and the door standing open; and that accused had been seen near the house with a gun in his possession—a charge that if accused by force entered the house, without the consent of the prosecutor, and with the intent to fraudulently take personal property therein, he was guilty of burglary, was sufficient, though it did not define "entry" or "force." *Brown v. State*, 119 S. W. 312, 56 App. 87.

Where the state, in a prosecution for burglary, puts in evidence defendant's confession that the window was open, and that he merely reached into the house and took the money in question out through the opening, without any breaking, it is bound by such confession, unless impeached; and defendant is entitled to an instruction on the question of necessity for the use of force to constitute burglary, as defined by article 1308. *Winkler v. State*, 58 App. 564, 126 S. W. 1134.

Where circumstances are relied upon to show a burglary, and the evidence leaves it uncertain whether the house was entered and money taken during the day or at night, an instruction that the offense of "burglary" includes every kind of entering without consent of the owner or occupant, and that it is not necessary that there should be an actual breaking, except where entry is made in the daytime, is erroneous, as the question of force is ignored. *Winkler v. State*, 58 App. 564, 126 S. W. 1134.

An instruction, in a prosecution for burglary of a store, stated that if the jury believed that accused, at the time and place stated, by force or breaking at night, or by breaking in the daytime, entered a house occupied by another with intent fraudulently to take corporeal personal property therein and belonging to such person, from his possession, without his consent, with intent to deprive him of the value thereof, and appropriate it to accused's use and benefit, and that accused at the time had discretion sufficient to understand the wrongfulness of his act, they should find him guilty as charged, but if the jury did not find these facts to be established they should acquit. Held, that the charge given required the jury to find all of the elements of theft in order to convict, so that the court was not required to technically define theft in a separate charge. *Ragsdale v. State*, 61 App. 145, 134 S. W. 234.

Where, in a prosecution for burglary with intent to kill, the court withdrew a count alleging burglary of a private residence with intent to kill under article 1305, because the evidence did not clearly show that the house was a private residence, and submitted the count charging burglary at night with intent to kill, as defined by article 1303, any error in withdrawing the count was favorable to defendant and therefore not reversible under Code Civ. Proc. art. 743; the evidence being sufficient to convict under the count submitted. *Hopkins v. State*, 61 App. 590, 135 S. W. 553.

In a trial for burglary that the court in defining burglary gave the statutory definition was not error, where, in a charge applicable to defendant, it instructed that by the term "breaking" was meant that the entry must be made with actual force, and that, as the burglary was alleged to have taken place in the daytime, the jury must be satisfied beyond a reasonable doubt that the entry was made by force in the daytime, or they could not convict. *Kinhead v. State*, 61 App. 651, 135 S. W. 573.

Where the occupant of a burglarized house was not the real owner of the goods stolen therefrom, but had charge thereof for the owners, who had left them with him to be pressed, they were sufficiently his property as owner to authorize a charge that, if accused did by force and breaking in the nighttime unlawfully enter the house occupied by such person, as charged in the indictment, with the intent to commit theft, he should be found guilty of burglary. *Turner v. State*, 62 App. 65, 136 S. W. 486.

Prosecutor, having opened a rival soda water factory to defendant, the latter informed him that others had tried to run an opposition factory but had been put out of business. A few nights thereafter defendant while intoxicated broke in the door of prosecutor's place of business, and when arrested he was found inside the building with a bottle of oil and a wrench. There was also evidence that prosecutor's machinery had been tampered with and was leaking. Held, that the court erred in refusing to charge that, before defendant could be convicted of burglary, the jury must believe that he broke and entered the house with the specific intent to commit either the crime of arson or theft, and if he broke and entered for any other purpose, or merely to destroy property therein, or to mingle oil in prosecutor's carbonator, he was not guilty, and in charging, in response to the jury's request for additional instructions, that, if defendant broke and entered the house with intent to commit theft, then the offense of burglary with intent to steal would be complete, though no theft was actually committed. *Vickery v. State*, 62 App. 311, 137 S. W. 687, Ann. Cas. 1913C, 514.

An instruction in a burglary case should expressly require a finding that the person from whom the property was taken was its owner, though that fact is evident from the evidence. *Majors v. State*, 63 App. 488, 140 S. W. 1095.

In a prosecution for breaking and entering a storage room in the custody of C., an instruction that, if C. had the key and exclusive right and means of entry, then he in law would be the "occupant," was correct and was not objectionable as charging that C. was in fact the occupant of the room burglarized. *Kinney v. State* (Cr. App.) 148 S. W. 783.

Where, on a trial for burglary, prosecutor testified that accused entered the house burglarized by opening a door, and that a gold scarf pin was lost the evening of the burglary, and accused denied entering the house, and the court charged that the jury must find that the entry was made with intent to steal, the refusal to charge on the issue of intent to steal conceived after entering into the house was proper. *Snodgrass v. State* (Cr. App.) 148 S. W. 1095.

In a prosecution for burglary of a house the court properly refused a requested charge that the jury must be satisfied whether the entry was in the daytime or in the night, before they could convict. *Parker v. State* (Cr. App.) 149 S. W. 108.

On a trial for breaking and entering a harness house and stealing a saddle, bridle, and blanket, where it was shown that a horse was stolen from a lot at the same time, evidence as to accused's possession of the horse shortly afterwards was admissible, and hence its admission and the refusal of an instruction to disregard it were proper. *Stephens v. State* (Cr. App.) 154 S. W. 1001.

Instructions expressly requiring the jury to find that accused entered the house at night in order to convict, and charging in addition that if accused did not enter the house at night, or with the owner's consent, or not by force, or not for the purpose of committing theft, the jury should acquit, sufficiently charged that the jury must find beyond a reasonable doubt that accused entered the house at night. *Dennis v. State*, 71 App. 162, 158 S. W. 1008.

The fact that one who with two others slept in a schoolhouse near the burglarized store on the night of the burglary had since moved to Oklahoma, and the sheriff could not find him in the county, and that knives from the burglarized store were found under the schoolhouse, did not authorize the submission of the issue that such person committed the burglary, where the persons sleeping at the schoolhouse with him testified that he was in the schoolhouse all night. *Pinkerton v. State*, 71 App. 195, 160 S. W. 87.

33. — **Conformity to indictment.**—See *Ellis v. State*, 57 App. 601, 124 S. W. 667.

Under an indictment charging burglary with intent to commit theft, an instruction that the jury should convict defendant if they believed that he broke and entered the house by force with intent to commit a felony or theft is erroneous, as authorizing conviction of an offense not specifically charged in the indictment. *Emerson v. State*, 114 S. W. 834, 54 App. 628; *Williams v. State*, 53 App. 2, 103 S. W. 371.

It was error to charge the provisions of the former statute providing increased punishment for burglary by force, where the indictment did not charge that the entry was by force. *Hobbs v. State*, 44 Tex. 353; *Wilcox v. State*, 45 Tex. 146.

The charge must conform to, and be limited by the specific offense set forth in

the indictment. Thus, where the indictment charges a burglary by means of force alone, it is error to charge with reference to a burglary committed by means of threats or fraud. *Lott v. State*, 17 App. 598; *Sullivan v. State*, 13 App. 462; *Weeks v. State*, Id. 466; *Buntain v. State*, 15 App. 485; *Levine v. State*, 22 App. 683, 3 S. W. 660. So, where the indictment charges a burglary committed in the daytime, it is error to instruct as to a burglary in the nighttime. *Bravo v. State*, 20 App. 188; *Mace v. State*, 9 App. 110; *Alexander v. State*, 31 App. 359, 20 S. W. 736. See, also, *Buchanan v. State*, 24 App. 195, 5 S. W. 847. Where the indictment charges a burglary with intent to commit theft, the charge must give the law of theft, as well as that of burglary. *Castenaga v. State*, 11 App. 390; *Simms v. State*, 2 App. 110; *Struckman v. State*, 7 App. 581; *Harris v. State*, 51 App. 564, 103 S. W. 390. Where the indictment charges burglary with intent to commit theft, it was held that the court erred in refusing to instruct the jury that the intent to commit theft must have existed in the mind of the defendant at the very time he entered the house, and that if he first conceived such intent after entering the house he must be acquitted of burglary. *Harris v. State*, 20 App. 652.

On a trial for a night time burglary there was no error in defining "breaking" as applied to a day time entry. The character of force is the same. *Daggett v. State*, 39 App. 5, 44 S. W. 148, 842.

On a trial for night time burglary there was no occasion or necessary for the court to define the terms "force" or "entry." *Dupree v. State*, 56 App. 206, 119 S. W. 685.

The court must, in burglary cases, instruct the jury that the burglarious entry must be found to have been made with the specific intent charged in the indictment. *Coleman v. State*, 26 App. 252, 9 S. W. 609; *Miller v. State*, 28 App. 445, 13 S. W. 646.

The court instructed the jury that if the burglarized building was composed of two rooms separated by a partition wall and if the alleged owner lived in one room and had exclusive control and management of it, she would be the owner; held, sufficient. *Reed v. State*, 34 App. 597, 31 S. W. 404.

Where an indictment for burglarizing a school building alleged that the entry was with intent to steal property belonging to the janitor, the court properly charged that a person in direct control of a house and in exclusive charge and control of property was for the purposes of the law the occupant of such house and owner of such property. *Lamater v. State*, 38 App. 249, 42 S. W. 304.

In prosecution for entering a house through an open door during the day and remaining concealed until night, the issue of fraudulent entry must be submitted to the jury. *St. Louis v. State* (Cr. App.) 59 S. W. 889.

Where an indictment charged an entry without the consent of the occupant of the house, and the jury were instructed that to convict they must find an entry without the free consent of the occupant, a further instruction that if accused by force in the night entered the house, as charged in the indictment, with intent to commit theft, to find him guilty, was not erroneous, as authorizing his conviction regardless of whether he had prosecutor's consent to enter the house. *Moore v. State*, 48 App. 400, 88 S. W. 230.

Where defendant was charged with burglary of a house occupied by one W., with the intent to steal the property of W., the court should have instructed that, in order to constitute burglary, it was necessary that the goods taken be in possession of W., and that the entry was for the purpose of stealing goods possessed by him. *Roberson v. State*, 51 App. 335, 101 S. W. 800.

A count of an indictment charging a daytime burglary did not allege that it was a private residence, but simply charged a burglarious entry of a house belonging to G. with intent to commit theft. A court charging a nighttime burglary alleged that it was a private residence occupied by G. and his family. A charge authorized a conviction on proof of an entry and remaining concealed therein, which state of facts was not pleaded in the indictment. The conviction was under the count for daytime burglary. Held, under article 1304, that the error in the charge cannot be complained of by the defendant, since it could not have induced the jury to return a verdict of guilty. *Fox v. State*, 62 App. 430, 138 S. W. 413.

Where in a trial on an indictment alleging burglary in the daytime in the first count, and burglary in the nighttime in the second, the evidence clearly established nighttime burglary, and the court charged that defendant should be acquitted if it was not nighttime burglary, it was not error to submit the second count only. *Shaffer v. State* (Cr. App.) 151 S. W. 1061.

Where an indictment in one count charged a daytime burglary and in another a nighttime burglary, and there was evidence sufficient to support a conviction under the second count, but not under the first, an instruction submitting generally, the question whether accused broke and entered the house, without reference to either a daytime or nighttime burglary, was not erroneous, since the verdict being general the conviction would be imputed to the count sustained by the facts. *Shornweber v. State*, 70 App. 389, 156 S. W. 222.

Where an indictment alleged that the warehouse burglarized was the property of one H. whom all the testimony showed to be the manager of a coal company owning the warehouse, the fact that a negro who fed stock therefrom carried a key, and that another employé also carried a key, would not raise the issue that they were the owners of the property so as to require an instruction thereon. *Holmes v. State*, 70 App. 214, 156 S. W. 1173.

34. — Possession of stolen property and explanation.—On trial for burglary where defendant made no explanation, but when his possession was challenged, merely said he knew nothing about it; held, error for the court to charge on recent possession. *Franks v. State*, 36 App. 149, 35 S. W. 977; *Jackson v. State*, 28 App. 143, 12 S. W. 701; *Carson v. State*, 48 App. 157, 86 S. W. 1011.

In a prosecution for burglary, a charge on recent possession is not necessary, unless defendant gave an explanation of his possession when found in such possession. *Gilford v. State*, 48 App. 312, 87 S. W. 698.

Nor unless the explanation is reasonable. *Connors v. State*, 31 App. 453, 20 S. W. 981.

An instruction that if defendant was found in possession of stolen property recently after the burglary, and failed to give a reasonable account of his possession, the jury might consider these facts with all the other facts and circumstances to enable them to determine whether defendant was guilty, was sufficiently favorable to defendant. *Prince v. State*, 44 Tex. 480.

An instruction given at defendant's request in connection with another instruction given by the court held to sufficiently present the law as to defendant's explanation of his possession of stolen property. *McCoy v. State*, 48 App. 30, 85 S. W. 1072.

Where the indictment charged burglary and the theft of oats, and the defense relied upon was, that defendant had purchased the oats, which were found in his possession recently after the burglary, and there was evidence tending to show such a purchase, it was held that the court should have affirmatively and pertinently expounded to the jury the law in regard to this defense. *Dond v. State*, 23 App. 180, 4 S. W. 580; *Shuler v. State*, 23 App. 182, 4 S. W. 581.

An instruction that the jury might consider defendant's possession of the stolen property, if he failed to give a reasonable account thereof, was properly refused, as such possession might be considered whether he gave an account thereof or not. *Payne v. State*, 21 App. 184, 17 S. W. 463.

Where defendant claimed to have bought the bed he was charged with taking, the court charged the jury that if they had a reasonable doubt that the bed was the property of prosecutor, they would acquit defendant. Held sufficient. *Threadgill v. State*, 32 App. 451, 24 S. W. 511.

Where the only evidence was the recent possession of property stolen from the burglarized house, the court should have instructed on the law of circumstantial evidence. *Robertson v. State*, 33 App. 366, 26 S. W. 508.

A charge that if property was stolen and recently thereafter found in defendant's possession, and he made no reasonable explanation, a conviction was justified, was on the weight of the evidence. *Wheeler v. State*, 34 App. 350, 30 S. W. 913.

Where defendant testifies as to how defendant came into possession, a charge on the effect of possession is necessary. *Williams v. State* (Cr. App.) 33 S. W. 371.

It is error to charge that if defendant made an explanation which was reasonable and probably true, his possession of the stolen property should not be considered unless such explanation is shown to be false, since the jury should be told to consider such testimony in defendant's favor, if the explanation is not shown to be false. *Hayes v. State*, 36 App. 146, 35 S. W. 983.

An instruction authorizing a conviction on the fact that defendant, shortly after the burglary, was found in possession of property taken in the burglary, on proof of the falsity of the explanation given by him, is on the weight of the evidence, and therefore erroneous. *Scott v. State* (Cr. App.) 36 S. W. 276.

On trial for burglary, defendant when found in possession of a pistol taken from the burglarized house, stated that he had bought it. The court instructed the jury that if they believed defendant had bought said pistol, or if they had a reasonable doubt concerning the matter, they would acquit him; held, sufficient. *Hays v. State*, 36 App. 533, 38 S. W. 171.

Charge as to explanation of possession; held, correct. *Williams v. State* (Cr. App.) 38 S. W. 989; *Riding v. State*, 40 App. 452, 50 S. W. 698.

An instruction that, if the jury believed the defendant's testimony that he bought the property from a third person, his possession thereof should not be considered as against defendant, was sufficiently favorable to him. *Lamater v. State*, 42 S. W. 304, 38 App. 249.

Where defendant claimed to have purchased property taken from the burglarized house and made that explanation when it was found in his possession, the failure to charge that if he had so purchased the property or if the jury had a reasonable doubt of that fact, they should acquit, was error. *Alvia v. State*, 42 App. 424, 60 S. W. 551.

An instruction that if property was stolen and recently thereafter found in the possession of defendant who at the time gave an explanation of his possession, reasonably consistent with innocence and probably true, the jury should accept such explanation and not consider such possession for any purpose, was erroneous, because if his explanation was correct the jury should acquit. *Lovelace v. State*, 45 App. 261, 76 S. W. 756.

An instruction that if defendant made an explanation of how he came by recently stolen property, which was reasonable and probably true and consistent with innocence, the jury should acquit, but if the state had shown such explanation to be false, the possession together with the explanation should be considered in connection with other circumstances, should have been given. *Lovelace v. State*, 45 App. 261, 76 S. W. 756; *Wheeler v. State*, 34 App. 350, 30 S. W. 913.

A charge that if property was stolen and recently thereafter found in defendant's possession, and if defendant gave an explanation of his possession, appearing reasonable and probably true and consistent with innocence, then before such circumstances could be considered against defendant, the jury must be satisfied from the other evidence of the falsity of defendant's explanation, and if they were not so satisfied they would acquit, was erroneous, as directing a conviction if defendant's explanation was false. *Hart v. State*, 47 App. 156, 82 S. W. 652; *Gilford v. State*, 48 App. 312, 87 S. W. 698.

On a prosecution for burglary, where it was shown that a purse stolen was found at defendant's house, an instruction that, if defendant was in possession of the purse and gave no explanation, it was a circumstance against him was erroneous. *Johnson v. State*, 50 App. 116, 96 S. W. 45.

It was proper to refuse a requested instruction that the mere possession of stolen property was not sufficient alone to convict of burglary, but only a circum-

stance to be considered together with the other evidence. *Hays v. State*, 51 App. 111, 100 S. W. 926.

Where a witness testified that she saw defendant come out of the window of the house with a bundle which he stated was his clothing which the owner of the house would not let him have, the court should have charged that if he went into the house for the purpose of getting his own clothing and secured it and not the property of such owner, he would not be guilty of burglary. *Harris v. State*, 51 App. 564, 103 S. W. 390.

Where defendant claimed that he obtained possession of stolen property from another person, an instruction that if he was not present when and where the house was broken and the property taken, but got it from some other person, he would not be guilty, sufficiently presented his defense. *Scott v. State*, 53 App. 332, 111 S. W. 657.

Where there was no explanation of defendant's possession of stolen property, and the case did not rest alone on such possession, the court was not required to charge specifically as to the recent possession of stolen property. *Young v. State*, 113 S. W. 764, 54 App. 560.

Where, on a trial for burglary, the state relied on the fact that a ring taken from accused several months after the burglary belonged to the wife of the owner of the house burglarized, and accused proved that he had purchased the ring, the failure to charge as to his statement as to the purchase as testified to was reversible error. *Moray v. State*, 61 App. 549, 135 S. W. 569.

Where one accused of burglary was accosted by the owner when leaving the house and told to return a pair of shoes and a pistol, which he did, throwing them into the owner's buggy without explanation, and running away, it was proper to omit to charge upon the presumption arising from the possession of recently stolen property, as he made no explanation of his possession. *Dixon v. State*, 62 App. 53, 136 S. W. 462.

Shoes were stolen from a freight car, and the state's principal witness there- after attempted to exchange a pair of the stolen shoes at the store of the owner. The witness asserted that he had acquired the shoes from accused, and that accused claimed to have bought them. Accused, when questioned, denied the transaction, and that he ever had possession of the shoes. Held, that an instruction on the possession of stolen property and the reasonableness of the explanation was improper, not being warranted by the evidence; the statement, if any, made by accused in regard to his possession, having been given before his right was questioned. *Handy v. State* (Cr. App.) 173 S. W. 299.

35. — Instructions in criminal cases in general.—See notes to C. C. P. art. 735.

36. — Instructions as to burden of proof and reasonable doubt.—See notes to C. C. P. art. 735.

37. — Instructions on weight of evidence.—See notes to C. C. P. art. 735.

38. — Instructions as to circumstantial evidence.—See notes to C. C. P. art. 735.

39. — Instructions as to accomplice testimony.—See notes to C. C. P. art. 801.

40. — Instructions as to principals.—See notes to C. C. P. art. 735.

41. — Instructions as to confessions.—See notes to C. C. P., art. 735. See, also, notes to C. C. P. art. 810, as to questions for jury.

42. — Limiting evidence.—See notes to C. C. P. art. 733.

43. — Instructions as to insanity, intoxication and burden of proving defenses.—See ante, art. 52 and notes; also notes to C. C. P. art. 735.

44. — Alibi.—See notes to C. C. P., art. 735.

45. — Harmless error.—See C. C. P., art. 743, and notes.

46. — Necessity of exceptions to charge.—See C. C. P. art. 743 and notes.

47. Argument of counsel.—See notes to C. C. P. arts. 724, 725.

48. Comments on failure of defendant to testify.—See C. C. P. art. 790 and notes.

49. Reopening case for further evidence.—See notes to C. C. P. art. 718.

50. Requisites and sufficiency of verdict.—See notes to C. C. P. arts. 763, 770.

51. Misconduct of jury.—See notes to C. C. P. art. 837, subd. 8.

52. Commitment of juveniles to reformatory.—See C. C. P. art. 1195 and notes.

53. Agreements not to prosecute.—See notes to C. C. P. art. 37.

54. Disqualification of prosecuting attorney.—See C. C. P. art. 40 and notes.

55. Liability of children for offenses.—See Penal Code, art. 34 and notes.

Art. 1305. [839a] "Burglary of private residence" defined.—The offense of burglary of a private residence is constituted by entering a private residence by force, threats or fraud, at night, or in any manner by entering a private residence at any time, either day or night, and remaining concealed therein until night, with the intent, in either case, of committing a felony, or the crime of theft. [Act 1899, p. 318.]

See notes under article 1304, ante.

Private residence defined.—See article 1314, post, and notes.

Necessity of presence of occupants.—It is not necessary that the family be personally present at the time of the burglary, but it is sufficient if the house is actu-

ally used at the time as a private residence though the family be temporarily absent. *Handy v. State*, 46 App. 406, 80 S. W. 526.

Distinct offense.—Prosecution for burglarizing private residence must now be conducted under this article and not under article 1303. *Harvey v. State* (Cr. App.) 61 S. W. 492.

Prosecution for a day time burglary of a private residence cannot be maintained under this article. For this article to apply it must be a night time burglary of a private residence, or a day time entry of private residence and remaining concealed until night with the intent to commit a felony or crime of theft. *Osborne v. State*, 42 App. 557, 61 S. W. 491 and cases following it overruled. *Williams v. State*, 42 App. 602, 61 S. W. 395, 62 S. W. 1057.

A day time burglary of a house or the night time burglary of a house is a distinct and separate offense from the night time burglary of a dwelling house *Martinus v. State*, 47 App. 528, 84 S. W. 831, 122 Am. St. Rep. 709.

A burglary committed in the day time is not within the purview of this article and the indictment need not allege that the house is a private residence. *Reyes v. State*, 51 App. 420, 102 S. W. 422.

Where the indictment merely alleges a burglary as denounced by articles 1303 and 1304, and the evidence shows a burglary of a private residence as denounced by article 1305, the variance is fatal to a conviction. *Sedgwick v. State*, 57 App. 420, 123 S. W. 702.

A conviction cannot be had under article 1305, relating to burglary of a private dwelling, where the burglarized house is not alleged to be a private dwelling; that article and article 1312, relating to burglary in private residences, covering a distinct offense from that defined by article 1303, defining "burglary" as the entry into a house by force or fraud at night, or in the daytime and remaining until night, with intent to commit a felony, and article 1304, making it burglary to enter a house in the daytime with intent to commit a felony or theft—article 1313 providing that nothing in articles 1305 or 1312 shall repeal articles 1303 and 1304. *Malley v. State*, 58 App. 425, 126 S. W. 598.

An indictment for burglary in the ordinary form, under article 1303, is not sustained by proof of burglary of a private residence, since such burglary is expressly made a distinct offense, and indictment therefor should be under article 1305. *Rodgers v. State*, 59 App. 146, 127 S. W. 834.

Under articles 1305 and 1312, making burglary of a private residence with intent to kill a distinct offense, it must be alleged and proved that the building was occupied as a residence at the time of the offense by some person or persons. *Hopkins v. State*, 61 App. 590, 135 S. W. 553.

The offenses described in articles 1303 and 1305 were distinct offenses, and a conviction cannot be had under article 1303, if the house burglarized was a private residence. *Alinis v. State*, 63 App. 272, 139 S. W. 980.

An indictment for the burglary of a residence in the daytime need not allege whether the burglary was committed in the daytime or in the nighttime, since, where a residence is burglariously entered in the daytime, the punishment is the same as for any other ordinary burglary, and it is only the burglary of a residence in the nighttime that is made a separate and distinct offense. *Snodgrass v. State* (Cr. App.) 148 S. W. 1095.

Indictment.—*Willson's Cr. Forms*, 629.

Indictment must allege the burglarized house to be a private residence. *Osborne v. State*, 42 App. 557, 61 S. W. 491, 492; *Fonville v. State* (Cr. App.) 62 S. W. 573; *Malley v. State*, 58 App. 425, 126 S. W. 598.

When the indictment contains no allegation that the house burglarized was a private residence and the proof shows that fact the variance is fatal. *Fonville v. State* (Cr. App.) 62 S. W. 573, overruled by *Williams v. State*, 42 App. 602, 61 S. W. 395, 62 S. W. 1057.

An indictment under this article must allege the essential elements constituting burglary therein mentioned among other things, that the burglarized house was a private residence. *Gilford v. State*, 48 App. 312, 87 S. W. 699.

The indictment must allege that the building or room was occupied and actually used at the time of the offense as a place of residence and should name the person occupying and using it. *Jones v. State*, 50 App. 100, 96 S. W. 44; *Johnson v. State*, 50 App. 116, 96 S. W. 45; *Lewis v. State*, 54 App. 636, 114 S. W. 818.

An indictment charging the burglary of a house "then and there the private residence of S. and that said S. was then and there using said house as a private residence," sufficiently charges that the house entered was used as a private residence. *Sedgwick v. State*, 57 App. 420, 123 S. W. 702.

Allegations in an indictment that accused by force, threats, and fraud broke and entered a house occupied by another sufficiently alleged an ordinary night or day breaking, but did not allege burglary of a private residence at night. *Ellis v. State*, 57 App. 601, 124 S. W. 667.

Art. 1306. [840] "Entry" defined.—The "entry" into a house, within the meaning of article 1303, includes every kind of entry but one made by the free consent of the occupant, or of one authorized to give such consent; it is not necessary that there should be any actual breakage to constitute the offense of burglary, except when the entry is made in the day time.

See notes under 1307, post.

Cited, *Dennis v. State*, 71 App. 162, 158 S. W. 1008.

Art. 1307. [841] Further defined.—The entry is not confined to the entrance of the whole body; it may consist of the entry of any

part for the purpose of committing a felony; or it may be constituted by the discharge of fire-arms or other deadly missile into the house, with intent to injure any person therein; or it may be constituted by the introduction of any instrument for the purpose of taking from the house any personal property, although no part of the body of the offender should be introduced.

Effect of statute in general.—While the general definition of burglary includes, in the breaking, intent to commit a felony, or the crime of theft, article 1307 is a limitation upon article 1303 and provides that where the entry is only of a part of the body, the crime intended to be committed after such breaking must be a felony. Under article 1303 this must be through an aperture made by the party. *Jones v. State*, 48 App. 336, 87 S. W. 1158.

This article does not abrogate the express terms of article 1303, but is simply an amplification upon and addition to, and explanation of the same. *Mason v. State* (Cr. App.) 100 S. W. 383, 384.

Article 1307 is but an addition to articles 1303 and 1304, and under the three articles, burglary may consist of entering a house by force, etc., or in entering a house and remaining therein with the intent to commit a felony, or by the discharge of firearms into a house with the intent to injure the person therein, and the intention need not be to commit a felony. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

Where defendant broke open the side of a railroad car, and entered in person, and took out some property, he was guilty, under the general statute, declaring one guilty of burglary who breaks and enters with intent to commit a felony or theft, and the value of the property was immaterial, as article 1307 was not applicable. *Boyd v. State*, 57 App. 647, 124 S. W. 651.

Burglarious entry in general.—Where the entry was made with the consent of the owner of the house, such consent being given by detectives, acting for said owner, it was held to be not a burglarious entry. *Speiden v. State*, 3 App. 156, 30 Am. Rep. 126. But where detectives merely facilitated the entry without suggesting the offense or originating the intent, the entry was held to be burglarious. *Johnson v. State*, 3 App. 590; *Robinson v. State*, 34 App. 71, 29 S. W. 40, 53 Am. St. Rep. 701.

Entry does not signify the entrance of the whole body. *Nash v. State*, 20 App. 384; *Burke v. State*, 5 App. 74; *Franco v. State*, 42 Tex. 276. To constitute a burglarious entry, the house must be entered by force, or by threats, or by fraud, whether the entry be in the daytime or in the nighttime. *Ross v. State*, 16 App. 554. To constitute burglary in the daytime the entrance into the house must be effected by actual force applied to the building. An entry in the daytime effected by threats or fraud, or by force, if such force be not upon the building, is not a burglarious entry. But if the entry be made at night, and be effected by force whether used upon the building or otherwise, or by threats, or by fraud, it is a burglarious entry. *Carr v. State*, 19 App. 635, 53 Am. Rep. 395; *Martin v. State*, 21 App. 1, 17 S. W. 430; *Martin v. State*, 1 App. 525.

An entry into a room with the owner's consent is not burglarious. *Turner v. State*, 24 App. 12, 5 S. W. 511.

As to an entry effected by fraud, see *Neiderluck v. State*, 23 App. 38, 3 S. W. 573; post, articles 1308, 1318 and 1319, and notes.

There was not only a total absence of evidence tending to show an entry by breaking or by force as alleged, but the proof was positive that the entry was made through an open door. Held insufficient to support a conviction. *Melton v. State*, 24 App. 287, 6 S. W. 303.

A special charge of the court was requested by the accused to the effect that, if the jury found that there were large openings in said building so situated as to admit of an easy entrance without force, and that the same could have been naturally used for said purpose and had been used for said purpose, and that at the time said property was taken an entry was made through either of said openings or unfinished ends, then the defendant is not guilty. Held, that the trial court did not err in refusing the said special charge, because, as the openings referred to were unusual places of entry, an entrance through either of them would be a burglarious entrance. *Painter v. State*, 26 App. 454, 9 S. W. 774.

An entry at night into a store during business hours with intent to conceal one's self; held, not a burglarious entry. *Edwards v. State*, 36 App. 387, 37 S. W. 438.

The slightest force, such as the opening of a door or the turning of a lock, is sufficient to constitute a burglarious entry. *Hedrick v. State*, 51 S. W. 252, 40 App. 532.

Where one breaks a window with the specific intent to enter there either with his hand or with his whole body, and thereafter takes thereout property of any value, he is guilty of burglary. *Mason v. State* (Cr. App.) 100 S. W. 383; *Williams v. State*, 53 App. 2, 108 S. W. 371.

Where defendant broke open the side of a railroad car, and entered in person, and took out some property, he was guilty of burglary, and the value of the property was immaterial, as art. 1307 was not applicable. *Boyd v. State*, 57 App. 647, 124 S. W. 651.

Discharge of firearms.—Entry effected by discharging fire-arms in house. *Melton v. State*, 24 App. 287, 6 S. W. 303; *Coleman v. State*, 26 App. 252, 9 S. W. 609; *Painter v. State*, 26 App. 454, 9 S. W. 775; *O'Brien v. State*, 27 App. 448, 11 S. W. 459; *Miller v. State*, 28 App. 445, 13 S. W. 646; *Walton v. State*, 29 App. 163, 15 S. W. 646.

To discharge firearms into a house with intent to injure any person therein is per se burglary, and constitutes all the force and entry necessary and essential to that crime. *Garner v. State*, 31 App. 22, 19 S. W. 333.

Indictment for burglary by discharge of fire-arms held sufficient. *Garner v. State*, 31 App. 22, 19 S. W. 333.

Under article 1307, discharging firearms into a house with intent to injure a person therein, constitutes burglary per se, and in a prosecution therefor, evidence of the general bad reputation of the alleged injured person for peace and quiet in the community, going merely to corroborate testimony that he had assaulted accused's wife, and tending to show that the shooting was only an aggravated assault, and not an assault with intent to murder, was properly excluded. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

It being per se burglary to shoot into a house with the intent to injure any person therein, it is immaterial whether accused, in a prosecution for such an offense, was guilty of assault with intent to murder, and it was not error to permit the prosecuting attorney to dismiss indictments charging accused with assault to commit murder before trying him for the burglary, arising out of the same transaction. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

In a prosecution for burglary by shooting into a dwelling house, where accused claimed that prosecuting witness had struck accused's wife and called her insulting names, and prosecuting witness testified that he never used violent language towards any one, and that his wife was never violent in language or conduct, evidence, to impeach the prosecuting witness, of a person that he had once gone to prosecuting witness' residence, and that prosecuting witness, without provocation or excuse, had spoken in a loud and angry manner in Mexican, and acted in a violent manner, was inadmissible as evidence merely of previous altercations with other parties. *Railey v. State*, 58 App. 1, 121 S. W. 1120, 125 S. W. 576.

In a prosecution for burglary by shooting into a dwelling house in the night with intent to murder, in which the state relied upon circumstantial evidence to convict, every circumstance throwing light upon the commission of the offense was admissible in evidence, and the conduct, on the night of the shooting, of accused and the person claimed to have been with him when they rode past the house and shot into it, was admissible, as well as testimony of the similarity of the tracks made by horses passing that night and those made by the horses of accused and such other as they rode past the house next day. *Windham v. State*, 59 App. 366, 128 S. W. 1130.

A motion to quash an indictment for burglary by the discharge of firearms into a house in the nighttime, with intent to commit a felony in the house, in violation of article 1307, was properly overruled, where the indictment was drawn strictly in the form laid down in White's Ann. Pen. Code, art. 1436. (White's Ann. Pen. Code, 1911, p. 1236). *Shetters v. State* (Cr. App.) 147 S. W. 582.

On a trial for burglary, committed by shooting into a house with intent to injure a woman who had previously lived with and been "kept" by accused, a question asked the prosecuting witness as to why accused wanted her to live with him, and whether he wanted her to sleep with him, was neither irrelevant nor incompetent. *Gradington v. State* (Cr. App.) 155 S. W. 210.

Art. 1308. [842] "Breaking" defined.—By the term "breaking," as used in article 1304, is meant that the entry must be made with actual force. The slightest force, however, is sufficient to constitute breaking; it may be by lifting the latch of the door that is shut, or by raising a window, the entry at a chimney, or other unusual place, the introduction of the hand or any instrument to draw out the property through an aperture made by the offender for that purpose.

See notes under article 1304, ante.

Burglarious breaking.—The word "breaking" implies actual force, but not such force as must necessarily amount to violence. *State v. Robertson*, 32 Tex. 159; *Anderson v. State*, 17 App. 305; *Franco v. State*, 42 Tex. 276.

"Breaking" is constituted by an entry with actual force, which to constitute burglary in the daytime must be applied to the building. A daytime burglary can not be committed by force not applied to the building, nor by threats or fraud. But a burglary in the nighttime may be committed by force whether applied to the building or not, or by threats, or by fraud. *Carr v. State*, 19 App. 635, 53 Am. Rep. 395; *Martin v. State*, 21 App. 1, 17 S. W. 430. When the entry is at night an actual breaking is not necessary. And breaking a room in the house, after entering the house by an open door, may be burglary. *Anderson v. State*, 17 App. 305; *Martin v. State*, 1 App. 525. As to what will constitute a breaking by fraud, see *Neiderluck v. State*, 23 App. 38, 3 S. W. 573. Ante, articles 1308, post, articles 1318 and 1319 and notes. See, also, *Williams v. State*, 24 App. 17, 5 S. W. 655; *Painter v. State*, 26 App. 454, 9 S. W. 774; *Garner v. State*, 31 App. 22, 19 S. W. 333.

A window may or may not be a usual place of entering a house, but this is a question of fact to be solved by the testimony. A window elevated five feet or more above the ground would be an unusual place, especially where the person entering through it did so by climbing. *Alexander v. State*, 31 App. 359, 20 S. W. 756.

The pushing open of a closed door held in place only by the friction of the door itself is a sufficient breaking. *Sparks v. State*, 34 App. 86, 29 S. W. 264.

To enter a mill house by crawling through a small hole under the sill is a "breaking," that being an unusual place of entry. *Knotts v. State* (Cr. App.) 32 S. W. 532.

Opening a closed door of a house is a breaking sufficient to constitute burglary. *Matthews v. State* (Cr. App.) 38 S. W. 172. See, also, *Martin v. State* (Cr. App.) 40 S. W. 270.

Day time burglary is not circumscribed by the illustrations of force used in the statute. If the door be shut and simply held in position by its own pressure upon the side and facings, it is a sufficient force and breaking to constitute a day time burglary to push, pull or shove it open with burglarious intent. *Duke v. State*, 42 App. 3, 57 S. W. 652.

Entering a room through a transom by tearing away a curtain is a sufficient breaking. *Holland v. State*, 47 App. 623, 85 S. W. 798.

If the window glass through which the defendant inserted his hand, was already broken, under this article he would not commit a burglary even though he inserted his hand for the purpose of committing theft. *Jones v. State*, 48 App. 336, 87 S. W. 1157.

(See note to article 1304.)

The "force" required to constitute burglary under this article, may be by lifting the latch of a closed door, by raising a window, by entry at a chimney, or other unusual place, the introduction of a hand or any instrument to draw out the property through the opening made by the burglar for that purpose. *Winkler v. State*, 58 App. 564, 126 S. W. 1134.

Where the state, in a prosecution for burglary, puts in evidence defendant's confession that the window was open, and that he merely reached into the house and took the money in question out through the opening, without any breaking, it is bound by such confession, unless impeached; and defendant is entitled to an instruction on the question of necessity for the use of force to constitute burglary, as defined by article 1308. *Winkler v. State*, 58 App. 564, 126 S. W. 1134.

A "breaking" as an element of the crime of burglary means an entry made with actual force, although the slightest force, as by lifting the latch of a door that is shut, or the opening of a door that is shut or locked, or the raising of a window, is sufficient. *Hollis v. State* (Cr. App.) 153 S. W. 853.

Under this article the unlocking and opening of a locked door and an entry thus affected with intent to steal or with actual theft is a breaking, even though the offender after committing the theft should again close and lock the door, and leave it as he found it. *Hollis v. State* (Cr. App.) 153 S. W. 853.

By "breaking" into a house is meant that the entry must be made with actual force, but the slightest force is sufficient to constitute a breaking, as the lifting of a doorlatch, etc. *Dennis v. State*, 71 App. 162, 158 S. W. 1008.

Art. 1309. [843] "House" defined.—A "house," within the meaning of this chapter, is any building or structure erected for public or private use, whether the property of the United States, of this state, or of any public or private corporation or association, or of any individual, and of whatever material it may be constructed.

What constitutes "house."—A "house" is any "building" or "structure" of whatever material it may be constructed. A "building" is a fabric, or edifice constructed; a thing built, as a house, a church, etc. A "structure" is a building of any kind, but chiefly a building of some size, or of magnificence; an edifice. An "office" is a place where a particular kind of business, or service, for others is transacted; a house, or apartment in which public officers and others transact business; as the register's office; a lawyer's office. Under these definitions an apartment constructed of pickets, and situated in one corner of a hardware house, and used to keep the account books, money, etc., of a lumber company, and to transact the business of said company in, was held to be a "house" within the meaning of the preceding article. *Anderson v. State*, 17 App. 305. A sheriff's office is a house within the meaning of the statute. *Bigham v. State*, 31 App. 244, 20 S. W. 577. A fruit stand built in the shape of a piano box, but large enough for the proprietor to stand in while making sales is a house. *Willis v. State*, 33 App. 168, 25 S. W. 1119. An ordinary "smoke house" is included in the definition. *Albritton v. State* (Cr. App.) 26 S. W. 398.

The house alleged to have been burglarized was what is commonly called a header box on a harvesting machine, it is 14 feet long, 6 feet wide, 4 feet high on one side and 18 inches high on the other, and had a top or cover; held, that it was not a house. *Williamson v. State*, 39 App. 60, 44 S. W. 1107, 73 Am. St. Rep. 901.

The structure burglarized was made of a wagon sheet stretched over a ridge-pole, and nailed down on each side to plank, which formed the sides. One end was boxed up with boards, the other end closed with a wagon sheet and some boxes; held, such structure was a house. *Henderson, J.*, dissenting from the opinion. *Favro v. State*, 39 App. 452, 49 S. W. 932, 73 Am. St. Rep. 950.

A shed was a house, within the burglary statute, though it was entirely closed by planking, and had no door, so that one could not enter without pulling off the planking. *Crow v. State*, 48 App. 25, 85 S. W. 1057.

A railroad car is not a "house" within the meaning of the law defining burglary, and an attempt to break and enter such a car is no offense. *Summers v. State*, 49 App. 90, 90 S. W. 310.

A show case 5 or 6 feet square and 6 or 8 feet high with a cover on same and a door located in the vestibule of a store house, is not a house, the breaking into and entry of which with felonious intent, constitutes burglary. *Clark v. State*, 56 App. 494, 120 S. W. 892.

Under this article, one compartment in a cold storage plant is a "house" within the statute, and one stealing meat stored therein is guilty of burglary. *Jame v. State*, 63 App. 559, 140 S. W. 1086.

A house alleged to have been burglarized was a storehouse with two wings. In one of the rooms hay had been stacked as high as the joists making a partition in the room, and here the beer stolen at the time of the burglary was stored. The parts of the room divided by the hay each had an outside entrance and were in the possession of different persons. A person could go from one part to the other by climbing over the hay through a space between the joists and the roof of the building. Held, that an instruction that each end of the room so divided was a separate "house," within the law relating to burglary, was proper. *Kinney v. State* (Cr. App.) 148 S. W. 783.

A harness house, which was a complete room with the door entered as the only entrance and which was made a part of a barn, was a "house" within the statute. *Dennis v. State*, 71 App. 162, 158 S. W. 1008.

The word "house," as used in article 1303, providing that the offense of burglary is constituted by entering a house by force at night, is given the most comprehensive meaning in view of article 1309, providing that the word shall mean any building or structure, of whatever material, erected for private use. *Williams v. State*, 72 App. 371, 162 S. W. 838.

A structure burglarized was a display window which was made a part of the building when it was constructed in that two of the outer walls of the window were the brick walls of the building, and the other was a wooden and brick structure partitioning off the showcase from the storeroom proper. The front of the show window was a glass window, raised from the bottom, and the window was from 9 to 18 inches deep and 5 or 6 feet high and wide, and the case contained four or five glass shelves for the goods, and was locked at the bottom of the window by a padlock. The showcase was outside of the store doors in the vestibule of the store, and there was no entrance to the showcase from the inside of the storeroom. Held, under this article that the show window was a "house" within article 1303, so as to make the forcible entry thereof burglary. *Williams v. State*, 72 App. 371, 162 S. W. 838.

A show case or show window which was made into and was a part of a house constituted a part of the "house," so that a breaking thereof and the taking of shoes therefrom was the breaking of a house. *Lewis v. State*, 72 App. 377, 162 S. W. 866.

Art. 1310. [844] "Day time" defined.—By the term "day time," is meant any time of the twenty-four hours from thirty minutes before sunrise until thirty minutes after sunset.

See notes to art. 1304, ante; *Laws v. State*, 26 App. 643, 10 S. W. 220.

Charge of court.—An instruction defining "nighttime burglary" should give a definition of "nighttime" as 30 minutes after sundown, and not before, as provided by statute. *Moray v. State*, 61 App. 549, 135 S. W. 569.

Evidence justifying submission of count.—Under this article, evidence that witness found a burglar in a room at about 10 or 15 minutes past 5 a. m. on a day in August, when the sun rose at about 18 minutes past 5 o'clock, was sufficient to justify submission of a count charging entry in the daytime. *Long v. State*, 53 App. 209, 127 S. W. 208, 21 Ann. Cas. 405.

Art. 1311. [845] Punishment.—The punishment for burglary shall be imprisonment in the penitentiary not less than two nor more than twelve years.

Explanatory.—The preceding article fixing the same punishment for all kinds of burglary was framed by the revisers of 1879 from articles 730, 731, 732, 733, O. C., which prescribed different punishments for different kinds of burglary; such as burglary of a dwelling house, burglary by force, burglary by the discharge of firearms, etc.

Art. 1312. [845a] Punishment for burglary of private residence.—The punishment for burglary of a private residence shall be by imprisonment in the penitentiary for any term of years not less than five. [Act 1899, p. 318.]

Statute as covering distinct offense.—A conviction cannot be had under article 1305, relating to burglary of a private dwelling, where the burglarized house is not alleged to be a private dwelling; that article and article 1312, relating to burglary in private residences, covering a distinct offense from that defined by article 1303, defining "burglary" as the entry into a house by force or fraud at night, or in the daytime and remaining until night, with intent to commit a felony, and article 1304, making it burglary to enter a house in the daytime with intent to commit a felony or theft—article 1313 providing that nothing in articles 1305 or 1312 shall repeal articles 1303 and 1304. *Malley v. State*, 58 App. 425, 126 S. W. 598.

Diurnal burglary.—If a burglary is committed in a private house in the day time, the fact of its being a private house does not change the punishment, which is imprisonment for not less than two nor more than twelve years. *Holland v. State*, 45 App. 172, 74 S. W. 763.

Nocturnal burglary.—A verdict of thirty years imprisonment was not cruel or excessive. *Handy v. State*, 46 App. 406, 80 S. W. 526.

Art. 1313. [845b] Burglary of private residence at night distinct offense.—Nothing in articles 1305 and 1312 shall be construed

to alter or in any manner repeal articles 1303 and 1304, nor any part thereof, but shall be construed to make burglary of a private residence at night a separate and distinct offense from burglary, as defined in articles 1303 and 1304. [Id., 318.]

Distinct offense.—Acts 1899, p. 318 applies only to burglaries committed at night. A daytime burglary of a private residence is not affected but is left as an offense under article 1303 as simply the burglary of a house. *Williams v. State*, 42 App. 602, 61 S. W. 395, 62 S. W. 1057.

A conviction cannot be had under article 1305, relating to burglary of a private dwelling, where the burglarized house is not alleged to be a private dwelling; that article and article 1312, relating to burglary in private residences, covering a distinct offense from that defined by article 1303, defining "burglary" as the entry into a house by force or fraud at night, or in the daytime and remaining until night, with intent to commit a felony, and article 1304, making it burglary to enter a house in the daytime with intent to commit a felony or theft—article 1313 providing that nothing in articles 1305 or 1312 shall repeal articles 1303 and 1304. *Malley v. State*, 58 App. 425, 126 S. W. 598.

Under articles 1305 and 1312, making burglary of a private residence with intent to kill a distinct offense, it must be alleged and proved that the building was occupied as a residence at the time of the offense by some person or persons. *Hopkins v. State*, 61 App. 590, 135 S. W. 553.

Art. 1314. [845c] "Private residence" defined.—The term "private residence," mentioned in this and articles 1305 and 1313, shall be construed to mean any building or room occupied and actually used, at the time of the offense, by any person or persons as a place of residence. [Id., p. 318.]

Cited, *Parker v. State* (Cr. App.) 149 S. W. 108.

What constitutes "private residence."—Where prosecutor was renting a room in a hotel and lived in it as a private residence, the room was a private residence within the statute. *Holland v. State*, 45 App. 172, 74 S. W. 763.

Burglary of a room in a school dormitory is of a private residence. *Mays v. State*, 50 App. 391, 97 S. W. 703.

There is no technical meaning as to what a private residence is. Where K. and another slept in a house which K. rented, insured and controlled, and in which he and others took their meals until about a week or ten days before the burglary, the house was a private residence. *Johnson v. State*, 52 App. 201, 107 S. W. 52.

It is necessary that somebody occupy the room or house burglarized as a private residence. *Lewis v. State*, 54 App. 636, 114 S. W. 818.

In a prosecution for burglary with intent to murder, in which error was alleged, in that the judge withdrew from the jury a count alleging burglary of a private residence with intent to kill under article 1305, evidence held insufficient to show that the house was occupied as a residence at the time of the offense. *Hopkins v. State*, 61 App. 590, 135 S. W. 553.

The house burglarized consisted of a storeroom, which was subdivided by a partition, the front room being a restaurant, the middle room being used as a kitchen, and the rear room as a sleeping apartment for the tenant, his wife, and daughter, and the entry was made in the middle room and the articles stolen therefrom. Held, that the only part of the building used as a private residence was the sleeping apartment, so that the burglary was not a burglary of a private residence. *Alinis v. State*, 63 App. 272, 139 S. W. 980.

An instruction in a prosecution for burglary which defines "private residence" as "a building actually occupied and used as a place of residence" is not erroneous, since placing the word "actually" before the word "occupied," instead of before the word "used," as in the statute, does not give to the words any different meaning. *Dowling v. State*, 63 App. 366, 140 S. W. 224.

A building burglarized consisted of a storehouse in which a restaurant was conducted. The storehouse was divided into three rooms. The first was used as a dining room, the middle room for cooking, and the rear room was occupied by prosecutor and his wife as a bedroom. The room entered, and from which the property was stolen, was the cookroom. Held, that the premises did not constitute a "private residence," and that accused was properly prosecuted under article 1304, declaring that he who enters a house in the daytime with intent to commit a theft by breaking is guilty of burglary, and not under article 1305, providing that the entry of a private residence, either in the day or night, shall constitute burglary. *Alinis v. State*, 63 App. 371, 140 S. W. 227.

Evidence in a trial for burglary of a dwelling held to show that it was the place of residence of the owner as charged, though he slept elsewhere most of the time. *Payne v. State* (Cr. App.) 148 S. W. 694.

A jewelry store in which was a little gallery about 10 feet above the floor curtained off as a sleeping apartment, with a railing around the gallery next to the store part, but without any partition, was not a "private residence" within the statute, which makes a distinction between ordinary burglary and the offense of breaking into a private residence. *Shornweber v. State*, 70 App. 389, 156 S. W. 222.

Art. 1315. Burglary with explosives.—Any person who shall commit burglary, as defined by the Penal Code of this state, and in

the commission of the offense uses nitro-glycerine, dynamite, gunpowder, or other high explosives, shall be deemed guilty of burglary with explosives. [Act 1907, p. 210.]

Art. 1316. Punishment for same.—Any person who shall be convicted of burglary with explosives shall be punished by imprisonment in the state prison for not less than twenty-five years and not more than forty years. [Id., p. 210.]

Art. 1317. [846] Other offenses committed after entry punishable.—If a house be entered in such manner as that the entry comes within the definition of burglary, and the person guilty of such burglary shall, after so entering, commit theft, or any other offense, he shall be punished for burglary, and also for whatever other offense is so committed. [Act Feb. 12, 1858, p. 180.]

See notes under article 1304, ante, and article 1318, post.

Trial or conviction of burglary as bar to prosecution for theft.—Under article 1317, a previous trial for burglary does not prevent a prosecution for theft of the property claimed to have been taken in the burglary. *Newton v. State* (Cr. App.) 143 S. W. 638.

Under the express provision of article 1317, a conviction of burglary of a box car would be no bar to a prosecution for theft of goods after the entry had been effected. *McDonald v. State*, 70 App. 80, 156 S. W. 209.

Indictment.—Willson's Cr. Forms, 625.

Art. 1318. [847] Same subject.—If the burglary was effected for the purpose of committing one felony, and the person guilty thereof shall, while in the house, commit another felony, he shall be punishable for any felony so committed as well as for the burglary.

Constitutionality.—This article is constitutional. *Smith v. State*, 22 App. 350, 3 S. W. 238.

Prosecution and conviction of burglary and contemporaneous offenses.—See notes under article 1304, ante.

A conviction can not be had under the same indictment for both burglary and the felony or theft committed after entry into the house. Convictions for each offense can only be had under separate indictments. *Howard v. State*, 8 App. 447; *Shepherd v. State*, 42 Tex. 501; *Robertson v. State*, 6 App. 669; *Struckman v. State*, 7 App. 581; *Smith v. State*, 22 App. 350, 3 S. W. 238.

Burglary and theft committed in one and the same transaction may be prosecuted and punished as separate but not as joint offenses. *Rust v. State*, 31 App. 75, 19 S. W. 763; *Alexander v. State*, 31 App. 359, 20 S. W. 756.

Where a party is charged in separate indictments for burglary and theft committed after the burglarious entry, he may be tried for each offense and convicted of both offenses. *Loakman v. State*, 32 App. 563, 25 S. W. 22. Cases of *Shepherd v. State*, 42 Tex. 501; *Robertson v. State*, 6 App. 669; *Struckman v. State*, 7 App. 581; *Howard v. State*, 8 App. 447; *Smith v. State*, 22 App. 350, 3 S. W. 238, holding a different doctrine, are overruled.

A former acquittal of an attempt to commit rape is not a bar to a prosecution for an attempt to commit burglary for the purpose of committing rape, involving the same offense. *Byas v. State*, 41 App. 51, 51 S. W. 923, 96 Am. St. Rep. 762.

A party may be convicted of burglary and of the offense intended to be committed in the perpetration of the burglary, as well as any other offense committed at the time. *Adams v. State* (Cr. App.) 62 S. W. 1050.

One having been convicted of burglary, and sentenced, may also be convicted of theft committed in connection with the same burglary; they not being included offenses. *Clark v. State*, 59 App. 246, 128 S. W. 131, 29 L. R. A. (N. S.) 323.

The fact that an indictment for burglary alleged possession of the premises in one person and that an indictment for theft growing out of the same transaction alleged possession of the goods in another person would not necessarily present a variance. *McDonald v. State*, 70 App. 80, 156 S. W. 209.

Acquittal or conviction of burglary as bar to prosecution for theft, and vice versa.—Former jeopardy in general, see C. C. P. art. 9, and notes.

Where a party is charged in separate indictments for burglary and theft committed after the burglarious entry, he may be convicted of both offenses. *Loakman v. State*, 32 App. 563, 25 S. W. 22. Cases of *Shepherd v. State*, 42 Tex. 501; *Robertson v. State*, 6 App. 669; *Struckman v. State*, 7 App. 581; *Howard v. State*, 8 App. 447; *Smith v. State*, 22 App. 350, 3 S. W. 238, holding a different doctrine are overruled.

When the indictment charges burglary, and also charges the commission of theft, a conviction of the burglary operates as a bar to any further prosecution for the theft. *Turner v. State*, 22 App. 42, 2 S. W. 619; *Miller v. State*, 16 App. 417; *Howard v. State*, 8 App. 447. See, also, *Williams v. State*, 24 App. 69, 5 S. W. 833; *Rust v. State*, 31 App. 75, 19 S. W. 763.

When burglary and theft is charged in one indictment it is a bar to another prosecution. *Crawford v. State*, 31 App. 51, 19 S. W. 766.

Conviction of theft does not bar prosecution for burglary even if it grew out of the same transaction. *Hunt v. State* (Cr. App.) 60 S. W. 965; *Fielder v. State*, 40 App. 184, 49 S. W. 376.

In a prosecution for burglary, evidence that accused had been acquitted of theft of the goods exhibited on the trial was not admissible as showing a second putting in jeopardy; the two defenses being distinct. *Wallace v. State*, 57 App. 354, 123 S. W. 135.

One having been convicted of burglary, and sentenced, may also be convicted of theft committed in connection with the same burglary; they not being included offenses. *Clark v. State*, 59 App. 246, 128 S. W. 131, 29 L. R. A. (N. S.) 323.

Burglary and theft growing out of the same transaction being separate and distinct offenses, an acquittal of the burglary will not bar a subsequent prosecution for the theft. *Roman v. State*, 64 App. 515, 142 S. W. 912.

Burglary and theft growing out of the same transaction being separate and distinct offenses, an acquittal of the burglary will not bar a subsequent prosecution for the theft. *Roman v. State*, 64 App. 515, 142 S. W. 912.

Acquittal of burglary as barring prosecution for receiving stolen property.—In a prosecution for receiving stolen property, it was not error to ignore a plea of former jeopardy based on an acquittal of burglary. Citing *Loakman v. State*, 32 App. 563, 25 S. W. 22. *Allen v. State* (Cr. App.) 175 S. W. 700.

Art. 1319. [848] Actual breaking necessary in case of domestic.

—An entry into a house for the purpose of committing theft, unless the same is effected by actual breaking, is not burglary when the same is done by a domestic servant or other inhabitant of such house; but a theft committed by such person after entering a house is punishable as in other cases.

“Domestic.”—“Domestics” are those who reside in the same house with the master they serve. The term does not extend to workmen and laborers employed out of doors. A domestic is a servant or hired laborer residing with a family. The preceding article includes both domestics and inhabitants, and does not extend to a servant whose employment is out of doors, and not in the house, or to a lodger or visitor, as distinguished from an inhabitant. *Wakefield v. State*, 41 Tex. 556.

A farm hand who sleeps and eats outside of the master’s house, though he performs chores inside of the house when directed, is not a domestic servant. *Waterhouse v. State*, 21 App. 663, 2 S. W. 889.

Where a man employed for certain work in a hotel, who performed no services in a saloon in the same building, under the same management, but operated separately from the hotel, unlocked the saloon door at night and entered to commit larceny, it was not error, on his trial for burglary, to refuse to charge as to domestic servants, since he was not a servant as to the saloon. *Jackson v. State*, 43 App. 260, 64 S. W. 864.

A farm tenant who sometimes worked in a store, but never about the store-keeper’s house, was not a “domestic servant,” so as to require submission of his status as such in a trial for burglary of the house. *Williams v. State* (Cr. App.) 143 S. W. 634.

“Inhabitant.”—An “inhabitant” is one who has a fixed residence as distinguished from an occasional lodger or visitor. *Wakefield v. State*, 41 Tex. 556; *Ullman v. State*, 1 App. 220, 28 Am. Rep. 405.

A “boarder” is not an inhabitant. *Ullman v. State*, 1 App. 220, 28 Am. Rep. 405.

Breaking and entry.—To constitute burglary by a domestic servant, or an inhabitant of the house, there must be an actual breaking. The mere lifting of a latch to effect an entry, is, in such case, not an actual breaking. But where such servant or inhabitant is acting with others in entering the house, an actual breaking is not necessary to constitute burglary as to him, and as to those acting with him. *Neiderluck v. State*, 23 App. 38, 3 S. W. 573; *Alexander v. State*, 48 App. 531, 89 S. W. 642, 122 Am. St. Rep. 771. Ante, articles 1307 and 1308 and notes.

The difference in an unlawful entry made by a stranger and by a domestic servant is, in the former case a constructive breaking is sufficient, while in the latter an actual breaking must be proved. *Peters v. State*, 33 App. 170, 26 S. W. 61.

Art. 1320. [849] Attempt at burglary; how punished.—If any person shall attempt to commit the crime of burglary, he shall be punished by confinement in the penitentiary not less than two nor more than four years. [Act Feb. 11, 1860, pp. 100-01.]

Attempts and conspiracy to commit offense.—Defendant proposed the crime to another, who informed the owner of the premises sought to be burglarized. The owner told the informer not to hinder defendant but to let him come of his own free will, and the informer agreed with defendant to commit the burglary without intending its accomplishment. An actual attempt to enter was made. Held that defendant did not have the owner’s consent, and was guilty of an attempt. *Robinson v. State*, 34 App. 71, 29 S. W. 40, 53 Am. St. Rep. 701.

It is not burglary nor any other offense to “attempt” to break and enter a railroad car. *Summers v. State*, 49 App. 90, 90 S. W. 310.

Defendants, at night, burglarized, or attempted to burglarize, a store. They were armed to resist arrest. When detected by decedent and a third person they were asked to halt but made no inquiry of the object, and when called to halt a second time they shot and killed decedent. Neither of defendants knew, or could have known, that decedent and the third person did not have a warrant for their arrest. Held, that under articles 1303 and 1320, making a felony to commit the offense of burglary or to attempt to commit burglary, and C. C. P. art. 259,

authorizing a peace officer or any other person to arrest without warrant when a felony is committed within his view, the issue of murder was raised. *Stewart v. State* (Cr. App.) 174 S. W. 1077.

Indictment.—Willson's Cr. Forms, 631.

An indictment charging defendant with attempting to break and enter a house with intent to commit the crime of theft, by attempting by force to raise a window was sufficient. *Jones v. State*, 53 App. 470, 110 S. W. 748.

Evidence.—Under articles 1320 and 1321, defining an attempt as an endeavor to accomplish burglary falling short of the ultimate design, evidence held to support a conviction for an attempt to commit burglary. *Peters v. State* (Cr. App.) 154 S. W. 563.

Art. 1321. [850] "Attempt" defined.—An "attempt," in the sense in which the word is used in the preceding article, is an endeavor to accomplish the crime of burglary carried beyond mere preparation, but falling short of the ultimate design in any part of it. [Id.]

See notes under the preceding article.

See *Lovett v. State*, 19 Tex. 174.

Indictment.—Willson's Cr. Forms, 631.

CHAPTER SEVEN

OF OFFENSES ON BOARD OF VESSELS, STEAMBOATS AND RAILROAD CARS

Art.		Art.	
1322.	Burglarious entry on board of vessel.	1325.	Rules, etc., of burglary applicable.
1323.	By actual breaking, in day time.	1326.	Theft by a servant on board punishable as such.
1324.	Other offense committed after entry punishable.		

Article 1322. [851] Burglarious entry on board of vessel.—If any person, by any of the means enumerated in article 1303, shall at night enter any vessel, steamboat or railroad car, with intent to commit a felony or theft, he shall be punished by confinement in the penitentiary not less than two nor more than five years.

See notes under following article.

Indictment.—Willson's Cr. Forms, 631a.

Art. 1323. [852] By actual breaking in daytime.—If any person shall, by breaking, enter a vessel, steamboat or railroad car in the daytime, with intent to commit a felony or theft, he shall be punished as prescribed in the preceding article.

Breaking as element of offense.—Whether the entry be by day or night there must be a breaking. If in the daytime the breaking must be an actual breaking applied to the building. *Newman v. State*, 55 App. 273, 116 S. W. 577.

Attempt.—The attempt to break and enter a railroad car is no offense under our law. *Summers v. State*, 49 App. 90, 90 S. W. 310.

Indictment.—See *Hamilton v. State*, 26 App. 206, 9 S. W. 687.

An indictment charging defendant with breaking and entering a railroad car occupied by K., with intent to steal the property of K. and H., is not defective because it does not allege the ownership of the car, or the right in which K. was occupying it. *Pyland v. State*, 33 App. 382, 26 S. W. 621.

Where it appears that the person named in the indictment as the owner of and in possession of the stolen goods had the exclusive control thereof, it is immaterial whether he was a general or special owner. *Smith v. State*, 34 App. 124, 29 S. W. 775.

Evidence.—Opinion, hearsay and best evidence, see notes under C. C. P., art. 783.

See *Butler v. State*, 52 App. 528, 107 S. W. 840; *Hamilton v. State*, 26 App. 206, 9 S. W. 687.

Where there were missed from a broken freight car, a lawn mower and a box of poultry food, two handles of the lawn mower being left in its broken box, evidence that a like box of food and lawn mower without handles, with other goods corresponding with goods missed from other cars, were found hidden on defendant's premises, was enough to show that the car had been entered, and the goods found taken therefrom. *Dawson v. State*, 25 S. W. 21, 32 App. 535, 40 Am. St. Rep. 791.

Where defendant is charged with burglarizing a car with intent to steal the property of certain persons, it is not error to permit proof of the character and ownership of the stolen property. *Pyland v. State*, 33 App. 382, 26 S. W. 621.

On trial of a person charged with breaking and entering a railroad car occupied by K., it was not error to permit the state to show want of consent of K., and that he was in control of the car at the time of the burglary. *Pyland v. State*, 33 App. 382, 26 S. W. 621.

In a prosecution for burglary of a freight car, evidence held to warrant a conviction. *McDonald v. State* (Cr. App.) 152 S. W. 1061.

In a prosecution for burglary of a freight car, evidence held to warrant a finding that a certain conductor was in control and occupancy thereof at the time of the offense, as alleged in the indictment. *McDonald v. State* (Cr. App.) 152 S. W. 1061.

It is not sufficient to convict defendant of burglary of a car, from which whisky of a certain brand was taken, that two months later, in a warehouse near there, a key to which he had, and to which he had to go for grain, he was seen drinking whisky of that brand, which he got from under the floor; it not being identified as the whisky taken from the car, and he testifying without contradiction that a certain person told him whisky was there, and to help himself. *Oliver v. State* (Cr. App.) 153 S. W. 309.

Instructions.—In a prosecution for burglary by entering a railroad car, where it appeared that accused, when found in the car, stated that he had reported the car as being open, and had been instructed by his foreman, S., to nail it up, and that he had gone in to see whether anything had been taken, and there was no pretense or claim that he had gone into the car at the direction of S., it was error to instruct that, if the jury was not satisfied by the evidence beyond a reasonable doubt that accused's claim that he was in the car under the direction of S. when found there by witnesses named was untrue, they should acquit, since the charge was on a vital point, and was inapt, if not inaccurate, in submitting that phase of accused's case. *Butler v. State*, 107 S. W. 840, 52 App. 528.

New trial.—See notes to C. C. P. art. 837.

Art. 1324. [853] Other offenses committed after entry punishable.—If a vessel, steamboat or railroad car be entered in such manner as that the entry, if made in a house, would be burglary, and the person so entering shall commit theft or any other offense after entry, he shall be punished for the offense defined in article 851, and also for whatever other offense he may so commit.

See art. 1318, note.

Art. 1325. [854] Rules, etc., of burglary applicable.—The definitions, rules and explanations of terms in the preceding chapter are applicable to such terms in this chapter; and the rules prescribed in articles 1303, 1304, 1305, 1306 and 1307 of the preceding chapter shall also apply to similar cases on board of a vessel, steamboat or railroad car.

Indictment.—The rule that in charging burglary of a house it is sufficient to allege that it was done burglariously and without the consent of the occupant, without alleging the ownership or the right in which such occupant is occupying and holding is, under this article, applicable to burglary of a railroad car. *Pyland v. State*, 33 App. 382, 26 S. W. 621.

Art. 1326. [855] Theft by a servant on board punishable as such.—A theft on board a steamboat, vessel or railroad car, committed by a servant or employé, except in cases where there has been an actual breaking in, is punishable simply as theft.

CHAPTER EIGHT

OF ROBBERY

Art. 1327. "Robbery" defined and punished.	Art. 1328. Fraudulent acquisition of property by threats.
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Article 1327. [856] "Robbery" defined and punished.—If any person by assault or violence or by putting in fear of life or bodily injury shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary for life, or for a term of not less than five years; and, when a firearm or other deadly weapon is used or exhibited in the commission of the offense, the punishment shall be death, or by confinement in the penitentiary for any term not less than five years. [Act April 12, 1883, pp. 80–81; amend. 1895, p. 89.]

Explanatory.—The preceding article was article 743 of the original Code, and read as follows:

"Art. 743. If any person, by assault or by violence, and putting in fear of life or bodily injury, shall fraudulently take from the person of another any property,

with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary, for a term not less than two, nor more than ten years."

It was amended by Act of November 12, 1866, and as then amended was adopted in the Revised Code (1879) as follows:

Art. 722. If any person by assault, or by violence and putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another, any property, with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary not less than two nor more than ten years."

And thus the article remained until amended by the Act of April 12, 1883, after which it was the same as article 856 down to and including the first penal clause, and then read as follows: "When the offense is committed by two or more persons acting together, and a fire-arm or other deadly weapon is used or exhibited by either of them in the commission of the offense the person or persons so using or exhibiting the fire-arm or other deadly weapon shall be punished by imprisonment in the penitentiary for life or for a term not less than five years."

See *McCormick v. State*, 26 App. 678, 9 S. W. 277; *Coffelt v. State*, 27 App. 608, 11 S. W. 639, 11 Am. St. Rep. 205; *Clark v. State*, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Miller v. State*, 28 App. 445, 13 S. W. 646; *Evans v. State* (Cr. App.) 148 S. W. 573; *Goodman v. State* (Cr. App.) 177 S. W. 968.

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| 1. Nature and elements of offense. | 10. Admissibility of evidence in general. |
| 2. Distinguished from theft. | 11. Other offenses as evidence. |
| 3. Receiving money taken as offense. | 12. Sufficiency of evidence. |
| 4. Former jeopardy. | 13. Questions for jury. |
| 5. Bail. | 14. Argument of counsel. |
| 6. Special venire in capital cases. | 15. Charge of court. |
| 7. Indictment. | 16. Responsiveness of verdict. |
| 8. ——— Proof and variance. | 17. Conviction of assault. |
| 9. Judicial notice. | 18. New trial. |

1. Nature and elements of offense.—It must be proved that the property taken belonged to some other person than the defendant. A party cannot be guilty of robbery in taking his own property, or property which he bona fide believes to belong to him. *Smedly v. State*, 30 Tex. 214; *Barnes v. State*, 9 App. 128.

The effect of the amendment of February 12, 1883, of article 722 (Code 1879) is to prescribe three separate, distinct, and independent modes in which the offense of robbery may be committed: 1, by assault; 2, by violence; 3, by putting in fear of life, or bodily injury. Violence, without the concurrence of either one of the others, is a mode in which the offense may be committed. *Bond v. State*, 20 App. 421; *Leonard v. State*, Id. 422.

Robbery by use of firearms is a capital felony. *Burries v. State*, 36 App. 13, 35 S. W. 164.

The indictment charged a robbery by means of assault, violence, and putting in fear. The proof shows that the defendant, at night, with his hat pulled down and his collar turned up, met the injured party and summoned him to throw up his hands, stating that he was an officer of the law and would arrest the injured party for being drunk and noisy; that the injured party (who testified that he was much alarmed) threw up his hands, and the defendant then took a roll of money from the pocket of the said injured party. Held, that the proof sustains an indictment for robbery by putting in fear, wherefore the trial court did not err in refusing a requested charge to the effect that the jury should acquit the defendant if they believed that he obtained the money by so personating an officer that the injured party, believing him to be an officer, permitted him to take the money. *McCormick v. State*, 26 App. 678, 9 S. W. 277.

Where money lost by defendant to the prosecutor in a gambling game, had been delivered to the prosecutor under the rules of the game without protest from defendant, the subsequent retaking of the money by defendant at the point of a pistol, was robbery. *Blain v. State*, 34 App. 417, 31 S. W. 368.

Robbery may be committed by assault as well as by putting in fear. *Pendy v. State*, 34 App. 643, 31 S. W. 647.

When no fear is excited prior to the robbery, there must, to constitute the crime, have been force or violence. *Johnson v. State*, 35 App. 140, 32 S. W. 537.

Property taken from a house in which the owner lived is taken from her possession, although it belonged to her son, and it is not necessary to prove want of the son's consent. *Williams v. State*, 37 App. 147, 38 S. W. 999.

Party cannot retake by force money that he has willingly delivered, on the ground that the money belonged to him. *Carroll v. State*, 42 App. 30, 57 S. W. 100.

Where, after making an arrest and taking the prisoner to jail, the officers, without asking his consent to be searched, rudely backed him against the wall and held his hands up, while one of them extracted money from his pocket, sufficient force was used to constitute robbery. *Tones v. State*, 48 App. 363, 88 S. W. 217, 1 L. R. A. (N. S.) 1024, 122 Am. St. Rep. 759, 13 Ann. Cas. 455.

Conceding that officers making an arrest may search the prisoner and take valuables from him for the purpose of keeping them safely until he is enlarged, yet if they had the intent, at the time of finding valuables or money on him, to take the same, and used force to make the search, their right of search is not available to defeat a prosecution for robbery. *Tones v. State*, 48 App. 363, 88 S. W. 217, 1 L. R. A. (N. S.) 1024, 122 Am. St. Rep. 759, 13 Ann. Cas. 455.

Officers who make a rightful arrest, and subsequently use violence and rob the party arrested, are not exonerated on account of the legality of the alleged arrest. *Tones v. State*, 48 App. 363, 88 S. W. 217, 1 L. R. A. (N. S.) 1024, 122 Am. St. Rep. 759, 13 Ann. Cas. 455.

Where prosecutor, in anticipation of being robbed, carried marked money, in order to detect the robber, this was not such consent as absolved defendant from criminality. *Tones v. State*, 48 App. 363, 88 S. W. 217, 1 L. R. A. (N. S.) 1024, 122 Am. St. Rep. 759, 13 Ann. Cas. 455.

It is not robbery for one to forcibly compel another to give up to him money which the former believes to belong to him. To constitute robbery the taker must have a fraudulent intent, and he must take another's property and not his own. *Glenn v. State*, 49 App. 349, 92 S. W. 806, 13 Ann. Cas. 774.

Where defendant leveled a pistol at prosecutor, and compelled him to draw a \$10 bill from his pocket, whereupon defendant had the bill changed, and returned \$2 to prosecutor, defendant was guilty of robbery, notwithstanding prosecutor owed defendant \$\$ for services, and defendant's acts were merely for the purpose of collecting his debt. *Fannin v. State*, 51 App. 41, 100 S. W. 916, 10 L. R. A. (N. S.) 744, 123 Am. St. Rep. 874.

A person was guilty of robbery by force where he took money from the prosecutor's pocket while the prosecutor was vomiting, and in a measure helpless, but nevertheless protested against the taking of the money and sought to prevent it. *Williams v. State*, 51 App. 361, 102 S. W. 1134, 123 Am. St. Rep. 884.

Where a person orders others to hold up their hands, and through fear of life they do so, and he goes through their pockets and takes money, he is guilty of robbery. *Keys v. State*, 60 App. 279, 131 S. W. 1068.

That a robber evidently intended to obtain money placed in the victim's coat the day before, and, taking the coat, carried it a short distance and threw it away, does not make the offense any less robbery. *Brown v. State*, 61 App. 334, 136 S. W. 265.

To constitute robbery, the taking need not be "without the consent of the owner and fraudulently done"; a taking by putting in fear of life or bodily injury being sufficient. *Brown v. State*, 61 App. 334, 136 S. W. 265.

Under article 1327, robbery may be committed by assault, by violence, by putting in fear of life, or by putting in fear of bodily injury. *Green v. State* (Cr. App.) 147 S. W. 593.

Under article 1327, there are three modes in which the offense may be committed—by assault, by violence, and by putting in fear of life or bodily injury; each being a distinct mode of itself, whether connected and accompanied by either of the other two modes or not. *Robinson v. State* (Cr. App.) 149 S. W. 186.

If accused had in fact won the money claimed to have been taken by him by robbery at the time the banker in a game of chance took the money and placed it in "the game," he would not be guilty of robbery if he picked the money up from the table and went off with it, even if the other elements of robbery were present. *Palmer v. State*, 71 App. 335, 160 S. W. 349.

If the party losing at cards voluntarily delivers the money lost to the winner's actual possession, the winner owns the money, so that the forcible taking of it from his possession may constitute robbery. *Coker v. State*, 71 App. 504, 160 S. W. 366.

2. **Distinguished from theft.**—The taking of property from the person by force and violence, is robbery instead of theft from the person. *Gallagher v. State*, 34 App. 306, 30 S. W. 557.

Snatching money from another's hand does not constitute robbery but would seem to be theft from the person. *Johnson v. State*, 35 App. 140, 32 S. W. 537.

3. **Receiving money taken as offense.**—It is no offense to receive property taken in robbery as it is in theft. *Parker v. State*, 40 App. 123, 49 S. W. 80.

4. **Former jeopardy.**—See notes under C. C. P. art. 9.

5. **Bail.**—See notes under C. C. P. art. 6.

6. **Special venire in capital cases.**—See C. C. P., tit. 8, c. 3, and notes.

7. **Indictment.**—Willson's Cr. Forms, 480, 632, 932.

See C. C. P. art. 470, and notes.

Description of property, see notes under C. C. P. art. 458.

Duplicity and election, see notes to C. C. P. art. 481.

Attacking validity on habeas corpus, see notes to C. C. P. art. 160.

See *Farris v. State*, 26 App. 105, 9 S. W. 487; *Clark v. State*, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Miller v. State*, 28 App. 445, 13 S. W. 646; *Menear v. State*, 30 App. 475, 17 S. W. 1082; *Weaver v. State*, 52 App. 11, 105 S. W. 139.

Where the indictment charges several as principals in the commission of the offense, it need not allege that they "acted together" in the commission of the offense, or that they conspired together to commit it. *Bell v. State*, 1 App. 598.

It must be shown by appropriate averment that the property taken belonged to some person other than the accused, or that the person deprived of its possession was entitled thereto as against the accused. *Barnes v. State*, 9 App. 128; *Smedly v. State*, 30 Tex. 214. An indictment for this offense will not support a conviction for an assault with intent to murder. *Munson v. State*, 21 App. 329, 17 S. W. 251.

Robbery is simply aggravated larceny, and the same particularity should be observed in describing the kind of property as is required in indictments for theft. *Winston v. State*, 9 App. 143.

An essential element in the offense of robbery is, that the property was taken with the intent on the part of the taker to appropriate it to his own use, and an allegation of such intent is indispensable to the sufficiency of an indictment for this offense. *Morris v. State*, 13 App. 65. Under article 1327 as it read before last being amended, it was held that an indictment which charged that the robbery was perpetrated by putting the party robbed in fear of his life, etc., but did not allege that the putting in fear was accomplished by violence, was insufficient. *Kimble v. State*, 12 App. 420. See, also, *Williams v. State*, Id. 240. Under the article as it now is, such an indictment would be sufficient, the "putting in fear," etc., being of itself sufficient, without violence, to constitute a means of commit-

ting the offense. *Bond v. State*, 20 App. 421; *Leonard v. State*, Id. 422. It is not necessary to allege the value of the property taken or involved in the robbery. *Williams v. State*, 10 App. 8; *Winston v. State*, 9 App. 143. The indictment must charge an assault, or violence upon the person, and must be so certain as to the party against whom the offense was committed as to enable the defendant to understand who that party is. *Parker v. State*, 9 App. 251.

An indictment under article 1327 which substantially pursues the common law precedents for the offense of robbery, will be sufficient. *Trimble v. State*, 16 App. 115; *Burns v. State*, 12 App. 269. See the last cited case for an indictment held good, and the first cited case for an indictment held bad. See, also, *Reardon v. State*, 4 App. 602.

An indictment which did not allege that the party alleged to have been robbed was the party assaulted or put in fear of life or bodily injury, was insufficient. *Trimble v. State*, 16 App. 115.

It is a matter of substance that the possession of the property taken be properly alleged; held, that the use of the word "possession" for "possession" vitiated the indictment. *Evans v. State*, 34 App. 110, 29 S. W. 266.

The indictment charged that defendant did attempt to fraudulently take, etc.; held, that the word "attempt" as there used is equal to "intent," and the indictment is sufficient. *Atkinson v. State*, 34 App. 424, 30 S. W. 1064.

The indictment charged that the money taken was twenty dollars current money of the United States, a better description of which the grand jurors cannot give, etc. The evidence showed the money to be two ten and one five dollar bills; held, no variance. *Harris v. State*, 34 App. 497, 31 S. W. 382.

Indictment need not allege that the property taken was carried away. *Thompson v. State*, 35 App. 511, 34 S. W. 629.

The indictment alleged the property belonged to Mrs. B., the proof showed that the property belonged to a son of Mrs. B., but the son was at that time away from home and the property was in Mrs. B.'s possession; held, the indictment was sufficient. *Williams and Gordon v. State*, 37 App. 147, 38 S. W. 999.

Defendant was convicted in Graysen county for bringing property, acquired by robbery in the Chickasaw Nation, Ind. Ter., into this State, the indictment charged that defendant with violence took from the possession, etc.; held, insufficient. *Smith v. State*, 37 App. 342, 39 S. W. 933.

Two distinct offenses being defined in this article, if an indictment charges both offenses in the same count, it is duplicitous and bad. *Murdock v. State*, 52 App. 262, 106 S. W. 375.

See this case for indictment held to be good under this article. *Flannagan v. State*, 55 App. 162, 116 S. W. 55.

It is unnecessary that an indictment allege that the property was taken against the person's will, where it alleged that it was acquired by assault and violence, and by putting in fear of bodily injury, etc. *Chancey v. State*, 58 App. 54, 124 S. W. 426.

Under article 1327 it is unnecessary that an indictment allege that the property was taken against the person's will, where it alleged that it was acquired by assault and violence, and by putting in fear of bodily injury, etc. *Chancey v. State*, 58 App. 54, 124 S. W. 426.

An indictment for robbery under article 1327, which alleges that defendant unlawfully assaulted a person named, and by such assault, and by violence, and by putting such person in fear of life or bodily injury, and by using or exhibiting a pistol, fraudulently took from such person's possession without his consent certain described money, charges only the single offense of robbery by firearms, and is not duplicitous as charging both a capital and common felony. *Green v. State* (Cr. App.) 147 S. W. 593.

An indictment under article 1327 alleged that accused, "with force and arms" by unlawfully using a firearm, fraudulently took personal property from the owner without his consent and with intent to appropriate the same to his own use. Held in view of article 1327 and C. C. P. art. 460, that "violence" was a general term including all sorts of force, synonymous with physical "force," and used interchangeably in relation to assault; that "violently" meant by or with "force"; that "violent" meant impelled with "force"; and hence that the term "with force and arms" sufficiently alleged that the robbery was effected by "violence" as used in the statute. *Robinson v. State* (Cr. App.) 149 S. W. 186.

An indictment for robbery, under article 1327, must allege that the robbery was accomplished by means of an assault, or by violence, or by putting in fear of life or bodily injury, and, if it is sought to charge the graver grade of the offense, must allege also that a firearm or other deadly weapon was used in its commission. *Robinson v. State* (Cr. App.) 149 S. W. 186.

In order to authorize the jury to assess the death penalty for robbery, the indictment must allege that the robbery was committed by exhibiting firearms or deadly weapons. *Dosh v. State*, 72 App. 239, 161 S. W. 979.

Under Pen. Code 1911, art. 1327, defining "robbery" and increasing the punishment, if, in making the assault, a firearm or deadly weapon is used, an indictment that defendant did make an assault on J. S., and by said assault and by violence, and putting in fear of life by the use of firearms, did fraudulently take from S. certain property, charges but one offense—robbery by the use of firearms. *Bell v. State* (Cr. App.) 177 S. W. 966.

8. — Proof and variance.—Where an indictment charged the taking of certain coins and bills, "current money of the United States of America," such description, though unnecessary, must be proved. *Coffelt v. State*, 27 App. 608, 11 S. W. 639, 11 Am. St. Rep. 205; *Early v. State*, 113 S. W. 1036, 56 App. 61.

An indictment which charges the defendant as a principal will not warrant his conviction as an accessory. *Golden v. State*, 18 App. 637.

An indictment for robbery will not support a conviction of assault with intent to murder. *Munson v. State*, 21 App. 329, 17 S. W. 251.

Proof that the injured person delivered the money to defendant on his demanding the same, at the muzzle of a cocked pistol, supports the allegation that defendant "took" the money; and Pen. Code Tex. art. 1327 and not article 1328, applies. *Coffelt v. State*, 27 App. 608, 11 S. W. 639, 11 Am. St. Rep. 205.

Where the indictment charges taking of paper money and evidence shows the money was silver, the variance is fatal. *Harris v. State* (Cr. App.) 30 S. W. 221.

But where indictment charged the taking of twenty dollars and the proof showed the taking of fifteen dollars, there is no variance. *Harris v. State*, 34 App. 497, 31 S. W. 382. Where the indictment charged robbery by threats of violence, and the evidence showed actual violence used, there is no variance. *Williams v. State*, 34 App. 523, 31 S. W. 405.

Where indictment charges robbery by assault and putting in fear of life, State can prove that firearms were used. There is no variance. *Carroll v. State* (Cr. App.) 57 S. W. 100.

In a prosecution for ordinary robbery by assault, defendant cannot complain of a conviction therefor on the ground that the evidence shows that, if he committed a robbery, he used a pistol, making him guilty of a higher grade of offense. *Wyatt v. State*, 114 S. W. 812, 55 App. 73.

Under an indictment charging robbery by an assault and violence by putting the prosecutor in fear of life and bodily injury, evidence that defendant used a pistol as a bludgeon does not constitute a variance. *Wyatt v. State*, 58 App. 115, 124 S. W. 929, 137 Am. St. Rep. 926.

In a robbery trial there is no fatal variance between a charge that something over \$11 was taken, and proof that it was \$10 and some cents. *Robinson v. State*, 62 App. 645, 138 S. W. 704.

Though an indictment for robbery alleged that \$74 in the form of \$10 bills, \$5 bills, and \$2 bills were taken from prosecutor, it is sufficient to prove the taking of any part of the money. *Jones v. State* (Cr. App.) 143 S. W. 621.

Where an indictment for robbery alleged that C. was robbed of \$10, a fact that the proof showed that he was robbed of \$14 was not a variance. *Bracher v. State*, 72 App. 198, 161 S. W. 124.

The variance between an indictment for robbery alleging that accused robbed prosecutor of one 10-cent piece, and the proof of the robbery of two 5-cent pieces, is fatal. *McCaskey v. State* (Cr. App.) 174 S. W. 338.

A charge that one robbed another of "lawful money of the United States" is sustained by proof that the accused took "dollars" in money. *Sparks v. State* (Cr. App.) 177 S. W. 968.

9. Judicial notice.—See notes to C. C. P. art. 783.

10. Admissibility of evidence in general.—Character or reputation, see notes to C. C. P. art. 783.

Admissions, declarations and hearsay, see notes to C. C. P. art. 783.

Res gestæ and other offenses, see notes to C. C. P. art. 783.

Acts and declarations of conspirators, see notes to C. C. P. art. 783.

Opinion evidence, see notes to C. C. P. art. 783.

Evidence on former trial, see notes to C. C. P. art. 783.

Defendant as a witness in his own behalf, see C. C. P. art. 790, and notes.

Examination, corroboration and impeachment of witnesses, see notes to art. 3687 of *Vernon's Sayles' Civ. St.* 1914.

Limiting evidence, see notes to C. C. P. art. 783.

Cure of error in admitting evidence, see notes to C. C. P. art. 783.

Harmless error in admitting evidence, see notes to C. C. P. art. 938.

Remote evidence tending to identify the defendant as the perpetrator of the robbery, is admissible. *Reardon v. State*, 4 App. 602.

The injured party may testify that he surrendered the property because he believed he would be shot if he did not. *Dill v. State*, 6 App. 113.

Impleaded alone under article 1327, defendant objected to proof showing that he acted in concert with another. Objection properly overruled. *Farris v. State*, 26 App. 105, 9 S. W. 487.

Evidence that the sheriff had an execution against defendant was in this case held admissible to show motive. *Armstrong v. State*, 34 App. 248, 30 S. W. 235.

A State's witness, over defendant's objection, testified that the reason he noticed the parties charged with the robbery at his saloon was that some negroes bought a can of beer and got into a squabble over it, and while they were squabbling he noticed defendant drink some of the beer; held, under the circumstances of this case the evidence was admissible. *Gallagher v. State*, 34 App. 302, 30 S. W. 558.

Defendant objected to the testimony of certain witnesses, who identified him soon after the robbery was committed, as being the person whom they had seen near the place immediately before the commission of the offense, because he claimed he was taken before them by the sheriff and thereby forced to make evidence against himself. Inasmuch as the evidence showed that he went before the sheriff voluntarily; held, properly admitted. *Land v. State*, 34 App. 330, 30 S. W. 788.

Evidence that the money defendant was charged with taking had been previously won from him on a bet, is inadmissible. *Blain v. State*, 34 App. 448, 31 S. W. 368.

Where defendant was charged with having a pistol when he committed the offense, and denied ever having carried a pistol, it is competent to prove that he had a pistol after the robbery. *Williams v. State*, 34 App. 523, 31 S. W. 405.

The main State witness had testified that defendant was the person who robbed him; defendant had shown contradictory statements theretofore made by such witness; held, the State had a right to show that said witness stated soon after the

commission of the offense that defendant was the person who robbed him. *Kirk v. State*, 35 App. 224, 32 S. W. 1045.

Testimony of a witness that on the day the robbery was committed he saw two men about six hundred yards away in a pasture, and that one of them was a tall man and the other a short man, is admissible with other circumstances to show that defendant and his accomplice, one of whom was tall and the other short, were in the vicinity. *Angley v. State*, 35 App. 427, 34 S. W. 116.

When tracks of two persons are discovered, one set made with number 9 and the other number 7 shoes, and the track made by one of the number 7 shoes has a peculiar mark showing an indentation in the sole, and there is evidence that defendant and another committed the offense and that defendant wore number 9 shoes and his accomplice number 7, evidence on the trial of defendant that his accomplice when arrested had on a shoe with a worn place in the sole corresponding to the mark in the track, is admissible. *Id.*

Where it is proved that at the time of a robbery one of two assailants had a red handkerchief, evidence is admissible, on the trial of defendant, to show that his accomplice when arrested had a red handkerchief in his pocket. *Angley v. State*, 35 App. 427, 34 S. W. 116.

Evidence that others had been seen near where the robbery was committed held, too remote. *Thompson v. State*, 35 App. 511, 34 S. W. 629.

Evidence that buried money was identified by an accomplice of defendant held sufficient to admit the money in evidence. *Id.*

Where a witness, at the time of the robbery, identified defendants, but failed thereafter, when he had an opportunity to do so, evidence that his reason for not identifying them was fear of his personal safety is admissible to explain conduct. *Thompson v. State*, 35 App. 511, 34 S. W. 629.

It was competent for the state to prove by the sheriff that when he heard of the crime he sent men to the hotels to see who came in, and to defendant's home, with instructions to watch, and that on the same night, prior to the arrest, he began to look for defendant, and the next morning went to the scene of the robbery to see if he could find defendant's pistol handle. *Kirk v. State* (Cr. App.) 37 S. W. 440.

It was not error to permit a witness to testify that, about 30 minutes after defendant and his co-conspirators had borrowed a gun of the witness, they passed near his residence, and that, while he was not definitely certain as to the identity of the parties as being the same who borrowed his gun, he took them to be the same parties. *Brooks v. State* (Cr. App.) 37 S. W. 739.

When a robbery was committed by several parties, it is admissible to prove that when one of the parties was arrested part of the stolen property was in his possession, although defendant was not present when such property was found. *Wyatt v. State*, 38 App. 256, 42 S. W. 598.

On trial of two joint defendants for robbery, one of them, after going into the evidence, withdrew his plea of not guilty and entered a plea of guilty. Afterwards his attorney was placed on the stand, and, over the other defendant's objection, was allowed to testify that he advised his client to plead guilty because he saw no defense for him, and had no hope of winning the case; held, error. *Underwood v. State*, 39 App. 409, 46 S. W. 245.

A robbery by one holding a knife over the victim while he took his money, another standing by pointing a pistol at the person robbed and his wife during such time, constitutes an entire transaction, and may be proved under an indictment for robbery by the use of firearms. *Underwood v. State*, 39 App. 409, 46 S. W. 245.

Evidence that other parties than defendant were placed in such relation to prosecutor that they might have been the guilty parties was admissible. *Chancey v. State*, 50 App. 85, 96 S. W. 12.

Where it appears, that defendant left his grips at his boarding house, evidence is admissible that they were afterwards surrendered to defendant's attorney, though defendant was not present, and there was no evidence that defendant directed such surrender. *Tabor v. State*, 52 App. 387, 107 S. W. 1116.

In a prosecution for robbery committed on a railroad train, the conductor's pass issued to defendant is admissible in evidence. *Tabor v. State*, 52 App. 387, 107 S. W. 1116.

On a trial for robbery in compelling the prosecutor to draw money from a bank and give the same to defendant, evidence is admissible that, just before going to the bank, defendant had, by putting the prosecutor in fear, taken a sum of money from him, and that defendant continued in control of the prosecutor until after the money was procured from the bank. *Harris v. State*, 55 App. 469, 117 S. W. 839.

Where the state relied on circumstantial evidence in a trial for robbery, it could show that accused on seeing the victim draw money from a bank the day before the robbery said, "Cap, that looks mighty good." *Brown v. State*, 61 App. 334, 136 S. W. 265.

In a prosecution for assault with intent to rob, testimony by the prosecuting witness that he had his money in his shoe is admissible, where for that reason his assailants did not find it when they searched him. *Chafino v. State* (Cr. App.) 154 S. W. 546.

In a prosecution for robbery, evidence that defendant had no money prior to the date of the alleged robbery, but had money the day following, and paid back a loan, was admissible. *Perry v. State* (Cr. App.) 155 S. W. 263.

In a prosecution for robbery occurring during an assault of prosecutor under an alleged conspiracy in a place he was attempting to get evidence against as selling intoxicating liquors contrary to law, the state may show that defendant, the proprietor of the place, had a United States internal revenue license, and explained that he got it to avoid prosecution by the federal authorities. *Phillips v. State* (Cr. App.) 164 S. W. 1004.

Where, on a trial for robbery, the state showed that accused shot prosecutor, and struck him over the head with a gun, and took a dog in the possession of prosecutor, and compelled prosecutor through threats and violence to pay him money, and accused denied that he struck prosecutor, testimony of a witness that he saw a man strike prosecutor, and the testimony of a physician that prosecutor had bruises on his chin made with a blunt instrument, and that his scalp had a "pulp appearance" and looked like it was lacerated by some blunt instrument, was proper rebuttal testimony. *Raleigh v. State* (Cr. App.) 163 S. W. 1050.

In a prosecution for robbery in being compelled by defendant and others to furnish money to buy bottles of whisky, where the evidence of the prosecuting witness and his reputation for truth and veracity were attacked, whisky bottles picked up at the place of the robbery were properly admitted in evidence. *Bruce v. State* (Cr. App.) 173 S. W. 301.

11. **Other offenses as evidence.**—See notes under C. C. P. art. 783.

12. **Sufficiency of evidence.**—Evidence held to sustain a conviction of robbery. *Robinson v. State*, 62 App. 645, 138 S. W. 704; *Fields v. State*, 41 Tex. 25; *Odle v. State*, 13 App. 612; *Makinson v. State*, 16 App. 133; *Bonn v. State*, 20 App. 421; *Williams v. State*, 37 App. 147, 38 S. W. 999; *Tabor v. State* (Cr. App.) 107 S. W. 1116; *Beard v. State*, 44 App. 402; 71 S. W. 960; *Jackson v. State*, 60 App. 273, 131 S. W. 1076; *Spiller v. State* (Cr. App.) 150 S. W. 1164; *Hendricks v. State*, 72 App. 75, 160 S. W. 1190; *Phillips v. State* (Cr. App.) 164 S. W. 1004; *Glasper v. State* (Cr. App.) 174 S. W. 585; *Contra, Kimble v. State*, 12 App. 429; *Barnett v. State*, 17 App. 191; *Golden v. State*, 18 App. 637; *Menear v. State*, 30 App. 475, 17 S. W. 1082; *Brooks v. State* (Cr. App.) 37 S. W. 739; *Davis v. State*, 37 App. 47, 38 S. W. 792, 66 Am. St. Rep. 791.

The mere presence of the accused at the robbery will not be sufficient evidence to warrant his conviction of the offense. *Ring v. State*, 42 Tex. 282.

Evidence supports conviction over defense of coercion. *Ashworth v. State*, 31 App. 419, 20 S. W. 982.

The prosecuting witness referred to the money taken as "my money" and "money in bills." An accomplice testified: "We got his money from him;" held, sufficient to support the charge of taking a certain number of dollars which passed current as money of the United States. *Colter v. State*, 37 App. 284, 39 S. W. 579.

Testimony of one robbed in the dark that judging from the man's size and voice, he was of the opinion that defendant was the guilty party, held insufficient to sustain a conviction. *Walker v. State*, 50 App. 221, 96 S. W. 35.

Evidence in a prosecution for robbery with firearms held sufficient to sustain a conviction. *Green v. State* (Cr. App.) 147 S. W. 593.

In a prosecution for robbery, evidence held to justify a conviction, notwithstanding defendant's evidence of alibi. *Bracher v. State*, 72 App. 198, 161 S. W. 124.

Evidence held insufficient to establish the identity of the person robbed with the person named in the indictment as having been robbed. *Sparks v. State* (Cr. App.) 177 S. W. 968.

In a prosecution for robbery by the use of firearms, where defendant repossessed himself of property taken from him under a writ of sequestration, evidence held to justify a finding that defendant knew that the person robbed was a constable and had such writ. *Bell v. State* (Cr. App.) 177 S. W. 966.

13. **Questions for jury.**—Question as to whether the money was obtained by assault and violence, or by putting witness in fear of bodily injury was properly submitted to the jury. *Thompson v. State* (Cr. App.) 26 S. W. 1081.

In a prosecution for robbery charged to have been committed by "violence" and also by putting "in fear of life or bodily injury," evidence held to make both of such questions issues for the jury. *Palmer v. State*, 71 App. 335, 160 S. W. 349.

14. **Argument of counsel.**—See notes to C. C. P. arts. 724, 725.

15. **Charge of court.**—Instructions on the weight of the evidence, see notes to C. C. P., art. 735.

Instructions as to accomplice testimony, see notes to C. C. P., art. 801.

Instructions as to alibi, see notes to C. C. P., art. 735.

Charge as to defendant's failure to testify, see notes to C. C. P., art. 790.

Instructions as to confessions, see notes to C. C. P., art. 735.

Instructions as to reasonable doubt, presumption of innocence and burden of proof, see notes to C. C. P., art. 785.

Harmless error in instructions, see C. C. P., art. 743 and notes.

When the defense is alibi, and the evidence conflicting, a charge that "if the accused did commit the robbery as charged in the indictment, or participated in the same," is not materially erroneous. *Reardon v. State*, 4 App. 602.

A charge which incorrectly instructs the jury as to the penalty for the offense is fundamental error, although such instruction be favorable to the defendant. Thus, where the offense was committed, after the last amendment of article 1327, and the court instructed the jury to assess the penalty prescribed by said article before it was amended, the error was held to be fundamental. *Gardenhire v. State*, 18 App. 565; *Turner v. State*, 17 App. 587. It was held error to charge the jury under an indictment for robbery that they might convict the defendant of an assault with intent to murder. *Munson v. State*, 21 App. 329, 17 S. W. 251. Where the defense was an alibi, and the evidence was conflicting, it was held not to be material error to charge "if the accused did commit the robbery as charged in the indictment, or participated in the same, you will find him guilty," etc. *Reardon v. State*, 4 App. 602; *Williams v. State*, 25 App. 76, 7 S. W. 661; *Jenkins v. State*, 28 App. 86, 12 S. W. 411; *Graham v. State*, 29 App. 31, 13 S. W. 1013. Where the court charged the jury to convict if they believed that defendant accomplished his crime by putting the injured party in fear of his life or "serious" bodily injury, held, if the charge was erroneous it was beneficial to defendant, and he could not complain. *Green v. State*, 32 App. 298, 22 S. W. 1094. Where the issue of intent has been fairly submitted to the jury and the evidence conflicting, verdict will

not be disturbed. *Rogers v. State*, 32 App. 447, 24 S. W. 282. Where it is not averred that deadly weapons were used in the commission of the offense, it is error for the court to charge the jury in relation to the use of deadly weapons. *Jackson v. State*, 33 App. 281, 26 S. W. 194, 622, 47 Am. St. Rep. 30. Where force is used the court should charge the law of robbery, and not theft from the person. *Gallagher v. State*, 34 App. 302, 30 S. W. 558.

The jury were instructed that the punishment was confinement in the penitentiary for life, or not less than five years; that where a person not over 16 years old is convicted of a felony, and the punishment is five years or less, the judgment should be confinement in the state reformatory during his sentence; and if, therefore, they found defendant guilty, and not over 16, they should fix his punishment at confinement in the reformatory for life, or not less than five years. Held, that such instructions, being contradictory, were erroneous. *Green v. State*, 32 App. 298, 22 S. W. 1094.

Where an indictment for robbery was insufficient as to the allegation that the property was taken from the possession of prosecutor, it was reversible error to charge that, if defendant took the property from prosecutor's "person or possession," the jury should find him guilty. *Evans v. State*, 34 App. 110, 29 S. W. 266.

The fact that the indictment did not charge defendant with being an accomplice in a joint robbery did not render a charge applicable to principals improper. *Gallagher v. State*, 34 App. 306, 30 S. W. 557.

Where the theory of the defense was that defendant's companion assaulted prosecutor, that defendant merely intervened to prevent his companion from injuring the prosecutor, and that he had no knowledge of or part in the robbery, defendant was entitled to a charge that, if defendant grabbed prosecutor, or interfered to prevent an assault being made on prosecutor, and that alone was his intent, or if the jury had a reasonable doubt as to that being his intent, then they should find him not guilty. *Bollen v. State*, 48 App. 70, 86 S. W. 1025.

On a prosecution for robbery by an assault, where the court in its charge copied the statute on assault, the charge was sufficient without copying the statute defining assault and battery. *Bollen v. State*, 48 App. 70, 86 S. W. 1025.

The defendant was entitled to a charge that the taking of the money must be fraudulent, in the application of the law to the facts, though the statute on assault to rob was copied in the charge. *Bollen v. State*, 48 App. 70, 86 S. W. 1025.

Where prosecutor claimed that defendant took the money from his pocket by force while defendant claimed that prosecutor gave him the money for safe-keeping, it was not necessary to charge that a mere snatching of the money from the prosecutor did not constitute the offense. *Williams v. State*, 51 App. 361, 102 S. W. 1134, 123 Am. St. Rep. 884.

Where defendant was arrested 20 days after the robbery, and a package of money was then found on his person, which was identified as one taken at the time, the failure of the court to instruct that such possession was not so recent as would authorize the jury to consider it a circumstance against defendant was proper; the instruction on circumstantial evidence being sufficient. *Tabor v. State*, 52 App. 387, 107 S. W. 1116.

Where the alleged robbery grew out of a game of cards on which the money taken was bet and it was sharply contested as to which party was entitled to the money, it was error to refuse to charge that if accused took the money under an honest claim of right believing it was his property, the jury should acquit. *Carr v. State*, 55 App. 352, 116 S. W. 591.

An instruction held not objectionable as failing to require an acquittal unless the jury believe beyond a reasonable doubt that the property was taken with intent to appropriate it to defendant's benefit. *Walling v. State*, 55 App. 254, 116 S. W. 813.

In a prosecution for robbery, a requested charge that the term "lawful money" includes legal tender coin, or legal tender treasury notes of the United States, but excludes United States treasury warrants, bank bills, though they pass as current, and gold certificates, was properly refused as misstating the law. *Jackson v. State*, 60 App. 273, 131 S. W. 1076.

Where accused was charged with putting another in fear of his life by using a gun and fraudulently taking his coat from him, and the evidence showed that some one made the victim remove his coat and leave it on the ground, it was not error to refuse to instruct that if accused held the victim up with a gun, and caused him to remove and leave his coat, intending to steal money believed to be in the coat, he should be acquitted. *Brown v. State*, 61 App. 334, 136 S. W. 265.

It was not error to instruct that, if one by assault, violence, or putting in fear of life or bodily injury fraudulently takes from another any property with intent to appropriate it to his own use, he is guilty of robbery, and that, when a firearm is exhibited in committing the offense, the punishment must be death or imprisonment for not less than five years. *Brown v. State*, 61 App. 334, 136 S. W. 265.

In a prosecution for robbery with firearms, where the state showed that, after a game of cards, defendant compelled the state's principal witness to hand back money he had won in the game, a charge that if defendant presented a pistol at or toward the state's witness, and took from his possession the money described in the indictment without his consent, but did not intend to permanently appropriate it, or, if there was a reasonable doubt as to such intention, defendant should be acquitted, was not objectionable as authorizing a conviction, though defendant afterwards intended to repay the state's witness. *Green v. State* (Cr. App.) 147 S. W. 593.

In a prosecution for robbery, where the indictment charged that accused robbed two companions, and evidence of both robberies was admitted, the charge properly required the jury to believe that accused robbed both of the companions of the property described before a verdict of guilty should be rendered. *Compton v. State* (Cr. App.) 148 S. W. 580.

Where, in a prosecution for robbery, the evidence without dispute showed that, if the defendant committed the offense at all, it was accompanied by assault, violence, and putting complainant in fear by pointing a revolver at him, defendant was not entitled to reversal of a conviction because an instruction defining the offense erroneously failed to require as an element thereof that the robbery must have been accompanied by assault, or putting the person robbed in fear of his life, or of bodily injury, as required by article 1327. *Johnson v. State* (Cr. App.) 150 S. W. 623.

An instruction in a robbery case that if accused assaulted another, and then and there by violence and putting in fear the said other did fraudulently take certain money from his possession and person, he would be guilty was not objectionable for failure to add "of life or bodily injury," where the indictment also charged that the robbery was committed by "violence"; it not being necessary, where violence was charged, to also instruct with reference to putting "in fear of life or bodily injury." *Palmer v. State*, 71 App. 335, 160 S. W. 349.

An instruction in a prosecution for robbery that if accused unlawfully made an assault upon another, and by putting him in fear of life or bodily injury did then and there fraudulently take from his person \$50 in money, or any other sum, with intent to appropriate it to his own use, he would be guilty as charged, was correct. *Palmer v. State*, 71 App. 335, 160 S. W. 349.

An instruction charging the statute was improper for using the word "or" instead of the word "and," in stating the penalty when a firearm is used or exhibited. *Coker v. State*, 71 App. 504, 160 S. W. 366.

Where, in a prosecution for robbery by firearms, it appeared that the accused had previously lost the money at cards, it was improper to charge that, if accused retok the money under an honest claim of right, believing it to be his property, the jury should acquit. *Coker v. State*, 71 App. 504, 160 S. W. 366.

In a prosecution for robbery, it was proper for the court to define the word "wilful" and require that the jury find that the robbery was unlawful and wilfully committed, though the statute defining the offense does not in terms require that the robbery be wilfully done. *Madrid v. State*, 71 App. 420, 161 S. W. 93.

In a prosecution for robbery, where the evidence showed that the complaining witness had prevented his wife from making further loans and gifts to accused, who was her lover, a charge on the want of motive predicated on the ground that accused could obtain desired funds from the woman, was properly refused. *Collins v. State* (Cr. App.) 178 S. W. 345.

16. **Responsiveness of verdict.**—A verdict that the jury find defendant "guilty of robbery and assess his punishment at confinement in the penitentiary for life" is responsive to an indictment charging simple robbery and robbery with a deadly weapon. *Tabor v. State*, 52 App. 387, 107 S. W. 1116.

17. **Conviction of assault.**—See notes under C. C. P., art. 771.

18. **New trial.**—See notes to C. C. P., art. 837.

Art. 1328. [857] Fraudulent acquisition of property by threats.—If any person, by threatening to do some illegal act injurious to the character, person or property of another, shall fraudulently induce the person so threatened to deliver to him any property, with intent to appropriate the same to his own use, he shall be punished by confinement in the penitentiary not less than two nor more than five years. [Act Feb. 12, 1858, p. 180.]

See notes under article 1327, ante.

See *McCormick v. State*, 26 App. 678, 9 S. W. 277; *Miller v. State*, 28 App. 445, 13 S. W. 646.

What constitutes offense.—To constitute the offense defined by article 1328 it must appear: 1. That the accused threatened to do some illegal act, injurious to the character, person, or property of another, and the indictment should aver the threats, and the illegal act threatened, with reasonable certainty. 2. That by means of such threats the accused fraudulently induced the person threatened to deliver to him certain property, which property should be described in the indictment as in an indictment for theft, alleging the ownership thereof, except that its value need not be alleged. 3. That the accused so obtained the property with the intent to appropriate the same to his own use. *Williams v. State*, 13 App. 285, 46 Am. Rep. 237.

Where money was delivered to defendant on his demand at the point of a cocked pistol, there was a taking within art. 1327, and not merely a delivery through fear within art. 1328. *Coffelt v. State*, 27 App. 608, 11 S. W. 639, 11 Am. St. Rep. 205.

A threat to accuse and prosecute a person of an offense of which he is guilty, though made by a person who did not see the commission of the offense, but only knew of it from information, is not a threat to do an illegal act; so that obtaining money thereby is not within this article. *Davis v. State*, 37 App. 47, 38 S. W. 792, 66 Am. St. Rep. 791.

Under the statute, the threat must be to do an illegal act; consequently the threat to do a legal act would not come within the offense defined. *Burnsides v. State*, 51 App. 399, 102 S. W. 118.

A false personation of an officer, a false charge that one had committed an offense and a threat to put him in jail whereby he is induced to pay the accused money to release him is sufficient to make out a case of robbery under this article. *Burnsides v. State*, 51 App. 399, 102 S. W. 120.

Indictment.—Willson's Cr. Forms, 481, 632, 932.

An information for extorting money by threats of prosecution under the local option law is insufficient when it fails to allege by proper averments that such law was in force, and does not allege an agreement between defendant and the other persons concerned in the extortion, to extort or make an agreement with the offender to obtain the money. *Williams v. State*, 51 App. 1, 100 S. W. 149.

Where indictment charges, with "an attempt" to fraudulently take, instead of with "intent," held sufficient. *Runnells v. State*, 34 App. 431, 30 S. W. 1065.

Where indictment described check, it was not necessary to allege its value. *Williams v. State*, 34 App. 523, 31 S. W. 405.

An indictment charging that the accused induced G. to pay him \$500 by threatening to prosecute him for adultery is insufficient, unless it alleges that accused falsely charged G. with adultery, and negatives G.'s guilt, setting out the constituent elements of the offense of adultery, since if G. was guilty, a threat to prosecute him was not a threat to do an illegal act. *Scales v. State* (Cr. App.) 144 S. W. 263.

Charge of court.—The accused had the right to have his theory of the case presented to the jury, viz.: that he had been specially authorized by an officer to assist in making arrests, since, if the arrest was made in good faith, the subsequent taking of money from the one arrested would not be robbery under this article. It might be bribery or false personation of an officer. *Burnsides v. State*, 51 App. 399, 102 S. W. 120.

CHAPTER NINE OF THEFT IN GENERAL

<p>Art. 1329. "Theft" defined. 1330. Property must have some value. 1331. Asportation not necessary. 1332. The "taking" must be wrongful. 1333. Possession and ownership need not be in same person. 1334. Possession, how constituted. 1335. Theft of one's own property, when. 1336. Part owner cannot commit, unless. 1337. "Property" defined. 1338. Animals of domestic breed included. 1339. Particular penalties exclude general punishment.</p>	<p>Art. 1340. Theft of fifty dollars and over, how punished. 1341. Petty theft, how punished. 1342. General penalties not applicable, when. 1343. Voluntary return of stolen property. 1344. "Steal" or "stolen" includes what. 1345. Stealing of agricultural products. 1346. Stealing record book or filed paper. 1347. Stealing from a wreck. 1348. Conversion by a bailee is theft. 1349. Receiving stolen property.</p>
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Article 1329. [858] "Theft" defined.—"Theft" is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.

<p>1. Nature and elements of offense in general. 2. Subject of offense. 3. Offenses included. 4. Asportation. 5. Possession and ownership and want of consent. 6. Theft of wife's goods by husband. 7. Intent. 8. Felony or misdemeanor. 9. Compared with and distinguished from other offenses. 10. Burglary and theft in same transaction. 11. Principals and accomplices. 12. Venue. 13. Former jeopardy. 14. Indictment, complaint and information—In general. 15. — Name of parties. 16. — Venue. 17. — Time of offense. 18. — Intent.</p>	<p>19. — Asportation and fraudulent taking. 20. — Ownership and possession and want of consent. 21. — Description of property. 22. — Value. 23. — Clerical error. 24. Evidence—In general. 25. — Burden of proof. 26. — Intent. 27. — Venue. 28. — Time of offense. 29. — Identity of property. 30. — Value of property. 31. — Ownership and possession. 32. — Want of owner's consent. 33. — Possession of stolen property. 34. — Explanation of possession. 35. — Sufficiency to convict. 36. — Insufficiency to convict. 37. Questions for jury. 38. Charge of court. 39. Verdict.</p>
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1. Nature and elements of offense in general.—A "theft" is the fraudulent taking of property with intent to deprive the owner of the value of it, and with intent to appropriate the property to one's own use and benefit. *Kellar v. State* (Cr. App.) 176 S. W. 723.

The doctrine of ultra vires cannot be invoked as a defense. *Leonard v. State*, 7 App. 417.

"Felonious" is not equivalent to "fraudulent" in the definition of theft. *Sloan v. State*, 18 App. 225, overruling *Musquez v. State*, 41 Tex. 226.

In a prosecution for theft, a charge instructing the jury that the killing of the animal constituted the offense was erroneous as the taking (if any) of the animal constituted the offense. *Crowell v. State*, 24 App. 404, 6 S. W. 318.

If the stolen hogs were placed in the pen built by defendant and afterwards escaped from the pen and were retaken by defendant it would be a second theft separate and distinct from the first, for which he might be prosecuted. *Trimble v. State*, 33 App. 397, 26 S. W. 727.

One who procures the agent of a railroad company to send him property of another is guilty of theft. *Sikes v. State* (Cr. App.) 28 S. W. 688.

One is guilty of theft who sells property of another and through an innocent third party delivers it to the purchaser. *Lane v. State*, 41 App. 558, 55 S. W. 831.

The offense is complete if the person aggrieved is engaged in his own business and not as a hireling. *Nelson v. State* (Cr. App.) 57 S. W. 645.

Under article 1329, where a person took an automobile from a private garage, and after riding around and hauling persons for hire returned it to an alley in the rear of the owner's house the same night, the taking did not constitute theft. *Smith v. State* (Cr. App.) 146 S. W. 547.

Where accused took possession of and tied a cow to a tree to be butchered, he was guilty of larceny, although she had not yet been sold or butchered. *Powers v. State* (Cr. App.) 152 S. W. 909.

To constitute theft under the statute, accused must have been connected with the original taking, as principal, and he must have been the taker. *Davis v. State* (Cr. App.) 152 S. W. 1094.

The taking of goods from different departments in a department store during a night pursuant to one purpose constitutes but one theft. *Wilson v. State*, 70 App. 631, 158 S. W. 516.

Where no valid levy of personalty of a debtor was made until a specified date, and possession was not taken by the sheriff until that date, an appropriation by the debtor of the personalty prior to that date was not larceny. *Scott v. State* (Cr. App.) 166 S. W. 732.

2. **Subject of offense.**—See articles 1332, 1337, and 1338, post, and notes thereunder.

3. **Offenses included.**—See C. C. P., art. 772, and notes thereunder.

4. **Asportation.**—See notes under article 1331, post.

5. **Possession and ownership and want of consent.**—See articles 1331-1335, post, and notes thereunder.

Property purchased and left in the store is in possession of the merchant, not his clerk. *Burns v. State*, 35 Tex. 724.

The widow is the "owner" of unadministered community property is her actual custody. *Henry v. State*, 45 Tex. 84. As is, also, a joint owner who has exclusive possession. *Id.* And if the owner temporarily deposits his property with another, the possession remains with him. *Garling v. State*, 2 App. 44.

Where the alleged owner had had possession of the cow, claiming her as his own, for two years, he had the superior title to her by limitation and the court correctly so instructed the jury. *Brooks v. State*, 38 App. 167, 31 S. W. 410.

Defendant intrusted with several bales of cotton deposited them in a warehouse, he afterward procured samples of two bales and sold them; held, this was not such actual possession as would support a conviction for theft. *Johnson v. State*, 34 App. 254, 30 S. W. 228.

It is no defense to a charge of cattle theft that the ownership of the animal had become vested in the county as an estray, when twelve months had not elapsed from the time of the estraying of such animal. *Williams v. State* (Cr. App.) 34 S. W. 123.

State need not prove want of consent of owner when property is in exclusive control of local agent. *Wilson v. State*, 37 App. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373.

In a prosecution for taking property alleged to belong to one of several joint owners, defendant could show that he took it with the consent of the others, and thereby defeat the prosecution. *Lockett v. State*, 59 App. 531, 129 S. W. 627.

In a prosecution for theft, it is necessary to show by evidence that defendant took the property without the owner's consent. *McConico v. State*, 61 App. 48, 133 S. W. 1047.

To establish ownership of property charged to have been stolen, the state must show exclusive control, care, and management in the claimed owner. *Spiller v. State*, 61 App. 555, 135 S. W. 549.

A railroad yardmaster having the care and control of freight at a certain point had the legal possession of goods in cars there. *McDonald v. State*, 70 App. 80, 156 S. W. 209.

One to whom the owner gave possession of property, on his false pretense that he would send back the money therefor, cannot be convicted of theft under Pen. Code 1911, art. 1329, including in its definition thereof a taking from the owner's possession "without his consent." *Anderson v. State* (Cr. App.) 177 S. W. 85.

6. **Theft of wife's goods by husband.**—And a husband cannot commit theft of his wife's goods, unless there has been a divorce or a distinct separation, and the husband has clearly abandoned possession of her property and recognized her right to its exclusive possession. *Overton v. State*, 43 Tex. 616.

7. **Intent.**—See notes under article 1332, post.

The intent to appropriate the property must exist at the very moment of coming into possession of the same. *Siemers v. State* (Cr. App.) 55 S. W. 334; *Pylee v. State*, 62 App. 49, 136 S. W. 464.

The taking of the property must have been fraudulent, and with this taking must concur the intent to deprive the owner of the value of the same, and ap-

propriate it to the taker's use and benefit. *State v. Sherlock*, 26 Tex. 106; *Ridge-way v. State*, 41 Tex. 231; *Williams v. State*, 12 App. 395; *Tallant v. State*, 14 App. 234. And see *Muldrew v. State*, 12 App. 617; *Chance v. State*, 27 App. 441, 11 S. W. 457.

Intent is an essential ingredient of theft, and must be alleged and proved. *Guest v. State*, 24 App. 235, 5 S. W. 840; *Willis v. State*, 24 App. 584, 6 S. W. 856; *Blain v. State*, 24 App. 626, 7 S. W. 239; *Brown v. State*, 28 App. 379, 13 S. W. 150; *Lewis v. State*, 29 App. 105, 14 S. W. 1008.

The evidence in this case tending to support the defense that the accused killed the alleged stolen animal by direction of his employer, the charge of the court was erroneous in not instructing the jury that, if they believed that the accused took the said animal by direction of his employer, for the use and benefit of his employer, believing at the time that his said employer owned or had a right to appropriate the animal, then the accused would not be guilty of theft, because of the absence of the fraudulent intent. *Myers v. State*, 24 App. 334, 6 S. W. 194. Other decisions hereunder: *Bennett v. State*, 28 App. 342, 13 S. W. 142; *Earton v. State*, 28 App. 483, 13 S. W. 783. The intent must be to permanently, and not temporarily, appropriate the property. *Schultz v. State*, 30 App. 94, 16 S. W. 756.

Intent to destroy or to appropriate to the use and benefit of some other person is sufficient. *Stegall v. State*, 32 App. 100, 22 S. W. 146, 40 Am. St. Rep. 761.

On trial for horse-theft the defense was that the horse had been taken in hope of a reward for his return, and not for the purpose of appropriating him to defendant's use; held defendant at least intended to deprive the owner of the value and appropriate him to his own use, so far as the reward was concerned, and was guilty of theft. *Dunn v. State*, 34 App. 257, 30 S. W. 227, 53 Am. St. Rep. 714.

If the object of the taker was to compel the party from whom the goods were taken to pay a debt, he is not guilty of theft. *Young alias Burkett v. State*, 34 App. 290, 30 S. W. 238.

A person taking an article with the intention of allowing the owner the value of the same on a settlement of accounts, is not guilty of theft. *Young v. State*, 37 App. 457, 36 S. W. 272.

The evidence showed that at the time defendant took the horse he was drunk, and that he took him for temporary use only, but afterwards sold him; held, if he did not at the time of the taking have the intent to appropriate the horse, the offense would not be theft. *Cady v. State*, 39 App. 236, 45 S. W. 568.

Where defendant testified in a case in which he was being tried for theft of cattle belonging to an unknown owner, that he had authority to take cattle belonging to Y., court should charge that if he believed the cattle belonged to Y. they should acquit. *Melton v. State* (Cr. App.) 56 S. W. 67.

Where, in a prosecution for stealing oats, accused and his wife testified that, when he took the oats from a field by which he was driving, he stated his intention to give his father-in-law, who accompanied him in another buggy, money to pay the owner for the oats, accused driving a scary team which he could not leave, it was error to refuse a requested charge that, if accused took the oats without fraudulent intent, with a view to paying for them, the jury should acquit. *Pyles v. State* (Cr. App.) 136 S. W. 464.

To authorize a conviction for theft, a specific intent must have existed in accused's mind at the very time of the taking. *Burton v. State* (Cr. App.) 146 S. W. 186.

That accused took a cow for another is no defense to a prosecution for larceny where it did not appear that he believed the cow belonged to the person for whom he acted. *Powers v. State* (Cr. App.) 152 S. W. 909.

8. Felony or misdemeanor.—See articles 1339-1342, post, and notes thereunder.

9. Compared with and distinguished from other offenses.—See notes under articles 1332, 1349, 1356, and 1421, post.

See *Simco v. State*, 8 App. 406; *Zysman v. State*, 42 App. 432, 60 S. W. 669; *De Gaultie v. State*, 31 Tex. 32; *Cobletz v. State*, 36 Tex. 353; *Huntsman v. State*, 12 App. 619; *Whitworth v. State*, 11 App. 414; *Sims v. State*, 21 App. 649, 1 S. W. 465; *Bink v. State*, 50 App. 450, 98 S. W. 249; *Taylor v. State*, 32 App. 110, 22 S. W. 148; *Frank v. State*, 30 App. 381, 17 S. W. 936; *Pitts v. State*, 5 App. 122; *Hudson v. State*, 10 App. 215; *White v. State*, 11 Tex. 769; *Cline v. State*, 43 Tex. 494; *Abbey v. State*, 35 App. 589, 34 S. W. 930.

A conviction for the offense of receiving stolen property can not be had under an indictment charging theft. *Brown v. State*, 15 App. 581; *Chandler v. State*, Id. 587; *Gaither v. State*, 21 App. 527, 1 S. W. 456; *Wheeler v. State*, 34 App. 350, 30 S. W. 913; *Ferandez v. State*, 25 App. 538, 8 S. W. 667; *Gray v. State*, 24 App. 611, 7 S. W. 339.

For distinction between "malicious mischief" and "theft," see *Thompson v. State*, 30 Tex. 356.

Under an indictment for theft, a conviction can be had for wilfully driving stock from accustomed range. *Counts v. State*, 37 Tex. 593; *Bawcom v. State*, 41 Tex. 189; *Guest v. State*, 24 App. 530, 7 S. W. 242.

That the defendant, subsequent to the theft of the property, and with knowledge that it was stolen, aided the thief to dispose of it, or purchased it from the thief, are facts sufficient to support a conviction for receiving stolen property, knowing it to be stolen, but not to support a conviction for theft. *Prator v. State*, 15 App. 363.

The offense of theft from the person being essentially different from ordinary theft, a conviction thereof can not be had under an indictment for ordinary theft. *Harris v. State*, 17 App. 132.

Where indictment charges theft from the person only the defendant can not be convicted of petty theft. *Roberts v. State*, 33 App. 83, 24 S. W. 395.

Under an indictment for theft of cattle, the defendant may be convicted of the

offense denounced by article 1356. *Campbell v. State*, 22 App. 262, 2 S. W. 825; *Foster v. State*, 21 App. 80, 17 S. W. 548; *Smith v. State*, 21 App. 134, 17 S. W. 558.

Though under an indictment charging theft of cattle in the usual form, a conviction may be had either for the theft defined in article 1356, or for the misdemeanor of driving cattle from their accustomed range as defined in article 1336, the verdict, to be sufficient, must show with reasonable certainty of which offense, the felony or the misdemeanor, the accused was found guilty. *Guest v. State*, 24 App. 530, 7 S. W. 242 (overruled by *Long v. State*, 39 App. 461, 46 S. W. 821, 73 Am. St. Rep. 954). And on the same subject, see *Taylor v. State*, 25 App. 96, 7 S. W. 861; *Spoonemore v. State*, 25 App. 358, 8 S. W. 280; *Woods v. State*, 26 App. 490, 10 S. W. 108; *Lopez v. State*, 28 App. 343, 13 S. W. 219.

If the owner is induced to part with his property finally, or to convey title thereto, the crime is swindling. But if possession only is obtained, and in such manner as is not adequate to pass the title thereto, but only its custody for a time, and thereafter is converted by the taker in pursuance of his original design, it is theft. *Massey v. State*, 31 App. 371, 20 S. W. 758.

A conviction for theft of a horse, on a general indictment for theft, is not supported by evidence that defendant borrowed the horse and thereafter converted him to his own use. *Mangum v. State*, 38 App. 231, 42 S. W. 291.

Defendant was an employé of prosecutor, prosecutor left him temporarily in charge of his store while he went to Dallas; soon after prosecutor left defendant took the goods charged to have been stolen and fled to Arkansas; held, he was guilty of theft and not embezzlement. *Roeder v. State*, 39 App. 199, 45 S. W. 570.

It is error to charge that defendant can be convicted of driving stock from accustomed range, under an indictment for theft. *Chambers v. State* (Cr. App.) 59 S. W. 261.

Indictment may include counts for theft and theft from the person, and conviction under the first count operates as acquittal of the second count. *Hooton v. State*, 53 App. 6, 108 S. W. 651; *Flynn v. State*, 47 App. 26, 83 S. W. 206.

Accused drove a herd of cattle to town for shipment to market. A third person drove another's cattle into the herd, and requested accused to take them to market and remit to him the money after a sale of the cattle. The third person was seen in conjunction with accused in driving the cattle. Held, that accused, if not engaged in the original taking, could at most be convicted of receiving stolen property, knowing it to be stolen. *Lee v. State*, 57 App. 177, 123 S. W. 389.

One who by means of false representations obtained money from another as an advancement for work, to be thereafter performed, and who failed to perform the work, was not guilty of theft of the money advanced though an indictment for swindling might lie. *Taylor v. State*, 64 App. 157, 141 S. W. 949.

Where accused was apprehended as he was loading stolen lard into a wagon on a railroad right of way, the court properly charged that he was not guilty of theft, unless he was connected with the original taking of the lard from the railroad car, since, if he was not so connected, he was only guilty of receiving stolen goods. *Roman v. State*, 64 App. 515, 142 S. W. 912.

The offenses of theft of property, of being an accomplice to the theft of such property, and of receiving and concealing the same property are entirely separate and distinct offenses, and, under an indictment charging one of such offenses, a party cannot be convicted of either of the others. *Kaufman v. State*, 70 App. 438, 159 S. W. 58.

The word "bailee" as used in the embezzlement statute, which punishes the fraudulent conversion by a bailee, does not include all bailments, but only those for the sole benefit of the bailor, where there is a fiduciary relation between the parties; hence as there must be a fraudulent taking to constitute the crime of theft denounced by article 1329, the conversion of property by a bailee, where the bailment is for mutual benefit, falls within the purview of article 1348, making such conversion an offense, being neither theft nor embezzlement. *Johnson v. State*, 71 App. 206, 159 S. W. 849.

The owner of certain personal property went to a bathing beach, and, before going in, deposited the property with the bathhouse keeper. R. in some way obtained possession of the check, presented it to the keeper, and obtained the property, and the next day part of it was found in accused's possession, concealed in a safety deposit vault. Held that the evidence showed pure theft on the part of R., and did not raise the issue of embezzlement. *Goldstein v. State* (Cr. App.) 171 S. W. 709.

10. **Burglary and theft in same transaction.**—See notes under chapter 6, ante.

11. **Principals and accomplices.**—See notes under articles 74, 77, and 79, ante, and C. C. P. art. 801.

12. **Venue.**—See notes on "Evidence," post and C. C. P. art. 245 and notes thereunder.

13. **Former jeopardy.**—See notes under articles 1317 and 1318, ante, and C. C. P. art. 9.

14. **Indictment, complaint, and information**—In general.—See notes under article 1332, post, and, also, C. C. P. arts. 451, et seq., and notes thereunder.

Willson's Cr. Forms, 634.

Proof and variance, see notes on "Evidence," post.

See *Tinney v. State*, 24 App. 112, 5 S. W. 831; *Guest v. State*, 24 App. 530, 7 S. W. 242; *Lott v. State*, 24 App. 723, 14 S. W. 277; *Smith v. State*, 24 App. 290, 6 S. W. 40.

Where the indictment alleged that the defendant "did kill, steal, take, and carry away a hog," it was held that the indictment charged the theft of a dead and not a live hog. *Thompson v. State*, 30 Tex. 356.

The word "feloniously" need not be used in the indictment. The word fraudu-

lently characterizes the offense, and is indispensable in charging it. *Prim v. State*, 32 Tex. 157; *Calvin v. State*, 25 Tex. 793; *Austin v. State*, 42 Tex. 345; *Conner v. State*, 6 App. 455; *Jorasco v. State*, Id. 238.

If the proof upon which the state depends leaves it in doubt whether the offense is theft per se or wilfully driving stock from the range, the indictment should charge both in different counts. *Smith v. State*, 34 Tex. 612.

In general the indictment must charge the acts, intents, and omissions which enter into the definition of, and constitute the offense. *Williams v. State*, 12 App. 396; *Hodges v. State*, Id. 554; *Young v. State*, Id. 614; *Muldrew v. State*, Id. 617; *Insall v. State*, 14 App. 145. If two distinct offenses be charged in the same count, the indictment will be bad for duplicity. *Hickman v. State*, 23 App. 441, 2 S. W. 640; *Heineman v. State*, 22 App. 44, 2 S. W. 619. Where different articles are taken at the same time and place, although from different persons, such taking constitutes but one offense, and will support but one prosecution. *Wilson v. State*, 45 Tex. 76, 23 Am. Rep. 602; *Quitow v. State*, 1 App. 48, 28 Am. Rep. 396; *Hozier v. State*, 6 App. 542.

Indictment alleged the name both of accused and the owner as "Mack Brown." Good as an indictment. *Brown v. State*, 28 App. 379, 13 S. W. 150.

The affidavit and information for theft alleging that Chas. Davis was in possession of a ring, it having been lent to Geo. Davis by the owner, who unlawfully converted it to his own use, is defective; the allegations being inconsistent, as no connection is shown between the two Davises, and it cannot be told which one appropriated it. *Davis v. State*, 60 App. 108, 131 S. W. 315.

An indictment for a theft may charge it to have been accomplished in both the ways the statute states the offense can be committed. *Wright v. State*, 70 App. 73, 156 S. W. 624.

15. — Names of parties.—See notes under C. C. P. art. 456.

16. — Venue.—See notes under C. C. P. art. 451, subd. 5.

17. — Time of offense.—Proving as alleged, see post, notes under "Evidence."

A conviction is not void because different dates are alleged in two different counts. *Shuman v. State*, 34 App. 69, 29 S. W. 160.

18. — Intent.—In addition to the allegation that the property was fraudulently taken, it must be alleged that it was taken with the intent to deprive the owner of the value of the same, and to appropriate it to the use and benefit of the person taking. *Peralto v. State*, 17 App. 578; *Tallant v. State*, 14 App. 234; *Jones v. State*, 12 App. 424; *Ridgeway v. State*, 41 Tex. 231; *State v. Sherlock*, 26 Tex. 106. Where the allegation was that the property was taken with intent to deprive the owner of the value of the same, and to appropriate the value of the same, etc., using the word "value" in place of the statutory word "it," the allegation was held to be sufficient, though it would have been better to have followed the exact language of the statute. *Thompson v. State*, 16 App. 74; *Barrett v. State*, 18 App. 64. See C. C. P., art. 454. In charging the intent, it is not necessary to aver time and place separately to each intent, as "then and there to deprive the owner," etc., and "then and there to appropriate," etc. *Harris v. State*, 2 App. 102.

An indictment which alleges that accused fraudulently took personalty of prosecutor from the possession of prosecutor without his consent, and with the intent of accused to appropriate the property to his own use, is fatally defective for failing to allege accused's intent to deprive prosecutor of the value of the property. *Moore v. State* (Cr. App.) 166 S. W. 1153.

19. — Asportation and fraudulent taking.—Asportation need not be alleged. *Austin v. State*, 42 Tex. 345; *Coombes v. State*, 17 App. 258 (overruling *Martin v. State*, 44 Tex. 172); *Madison v. State*, 16 App. 435; *Doss v. State*, 21 App. 505, 2 S. W. 814, 57 Am. Rep. 618 (overruling *Lott v. State*, 20 App. 230); *Conner v. State*, 24 App. 245, 6 S. W. 133; *Coward v. State*, 24 App. 590, 7 S. W. 332.

It need not be alleged that the property was carried away. It is sufficient to allege that it was fraudulently taken. *Conner v. State*, 6 App. 455; *Prim v. State*, 32 Tex. 157; *Austin v. State*, 42 Tex. 345; *Hall v. State*, 41 Tex. 287; *Walker v. State*, 3 App. 70.

It is indispensably essential to allege that the property was fraudulently taken. An allegation that it was feloniously taken will not be sufficient. The statute in defining the offense uses the word "fraudulent" to characterize the taking. *Ware v. State*, 19 App. 13; *Spain v. State*, Id. 469; *Sloan v. State*, 18 App. 225, overruling upon this point, *Musquez v. State*, 41 Tex. 226; *Ortis v. State*, 18 App. 282; *McPherson v. State*, 20 App. 194; *Muldrew v. State*, 12 App. 617; *State v. Earp*, 41 Tex. 487; *Holley v. State*, 24 App. 35, 5 S. W. 523; *Chance v. State*, 27 App. 441, 11 S. W. 457; *Green v. State*, 27 App. 570, 11 S. W. 636; *Wilson v. State*, 27 App. 577, 11 S. W. 638; *Minter v. State*, 26 App. 217, 9 S. W. 561; *Johnston v. State*, 25 App. 731, 9 S. W. 48; *Moore v. State*, 28 App. 377, 13 S. W. 152. See, also, *Jorasco v. State*, 6 App. 238.

It must be alleged (and proved) that the property was taken from the possession of the owner. Omission of the word "of" is fatal to the indictment. *Riley v. State*, 27 App. 606, 11 S. W. 642.

An information for theft, which does not charge that the property taken was taken from the possession of the owner, or of some one holding for him, is insufficient under the statute defining theft. *Henley v. State*, 61 App. 428, 135 S. W. 133.

Where the complaint and information in a prosecution for theft merely stated that the defendant unlawfully took one pair of lines, the property of one M., without his consent, and failed to charge a fraudulent taking, they were defective. *Watt v. State*, 61 App. 602, 136 S. W. 56.

A complaint and information charging theft, which does not allege that accused fraudulently took the property from the alleged owner, is fatally defective. *Baldwin v. State* (Cr. App.) 175 S. W. 701.

20. — **Ownership and possession and want of consent.**—See notes under article 1348, post, and C. C. P. arts. 456, 457.

An indictment is fatally defective if it fails to charge from whose possession the property was taken. *Garner v. State*, 36 Tex. 693; *Garcia v. State*, 26 Tex. 209, 82 Am. Dec. 605; *Watts v. State*, 6 App. 263; *Case v. State*, 12 App. 228; *Reed v. State*, 14 App. 662; *Bailey v. State*, 18 App. 426; *Ryan v. State* (Cr. App.) 176 S. W. 49.

The name of the owner or possessor must be correctly charged. The given name may be stated by initials. C. C. P. art. 456; *Collins v. State*, 43 Tex. 577 (overruling *Brown v. State*, 32 Tex. 125); *Spoonemore v. State*, 25 App. 358, 8 S. W. 280.

As to temporary possession. *Blackburn v. State*, 44 Tex. 457; *Bailey v. State*, 18 App. 426; *Frazier v. State*, Id. 434; *Emmerson v. State*, 33 App. 89, 25 S. W. 289.

The ownership of the property must be averred, or it must be averred that the name of the owner is unknown to the grand jury. *Culberson v. State*, 2 App. 324; *Stone v. State*, 12 App. 193; *Maddox v. State*, 14 App. 447.

Where possession is alleged to be in a person other than the owner of the property, it is not a valid objection to the indictment that it does not allege that the person in possession was holding the property for the owner. *Alexander v. State*, 4 App. 261.

The property belonging to a married woman, ownership and possession is properly alleged in the husband, and the indictment need not negative the wife's consent. *Burt v. State*, 7 App. 578; *Sinclair v. State*, 34 App. 453, 30 S. W. 1070; *Coombes v. State*, 17 App. 258.

Ownership and want of consent are ingredients and must be alleged. *Williams v. State*, 12 App. 395; *Roberson v. State*, 51 App. 335, 101 S. W. 800.

Alleging possession in the special owner, and the want of his consent, indictment need not allege possession of the actual owner nor negative his consent. *Frazier v. State*, 18 App. 434; *Bailey v. State*, 20 App. 68; *Littleton v. State*, 20 App. 168; *Ledbetter v. State*, 35 App. 195, 32 S. W. 903.

With regard to the allegations of ownership and possession, the following rules are deducible from the decisions: 1. The facts as they exist should be alleged, and if the facts be doubtful the pleader should resort to different counts, and thus meet the proof in whatever shape it may be adduced. 2. If A be the actual or general owner of the property, and had the same in his actual control, care, and management at the time it was stolen, both ownership and possession should be alleged to be in him, notwithstanding the property was in care of, and being used by the agent or servant of the owner. 3. If A be the actual or general owner, but B, at the time of the theft, had the actual control, care, and management of the property, the ownership may be alleged to be in either A or B, but the possession must be alleged to have been in B. In such case, it is better to allege both the ownership and possession in B, the special owner. *Briggs v. State*, 20 App. 106; *Littleton v. State*, Id. 168; *Hall v. State*, 22 App. 632, 3 S. W. 338; *Frazier v. State*, 18 App. 434; *Bailey v. State*, Id. 426; *May v. State*, 15 App. 430; *Duren v. State*, Id. 624; *Wilson v. State*, 12 App. 481; *Hill v. State*, 11 App. 132; *Dreyer v. State*, Id. 503; *Pippin v. State*, 9 App. 269; *Walker v. State*, Id. 38; *Moore v. State*, 8 App. 496; *Skipworth v. State*, Id. 135; *West v. State*, 6 App. 485; *Jinks v. State*, 5 App. 68; *Fore v. State*, Id. 251; *Trafton v. State*, Id. 480; *Crockett v. State*, Id. 526; *Gaines v. State*, 4 App. 330; *Garling v. State*, 2 App. 44; *King v. State*, 43 Tex. 351; *Blackburn v. State*, 44 Tex. 457.

The property belonging to a widow, non compos mentis, and her children, they living with the former's father, S., who had sole control and care of the property, and was guardian for the children, indictment should have alleged the taking from the possession of S., or, alleging the ownership in the widow and children, that it was taken from the possession of S., who was holding it for them. *Briggs v. State*, 20 App. 106.

Possession from which the property was taken must be alleged and at least substantially proved. *Littleton v. State*, 20 App. 168; *White v. State*, 33 App. 94, 25 S. W. 290; *Mixon v. State*, 28 App. 347, 13 S. W. 143; *Hill v. State*, 55 App. 407, 117 S. W. 823.

The indictment must allege that the property was taken without the consent of the owner. If the ownership of the property be alleged to be in A and the possession in B, the allegation must be that the property was taken without the consent of either A or B. *Schultz v. State*, 20 App. 308; *Williams v. State*, 19 App. 277; *Atterberry v. State*, Id. 401; *Bailey v. State*, 18 App. 427; *Frazier v. State*, Id. 434; *Bland v. State*, Id. 12; *Williams v. State*, 12 App. 395. When the indictment alleges a joint ownership of two or more persons, the non-consent of each owner must be alleged. It will not be sufficient to allege their want of consent jointly. *McIntosh v. State*, 18 App. 284; *Taylor v. State*, Id. 489. But where the indictment alleges the ownership to be in two or more persons not jointly, but separately, it is sufficient to allege that the property was taken without the consent of the owners. *Smith v. State*, 21 App. 96, 17 S. W. 560. The allegation as to want of consent should negative the consent of the alleged owner or owners, and the alleged possessor or possessors of the property, but it need not, and should not, negative the consent of persons not named in the indictment. It was formerly held that where there were both a general and a special owner of the property it was essential to allege and prove the want of consent of both, and that where both ownership and possession were alleged to be in the special owner, it was essential to prove not only his want of consent, but also the want of consent of the general owner. *Jackson v. State*, 7 App. 363; *Wilson v. State*, 12 App. 481; *Bowling v.*

State, 13 App. 338; *Erskine v. State*, 1 App. 405. But these decisions, in so far as they hold as above stated, were expressly overruled in *Frazier v. State*, 13 App. 434.

As to theft of property belonging to a corporation, see *Stallings v. State*, 29 App. 220, 15 S. W. 716.

Indictment must not only describe the corporation by its corporate name, but allege that it was a corporation, allege the name of the special owner from whose possession the property was taken and that he was holding the same for the corporation, negative his consent and aver that the property was taken with the intent to deprive the owner of the value of the same. *Thurmond v. State*, 30 App. 539, 17 S. W. 1098; *White v. State*, 24 App. 231, 5 S. W. 857, 5 Am. St. Rep. 879; *Barnes v. State*, 46 App. 513, 81 S. W. 735; *Kersh v. State*, 45 App. 451, 77 S. W. 790. But contra, see *Price v. State*, 41 Tex. 215.

Indictment should allege the want of consent of the party in possession, and also of the unknown owner. *Swink v. State*, 32 App. 530, 24 S. W. 893.

It is admissible in two different counts to charge the property as belonging to different persons. *Pisano v. State*, 34 App. 63, 29 S. W. 42; *Shuman v. State*, 34 App. 69, 29 S. W. 160; *Smith v. State*, 34 App. 123, 29 S. W. 774.

An indictment alleging in two different counts the property as belonging to different persons is not duplicitous. *Pisano v. State*, 34 App. 63, 29 S. W. 42.

An indictment for theft may allege, in one count, ownership and possession in one person, and in another, ownership in the same person and possession in another. *Shuman v. State*, 34 App. 69, 29 S. W. 160.

When the indictment alleges ownership in a person to the grand jurors unknown, the defendant in order to take advantage of lack of diligence in said grand jury in discovering owner, should show such lack of diligence at the trial in the court below. *Logan v. State*, 36 App. 1, 34 S. W. 925.

The indictment must negative the owner's consent to the taking. *Long v. State* (Cr. App.) 39 S. W. 674.

Where indictment alleges joint ownership, it must allege want of consent of each owner. Using the word "their" in the indictment is not sufficient. *Young v. State* (Cr. App.) 59 S. W. 891.

Though art. 457 of the C. of C. P. authorizes the allegation of ownership in either the actual or special owner, it is better practice, in most instances, to allege the ownership in him who has the actual control, care and management—in short, the possession—of the property. *Shelton v. State*, 52 App. 611, 108 S. W. 679; *Frazier v. State*, 18 App. 434 (overruling *Erskine v. State*, 1 App. 405); *Jackson v. State*, 7 App. 363; *Bowling v. State*, 13 App. 333; *Williamson v. State*, 13 App. 514; *Wilson v. State*, 12 App. 481.

An indictment for larceny, which alleges a joint ownership by two or more persons, must allege the nonconsent of each owner, and it is not sufficient to merely allege the want of consent jointly. *Arseneaux v. State*, 63 App. 566, 140 S. W. 776.

Although the keeper of an automobile garage had the care of a machine which was left there when not in use by the owner, his care or custody of the machine did not constitute ownership for the purpose of the allegation of ownership and taking without consent in a prosecution for theft of a part of a machine. *Staha v. State* (Cr. App.) 151 S. W. 543.

Where the owner of cattle placed them in the pasture of one J., who under Rev. St. 1911, § 5664, had a lien thereon for pasturage, J. was the special owner as against the real owner, and an indictment for their theft should have alleged ownership in J. or real ownership in the owner and special ownership in J. *McKnight v. State*, 70 App. 470, 156 S. W. 1188.

An indictment for the theft of property in possession of a renter should allege general possession in the owner's agent and special ownership in the renter, or ownership in the agent, or in the renter. *Lewis v. State* (Cr. App.) 164 S. W. 5.

21. — Description of property.—See notes under article 1330, post, and C. C. P. arts. 458, 468, and notes thereunder.

22. — Value.—See notes under article 1342, post.

23. — Clerical error.—See notes under C. C. P. art. 476.

24. Evidence.—In general.—For decisions relating to accomplice testimony, circumstantial evidence, confessions, *res gestæ*, declarations, and other decisions upon evidence not stated in this chapter, see title 8, chap. 7, C. C. P. Evidence.

Variance as to middle initial to the given name as charged and proved, is immaterial (*Spencer v. State*, 34 App. 65, 29 S. W. 159); but this rule does not extend to the first initial, unless it be shown that defendant was as well known by the name alleged as by his true name. C. C. P. art. 456; *Willis v. State*, 24 App. 487, 6 S. W. 200; *Young v. State*, 30 App. 308, 17 S. W. 413.

The fact that a bill of sale has been neither acknowledged nor recorded does not render it inadmissible in evidence. *Lockwood v. State*, 32 App. 137, 22 S. W. 413. See, also, note, post, as to evidence of ownership and possession.

On trial for theft of a cow it was proven by the State that defendant was seen one evening driving the cow towards his home; held, admissible to prove that next morning defendant's son was seen dragging the hide of the animal across defendant's yard. *Brown v. State*, 34 App. 150, 29 S. W. 772.

Evidence that accused made inquiry as to the ownership of the property is admissible. *Green v. State* (Cr. App.) 30 S. W. 220.

Evidence of quarrels between defendant and prosecuting witness is inadmissible. *Tabor v. State*, 34 App. 631, 31 S. W. 662, 53 Am. St. Rep. 726.

The evidence showed that defendant knew to whom the cattle belonged, and when the owner spoke of branding them, defendant told him it was not necessary, that he would protect his ownership; held, his defense of mistake was untenable. *Lawrence v. State*, 35 App. 114, 32 S. W. 530.

The State was allowed to prove that the cotton yard books showed that a

certain bale of cotton was sold by defendant; held, error. *Howard v. State*, 35 App. 136, 32 S. W. 544.

On prosecution for theft of chickens it is error to allow witnesses to testify that they were on the same night watching their henroosts. *Smith v. State* (Cr. App.) 33 S. W. 1079.

It was admissible to prove that part of the property was found on the ground near where defendant was arrested, also to prove that a negro who had been in the same cell with defendant was taken out and pointed out part of the property. *Payton v. State*, 35 App. 508, 34 S. W. 615.

It is admissible to prove that defendant sold a horse stolen on the same night of the alleged theft. *Bonnors v. State* (Cr. App.) 35 S. W. 650.

The fact that a complaint had been made against another person for the same theft is no evidence that defendant did not commit the theft. *Bigham v. State*, 36 App. 453, 37 S. W. 753.

A person charged with theft of property which he sold and claimed to have authority from the owner to sell, should be allowed to introduce, as tending to corroborate his statement, testimony that the owner had procured and tried to procure the services of other persons to sell such property. *Kimball v. State*, 37 App. 230, 39 S. W. 297, 66 Am. St. Rep. 799.

Evidence held properly excluded. *Hart v. State* (Cr. App.) 40 S. W. 495.

Evidence in horse-theft. *Harvard v. State*, 49 App. 290, 32 S. W. 804; *Trevenio v. State*, 48 App. 207, 37 S. W. 1162; *Young v. State*, 47 App. 468, 33 S. W. 808.

Where defendant claimed he obtained the mules in controversy from D., but testified that he had made no application for a subpoena for D., the jury could consider his failure to do so as bearing on the bona fides of his contention that he was an innocent purchaser of the property. *Cleveland v. State*, 57 App. 356, 123 S. W. 142.

In a prosecution for theft, evidence that on the day after defendant procured the money in question from prosecutor by false pretext, as prosecutor and witness were going down the street they came up to defendant, who thereupon ran, was admissible. *Hawkins v. State*, 58 App. 407, 126 S. W. 268, 137 Am. St. Rep. 970.

Where, on a trial for the larceny of a cow, the identity of the animal stolen was in dispute, the acts of the constable in watching the cow while tied in the woods during the greater part of a day are inadmissible as reflecting the opinion of the constable that the animal had been stolen, and that accused was connected with the offense. *Richards v. State*, 59 App. 203, 127 S. W. 823.

In a prosecution for theft, evidence held to sustain the charge of the indictment that the property taken was lawful current money of the United States of America. *Bacon v. State*, 61 App. 206, 134 S. W. 690.

In a prosecution for theft of a deed, evidence was admissible that accused executed a deed to the property conveyed by that claimed to have been stolen, in order to show that he was exercising acts of ownership under the stolen deed. *Roberts v. State*, 61 App. 434, 135 S. W. 144.

In a prosecution for theft of a cow which disappeared Saturday, where the theory of the prosecution was that the cow was killed by the accused on Monday, and as to which the evidence for the prosecution was only circumstantial, the rejection of evidence offered by the accused to show that, when the cow was found on Tuesday, she had been dead four or five days, is error, as the killing of cattle to secure the hide constitutes a theft of the cattle, but it is not a theft of an animal to remove the hide from a dead animal. *Jackson v. State*, 62 App. 106, 136 S. W. 783.

In a trial for stealing hides, based upon circumstantial evidence, any circumstance connecting accused with hides shipped and identified as including those stolen, or any misstatement by him concerning them while not under arrest, were admissible as bearing on his claim that he bought the hides from an unknown man. *Davis v. State*, 63 App. 453, 140 S. W. 349.

In a trial for stealing hides, based on circumstantial evidence, the state could show that hides found in a package which accused shipped with those stolen were stolen the night after the particular theft, and on the night before accused delivered the package for shipment, where accused claimed to have bought the hides in good faith from a stranger. *Davis v. State*, 63 App. 453, 140 S. W. 349.

In a prosecution for theft of a beef, testimony of a person who saw the property alleged to have been stolen in the pen of the defendant and told another person about it on a certain day, and of such other person that the first witness did so tell him, is admissible to show the time the beef was in the pen, and thereby disprove testimony of defendant to the effect that on the day before the witness saw the beef he purchased it from a traveler in another county. *Chance v. State*, 63 App. 602, 141 S. W. 113.

In the trial of a train newsboy for the theft of money from a passenger's hand bag left on the train, the conductor's testimony that, while he was looking for the hand bag after notice by telegram, a lady passenger told him that a lady left her hand bag, when defendant "buted in" and said, "Yes, I saw it lying there," was properly admitted. *Lane v. State* (Cr. App.) 152 S. W. 897.

It was not error, in the trial of a train newsboy for theft of money from a hand bag left on the train by a passenger, to permit the passenger to testify that the money and hand bag were taken without her consent. *Lane v. State* (Cr. App.) 152 S. W. 897.

In a trial for horse theft, it was not error to permit the state to show that witness met a man near prosecuting witness' home riding one horse and leading another, though his description of the man and the horses did not identify the man definitely as accused, nor either of the horses as the one stolen. *Lester v. State* (Cr. App.) 154 S. W. 554.

On a trial for theft of cotton, the testimony of a witness that he had seen mule tracks and that accused owned mules was admissible. *Wilson v. State*, 70 App. 340, 156 S. W. 204.

Where the state depended on circumstantial evidence to establish a larceny of cotton, that tracks leading to the door where the cotton was found had been rubbed out by the foot could be proved. *Wilson v. State*, 70 App. 340, 156 S. W. 204.

Where accused was on trial for the theft of horses delivered to prosecutor as a pledge to secure the release of a mortgage on a chattel awarded to prosecutor on the dissolution of the firm in which the parties were partners, evidence as to the formation of the firm and as to accused's representations that the chattel was not incumbered was admissible. *Haley v. State*, 70 App. 30, 156 S. W. 637.

On a trial for theft of cattle for which accused claimed to have a bill of sale, evidence that the general reputation for honesty of the notary before whom the bill of sale purported to have been acknowledged was a "little bad" should have been excluded. *Turner v. State*, 71 App. 477, 160 S. W. 357.

25. — **Burden of proof.**—See article 52, ante, and C. C. P. art. 785, and notes thereunder.

The evidence must show satisfactorily, beyond a reasonable doubt, that the accused took the property fraudulently, with the intent to deprive the owner of the value of the same, and to appropriate it to his, the accused's, use or benefit. The fraudulent intent with which the property was taken is the very gist of the offense, and without such intent there can be no theft. Such fraudulent intent must have existed in the mind of the accused at the very time that he took the property. If at the very time he came into the possession of the property, such fraudulent intent did not exist in his mind, such intent, subsequently formed, would not make the taking of the property theft. *Hernandez v. State*, 20 App. 151; *Wilson v. State*, Id. 662; *Warren v. State*, 17 App. 207; *Winn v. State*, Id. 284; *Reed v. State*, 8 App. 40, 34 Am. Rep. 732; *Robinson v. State*, 11 App. 403, 40 Am. Rep. 790; *Ainsworth v. State*, Id. 339; *Wilson v. State*, 14 App. 205; *Wolf v. State*, Id. 210; *Knutson v. State*, Id. 570; *Deering v. State*, Id. 599; *McAfee v. State*, Id. 668; *Dow v. State*, 12 App. 343; *Landin v. State*, 10 App. 63; *Mullins v. State*, 37 Tex. 337; *Isaacs v. State*, 30 Tex. 450; *Billard v. State*, Id. 367, 94 Am. Dec. 317; *Quitow v. State*, 1 App. 65; *Johnson v. State*, Id. 118; *Clayton v. State*, 15 App. 348; *Ricks v. State*, 19 App. 308; *Martindale v. State*, Id. 333. And such fraudulent intent must be to appropriate or convert the property permanently. An intent merely to use the property temporarily, without an intent to permanently appropriate it, is not such an intent as will constitute theft. *Wilson v. State*, 18 App. 270, 51 Am. Rep. 309; *Loza v. State*, 1 App. 488, 28 Am. Rep. 416; *Johnson v. State*, 36 Tex. 375; *Blackburn v. State*, 44 Tex. 457. The intent with which the property was taken is to be arrived at by considering all the circumstances, immediately or remotely attending the taking that may be relevant thereto. *McNair v. State*, 14 App. 78; *Jinks v. State*, 5 App. 68. The first and most important element or indicia of fraudulent intent is an attempt at concealment. *Herber v. State*, 7 Tex. 69. But there may be theft without any attempt at concealment, for the fraudulent intent may be shown to have existed, by proof of other facts. The manner of the taking is merely a circumstance more or less cogent, according to the other facts proved, to demonstrate intent. A taking may be with fraudulent intent, and theft, although it be open and public, and without any attempt at concealment. *Billard v. State*, 30 Tex. 367, 94 Am. Dec. 317; *Isaacs v. State*, Id. 450; *Terrell v. State*, 41 Tex. 463; *Loza v. State*, 1 App. 488, 28 Am. Rep. 416; *Quitow v. State*, Id. 65; *Dignowitty v. State*, 17 Tex. 521, 67 Am. Dec. 670. It is not theft to take a neighbor's horse openly in the streets of a city, and ride him a few miles in the country, with the intention, fairly manifested, to return him to the owner. *McDaniel v. State*, 33 Tex. 419. Nor is it theft to take property openly, in the presence of others, or of another claimant, under color of title, without fraudulent intent. *Kay v. State*, 40 Tex. 29; *Boyd v. State*, 18 App. 339. Nor to take it under an honest, though mistaken claim of right. *Bray v. State*, 41 Tex. 203; *Thurman v. State*, 33 Tex. 684; ante, art. 1336. Under such circumstances the evidence must show: 1. That the accused took the property. 2. That it belonged to the alleged owner. 3. That it was taken fraudulently by the accused, and without belief on his part that it was his own. *Johnson v. State*, 41 Tex. 608; ante, art. 1336. But it is not essential to constitute theft that the taker should know who is the owner of the property. It is sufficient if he knows that it is not his own, and takes it with a fraudulent intent. *Lawrence v. State*, 20 App. 536. When the property was obtained by false pretext, the evidence must show an appropriation of it by the accused. It will not be sufficient to show merely its temporary use by him. *Berg v. State*, 2 App. 148; ante, art. 1332. The mere fact that the accused rode an estray horse several days in the neighborhood, is not sufficient to show a fraudulent taking and permanent appropriation of the horse. *Blackburn v. State*, 44 Tex. 457. See, also, *Johnson v. State*, 36 Tex. 375; *Pitts v. State*, 3 App. 210. But an "estrays" is the subject of theft, and it is no defense that the animal was delivered to the accused by another person, who had taken it up and had not legally estrayed it. *State v. Apel*, 14 Tex. 428; *Owens v. State*, 7 App. 470. In *Debbs v. State*, 43 Tex. 650, it was held that if the accused honestly believed that the owner of an animal had forfeited his title to it, by a failure to brand it, the appropriation of such animal under such belief, would not be theft. But in the subsequent case of *Lawrence v. State*, 20 App. 536, it is held that the fraudulent taking of an unmarked sheep, goat, or hog is as much theft as though the same had been marked, and the doctrine laid down in the *Debbs Case*, supra, is overruled. It is competent for the state to prove the theft of other property at the same time and place as the property in question, if such proof conduces to establish identity in developing the *res gesta*, or to prove the guilt of the accused by circumstances connected with

the theft, or to show the intent with which the accused acted with respect to the property for the theft of which he is on trial. *Carter v. State*, 23 App. 508, 5 S. W. 128; *Mayfield v. State*, Id. 645, 5 S. W. 161; *Holmes v. State*, 20 App. 509; *Kelley v. State*, 18 App. 262; *House v. State*, 16 App. 31; *Jones v. State*, 14 App. 85; *McCall v. State*, Id. 353; *Long v. State*, 11 App. 381; *Davison v. State*, 12 App. 215; *Tyler v. State*, 13 App. 205; *Gilbraith v. State*, 41 Tex. 567; *Ivey v. State*, 43 Tex. 425; *Wright v. State*, 10 App. 476; *Webb v. State*, 8 App. 115; *Hardin v. State*, Id. 653; *Smith v. State*, 21 App. 96, 17 S. W. 560; *Smith v. State*, Id. 133, 17 S. W. 558; *Conley v. State*, Id. 495, 1 S. W. 454. The state is not entitled to prove that accused had been "extradited" from Mexico on another charge. *Fore v. State*, 5 App. 251. Nor that he was a "county convict." *Persons v. State*, 3 App. 240. Nor that he had "conscripted" cattle found in his possession. *Debbs v. State*, 43 Tex. 650. The defendant may rebut the state's evidence tending to show fraudulent intent by any facts and circumstances which may tend to show that he took the property without such fraudulent intent. He is not restricted to proof that he owned the property, or had a legal right to take it. *Wills v. State*, 40 Tex. 69; *Smith v. State*, 41 Tex. 168; *Bawcom v. State*, Id. 189. Where the proof showed that the defendant was the hired hand of another person, hired to drive cattle, merely to prove that the stolen cattle were found in the herd which the defendant had in charge, is not sufficient to warrant his conviction of the theft. *Allen v. State*, 42 Tex. 517; *Perry v. State*, 41 Tex. 483. Contradictory statements are not sufficient evidence of crime, where the evidence shows that they were prompted by another motive than concealment of the guilt of the accused. *Porter v. State*, 43 Tex. 368. An indictment for the theft of cattle is sustained by proof that the cattle were killed with the fraudulent intent of appropriating their hides. *Musquez v. State*, 41 Tex. 226; *McPhail v. State*, 9 App. 164. It is permissible for a defendant charged with theft of animals, to prove his directions given to his employes in relation to the animals, for the purpose of rebutting fraudulent intent. *Bawcom v. State*, 41 Tex. 189. An unrecorded brand, or an unauthorized bill of sale, though inadmissible to prove title, may be competent to rebut a fraudulent intent. *Long v. State*, 1 App. 466.

If the possession of the property was obtained by the defendant from the owner lawfully and in good faith, its subsequent appropriation by the defendant to his own use, without the owner's consent, does not constitute theft. *Lott v. State*, 24 App. 723, 14 S. W. 277.

26. — **Intent.**—Property taken with intent to destroy, or for the benefit of some other person, will be sufficient to constitute the offense. *Stegall v. State*, 32 App. 100, 22 S. W. 146, 40 Am. St. Rep. 761. Proof that defendant took property to hold for reward is sufficient evidence of intent. *Dunn v. State*, 34 App. 257, 30 S. W. 227, 53 Am. St. Rep. 714.

It is error to exclude evidence tending to show that the article was taken temporarily and in sport. *Colwell v. State* (Cr. App.) 34 S. W. 615.

Where, in a prosecution for theft of cattle, the defendant claims to have purchased the property in good faith, and after the time of the alleged theft exhibited to the district attorney a bill of sale purporting to transfer title to the person from whom defendant claimed to have purchased, evidence to show that the seller in such bill of sale did not execute it, but that it was made by defendant and another, who remarked at the time of its making that it would clear defendant and put the person named therein as seller in the penitentiary, is admissible as bearing on the claim of purchase in good faith. *Chance v. State*, 63 App. 602, 141 S. W. 113.

In a prosecution for cattle theft, where accused claimed that he killed the animal in good faith, relying on an earmark, evidence as to the age of the mark was admissible. *Roberts v. State*, 64 App. 135, 141 S. W. 235.

Evidence, in a prosecution for horse theft, held to sustain a finding that the horses were taken with the intention of stealing them. *Burton v. State* (Cr. App.) 146 S. W. 186.

In a prosecution for hog theft in which accused claimed that he believed the hog belonged to his father when he took it, the state could not show as an incriminative fact whether accused had ever attempted to institute civil proceedings to recover the hog from the alleged owner. *Harris v. State*, 71 App. 463, 160 S. W. 447.

Where defendant's only defense was that he thought the hog which he killed was his own, and no complaint was made as to the court's manner of submitting the question to the jury, a judgment of conviction is not "contrary to the law and evidence." *Hall v. State*, 72 App. 526, 162 S. W. 1154.

27. — **Venue.**—The indictment may allege the venue of the offense to be in the county of the prosecution, and such allegation will be sustained by proof that the property was stolen in any other county in the state, and brought by the thief into the county of the prosecution. C. C. P. art. 245. *Cox v. State*, 41 Tex. 1; *Connell v. State*, 2 App. 422; *Cameron v. State*, 9 App. 332; *Roth v. State*, 10 App. 27; *Dixon v. State*, 15 App. 480. This rule applies to all species of theft. *Shubert v. State*, 20 App. 320; *McElmurray v. State*, 21 App. 691, 2 S. W. 892; *Clark v. State*, 23 App. 612, 5 S. W. 178; Id. 23 App. 618, 5 S. W. 163. Except theft from the person, in which case the prosecution can be maintained only in the county where the property was originally taken. *Gage v. State*, 22 App. 123, 2 S. W. 638.

Venue must be alleged in the county of the prosecution, and it is met by proof that the offense was committed within 400 yards of the county line. *Cox v. State*, 41 Tex. 1; *Cameron v. State*, 9 App. 232; C. C. P. art. 237; *McElroy v. State*, 53 App. 57, 111 S. W. 948.

Where the proof was that the stolen animal was seen in its accustomed range, in C. county, one week before it was found in defendant's possession in another

county, it was held that it was sufficiently proved that, when taken, the animal was in C. county. *Ashlock v. State*, 16 App. 13.

The allegation of venue must be proved, and on appeal, where there is a statement of facts in the record, unless such statement of facts shows proof of venue, the conviction will be set aside. Venue is an issue which must be affirmatively and not inferentially proved. *Ryan v. State*, 22 App. 699, 3 S. W. 547; *Briggs v. State*, 20 App. 106; *Latham v. State*, 19 App. 305; *Bragg v. State*, 17 App. 219; *Winn v. State*, 15 App. 169; *Williamson v. State*, 13 App. 514.

Under a general rule of venue and jurisdiction the proof must show a complete offense in the county where venue was laid. But by special provision the thief may be prosecuted in any county through, or into which he takes the property. *West v. State*, 28 App. 1, 11 S. W. 635. Formerly this rule could not apply to accomplices and accessories to theft, but does now under the amendment of April 4, 1889. Where defendant hired a horse in D. county and sold him in G. county, if the hiring was only a pretext to obtain possession of the horse, the venue was in D. county. *Givins v. State*, 32 App. 457, 24 S. W. 287.

Proof that property was stolen in another county and was found in possession of defendant in county of prosecution is sufficient to sustain conviction for bringing stolen property into the county. *Lyon v. State* (Cr. App.) 34 S. W. 947.

Where, on a trial for the theft of a horse, and for receiving the horse, knowing that it was stolen, and concealing it, there was no evidence that accused received or concealed the horse in the county, unless he stole it in the county, and the circumstances justified a finding that he committed the theft of the horse in the county, a conviction of receiving and concealing the horse in the county, but acquitting him of the theft thereof, was unwarranted by the evidence. *Arrington v. State*, 62 App. 357, 137 S. W. 669.

Evidence, in the trial of a newsboy for the theft of money from a satchel left on a train, held to sustain a finding that the crime was committed in the county of the trial. *Lane v. State* (Cr. App.) 152 S. W. 897.

28. — **Time of offense.**—It is not necessary to prove that the theft was committed on the day alleged, but it must be proved that it was committed at some time prior to the presentment of the indictment or information, and at a date within the period of limitation prescribed for a prosecution for the offense. *Jackson v. State*, 34 Tex. 136; *Fisher v. State*, 33 Tex. 792.

29. — **Identity of property.**—See *Taylor v. State*, 53 App. 615, 111 S. W. 151. Prior to the amendment of article 1353 in revising it, by omitting therefrom the words "gelding, mare, colt," it was held that where the indictment alleged the animal stolen to be a "horse," and the proof showed that it was a "gelding," or a "mare," or a "colt," there was a fatal variance, and the conviction could not be sustained. It was required that the allegation that the animal was a "horse," or a "gelding," or a "mare," or a "colt," must be strictly proved, and that one of these could not be alleged, and another proved. *Banks v. State*, 28 Tex. 644; *Swindell v. State*, 32 Tex. 102; *Jordt v. State*, 31 Tex. 571, 98 Am. Dec. 550; *Gibbs v. State*, 34 Tex. 134; *Keese v. State*, 1 App. 298; *Lunsford v. State*, Id. 448, 28 Am. Rep. 414; *Persons v. State*, 3 App. 241; *Brisco v. State*, 4 App. 219, 30 Am. Rep. 162.

But it is now only necessary to allege that the animal was a "horse," or an "ass," or a "mule," and a conviction will be sustained upon proof that it was an animal included within the generic word used. *Valesco v. State*, 9 App. 76; *Johnson v. State*, 16 App. 402; *Davis v. State*, 23 App. 210, 4 S. W. 590.

The property must be identified as the alleged stolen property by the best evidence attainable. *Garcia v. State*, 26 Tex. 209, 82 Am. Dec. 605. But positive identification of paper money may, under some circumstances, be dispensed with. *Bagley v. State*, 3 App. 163. The property described in the indictment must be proved as described. If the property be described with unnecessary particularity in the indictment, such description must nevertheless be proved, or the indictment will not be sustained. *Hill v. State*, 41 Tex. 253; *Warrington v. State*, 1 App. 168; *Rose v. State*, Id. 401; *Watson v. State*, 5 App. 11; *Allen v. State*, 8 App. 360; *Simpson v. State*, 10 App. 681; *Davis v. State*, 13 App. 215; *Courtney v. State*, 3 App. 258; *McGee v. State*, 4 App. 625; *Cameron v. State*, 9 App. 332; *Gray v. State*, 11 App. 411. But where the variance is as to surplusage, or as to immaterial matter, it will not be fatal. The rule requiring the descriptive averments in the indictment to be proved, is complied with when such averments are substantially proved, as that one identifies the other. *Smith v. State*, 7 App. 382; *Sweat v. State*, 4 App. 617; *Wolf v. State*, Id. 332; *Meuley v. State*, 3 App. 382; *Stoneham v. State*, Id. 594; *Roth v. State*, 10 App. 27; *Hart v. State*, 14 App. 657. When the indictment charges the theft of two or more animals or of several articles of property, a conviction may be had when the proof shows the theft of but one of the animals, or of but one of the articles described. *Alderson v. State*, 2 App. 10. As to identity of animals, see arts. 881, 883, and notes. The jury cannot leave the court room and inspect the alleged stolen property, even with the consent of the defendant. *Smith v. State*, 42 Tex. 444.

Description of money in an indictment as "ten dollars, lawful money" requires proof of coin. *Warren v. State*, 29 Tex. 369.

Sufficient to describe the stolen animal by the generic term "horse," "ass," "mule" or "cattle." But if the descriptive averments unnecessarily include color, brand or sex, such averments must be proved. *Hill v. State*, 41 Tex. 253; *Coleman v. State*, 21 App. 520, 2 S. W. 859; *Loyd v. State*, 22 App. 646, 3 S. W. 670; *Smythe v. State*, 17 App. 244.

Where an indictment charged theft of a bill issued by the Chatam National Bank, and the one offered in evidence purported to be issued by the Chatham National Bank, it was held that the variance was not material. *Roth v. State*, 10 App. 27.

"Bank-bills" include "bank-notes," and where the indictment alleged the theft of a bank-bill, and the evidence proved the theft of a bank-note, there was no variance. *Roth v. State*, 10 App. 27.

An indictment which alleged that the animal stolen was "an animal of the horse species," was held to be sufficient, but reprehensible pleading. *Smythe v. State*, 17 App. 244. It is unnecessary to further describe the animal in the indictment, than to allege that it was a "horse," an "ass," or a "mule." If it be more particularly described as by its color, or brand, or sex, the descriptive allegation must be proved, or a conviction cannot be sustained. *Allen v. State*, 8 App. 360.

The indictment in this case charges the theft of a "beef, an animal of the cattle kind." The proof shows that the alleged stolen animal was a cow. Held, that the term "cow" is embraced in the term "beef," and that there is no variance between the allegation and the proof. *Smith v. State*, 24 App. 290, 6 S. W. 40; *Stewart v. State*, 24 App. 418, 6 S. W. 317.

The indictment charged the appellant with the theft of "one head of neat cattle." The proof shows that the cow of the alleged owner, with her original ear-marks changed into the ear-marks of the appellant, was found in the pen of the appellant, the appellant and another being present. To the owner's claim of property the appellant asserted no counterclaim, nor did he offer any explanation of his possession, but helped to turn the cow out of the pen. Afterward, a yearling, the offspring of the cow, was found upon the range, both the brand and the ear-marks of the owner of the cow, originally upon it, having been changed to the brand and ear-marks of the appellant. Held, that the proof should have been made to designate which of the animals was referred to in the indictment, and the charge of the court should have limited the evidence respecting the other animal to the legitimate purpose for which it was received. For the same reason—that it does not identify the animal referred to in the indictment—the evidence is insufficient to support the judgment of conviction. *Coward v. State*, 24 App. 590, 7 S. W. 332.

Evidence of gold and paper money is admissible on trial for theft of silver money when the money was all taken at the same time. *Davis v. State*, 32 App. 377, 23 S. W. 794.

The indictment charged the defendant with stealing a sorrel mare, thin in order, without any particular marks or brands. Evidence that he was seen coming from the direction of the owner's residence riding such an animal, and that he did not own any animal of that description; held sufficient identification to support the verdict. *Pearce v. State*, 37 App. 643, 40 S. W. 806.

Evidence held sufficient to identify animal. *Pierce v. State* (Cr. App.) 36 S. W. 95.

A witness testified that he knew defendant's cattle well. Defendant should have been allowed to ask witness on cross-examination to state the size, sex, color and apparent age of each of his three cattle. *Berry v. State*, 37 App. 44, 38 S. W. 812.

On trial of theft of one head of cattle it is admissible to show that bones which appeared to be those of a beef corresponding in size to that alleged to have been stolen by appellant, were dug up on the place occupied by him. *Foster v. State* (Cr. App.) 56 S. W. 58.

In prosecution for theft of property belonging to unknown owner, court must charge jury to acquit unless State identifies property as property taken from possession of unknown owner. *Melton v. State* (Cr. App.) 56 S. W. 67.

Where brand recorded after the commission of the offense is admitted in evidence, the court should instruct the jury that it can only be considered for purpose of identity and not to prove ownership. *Welch v. State*, 42 App. 338, 60 S. W. 46.

Under an information describing the property stolen as "lawful money of the United States," proof of theft of silver certificates or national bank notes was a variance. *Perry v. State*, 42 App. 540, 61 S. W. 400.

When theft of 85 cents, lawful current money of the United States of America is charged, the evidence must show legal tender coin, or United States currency. *Black v. State*, 46 App. 107, 79 S. W. 311.

The descriptive averments of an indictment must be proved as they are alleged; and in a prosecution for theft, where the property taken was described in the indictment as current money of the United States of America, it was necessary to prove that it was such, and the testimony of the loser that it consisted of certain coins was insufficient. *Rogers v. State*, 58 App. 146, 124 S. W. 921.

Where the indictment alleged the larceny of a \$5 gold piece of United States money, the state must not only prove that a \$5 gold piece was stolen, but must show that it was United States money. *Maxey v. State*, 58 App. 118, 124 S. W. 927.

Where the information charged accused with the theft of \$1, current money of the United States, of the value of \$1, the state must prove that the money taken was current money of the United States; that allegation being descriptive. *Johnson v. State*, 58 App. 442, 126 S. W. 597.

An indictment for theft of a sack of walnuts will not be supported by proof that it was a sack of mixed nuts. *Poston v. State*, 58 App. 583, 126 S. W. 1148.

Where, on a trial for larceny, the identity of the alleged stolen property is in dispute, the acts and declarations of the prosecuting witness in relation to the property, subsequent to the theft, and at a time accused had parted with his possession, are inadmissible, though it is competent to prove by prosecutor the identity of the property. *Richards v. State*, 59 App. 203, 127 S. W. 823.

Where a complaint charged the stealing of certain personalty, and an information charged the stealing of other articles, though the testimony at the trial may have tended to show that accused stole the goods charged in the complaint, but there was no evidence in the record to show that he stole the articles described

in the information, the conviction will be set aside. *Randell v. State*, 62 App. 524, 138 S. W. 118.

In a trial for stealing hides, it was proper to permit an officer to testify that, before recovering them from a package which accused had shipped, the owner described part of the stolen hides, and on afterwards opening the package found the hides described. *Davis v. State*, 63 App. 453, 140 S. W. 349.

Where lard compound was made of cotton seed oil and oleostearine, and was generally described as lard both in trade and among consumers, proof of the theft of such compound was sufficient to sustain a conviction under an indictment charging the theft of lard, though "lard" as defined by the dictionaries and the pure food law means a product of a hog. *Roman v. State*, 64 App. 515, 142 S. W. 912.

In a prosecution for stealing cattle, proof of the brand on the cattle, when not relied on to prove ownership, is admissible to identify the animals. *Williams v. State* (Cr. App.) 147 S. W. 571.

Under an indictment alleging the theft of a check indorsed by P. and delivered by him to a person named, the admission of evidence showing the theft of a check indorsed by a person other than P. and by such person delivered to the same named person is a variance between the allegation and proof, and is reversible error. *Ferguson v. State* (Cr. App.) 147 S. W. 592.

In a prosecution for the theft of cattle, the owner's testimony that the animal he lost had a certain brand, which was not shown to have been recorded, and that the hide of the buried animal looked like that of the animal lost but had cuts in it where the brands were, was admissible when offered, not to show ownership, but only to show identity of the hide with the animal missing. *Elmore v. State*, 72 App. 226, 162 S. W. 517.

In a prosecution for theft, evidence held insufficient to identify certain property in defendant's possession as that which was stolen. *Smith v. State* (Cr. App.) 153 S. W. 851.

Under Rev. St. 1911, art. 7160, as amended by Acts 33d Leg. c. 69, providing that no brand on animals except such as are recorded shall be recognized in law as evidence of the ownership of the animals upon which it is used, but that this shall not apply in criminal cases, in a criminal case evidence as to unrecorded brands is admissible to prove ownership as well as identity. *Turner v. State*, 71 App. 477, 160 S. W. 357.

On a trial for cattle theft, evidence as to an unrecorded cattle brand was admissible on the question of identity, though prior to Acts 33d Leg. c. 69, amending Rev. St. 1911, art. 7160, such evidence was not admissible to prove ownership. *Turner v. State*, 71 App. 477, 160 S. W. 357.

Evidence of the brand on the cattle alleged to have been stolen is admissible in evidence to prove their identity, though such brand is not recorded; the court having charged that it was admissible only for that purpose, and not to establish ownership. *Reynolds v. State*, 71 App. 454, 160 S. W. 362.

The testimony of the owner of a stolen horse, positively identifying an animal found in the defendant's possession as his own, is sufficient to sustain a conviction on appeal, even though the preponderance of the evidence is the other way. *Stewart v. State*, 71 App. 480, 160 S. W. 381.

Proof of the theft of one of several articles described and alleged to have been stolen in an indictment would support a conviction. *Schenk v. State* (Cr. App.) 174 S. W. 357.

Where an indictment charged the theft of "one distributor leather belt," and a witness testified that he would call it a distributor leather belt or a distributor drive belt, the court had no authority to strike from the indictment such description because of alleged variance of testimony. *Schenk v. State* (Cr. App.) 174 S. W. 357.

Where an indictment described the theft of "one distributor leather belt," and the witness testified that "the distributor leather belt I refer to is a large leather belt attached to another part of the machinery and also the distributor and drives the distributor belt. I don't know what they call the leather belt, but I call it a distributor leather belt, or a drive belt. The distributor belt proper is a canvas belt that distributes the cotton"—it was not error to refuse to strike the testimony as tending to prove theft of a belt other than the one alleged. *Schenk v. State* (Cr. App.) 174 S. W. 357.

In a prosecution for the theft of goats, where the owner had testified as to brand of the goats he had lost, and as to the brand of those found evidence as to the condition of the brand and to facts tending to show that the original brand had been run over and the marks changed was admissible. *Simonds v. State* (Cr. App.) 175 S. W. 1064.

30. — Value of property.—*O'Dell v. State*, 44 App. 307, 70 S. W. 964.

As to proof of value, see, also, art. 1342, note.

When the value is alleged at so many dollars, the proof may be value in currency dollars. *Hubotter v. State*, 32 Tex. 479.

In proving value, any evidence from which the jury can infer the value of the property is admissible; as for instance what the owner testifies of its value to him; the opinions of witnesses acquainted with like property; what such property has brought at actual sale, etc. *Martinez v. State*, 16 App. 122; *Cannon v. State*, 18 App. 172; *Saddler v. State*, 20 App. 195; *Rollins v. State*, 32 App. 567, 25 S. W. 125.

The defendant is entitled to prove the market value of the hogs, in rebuttal of evidence adduced by the state as to value. *Cannon v. State*, 18 App. 172.

Where evidence showed value of saddle to be twenty-two dollars and that owner had refused that amount for same, held sufficient proof of value. *Rollins v. State*, 32 App. 566, 25 S. W. 125.

Where the verdict of the jury fixes the value of the stolen property at the highest estimate of a number of witnesses the verdict will not be disturbed. *Lane v. State* (Cr. App.) 28 S. W. 202.

Where one was convicted of theft of a \$10 United States Currency bill, the fact that it was a \$10 bill and United States Currency proves its value. *Sowles v. State*, 52 App. 17, 105 S. W. 178.

On trial for theft of a watch, the prosecuting witness may be allowed to state what she gave for it. *McCoy v. State*, 56 App. 551, 120 S. W. 858.

Evidence held to sustain a conviction of theft of personal property over the value of \$50. *Cabral v. State*, 57 App. 304, 122 S. W. 872.

In a prosecution for theft of a deed, evidence was properly admitted as to the cost of having such a deed executed and acknowledged, and of the cost of having the deed in question prepared. *Roberts v. State*, 61 App. 434, 135 S. W. 144.

Evidence of various witnesses as to the value of the property stolen, ranging from \$40 to \$52, was sufficient to authorize a finding that the value was \$50 or over. *Frazier v. State*, 62 App. 640, 138 S. W. 620.

Where, in a prosecution for theft of certain gloves, the prosecuting witness testified that defendant thereafter admitted taking them and paid him \$1.75 for them was sufficient proof of value to justify the refusal of the charge that the state had failed to prove the value of the gloves, necessitating a verdict of not guilty. *Hatfield v. State* (Cr. App.) 147 S. W. 236.

One charged with theft of property worth over \$50 cannot be convicted of a felony, where there is a doubt as to the value, and he is then entitled to an acquittal of the felony. *Wilson v. State*, 70 App. 631, 158 S. W. 516.

31. — **Ownership and possession.**—See *Mixon v. State*, 28 App. 347, 13 S. W. 143; *English v. State*, 29 App. 174, 15 S. W. 649; *Sharp v. State*, 29 App. 211, 15 S. W. 176; *Otero v. State*, 30 App. 450, 17 S. W. 1081; *McGrew v. State*, 31 App. 336, 20 S. W. 740.

A "road brand," as distinguished from a "range brand," is a brand required by statute to be placed upon cattle before being removed from the county in which they are gathered to market outside of the state, which brand must be recorded in the county from which the cattle are to be driven, and before their removal from such county. The brand introduced in evidence in this case was the "road brand" of the alleged owner, which was recorded after the cattle were driven from the county where gathered, and after the commission of the offense. Held that the said brand was inadmissible to prove ownership, and should have been excluded. *Crowell v. State*, 24 App. 404, 6 S. W. 318; *Myers v. State*, 24 App. 334, 6 S. W. 194. Other decisions hereunder as follows: *Tinney v. State*, 24 App. 112, 5 S. W. 831; *White v. State*, 24 App. 231, 5 S. W. 857, 5 Am. St. Rep. 879; *Willis v. State*, 24 App. 487, 6 S. W. 200; *Lott v. State*, 24 App. 723, 14 S. W. 277; *Williams v. State*, 26 App. 131, 9 S. W. 357; *Woods v. State*, 26 App. 490, 10 S. W. 108; *Langham v. State*, 26 App. 533, 10 S. W. 113; *Hanson v. State*, 27 App. 140, 11 S. W. 37; *Stone v. State*, 27 App. 576, 11 S. W. 637; *Arcia v. State*, 28 App. 199, 12 S. W. 599; *Mixon v. State*, 28 App. 347, 13 S. W. 143; *Sharp v. State*, 29 App. 211, 15 S. W. 176; *Young v. State*, 30 App. 308, 17 S. W. 413; *Otero v. State*, 30 App. 450, 17 S. W. 1081.

See, also, as to mark and brand, *Harwell v. State*, 22 App. 251, 2 S. W. 606. The particular portion of the animal upon which the brand is placed is as important as the characters used. Where the brand was to be placed on the hip, evidence showing that it was on the ribs was held insufficient. *Priemuth v. State*, 1 App. 480. But such a variance may be explained by other evidence. *Harwell v. State*, 22 App. 251, 2 S. W. 606.

Possession of the servant is that of the master, and an allegation that it was in the latter is supported by proof that it was in the servant. *Thomas v. State*, 1 App. 289.

A variance between the middle initial letter of the given name as alleged and as proved will be immaterial. *Dixon v. State*, 2 App. 531; *Delphino v. State*, 11 App. 30. Where the proof showed that the owner was known by the name alleged in the indictment, as well as by his true name, it was held there was no variance. *Bird v. State*, 16 App. 525.

The allegations in the indictment of the ownership and possession of the alleged stolen property must be proved as laid. A material variance between these allegations and the evidence will be fatal. Proof of either a general or special property in the alleged owner will be sufficient. *Jinks v. State*, 5 App. 68; *Skipwith v. State*, 8 App. 135; *Walker v. State*, 9 App. 38; *Frazier v. State*, 18 App. 434. See upon this subject, ante, art. 858, note 6; art. 863, note 1. The ownership of animals may be proved otherwise than by a bill of sale. Exclusive control, care, and management of the property is sufficient proof of ownership. *Phillips v. State*, 17 App. 169; *Dodd v. State*, 10 App. 370; *Pippin v. State*, 9 App. 269; *Crockett v. State*, 5 App. 526. Where the indictment charges the ownership in two persons, jointly, it will not be sustained by proof that the ownership was in but one of the persons. *Brown v. State*, 35 Tex. 689. Where the indictment charges ownership in one person, and the proof shows that the property was owned jointly, or in common, by two or more persons, but was in the control, care, and management of the alleged owner, the allegation of ownership is sustained. *Terry v. State*, 15 App. 66; *Henry v. State*, 45 Tex. 84; *Crockett v. State*, 5 App. 526. Where the indictment alleges that the ownership of the property is unknown, the evidence must show that the grand jury used reasonable diligence to discover the ownership, and failed to ascertain who the owner of the property was. The allegation that the owner of the property was unknown to the grand jury must be sustained by proof. *Williamson v. State*, 13 App. 514; *Jorasco v. State*, 6 App. 238. Ownership cannot be proved by a bill of lading and indorsements. *Radford v. State*, 35 Tex. 15. Brands upon animals are not evidence of ownership unless recorded. But ear-marks are evidence of ownership though not recorded. *Love v. State*, 15 App.

563; *Johnson v. State*, 1 App. 333. And an unrecorded brand is competent evidence of the identity of the animal, though not of ownership. *Coombes v. State*, 17 App. 258. The proof of record of a brand to show ownership must be made by the record itself, or by a certified or sworn copy thereof. It cannot be made by parol evidence. *Elsner v. State*, 22 App. 687, 3 S. W. 474. Ownership of animals, however, may be proved in other ways than by marks and brands. *Corn v. State*, 41 Tex. 302; *Poag v. State*, 40 Tex. 151; *Allen v. State*, 42 Tex. 518; *Johnson v. State*, 1 App. 333; *Jones v. State*, 3 App. 498; *Lockhart v. State*, Id. 567; *Fisher v. State*, 4 App. 181; *Wolf v. State*, Id. 332; *Hutto v. State*, 7 App. 44; *Love v. State*, 15 App. 563; *Wyers v. State*, 21 App. 448, 2 S. W. 816; *Dreyer v. State*, 11 App. 631. Where a brand was recorded after the theft was committed, it was held that it was admissible in connection with other evidence, but of itself was not sufficient evidence of ownership. *Priemuth v. State*, 1 App. 480; *Harvey v. State*, 21 App. 178, 17 S. W. 158. A certified copy of the record of a recorded mark and brand is competent evidence. The original record need not be produced. *Wilson v. State*, 3 App. 206. When a mark and brand has been recorded in a county comprising the intended range of the owner's stock, it is admissible in evidence in any county in which a prosecution for the theft of such stock may be instituted. *Atterberry v. State*, 19 App. 401. A bill of sale, executed by the general to the special owner, after the alleged theft from the special owner, is not admissible to prove ownership. *Groom v. State*, 23 App. 82, 3 S. W. 668. A bill of sale cannot be introduced in evidence without proof of its execution, unless it has been filed among the papers in the cause at least three days before the commencement of the trial, and notice of such filing given to the opposite party or his attorney. And if there be a subscribing witness to the bill of sale, its execution cannot be proved by another witness who testifies that he saw it executed, unless the absence of the subscribing witness be accounted for. An unacknowledged, unrecorded bill of sale is admissible to prove ownership in theft. But the property mentioned in the bill of sale must be identified as the alleged stolen property. *Morrow v. State*, 22 App. 239, 2 S. W. 624. It is not a valid objection to a bill of sale that it was recorded in the wrong record book. *Britt v. State*, 21 App. 215, 17 S. W. 255. Animals running in their accustomed range are in the possession of their owner. If they are under the control, care, and management of a special owner, they are in the possession of such special owner. *Moore v. State*, 8 App. 496; *Mackey v. State*, 20 App. 603; *Littleton v. State*, 20 App. 168; ante, art. 1334. Possession from which the property was taken must be alleged and at least substantially proved. *Littleton v. State*, 20 App. 168; *White v. State*, 33 App. 94, 25 S. W. 290; *Mixon v. State*, 28 App. 347, 13 S. W. 143; *Hill v. State*, 55 App. 407, 117 S. W. 823.

While a recorded brand is evidence of ownership, it is only prima facie evidence, to be considered by the jury like any other evidence. *Alexander v. State*, 24 App. 126, 5 S. W. 840.

The indictment charged the ownership and possession of the property to be in J. C. B. The proof showed that the horse was taken by the accused from a place at which one Bull had hopped it by direction of D. H. B., who had borrowed the animal from J. C. B. Held, that the proof established the possession in D. H. B., and that the variance between the allegation and proof on that issue is fatal to the conviction. *Conner v. State*, 24 App. 245, 6 S. W. 138.

A brand, although recorded after the commission of the offense, is admissible in evidence, but is not sufficient to prove ownership. *Crowell v. State*, 24 App. 404, 6 S. W. 318.

Brands are not evidence of ownership, unless recorded; ear-marks are. *Myers v. State*, 24 App. 334, 6 S. W. 194; *Crowell v. State*, 24 App. 44, 6 S. W. 318; *Thompson v. State*, 25 App. 161, 7 S. W. 589; *Hayes v. State*, 30 App. 404, 17 S. W. 940; *Horn v. State*, 30 App. 541, 17 S. W. 1094; *Titile v. State*, 30 App. 597, 17 S. W. 1118.

In a trial for cattle theft the state relied wholly on the brand found upon the animal for proof that the animal belonged to the person whom the indictment alleged to be the owner, but failed to prove that the brand had been duly recorded. A bill of exceptions reserved by the defense shows that the defense objected to a record of the brand adduced by the state, but does not set out the record of the brand nor allege that it was put in evidence over the objections made to it by the defense. Held, that the evidence wholly fails to sustain the allegation of ownership made by the indictment, and consequently fails to support the verdict and judgment of conviction. *Burke v. State*, 25 App. 172, 7 S. W. 873. And see *Graves v. State*, 28 App. 354, 13 S. W. 149; *Lasher v. State*, 30 App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922; *Thompson v. State*, 25 App. 161, 7 S. W. 589.

Certificate of the county clerk of Young county to a copy taken from the record of marks and brands read as follows: "The state of Texas, county of Young: I, Chas. O. Joline, clerk of the county court in and for said county, do hereby certify that the foregoing is a true copy of the record of the mark and brand of Wilkins Bros." Signed, with seal, etc. Held, that such certification of the copy from the record was sufficient to show that the said mark and brand were recorded in Young county. *Byrd v. State*, 26 App. 374, 9 S. W. 759.

The certificate of the county clerk to a copy of the record of the brand of W. P. Coats reads as follows: "The state of Texas, county of Taylor: I, David J. Red, clerk of the county court of said county, do hereby certify that the foregoing is a true copy of the record of the mark and brand of W. P. Coats (horse brand)." Signed, with seal, etc. Held sufficient to show that the said brand was recorded in Taylor County. *Thompson v. State*, 26 App. 466, 9 S. W. 760.

By express provision of the statute (Rev. Stat. 1895, art. 4930, *Vernon's Sayles' Civ. St.* 1914, art. 7160), marks and brands which would otherwise be intrinsically evidence of ownership, are admissible in the courts of this state, to prove owner-

ship, only when they have been duly recorded. This rule applies to equine as well as other stock named in the statute. *Thompson v. State*, 26 App. 466, 9 S. W. 760.

The proof shows that Coats lived in Taylor county when his brand was recorded in that county, and that, at the time of the alleged theft of the horse, he lived in Callahan county, at which said time his horse stock ran in the counties of Taylor, Callahan, and Coleman. Held, that the record of the brand in Taylor county was sufficient, and complied with the provisions of the statute (Rev. St. 1895, art. 4930, Vernon's Sayles' Civ. St. 1914, art. 7160), which require that marks and brands shall be recorded in the county court of the county in which the stock may be. *Thompson v. State*, 26 App. 466, 9 S. W. 760.

Proof that M. was a joint owner and possessor with others of the stolen property, will support the allegation of the indictment which laid the ownership and possession in him only. See the statement of the case for a charge of the court on the issues of ownership and possession, held correct and sufficient. *Clark v. State*, 26 App. 486, 9 S. W. 767.

Owner's name was alleged as "Burris." The proof showed it to be "Burrows." But it being also shown that he was commonly known as "Burris," the variance was immaterial. *Taylor v. State*, 27 App. 44, 11 S. W. 35.

Unacknowledged, unrecorded bill of sale is admissible to prove ownership in theft. *Graves v. State*, 28 App. 354, 13 S. W. 149; *Abrigo v. State*, 29 App. 143, 15 S. W. 408; *Williams v. State*, 30 App. 153, 16 S. W. 760.

An unrecorded bill of sale conveying all cattle in a certain brand, which brand is upon the animal alleged to have been stolen, is legitimate testimony. *Wilson v. State*, 32 App. 22, 22 S. W. 39.

If the indictment allege the name of the owner unknown, and the proof shows that the name could have been ascertained if the grand jury had used ordinary diligence, the variance will be fatal. *Swink v. State*, 32 App. 530, 24 S. W. 893.

Where the indictment alleged ownership and possession in Bledsoe, and the proof shows Bledsoe to be the owner, but that at the time of the theft the property was in the care and under the control of one Little, the court should have instructed the jury that if Little had the possession, care, and management of the property at the time of the theft, they must acquit the defendant. *White v. State*, 33 App. 94, 25 S. W. 290.

And where the indictment alleges ownership in a certain person, proof of his exclusive possession, control, and management is sufficient. *Ledbetter v. State* (Cr. App.) 29 S. W. 1084.

Where defendant when arrested was using a part of the wire alleged to have been stolen, and when it was taken by the sheriff, remarked that he guessed he would bring it back, held, sufficient to show possession. *Pitts v. State* (Cr. App.) 30 S. W. 359. But where cotton is in a warehouse, deposited by accused under authority of owner, and he has only the receipts, it is not sufficient possession to support a conviction for theft. *Johnson v. State*, 34 App. 254, 30 S. W. 228.

The indictment alleged the ownership in H., the evidence showed the property to be the separate property of H.'s wife, but H. had control of the same; held, no variance. *Sinclair v. State*, 34 App. 453, 30 S. W. 1070.

Evidence that the alleged owner had exclusive possession is sufficient. *Ledbetter v. State*, 35 App. 195, 32 S. W. 903.

On trial for theft of cattle the record of marks and brands is admissible to prove ownership. *Thurmond v. State*, 37 App. 422, 35 S. W. 965.

Under indictment for theft of a horse alleging the ownership in a person to the grand jurors unknown, it is not necessary for the State to prove that the grand jury made diligent search to ascertain the owners. *McCarty v. State*, 36 App. 135, 35 S. W. 994.

If the evidence that by the use of reasonable diligence the grand jury might have ascertained the name of the owner of the stolen property, an indictment alleging the ownership in a person unknown will not be supported. *Grant v. State* (Cr. App.) 36 S. W. 264.

It is not admissible for defendant to prove that his stepfather, since deceased, claimed the animal charged to have been stolen. *Anderson v. State*, 39 App. 690, 24 S. W. 517.

The indictment alleged the horses to be the property of A. B. S., and in the possession of said A. B. S. The evidence showed that P. was looking after the horses, that the owner lived some distance from the farm where the horses were; held, the court should have instructed the jury that if they believed from the evidence that P. had the actual care, custody and control of the horses, they should acquit defendant. *Long v. State*, 39 App. 461, 46 S. W. 821, 73 Am. St. Rep. 954.

Brand recorded in one county can be used as evidence of ownership in a prosecution in another county. *Walton v. State*, 41 App. 454, 55 S. W. 563.

Where indictment alleges ownership and possession in one, and the proof shows ownership in one and possession in another, it is fatal to conviction. Both ownership and possession can be alleged in the one having possession. *Williams v. State*, 42 App. 18, 57 S. W. 93.

An unrecorded brand on an animal can only be used as any other flesh mark in connection with other testimony to identify the animal. It is no proof of ownership, and the flesh mark can be proved by parol as any other flesh mark. *Welch v. State*, 42 App. 338, 60 S. W. 46.

On an indictment for theft from an unknown owner, the State is only required to show, prima facie, that the owner was unknown to the grand jurors. *McCarty v. State*, 36 App. 135, 35 S. W. 994.

In a trial for theft, accused was entitled to prove that the property did not belong to the prosecuting witness and was not in his possession at the time of the alleged taking, but was in the possession of and was owned by another. *Wilson v. State*, 58 App. 104, 124 S. W. 943.

In a prosecution for theft of cattle, in which the indictment alleged, that the cattle were the property of H., and were taken from his possession without his

consent, proof that the cattle were under control by H., who lived in another state, but were in the immediate charge of a hired hand in this state, who looked after them and kept up the fences, etc., was a fatal variance. *Bonner v. State*, 58 App. 195, 125 S. W. 22.

That the evidence showed that the owner's surname was different from that alleged in the information in a prosecution for theft would be a variance. *Johnson v. State*, 58 App. 442, 126 S. W. 597.

The variance between an information for larceny, alleging special ownership in one person and general ownership in another of the goods stolen, and the evidence excluding the idea that the former had any ownership or possession of the goods, is fatal. *Coleburn v. State*, 61 App. 26, 133 S. W. 882.

Evidence held insufficient to show ownership, as charged in an indictment. *Spiller v. State*, 61 App. 555, 135 S. W. 549.

Evidence held insufficient to show ownership, as charged in a larceny indictment. *Spiller v. State*, 61 App. 555, 135 S. W. 549.

To establish ownership of property charged to have been stolen, the state must show exclusive control, care, and management in the claimed owner. *Spiller v. State*, 61 App. 555, 135 S. W. 549.

Evidence, in a trial for cattle theft, held to support a finding of special ownership in two persons in charge. *Taylor v. State*, 62 App. 611, 138 S. W. 615.

In a prosecution for theft of cattle marked with a peculiar brand, testimony by the prosecuting witness that his father and mother, who had owned the brand, were both dead, and that he was their sole heir and inherited it, was admissible. *Dugat v. State* (Cr. App.) 148 S. W. 789.

In a prosecution for larceny, unless inhibited by statute, proof that the stolen animal was marked with a given brand, and that the prosecuting witness was owner of the brand, is admissible. *Dugat v. State* (Cr. App.) 148 S. W. 789.

In a prosecution for the theft of cattle, the owner's testimony that the animal he lost had a certain brand, which was not shown to have been recorded, and that the hide of the buried animal looked like that of the animal lost but had cuts in it where the brands were, was admissible when offered, not to show ownership, but only to show identity of the hide with the animal missing. *Elmore v. State*, 72 App. 226, 162 S. W. 517.

In a prosecution for the theft of a cow, an unrecorded brand cannot be introduced to establish ownership. *Powers v. State* (Cr. App.) 152 S. W. 909.

In a prosecution for larceny of ice from a railroad company, evidence held sufficient to show that the general foreman of the mechanical department of the railroad company had a sufficient special ownership in the property stolen. *Schneider v. State*, 70 App. 517, 156 S. W. 944.

Under Rev. St. 1911, art. 7160, as amended by Acts 33d Leg. c. 69 (Vernon's Sayles' Civ. St. 1914, art. 7160) providing that no brand on animals except such as are recorded shall be recognized in law as evidence of the ownership of the animals upon which it is used, but that this shall not apply in criminal cases, in a criminal case evidence as to unrecorded brands is admissible to prove ownership as well as identity. *Turner v. State*, 71 App. 477, 160 S. W. 357.

In a prosecution for theft of property, possession of which was alleged to be in one W., but shown to be in his renter, while the evidence of such possession in the renter did not amount to demonstration, it was clear to the exclusion of reasonable doubt so as to require reversal. *Lewis v. State* (Cr. App.) 164 S. W. 5.

Ownership must be proven as alleged. *Schenk v. State* (Cr. App.) 174 S. W. 357. On indictment for theft ownership must be proven as alleged. *Schenk v. State* (Cr. App.) 174 S. W. 357.

32. — **Want of owner's consent.**—As to allegation of want of owner's consent, see, ante, notes under "Indictment and Information." The allegation of want of the owner's consent to the taking of the property must be proved. It can not be presumed merely from the possession of property recently stolen. *Garcia v. State*, 26 Tex. 209, 82 Am. Dec. 605. It can not be proved by the owner's declarations to third persons. *West v. State*, 32 Tex. 651. Nor by the mere fact that, in a dispute with the clerk as to whether defendant had bought the article, the former said he had not. *Davis v. State*, 37 Tex. 227. Nor by mere proof that the alleged owner claimed the property and took it. *Jorasco v. State*, 8 App. 540. But the fact of the want of the owner's consent may be proved by circumstantial evidence. *Wilson v. State*, 45 Tex. 76, 23 Am. Dec. 602; *McMahon v. State*, 1 App. 102; *Welsh v. State*, 3 App. 422; *Foster v. State*, 4 App. 246; *Trafton v. State*, 5 App. 480; *Rains v. State*, 7 App. 588; *Kemp v. State*, 38 Tex. 110; *Stewart v. State*, 9 App. 321; *Spruill v. State*, 10 App. 695; *Wilson v. State*, 12 App. 481; *Mackey v. State*, 20 App. 603. But circumstantial evidence should not be resorted to when direct evidence of the fact is attainable. *Wilson v. State*, 12 App. 481; *Bowling v. State*, 13 App. 338; *Williamson v. State*, Id. 514; *Anderson v. State*, 14 App. 49; *Love v. State*, 15 App. 563; *Miller v. State*, 18 App. 34; *Shultz v. State*, 20 App. 308; *Williams v. State*, 19 App. 277. Where ownership is alleged in two or more persons, the want of consent of each of the alleged owners must be proved. *Williams v. State*, 19 App. 276; *McIntosh v. State*, 18 App. 285. If the alleged owner proves to be an agent of the general owner, he may testify as to his authority as agent without producing a power of attorney. *Turner v. State*, 7 App. 596. The defendant can not prove declarations of the owner, made after the alleged theft, that the property was taken with his consent, although the owner be dead at the time of the trial. *Sneed v. State*, 4 App. 514. As to bill of sale of property, when offered as evidence by defendant, see *Long v. State*, 1 App. 466; *Shoefercater v. State*, 5 App. 207; *Dreyer v. State*, 11 App. 631. Where the theft is committed by means of false pretenses, the want of the owner's consent to the taking is shown by proof that the property was obtained from him by such means. Ante, art. 1332, note.

The consent of the owner was not shown by proof that, for the purpose of detecting the accused in the very act of theft, the horse was hobbled with the ex-

pectation and intent that defendant would take him, it not appearing that the owner in any way suggested the theft to the accused or induced him to commit it. *Conner v. State*, 24 App. 245, 6 S. W. 138. And see, also, *Stockman v. State*, 24 App. 387, 6 S. W. 298, 5 Am. St. Rep. 894; *Coward v. State*, 24 App. 591, 7 S. W. 332; *Jones v. State*, 28 App. 42, 11 S. W. 830; *Good v. State*, 30 App. 276, 17 S. W. 469; *Thurmond v. State*, 30 App. 539, 17 S. W. 1098.

Where a person borrows a horse to go to church, and while there the horse is stolen, such temporary custodian is not legally in possession of the horse, and it need not be shown that the taking was without his consent. *Emmerson v. State*, 33 App. 89, 25 S. W. 289.

When the owner of a horse loans it temporarily to another to ride to church and it is there stolen, the indictment properly alleged possession in the owner and it is not necessary to prove the want of consent of the temporary custodian. *Emmerson v. State*, 33 App. 89, 25 S. W. 289.

On trial for theft of cattle the alleged owner of the cattle died before trial; held, competent to prove that such deceased owner was before the grand jury and interested in the prosecution, thereby showing want of consent. *Brooks v. State*, 38 App. 167, 31 S. W. 410.

Where there is positive, affirmative testimony to be had as to want of consent to the theft from the person, that fact cannot be shown by circumstantial evidence; but it can be so shown where there is no positive evidence available. *Lynch v. State*, 70 App. 449, 156 S. W. 1182.

33. — Possession of stolen property.—See article 1359, post, and notes thereunder.

Possession of stolen property is presumptive evidence of the guilt of the possessor of the theft. It may be strong or weak, according to the circumstances of the case. It is merely a circumstance to be considered by the jury in connection with all the evidence adduced. And to warrant an inference or presumption of guilt from the circumstance of possession alone, such possession must be recent, must be personal and exclusive, must be unexplained, and must involve a distinct and conscious assertion of property by the defendant. *Robinson v. State*, 22 App. 690, 3 S. W. 736; *Ayres v. State*, 21 App. 399, 17 S. W. 253; *Lehman v. State*, 18 App. 174, 51 Am. Rep. 298; *Sullivan v. State*, 18 App. 623; *York v. State*, 17 App. 441; *Roberts v. State*, Id. 82; *Bragg v. State*, Id. 219; *Perkins v. State*, 32 Tex. 109; *McNair v. State*, 14 App. 83; *Schindler v. State*, 15 App. 394; *Faulkner v. State*, Id. 115; *Thomas v. State*, 43 Tex. 658; *Yates v. State*, 37 Tex. 202; *Beck v. State*, 44 Tex. 430; *Jenkins v. State*, 30 Tex. 444; *Mondragon v. State*, 33 Tex. 480. It was formerly held that the circumstance of possession of recently stolen property, unexplained, would not, standing alone, be sufficient to warrant a conviction of the theft. *Hannah v. State*, 1 App. 578; *Truax v. State*, 12 App. 230. But these decisions have been overruled and it is now the settled doctrine that if a party in whose possession property recently stolen is found, fails satisfactorily to account for his possession, the presumption of guilt arising from recent loss and possession will warrant his conviction of the theft. *Roberts v. State*, 17 App. 82; *McNair v. State*, 14 App. 78. Proof of possession of part of the stolen property if unexplained, will support a conviction for the theft of all of it. *Hill v. State*, 41 Tex. 253. And that it was all taken at the same time. *Jack v. State*, 20 App. 656. But proof of possession will not be sufficient to warrant a conviction, if the other facts in evidence are not consistent with guilt. *Wafford v. State*, 44 Tex. 439.

Possession of recently stolen property is not positive evidence of theft. At most it is but a circumstance tending to establish theft. A case, therefore, depending alone upon the possession of recently stolen property is a case resting alone upon circumstantial evidence, and in such case the omission of the trial court to charge the jury upon the law of circumstantial evidence is material error. Note the opinion for a state of proof to which the rule applies. And note in this case charge of the court as applied to the subject-matter and presumptions arising under the same. *Boyd v. State*, 24 App. 570, 6 S. W. 853, 5 Am. St. Rep. 908. Other decisions hereunder: *Bean v. State*, 24 App. 11, 5 S. W. 525; *Moreno v. State*, 24 App. 401, 6 S. W. 299; *Field v. State*, 24 App. 422, 6 S. W. 200; *Gilleland v. State*, 24 App. 524, 7 S. W. 241; *Willis v. State*, 24 App. 584, 6 S. W. 856; *Willis v. State*, 24 App. 586, 6 S. W. 857; *Tarin v. State*, 25 App. 360, 8 S. W. 473; *Romero v. State*, 25 App. 394, 6 S. W. 641; *Morgan v. State*, 25 App. 513, 8 S. W. 487; *Matlock v. State*, 25 App. 654, 8 S. W. 818, 8 Am. St. Rep. 451; *Bryant v. State* and *McFarland v. State*, 25 App. 751, 8 S. W. 937; *Brooklin v. State*, 26 App. 121, 9 S. W. 735; *Florez v. State*, 26 App. 477, 9 S. W. 772; *Clark v. State*, 27 App. 406, 11 S. W. 374; *Taylor v. State*, 27 App. 463, 11 S. W. 462; *Jackson v. State*, 28 App. 143, 12 S. W. 701; *Jackson v. State*, 28 App. 370, 13 S. W. 451, 19 Am. St. Rep. 839; *Bayne v. State*, 29 App. 132, 15 S. W. 404; *Williamson v. State*, 30 App. 330, 17 S. W. 722; *Clark v. State*, 30 App. 402, 17 S. W. 942. See, also, *Guest v. State*, 24 App. 235; *Smith v. State*, 24 App. 290, 6 S. W. 40; *Roy v. State*, 24 App. 369, 6 S. W. 186; *Stockman v. State*, 24 App. 387, 6 S. W. 298, 5 Am. St. Rep. 894; *Moreno v. State*, 24 App. 401, 6 S. W. 299; *McDaniel v. State*, 24 App. 552, 7 S. W. 249; *Coward v. State*, 24 App. 590, 7 S. W. 332; *Gray v. State*, 24 App. 611, 7 S. W. 339; *Bonnard v. State*, 25 App. 184, 7 S. W. 862, 8 Am. St. Rep. 431; *Fernandez v. State*, 25 App. 538, 8 S. W. 667; *Gentry v. State*, 25 App. 614, 8 S. W. 925; *Lee v. State*, 27 App. 476, 11 S. W. 483; *Cooper v. State*, 29 App. 8, 13 S. W. 1011, 25 Am. St. Rep. 712; *Lockhart v. State*, 29 App. 35, 13 S. W. 1012; *Sands v. State*, 30 App. 578, 18 S. W. 86; *Spradling v. State*, 30 App. 595, 17 S. W. 1117; *Connors v. State*, 31 App. 453, 20 S. W. 981; *Baldwin v. State*, 31 App. 589, 21 S. W. 679; *Lynne v. State*, 53 App. 375, 111 S. W. 729.

Possession of recently stolen property is but a circumstance to be taken in connection with other circumstances. *Torres v. State*, 33 App. 125, 25 S. W. 128. The court instructed the jury that the possession of the hide of the stolen animal by defendant's son would not be evidence against defendant, unless they believed

that said son received possession from defendant; held, correct. *Brown v. State*, 34 App. 150, 29 S. W. 772.

Evidence held sufficient to show that defendant had taken possession of property, see *Pitts v. State* (Cr. App.) 30 S. W. 359. Contra, see *Johnson v. State*, 34 App. 254, 30 S. W. 228.

Evidence of possession of a stolen cart held admissible. *Passagoli v. State* (Cr. App.) 38 S. W. 200.

In a prosecution for theft of a bay horse, which accused was shown to have exchanged for a sorrel, evidence held to show that accused was in exclusive possession of the bay when he swapped it for the sorrel. *Johnson v. State*, 57 App. 603, 124 S. W. 664.

Evidence of possession of recently stolen property is admissible against the possessor in a trial for theft thereof. *Newton v. State*, 62 App. 622, 138 S. W. 708.

In a prosecution for the theft of cattle, where it appeared that accused kept his cattle in a certain pasture and had been about the pasture a few days before the theft, the circumstance that the stolen animal was found in the pasture was admissible in evidence. *Dugat v. State* (Cr. App.) 148 S. W. 789.

In a prosecution for theft of goats, defendant's possession of the pasture where it was claimed they were found was admissible as bearing on his possession of them. *Simonds v. State* (Cr. App.) 175 S. W. 1064.

34. — Explanation of possession.—Charge of court as to, see note on "charge of court," post.

When the possession of recently stolen property is relied on as inculpatory of the defendant, his explanation of such possession is admissible in his behalf, provided it was given on the first occasion for any explanation by him—that is, when he was first directly or circumstantially called upon to explain his possession. And his explanation is admissible in his behalf, although at the time it was made, he was not then in possession of the property. *Taylor v. State*, 15 App. 356; *Castellow v. State*, Id. 551; *Howell v. State*, 16 App. 93; *Ross v. State*, Id. 554; *Satlillo v. State*, Id. 249; *Lewis v. State*, 17 App. 140; *Heskew v. State*, Id. 161; *York v. State*, Id. 441; *Windham v. State*, 19 App. 413; *Schultz v. State*, 20 App. 315. And when his explanation of his possession of the property is natural, reasonable, and probably true, it operates to rebut the presumption of guilt arising from his possession of the property, and in such case, if such explanation be not shown to be false, further evidence of the defendant's guilt will be required to warrant his conviction. *Roberts v. State*, 17 App. 82; *York v. State*, Id. 441; *Windham v. State*, 19 App. 413; *Schultz v. State*, 20 App. 315; *Howell v. State*, 16 App. 93; *Ross v. State*, Id. 554; *Irvine v. State*, 13 App. 499; *Sitterlee v. State*, Id. 587; *McCall v. State*, 14 App. 353; *Clement v. State*, 22 App. 23, 2 S. W. 379; *Clark v. State*, Id. 599, 3 S. W. 744; *Vaughn v. State*, 21 App. 573, 2 S. W. 825; *Miller v. State*, 18 App. 34; *Anderson v. State*, 11 App. 576. But the state is only required to prove the falsity of the defendant's explanation made at the time his possession was challenged. It can not be required to disprove every conflicting explanation the defendant may have made. *Ashlock v. State*, 16 App. 13. Recent possession of stolen property may be accounted for by proof of the purchase of the same, whether the purchase be in good or bad faith. And if the defendant in fact purchased the property, he can not be convicted of the theft of it, although he knew at the time he purchased it that it had been stolen by the seller. *Prator v. State*, 15 App. 363; *McAfee v. State*, 14 App. 668; *Bond v. State*, 23 App. 180, 4 S. W. 580; *Shuler v. State*, 23 App. 182, 4 S. W. 581; *Curlin v. State*, 23 App. 681, 5 S. W. 186; *Anderson v. State*, 11 App. 576. Where several are jointly indicted for the theft, explanation of possession by any one of them is admissible in evidence in behalf of each of the defendants. *Shelton v. State*, 11 App. 36; *Wright v. State*, 10 App. 476. See facts held insufficient to convict, although defendant's explanation of his possession was shown to be false. *Norwood v. State*, 20 App. 306.

To entitle defendant to introduce evidence of an explanation it must appear that the explanation was made when he was first called upon to explain. *Martin v. State*, 32 App. 441, 24 S. W. 512. See, also, *Threadgill v. State*, 32 App. 451, 21 S. W. 511.

The defense proposed to prove that the defendant, at his first meeting with the owner of the property after the alleged theft, proposed to pay him for the same. It was also proposed to prove the conversation which then ensued between the defendant and the owner, which conversation is not set out in the bill of exceptions. Held, that the said proof was properly excluded as being no part of the *res gestae* nor relevant to any issue in the case, and as not coming within the rule which qualifies as evidence a defendant's explanation of his possession of stolen property. *Brooks v. State*, 26 App. 184, 9 S. W. 562. Also, see *Cortez v. State*, 24 App. 511, 6 S. W. 546; *Guest v. State*, 24 App. 530, 7 S. W. 242; *Boyd v. State*, 24 App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; *Lopez v. State*, 28 App. 343, 13 S. W. 219; *Bayne v. State*, 29 App. 132, 15 S. W. 404; *Williamson v. State*, 30 App. 330, 17 S. W. 722; *Andrews v. State*, 25 App. 339, 8 S. W. 328; *Matlock v. State*, 25 App. 654, 8 S. W. 818, 8 Am. St. Rep. 451.

See evidence held admissible against the defendant's explanation. *Kelley v. State*, 31 App. 211, 20 S. W. 365.

State cannot convict upon the falsity of explanation of possession of property recently stolen; the jury can only consider said falsity as any other circumstance. For proper charge on this subject, see *Wheeler v. State*, 34 App. 350, 30 S. W. 913. For discussion, see *Scott v. State* (Cr. App.) 36 S. W. 276. *Smith v. State* (Cr. App.) 56 S. W. 54.

When possession of stolen property is relied upon by the State, any explanation of such possession made by defendant is admissible in evidence. *Goens v. State*, 35 App. 73, 31 S. W. 656.

Explanation cannot occur when there has been no possession, or when made prior to possession. *Eastland v. State* (Cr. App.) 59 S. W. 167.

In a prosecution for cattle theft, where the evidence was circumstantial and the defendant testified that he bought the beef found in his possession from another, it could show that the officers attempted to arrest two others for the theft, but the arrest was successfully resisted, and that the description of one of the others corresponded with the description of the man from whom he claimed to have bought the beef. *Silvas v. State*, 71 App. 213, 159 S. W. 223.

35. — **Sufficiency to convict.**—See notes under article 1332, post.

As to sufficiency of evidence as to particular facts or elements of offense, see notes, ante.

Evidence held sufficient to sustain conviction. *Smith v. State*, 35 Tex. 738; *Cox v. State*, 41 Tex. 1; *Cave v. State*, Id. 182; *Cameron v. State*, 44 Tex. 652; *Quitow v. State*, 1 App. 65; *Brown v. State*, 2 App. 139; *Bagley v. State*, 3 App. 163; *Gonzales v. State*, Id. 507; *Berry v. State*, 4 App. 492; *Bybee v. State*, Id. 505; *Blankenship v. State*, 5 App. 218; *West v. State*, 6 App. 485; *Slaughter v. State*, 7 App. 123; *Calhoun v. State*, Id. 340; *Hudson v. State*, 10 App. 215; *Dodd v. State*, Id. 370; *Lowe v. State*, 11 App. 253; *Rhodes v. State*, Id. 563; *Davison v. State*, 12 App. 214; *Harris v. State*, 13 App. 309; *Jones v. State*, 14 App. 85; *Luttrell v. State*, Id. 147; *Magee v. State*, Id. 366; *Hart v. State*, Id. 657; *Terry v. State*, 15 App. 66; *Schultz v. State*, Id. 258, 49 Am. Rep. 194; *Chandler v. State*, Id. 587; *Elam v. State*, 16 App. 34; *Cowell v. State*, Id. 57; *Sutton v. State*, Id. 490; *McAfee v. State*, 17 App. 135; *Reynolds v. State*, Id. 413; *Timbrook v. State*, 18 App. 1; *House v. State*, 19 App. 227; *White v. State*, Id. 343; *Atterberry v. State*, Id. 401; *Cunningham v. State*, 20 App. 162; *Lawrence v. State*, Id. 536; *Masterson v. State*, Id. 574; *Watson v. State*, 21 App. 598, 1 S. W. 451, 17 S. W. 550; *Rummel v. State*, 22 App. 558, 3 S. W. 763; *Hart v. State*, Id. 563, 3 S. W. 741; *Golden v. State*, Id. 1, 2 S. W. 531; *Porter v. State*, 23 App. 295, 4 S. W. 889; *Lynne v. State*, 53 App. 375, 111 S. W. 729; *Phillips v. State*, 35 App. 480, 34 S. W. 119; *Funderberg v. State* (Cr. App.) 34 S. W. 613; *Littlejohn v. State* (Cr. App.) 38 S. W. 789; *Evans v. State*, 36 App. 32, 35 S. W. 169; *Rucker v. State*, 51 App. 222, 101 S. W. 804; *Crouch v. State*, 52 App. 460, 107 S. W. 859; *Thompson v. State*, 45 App. 244, 76 S. W. 561; *Franklin v. State*, 59 App. 523, 129 S. W. 369; *Dixon v. State*, 62 App. 75, 136 S. W. 463; *Williams v. State*, 63 App. 507, 140 S. W. 447; *Alanis v. State* (Cr. App.) 150 S. W. 897; *Peace v. State* (Cr. App.) 153 S. W. 320; *Wilson v. State*, 70 App. 340, 156 S. W. 204.

Evidence held to support a conviction of cattle theft. *Hinsley v. State*, 60 App. 565, 132 S. W. 779; *La Flour v. State*, 59 App. 645, 129 S. W. 351; *Taylor v. State*, 62 App. 611, 138 S. W. 615; *Roberts v. State*, 64 App. 135, 141 S. W. 235; *Gotcher v. State* (Cr. App.) 148 S. W. 574; *Willcox v. State* (Cr. App.) 150 S. W. 898; *Elmore v. State*, 72 App. 226, 162 S. W. 517; *Jones v. State* (Cr. App.) 171 S. W. 714.

Evidence held to support a conviction of hog theft. *Fields v. State*, 57 App. 613, 124 S. W. 652; *Carr v. State*, 57 App. 185, 122 S. W. 258; *Smith v. State*, 62 App. 124, 136 S. W. 481; *Holloway v. State*, 63 App. 503, 140 S. W. 453; *Brown v. State* (Cr. App.) 148 S. W. 808.

Evidence held to sustain a conviction of horse theft. *Crane v. State*, 57 App. 476, 123 S. W. 422; *Teague v. State* (Cr. App.) 31 S. W. 401; *Dowd v. State* (Cr. App.) 35 S. W. 651; *Snodgrass v. State* (Cr. App.) 150 S. W. 162, 41 L. R. A. (N. S.) 1144; *Ables v. State* (Cr. App.) 177 S. W. 1161.

The burden is on the state throughout the trial to establish the guilt of accused beyond a reasonable doubt. Evidence establishing a mere probability, or a strong suspicion of his guilt, is not sufficient. *Chapman v. State*, 1 App. 728; *Ring v. State*, 42 Tex. 282; *Tollett v. State*, 44 Tex. 95; *Grant v. State*, 3 App. 1; *Casas v. State*, 12 App. 59. See tit. 8, c. 7, C. C. P.

The court instructed the jury that before they could convict defendant, they must believe, beyond a reasonable doubt, that he fraudulently took from the alleged owner the head of cattle charged, without his consent, and that the same was the personal property of said alleged owner; held, sufficient. *Thumond v. State*, 37 App. 422, 35 S. W. 965.

Defendant was charged with the theft of cattle belonging to one Bryant, the evidence showed that the owner was commonly called Bryant, though his name was Bryan; held, sufficient to support conviction. *Brooks v. State*, 39 App. 622, 47 S. W. 640.

In a prosecution for theft of a mule, evidence held to sustain a verdict of conviction. *Hernandez v. State*, 57 App. 15, 121 S. W. 505.

Evidence held to sustain a conviction of stealing hides. *Davis v. State*, 63 App. 453, 140 S. W. 349.

Evidence held to warrant a conviction of the theft of certain buggy wheels by accused. *Cooper v. State* (Cr. App.) 148 S. W. 1093.

Evidence in a prosecution for the theft of seed cotton held to sustain a verdict of guilty. *Tucker v. State* (Cr. App.) 150 S. W. 190.

Evidence held insufficient to sustain a conviction for stealing chickens. *Seymour v. State*, 71 App. 76, 158 S. W. 304.

In a prosecution for cattle theft, circumstantial evidence held to sustain a conviction. *Rasberry v. State* (Cr. App.) 170 S. W. 724.

36. — **Insufficiency to convict.**—As to insufficiency of evidence as to particular facts or elements of offense, see notes, ante.

Evidence, in a prosecution for horse stealing, held insufficient to sustain a conviction. *Rios v. State* (Cr. App.) 153 S. W. 308; *Stokely v. State*, 24 App. 509, 6 S. W. 538; *Thompson v. State*, 26 App. 466, 9 S. W. 760; *Lopez v. State*, 37 App. 649, 40 S. W. 972.

Evidence held insufficient to sustain conviction. *Powers v. State*, 16 Tex. 546; *Brown v. State*, 32 Tex. 606; *Thurman v. State*, 33 Tex. 684; *Gardiner v. State*, Id. 692; *Adams v. State*, 34 Tex. 526; *Radford v. State*, 35 Tex. 15; *Mullins v. State*, 37 Tex. 337; *Turner v. State*, 38 Tex. 166; *Ritcher v. State*, Id. 643; *McHenry v. State*, 40 Tex. 46; *Haynes v. State*, Id. 52; *Poag v. State*, Id. 151; *Gal-*

loway v. State, 41 Tex. 289; Cruitt v. State, Id. 476; Perry v. State, Id. 483; Johnson v. State, Id. 608; Cline v. State, 43 Tex. 494; McGee v. State, Id. 662; Martin v. State, 44 Tex. 172; Williams v. State, Id. 34; Beck v. State, Id. 430; Blackburn v. State, Id. 458; Wafford v. State, Id. 439; Loza v. State, 1 App. 488, 28 Am. Rep. 416; Berg v. State, 2 App. 148; Merritt v. State, Id. 177; Moore v. State, Id. 350; Smith v. State, Id. 477; Butler v. State, 3 App. 48; Clark v. State, 7 App. 57; Curry v. State, Id. 267; Landin v. State, 10 App. 63; Ward v. State, Id. 293; Brite v. State, Id. 368; Weldon v. State, Id. 400; Hornbeck v. State, Id. 408; Ellis v. State, Id. 540; Simpson v. State, Id. 681; Spruill v. State, Id. 695; Winn v. State, 11 App. 304; Conn v. State, Id. 390; Green v. State, 12 App. 51; Casas v. State, Id. 59; Pettigrew v. State, Id. 225; Dow v. State, Id. 343; Hardeman v. State, Id. 350; Johnson v. State, Id. 385; Seymore v. State, Id. 391; Taylor v. State, Id. 489; Shelton v. State, Id. 513; Hunter v. State, 13 App. 16; Voight v. State, Id. 21; Wyers v. State, Id. 57; Johnson v. State, Id. 378; McNair v. State, 14 App. 78; Mapes v. State, Id. 129; Dresch v. State, Id. 175; Wolf v. State, Id. 210; Crockett v. State, Id. 226; Hammel v. State, Id. 326; Knutson v. State, Id. 570; Deering v. State, Id. 599; Evans v. State, 15 App. 31; Taylor v. State, Id. 356; Schindler v. State, Id. 394; Harris v. State, Id. 411; Dixon v. State, Id. 480; Buntain v. State, Id. 490; Castellow v. State, Id. 551; Womack v. State, 16 App. 178; Harrison v. State, Id. 325; Johnson v. State, Id. 402; Madison v. State, Id. 435; Tucker v. State, Id. 471; Fletcher v. State, Id. 635; Moore v. State, 17 App. 176; Harris v. State, Id. 177; York v. State, Id. 441; Williams v. State, Id. 521; Miller v. State, 18 App. 34; Lehman v. State, Id. 174, 51 Am. Rep. 298; Heskew v. State, Id. 275; Fairy v. State, Id. 314; Small v. State, Id. 336; Boyd v. State, Id. 339; Trimble v. State, Id. 432; Foster v. State, 19 App. 73; Ricks v. State, Id. 308; Martindale v. State, Id. 333; Tarin v. State, Id. 359; McGuire v. State, Id. 467; Block v. State, 20 App. 175; Lott v. State, Id. 230; Norwood v. State, Id. 306; Holley v. State, 21 App. 156, 17 S. W. 159; Misseldine v. State, 21 App. 335, 17 S. W. 768; Roberts v. State, 21 App. 460, 1 S. W. 452; Wilkerson v. State, 21 App. 501, 2 S. W. 857; McLaren v. State, 21 App. 513, 2 S. W. 853; Benton v. State, 21 App. 554, 2 S. W. 885; Vaughn v. State, 21 App. 573, 2 S. W. 825; Owens v. State, 21 App. 579, 2 S. W. 808; Cain v. State, 21 App. 662, 2 S. W. 888; Page v. State, 22 App. 551, 3 S. W. 745; Clark v. State, 22 App. 599, 3 S. W. 744; Phipps v. State, 22 App. 621, 3 S. W. 761; Robinson v. State, 22 App. 690, 3 S. W. 736; Ryan v. State, 22 App. 699, 3 S. W. 547; Donohoe v. State, 23 App. 457, 5 S. W. 245; White v. State, 23 App. 643, 5 S. W. 164; Snoga v. State, 46 App. 419, 80 S. W. 625; Banks v. State, 56 App. 262, 119 S. W. 847; Landreth v. State, 53 App. 556, 110 S. W. 905; Johnson v. State, 50 App. 68, 94 S. W. 900; Yarbrough v. State (Cr. App.) 151 S. W. 545.

Evidence held not to support a conviction of hog theft. McClure v. State, 59 App. 287, 128 S. W. 386; Ellis v. State, 27 App. 190, 11 S. W. 111.

See this case for evidence held insufficient to support a conviction for theft, because it does not overcome the presumption of innocence nor exclude reasonable doubt. Reveal v. State, 27 App. 57, 10 S. W. 759.

Where evidence showed defendant to be a hired hand with no interest in the herd of cattle, and that he did not know the different brands of cattle in the herd, and while scattered up and down the creek drinking defendant drove another cow into the herd, held insufficient to support conviction. Mims v. State (Cr. App.) 32 S. W. 540.

Evidence held not to support a conviction of cattle theft. Daniel v. State, 60 App. 515, 132 S. W. 773. Where accused and two others were found in the possession of stolen property, and the evidence of the larceny was wholly circumstantial, it was not error to permit the state to show that the three persons were together some time before the stealing, that one of them, other than the accused, was going under an assumed name, and to trace their movements down to the time of their arrest. Slain v. State (Cr. App.) 145 S. W. 366.

Evidence in a prosecution for hog theft held insufficient in not proving the *corpus delicti* by connecting accused with the hog. Motley v. State (Cr. App.) 145 S. W. 620.

Where the prosecution relies for conviction solely upon evidence that the stolen horse was found in the defendant's possession, and that he gave a false explanation of where he got it, the evidence is wholly circumstantial, and it is reversible error for the court to refuse to charge the jury to that effect. Stewart v. State, 71 App. 480, 160 S. W. 381.

In a prosecution for the theft of a horse, where the facts raised the issue as to whether defendant had traded a mule for the horse at the time he drove the horse off, an instruction that if defendant got the horse in exchange for the mule, or if there was reasonable doubt as to whether the trade was made, he should be acquitted, was a specific presentation of the issue. Brooks v. State, 71 App. 599, 160 S. W. 696.

37. Questions for jury.—It is the province of the jury to determine the value of the property, and where the evidence upon that issue is conflicting, the verdict, on appeal, will not be disturbed if there be evidence to support it. Jack v. State, 20 App. 656.

See the opinion in *extenso*, and the statement of the case for proof developed on a trial for horse theft, which, raising the defense of mistake of fact on the part of the accused, in asserting claim to the animal alleged to have been stolen, demanded of the trial court the submission of that issue to the jury under proper instructions. Note, also, that in view of the proof, the trial court, having refused the accused a continuance, should have awarded him a new trial. Guajardo v. State, 24 App. 604, 7 S. W. 331.

There being no evidence of purchase of the animals, the court could not be required to submit such issue to the jury. Glass v. State, 34 App. 299, 30 S. W. 556.

But if there is such evidence, the court should give a proper instruction upon it. *Wheeler v. State*, 34 App. 350, 30 S. W. 913.

When there is evidence of honest acquisition the issue must be presented to the jury. *Parker v. State* (Cr. App.) 57 S. W. 668.

Evidence of theft held sufficient to present a question for the jury. *Petty v. State*, 59 App. 586, 129 S. W. 615.

Where an indictment for hog theft charged that the owner of the hog was unknown, there must be some evidence of such want of knowledge, either by the grand jurors or otherwise, to authorize submission of the question to the jury. *Davis v. State* (Cr. App.) 144 S. W. 938.

In a prosecution for larceny of mules which accused purchased and for which he executed a note signed by others as sureties, evidence held to make it a jury question whether the mules were in fact subsequently sold to the sureties, and, if so, whether accused was given authority by them to sell the mules, or whether the mules were merely pledged to the sureties. *Thompson v. State* (Cr. App.) 150 S. W. 181.

On evidence in a prosecution for the theft of a horse, held, that a peremptory instruction of acquittal was properly refused. *Brooks v. State*, 71 App. 599, 160 S. W. 696.

In a prosecution for theft, the sufficiency of the identification of the property held for the jury. *Schenk v. State* (Cr. App.) 174 S. W. 357.

38. Charge of court.—See C. C. P., arts. 735, et seq., and notes thereunder.

See note under article 1345.

Harmless error, see notes under C. C. P., art. 743.

See *Cunningham v. State*, 27 Tex. Cr. 479; *Young v. State*, 34 App. 290, 30 S. W. 238; *Blount v. State*, 34 App. 640, 31 S. W. 652.

The charge should instruct the jury on the law applicable to the particular case before them, as developed by the facts proved. It should apply the law to the evidence. It is not essential that it should give the statutory definition of theft; but failing to do this, it should inform the jury of the nature and character of the elements and ingredients of the offense. It should instruct as to fraudulent intent; that such intent is the essential ingredient of theft, and must have existed in the mind of the defendant at the very time he took the property; that such intent formed subsequent to the taking will not constitute theft; that a fraudulent intent embraces the ideas that the defendant knew when he took the property that it did not belong to him, that he took it intending at the time to deprive the owner of the value of it, and to appropriate the same permanently to his own use or benefit; that to constitute a fraudulent taking, it must be an intentional taking, without the consent of the owner, an intentional fraud, and an intentional appropriation. *Johnson v. State*, 1 App. 118. The charge must confine the fraudulent intent to the very time of the taking. *Warren v. State*, 17 App. 207. Where the evidence requires it the jury should be instructed as to the distinction between trespass and theft. *Bray v. State*, 41 Tex. 203; *Harris v. State*, 2 App. 102; *McPhail v. State*, 10 App. 128. Where there is evidence tending to show that the defendant took the property under an honest claim of right, such issue should be submitted to the jury under proper instructions, and the jury should be directed to acquit the defendant, if, from the evidence, they entertained a reasonable doubt that he took the property fraudulently. *Cameron v. State*, 9 App. 332; *Sigler v. State*, Id. 427; *Miles v. State*, 1 App. 510; *Loza v. State*, Id. 488, 28 Am. Rep. 416; *Hamilton v. State*, 2 App. 494; *Bray v. State*, 41 Tex. 203; *Varas v. State*, Id. 527; *Thompson v. State*, 43 Tex. 268; *Williams v. State*, 22 App. 332, 3 S. W. 226; *Evans v. State*, 15 App. 31; *Heskew v. State*, 18 App. 275. Where the evidence requires it, the court should instruct the jury that if the defendant took the property, with the intent at the time of appropriating it temporarily, but not permanently, they should acquit him. *Wilson v. State*, 18 App. 270, 51 Am. Rep. 309; *Loza v. State*, 1 App. 488, 28 Am. Rep. 416; *Blackburn v. State*, 44 Tex. 457; *Johnson v. State*, 36 Tex. 375; *Banks v. State*, 7 App. 591; *Dunham v. State*, 3 App. 465. Where there is evidence tending to show that the defendant purchased the property after it had been stolen by another, the charge should instruct the jury upon this issue, and direct the acquittal of the defendant, if from the evidence the jury entertained a reasonable doubt of his complicity in the theft. In such case the charge should not make the defendant's innocence depend upon his honest purchase of the property. If he, in fact, purchased it, having had no complicity in taking it, he cannot be convicted of theft, although he knew at the time of purchasing it that his vendor had stolen it. *Clayton v. State*, 15 App. 348; *Prator v. State*, Id. 363; *Faulkner v. State*, Id. 115; *Anderson v. State*, 11 App. 576; *Barrett v. State*, 18 App. 64; *Murphy v. State*, 17 App. 645; *Morrow v. State*, 22 App. 239, 2 S. W. 624; *McAfee v. State*, 14 App. 668; *Bond v. State*, 23 App. 180, 4 S. W. 580; *Shuler v. State*, 23 App. 182, 4 S. W. 581. Evidence of a purchase necessitates a charge in relation thereto, no matter what the court may think of its credibility. *Heath v. State*, 7 App. 464; *Smith v. State*, Id. 382; *Beekham v. State*, 8 App. 52; *Vincent v. State*, 9 App. 303; *Henry v. State*, Id. 358; *Ray v. State*, 13 App. 51. Where there is a doubt raised by the evidence that the defendant had any connection with, or complicity in the original taking of the property, the court should instruct the jury that he cannot be convicted of the theft of the property unless the evidence shows beyond a reasonable doubt that he participated in the original taking, no matter what connection he may have had with the property thereafter. *Tucker v. State*, 21 App. 699, 2 S. W. 893; *Curlin v. State*, 23 App. 681, 5 S. W. 186; *McAfee v. State*, 17 App. 135. If the evidence tends to show an acting together with others, conspiracy or complicity in the taking (or with a view to the covering up of a fraudulent taking) between the vendor in a bill of sale and the defendant, it would not only be right but proper for the court to submit the bona fides of the bill of sale, that the jury might ascertain and find whether or not it was a sham or device

conceived to cover up and avoid the theft. *Roberts v. State*, 17 App. 82; *Prator v. State*, 15 App. 363; *Shoefercater v. State*, 5 App. 207. If an animal was purchased by the defendant with the knowledge that it had been stolen by his vendor, and the animal escapes and returns to the possession of the owner, and the defendant then takes it, he is guilty of theft. *McAfee v. State*, 17 App. 135; *Ashlock v. State*, 16 App. 13. The charge must not authorize a conviction without guilty knowledge or intent. *Logan v. State*, 2 App. 403; *Riojas v. State*, 8 App. 49; *Spinks v. State*, Id. 125; *Vincent v. State*, 9 App. 303; *Henry v. State*, Id. 358; *Ray v. State*, 13 App. 51; *Chapman v. State*, 1 App. 728. Where two persons are jointly indicted, the court may charge on the theory that one took and the other was present, knowing the unlawful intent, etc. *Cruitt v. State*, 41 Tex. 476; *Bybee v. State*, 4 App. 505; *Berry v. State*, Id. 492. And even when the defendant is indicted alone, on proper evidence, the court may charge the law of principals. *Corn v. State*, 41 Tex. 301. The charge should instruct that the allegations of ownership and possession should be proved, and that unless proved the defendant should be acquitted. *Williams v. State*, 4 App. 5; *Kay v. State*, 40 Tex. 29; *Bray v. State*, 41 Tex. 560; *Robinson v. State*, 5 App. 519. It should also instruct that the allegation of want of consent must be proved. *Lindley v. State*, 3 App. 445; *Burt v. State*, 7 App. 578. Where the punishment is dependent upon the value of the property, the charge must explain the law upon the subject applicable to the facts in evidence and the standard of value. *Jackson v. State*, 20 App. 190; *Saddler v. State*, Id. 195. With regard to the presumption of guilt arising from possession of the property, the jury should not be told that the possession of recently stolen property is presumptive evidence of guilt. *Williams v. State*, 4 App. 178; *Alderson v. State*, 2 App. 10; *Foster v. State*, 1 App. 363; *Chapman v. State*, Id. 728; *Perry v. State*, 41 Tex. 484; *Thompson v. State*, 43 Tex. 268; *Thomas v. State*, Id. 658; *McCoy v. State*, 44 Tex. 618; *Parrish v. State*, 45 Tex. 51. It is a mere circumstance to be considered by the jury in connection with other evidence, and the jury should not be told otherwise. *Watkins v. State*, 2 App. 73; *Allen v. State*, 4 App. 581; *Williams v. State*, Id. 178; *Gose v. State*, 6 App. 121; *Conner v. State*, Id. 455. Where there is evidence adduced by the state proving, or tending to prove the theft of other property than that alleged in the indictment at the same time and place, the charge should not fail to instruct the jury that such testimony can only be considered by them for the purpose for which it was admitted, that is, to establish identity in developing the *res geste*, or to prove the guilt of the accused by circumstances connected with the theft, or to show the intent with which the defendant acted with respect to the property for the theft of which he is on trial; and that they could not convict the defendant for the theft of any other property than that named in the indictment. *Carter v. State*, 23 App. 508, 5 S. W. 128; *Davis v. State*, 23 App. 210, 4 S. W. 590; *Clark v. State*, 23 App. 612, 5 S. W. 178; *Mayfield v. State*, 23 App. 645, 5 S. W. 161; *Alexander v. State*, 21 App. 406, 17 S. W. 139, 57 Am. Rep. 617; *House v. State*, 16 App. 25. A charge which assumed that the property named in the indictment was stolen, and that the defendant was the thief, was held erroneous. *White v. State*, 21 App. 339, 17 S. W. 727. It is error to charge that the possession of a stolen animal by the defendant without a written transfer or bill of sale thereto, is *prima facie* evidence that such possession was illegal. *White v. State*, 21 App. 339, 17 S. W. 727; *Gomez v. State*, 15 App. 64; *Schindler v. State*, Id. 394; *Florez v. State*, 13 App. 665; *Garcia v. State*, 12 App. 335. It is a charge upon the weight of evidence and error to instruct the jury that if a part of the alleged stolen property was found and identified as such, the theft of the remainder might be inferred from that fact, if all of the property is shown to have been stolen at the same time and place. *White v. State*, 17 App. 188.

On other phases of theft. *Williams v. State*, 24 App. 412, 6 S. W. 318; *McDaniel v. State*, 24 App. 552, 7 S. W. 249; *Coward v. State*, 24 App. 590, 7 S. W. 332; *Reno v. State*, 25 App. 102, 7 S. W. 532; *Gentry v. State*, 25 App. 614, 8 S. W. 925; *Brooks v. State*, 26 App. 184, 9 S. W. 562; *Hanley v. State*, 28 App. 375, 13 S. W. 142; *Barton v. State*, 28 App. 483, 13 S. W. 783; *Williamson v. State*, 30 App. 330, 17 S. W. 722; *Welhouse v. State*, 30 App. 623, 18 S. W. 300; *Worsham v. State*, 56 App. 253, 120 S. W. 439, 18 Ann. Cas. 134.

An instruction defining theft in the language of article 858, was not insufficient for failing to define "fraudulent taking" and "consent" in the absence of a request for their definition. *Ellington v. State*, 63 App. 420, 140 S. W. 1102; *Ellington v. State*, 63 App. 424, 140 S. W. 1100.

Where the defendant was charged with theft of certain jewelry, one piece, a necklace, being of the value of over twenty dollars, and the other pieces being of less than twenty dollars in value, and there was evidence tending to show that defendant found the necklace, it was held that the court should have charged the jury, that if they believed from the evidence that she was guilty of the theft of the other articles, but had a reasonable doubt of her guilt of the theft of the necklace, they should not convict her of felony. *Lee v. State*, 14 App. 266.

An information charged the theft of a male hog. Held, that the trial court did not err in refusing to instruct the jury that a male hog is one which has not been changed from a boar to a barrow by castration. A barrow is a hog, especially a male hog, castrated. *Williams v. State*, 17 App. 521.

Duty to charge on felonious theft. *Lacey v. State*, 22 App. 657, 3 S. W. 343.

The *factum probandum* of theft, as that offense is defined by our statute, is the taking of the property. If the taking, being the main fact in issue, is not directly attested by an eyewitness, but is proved as a matter of inference from other facts in evidence, the case rests wholly upon circumstantial evidence, and the failure of the trial court to give in charge to the jury the law of circumstantial evidence is material error. *Crowell v. State*, 24 App. 404, 6 S. W. 318.

In proper cases the court should submit the *bona fides* of bills of sale in evidence. *Guest v. State*, 24 App. 530, 7 S. W. 242; *Boyd v. State*, 24 App. 570, 6 S.

W. 853, 5 Am. St. Rep. 908; *Fernandez v. State*, 25 App. 538, 8 S. W. 667; *White v. State*, 28 App. 71, 12 S. W. 406; *Huffman v. State*, 28 App. 174, 12 S. W. 588.

However improbable may be the evidence in support of a defense, it is the duty of the trial court to submit the issue to the jury under proper instructions. A defense witness in this case testified that he was present and witnessed the defendant's purchase of the alleged stolen animal. Held, that in failing to submit the question of a purchase vel non to the jury, the charge of the court was erroneous. *McDaniel v. State*, 24 App. 552, 7 S. W. 249.

The indictment alleged the ownership of the animal to be in C. and A. and R., and that the same was taken without the consent of C. or A. or R., or either of them, which correctly alleged the want of consent. The trial court charged the jury to convict if they found that the defendant took the animal without the consent of C. or A. or R., or either of them. Held, fundamental error, inasmuch as it was equivalent to an instruction to convict if any one of the parties did not consent, notwithstanding either or both of the other two may have consented. *Woods v. State*, 26 App. 490, 10 S. W. 108. Other decisions hereunder: *Conner v. State*, 24 App. 245, 6 S. W. 138; *Willis v. State*, 24 App. 487, 6 S. W. 200; *Jones v. State*, 28 App. 42, 11 S. W. 830; *Otero v. State*, 30 App. 450, 17 S. W. 1081. And as to asportation, see *Coward v. State*, 24 App. 590, 7 S. W. 332.

With reference to the defendant's explanation of his possession of recently stolen property, the trial court charged the jury as follows: "If you believe from the evidence that the animal in question had been recently stolen, and the defendant was found in possession of the same, and when his right to the possession of said animal was first challenged, he gave a reasonable account thereof consistent with his innocence, it devolves upon the state to show that it was untrue. If, however, when his possession was first challenged he failed to reasonably and satisfactorily account for his possession thereof, you will find him guilty as charged in the indictment." Held, that the latter clause of the said charge is erroneous, not only because it is upon the weight of evidence, but because it restricts the defensive proof to an opportune and reasonable explanation of the possession by the accused of the stolen property. *Arispe v. State*, 26 App. 581, 10 S. W. 111.

If the evidence does not raise the issue of voluntary return of the stolen property, the court should not charge upon it. *Harris v. State*, 29 App. 101, 14 S. W. 390, 25 Am. St. Rep. 717; *Schultz v. State*, 30 App. 94, 16 S. W. 756.

The evidence requiring it, the charge should instruct upon the distinction between trespass and theft, and to the effect that, if the property was taken merely for temporary use and not permanent appropriation, it was not theft. *Schultz v. State*, 30 App. 94, 16 S. W. 756.

A charge is radically erroneous which ignores the allegation of want of consent as well as possession of the alleged owner, and authorizes a conviction without proof of such averments, and which further required of the jury the defendant's conviction on proof of the want of consent of a party not named in the indictment, either as owner or in possession of the property. *Otero v. State*, 30 App. 450, 17 S. W. 1081. A joint ownership being alleged in the indictment, it was error to instruct the jury to convict if the evidence established the want of consent "of either" of the owners. *Woods v. State*, 26 App. 490, 10 S. W. 108; *Jones v. State*, 28 App. 42, 11 S. W. 830. The charge should apply the law to the evidence. *Myers v. State*, 24 App. 336, 6 S. W. 194. See, also, *Williams v. State*, 24 App. 24, 5 S. W. 655; *Myers v. State*, 24 App. 334, 6 S. W. 194; *Roy v. State*, 24 App. 369, 6 S. W. 186; *Gilleland v. State*, 24 App. 524, 7 S. W. 241; *Willis v. State*, 24 App. 584, 6 S. W. 856; *Boyd v. State*, 24 App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; *Criswell v. State*, 24 App. 606, 7 S. W. 337.

The charge was error as shifting the burden from the state to prove false a reasonable explanation of possession. *Lacy v. State*, 31 App. 78, 19 S. W. 896. And further, on such a charge, see *Connors v. State*, 31 App. 453, 20 S. W. 981.

On charge of court on the bona fides of defendant's explanation of possession of property. *Connors v. State*, 31 App. 453, 20 S. W. 981.

For charge held sufficient where defendant claimed to have bought the property, see *Mathews v. State*, 32 App. 355, 23 S. W. 690.

Where the defense was a purchase the court charged the jury that if the horse was originally taken from the owner by defendant and afterward he pretended to purchase him from another whom he knew was not the owner, such purchase would not avail as a defense. *Jameson v. State*, 32 App. 385, 24 S. W. 508.

All the facts and evidence must be considered by the jury and must be properly presented by the court in its charge. *James v. State*, 32 App. 509, 24 S. W. 642.

Court properly refused to instruct on the theory that the property had been taken piece at a time. *Torres v. State*, 33 App. 125, 25 S. W. 128.

For sufficient charge on recent possession and explanation, see *Hyatt v. State*, 32 App. 580, 25 S. W. 291.

On trial for theft of hogs under twenty dollars in value, alleged to have been committed before the offense was made a felony, the court charged the jury "to fix his (defendant's) punishment by imprisonment in the county jail not to exceed one year, and by fine in any sum not to exceed five hundred dollars." Held erroneous. *Hargrove v. State*, 33 App. 165, 25 S. W. 967.

The court instructed the jury that the possession of the hide of the stolen animal by defendant's son would not be evidence against defendant, unless they believed that said son received possession from defendant; held, correct. *Brown v. State*, 34 App. 150, 29 S. W. 772.

Instructions held erroneous, see *Prewitt v. State* (Cr. App.) 29 S. W. 792; *Brown v. State*, 34 App. 150, 29 S. W. 772; *Clark v. State*, 34 App. 120, 29 S. W. 382; *Hargrove v. State*, 33 App. 165, 25 S. W. 967. The jury after having retired returned and asked what length of time the property must have been in defendant's possession to constitute theft; the judge replied, "a moment's possession is sufficient." Held, while abstractly correct, it was insufficient under the facts. *Mahoney v. State*, 33 App. 388, 26 S. W. 622. Where indictment in one count charged

theft and in another receiving and concealing stolen property, instruction that the jury might convict of either offense on either count held error. *Pollard v. State*, 33 App. 197, 26 S. W. 70. When indictment charges theft generally and evidence shows theft from the person, the jury should be instructed to acquit. For charge held correct on indictment alleging ownership in person unknown to grand jurors, see *Peevehouse v. State* (Cr. App.) 27 S. W. 142.

Where the indictment alleges the property in possession of one person and the evidence shows it to be in another, the court should instruct the jury to acquit. *Green v. State* (Cr. App.) 30 S. W. 220.

The defense was that defendant took the horse in the hope of gaining a reward for his return. The court instructed the jury that this was not a temporary taking, but that if defendant intended to hold the horse until he was paid for its return, to that extent he must have intended to deprive the owner of the value of the horse, etc.; held, substantially correct. *Dunn v. State*, 34 App. 257, 30 S. W. 227, 53 Am. St. Rep. 714.

Defense was that the property belonged to defendant's mother, and that he had a right to take it. The court should have submitted a charge upon this phase of the case. *Vance v. State*, 34 App. 395, 30 S. W. 792.

State cannot convict on the falsity of explanation of property recently stolen; the jury can consider said falsity as any other circumstance. For proper charge in this subject, see *Wheeler v. State*, 34 App. 350, 30 S. W. 913. For discussion, see *Scott v. State* (Cr. App.) 36 S. W. 276; *Smith v. State* (Cr. App.) 56 S. W. 54.

A charge that defendant may be convicted if his explanation of recent possession is not reasonable, is error. *Pace v. State* (Cr. App.) 31 S. W. 173.

Where evidence of theft of other property is admitted without objection, the court in its charge should limit the jury to the evidence in the particular case. *Mask v. State*, 34 App. 136, 31 S. W. 408.

When there is no testimony as to defendant's keeping watch, a charge on that question is erroneous. *Tittle v. State*, 35 App. 96, 31 S. W. 677.

When the evidence in any way tends to show a claim of right, the court should instruct the jury on that phase of the case. *Vance v. State*, 34 App. 395, 30 S. W. 792; *Lawrence v. State* (Cr. App.) 30 S. W. 668; *Young v. State*, 34 App. 290, 30 S. W. 238; *Teague v. State* (Cr. App.) 31 S. W. 401; *Phillips v. State* (Cr. App.) *Id.* 644.

Instruction on intent, see *Green v. State* (Cr. App.) 33 S. W. 120.

The court upon request should charge upon defendant's explanation of his possession of stolen property. *Wright v. State*, 35 App. 470, 34 S. W. 273.

When there is no positive proof that defendant was nearer than thirty miles of the horse when it was stolen, the court should instruct on circumstantial evidence. *Green v. State* (Cr. App.) 34 S. W. 283.

The court charged the jury: "If recently stolen property was found in defendant's possession, and he gave an explanation of such possession, which appears reasonably true, you cannot convict him, unless you are satisfied from other testimony in the case that such explanation is false;" held, error. *Wilson v. State* (Cr. App.) 34 S. W. 284.

There was evidence that at the time the stolen animal was found in defendant's possession he had another animal, but no evidence that the other animal was stolen. In his charge the court said: "In this case the State has introduced evidence tending to prove theft of property other than that alleged in the indictment to have been stolen, and at the same time and place;" held, error. *Id.*

When the court charges on circumstantial evidence, a special charge on possession need not be given. *Bonnors v. State* (Cr. App.) 35 S. W. 650.

A charge that before there can be a conviction the jury must believe that the horses belonged to a certain person, renders unnecessary a charge that they must acquit if the property belonged to defendant. *Thurmond v. State*, 37 App. 422, 35 S. W. 965.

When there is no positive proof that accused was nearer than thirty miles of the place where the horse was stolen, a charge on circumstantial evidence should be given. *Green v. State* (Cr. App.) 34 S. W. 283; *Id.*, 36 App. 109, 35 S. W. 971.

Defendant was charged with theft of a plow stock of the value of two dollars. It appeared that the prosecutors owed defendant twenty-one dollars, and that he took the plowstock intending to account for it in the settlement of his debt; held, this was not theft, and the court erred in failing to instruct the jury on this phase of the case. *Young v. State*, 37 App. 457, 36 S. W. 272.

Instruction held sufficient on claim of right. *Hunter v. State* (Cr. App.) 37 S. W. 323.

When the taking is shown by positive evidence an instruction on circumstantial evidence is not necessary. *Rodgers v. State*, 36 App. 563, 33 S. W. 184.

The evidence showed that the sum of \$585 was placed in a locked closet in a room, and \$310 of said sum had disappeared; that no person except defendant and members of the family had been in the room. Defendant acknowledged taking the sum of \$45.60; held, that a charge in reference to the theft of property under the value of \$50 was properly refused. *Ellis v. State* (Cr. App.) 33 S. W. 205.

The indictment contained two counts, one for theft and one for knowingly receiving stolen property. Defendant was convicted for the latter; held, he could not be injured by a defective charge on the former count. *Rosson v. State*, 37 App. 87, 38 S. W. 788.

When the animal was only running with defendant's cattle and he did not claim ownership, and explained why the animal was in his pen, he was entitled to an instruction on that phase of the case, and the court's attention having been called to that defense, should have given a proper instruction. *Berry v. State*, 37 App. 44, 38 S. W. 812.

The court instructed the jury that defendant's explanation of possession might be shown to be false by circumstantial evidence; held, correct. *Franklin v. State*, 37 App. 312, 39 S. W. 680.

The defense was that the cow alleged to have been stolen took up and ran with defendant's cattle, and that defendant's son, without defendant's knowledge, put his brand on said cattle; held, the court should have given a plain, straight charge upon such defense. *Berry v. State*, 37 App. 44, 38 S. W. 812.

A charge that if taking was innocent defendant should be acquitted; held, sufficient. *Key v. State*, 37 App. 511, 40 S. W. 296.

The court instructed the jury: "If you believe from the evidence that the defendant, at the time he took the oats, believed that he had the consent of the owners or the consent of either of them, then there would be an absence of fraudulent intent and you will acquit the defendant;" held, sufficient. *Beabout v. State*, 37 App. 515, 40 S. W. 405.

As to fraudulent intent, see *Beabout v. State*, 36 App. 515, 40 S. W. 405.

Instruction as to stealing the property in another county and bringing it into the county of the prosecution; held, sufficient. *Thurman v. State*, 36 App. 646, 40 S. W. 795.

Instruction as to fraudulent intent; held, insufficient. *Harrell v. State*, 37 App. 612, 40 S. W. 799.

When the evidence tends to show that the taking was only for temporary use, the court should give that defense in the charge. *Harrell v. State*, 37 App. 612, 40 S. W. 799.

Defendant's witnesses testified that the calf charged to have been stolen was sucking defendant's cow, and that at the time it was branded they supposed it belonged to defendant, that they branded it when it was a sucking calf. The court should have instructed the jury in effect that if they believed from the evidence that the calf belonged to defendant's cow he could not be convicted. *Black v. State*, 38 App. 58, 41 S. W. 606.

See opinion for instruction held not contradictory, in that it instructed the jury that if defendant's explanation of possession was reasonable they should acquit him; but if defendant's explanation was unreasonable they should take his possession as a circumstance against him. *Wheeler v. State*, 38 App. 71, 41 S. W. 615.

On trial for theft of cattle when there is evidence of the taking of other cattle at the same time, the court should in its instruction limit such testimony to its legitimate purpose. *Bratt v. State*, 38 App. 121, 41 S. W. 622.

When the State admitted that defendant obtained possession of the money with consent of the owner, it was error for the court to charge the jury to convict if they found from the evidence that defendant obtained the money without the consent of the owner. It was also erroneous to charge upon the money being obtained by false pretense when there was no evidence of such pretense. *Sanders v. State*, 38 App. 343, 42 S. W. 983.

The evidence showed that about a month after the theft was committed, defendant's father was arrested and a part of the stolen property found in his possession. The court instructed on the possession of recently stolen property; held, error. The evidence showed that the property had been stolen for a month, and there was no evidence to show that defendant was present when his father was arrested. *Spillman v. State*, 38 App. 607, 44 S. W. 149.

On trial for theft of a horse it is proper for the court to charge the jury, if they find certain facts supported by the evidence, they should find defendant guilty of theft, if such facts constitute theft. *Crook v. State*, 39 App. 252, 45 S. W. 720.

Where State relies solely on possession of recently stolen property, charge on circumstantial evidence must be given. *Davis v. State* (Cr. App.) 55 S. W. 340.

Where an indictment contains first count for theft and second count for receiving stolen property, charge as to possession of property recently stolen, held erroneous, because jury might have applied it to second count in absence of explanation. *Trail v. State* (Cr. App.) 57 S. W. 92.

Where brand recorded after the commission of the offense is admitted in evidence, the court should instruct the jury that it can only be considered for purpose of identity and not to prove ownership. *Welch v. State*, 42 App. 338, 60 S. W. 46.

This article does not apply to horse theft, and a charge stating the punishment as provided by article 1353 as amended by act of 1897 was correct. *Beard v. State*, 45 App. 522, 78 S. W. 348.

A charge held erroneous as precluding the jury from passing on the value of a safe alleged to have been stolen. *Schwartz v. State*, 53 App. 449, 111 S. W. 399.

It is error to charge that if the jury should find the defendant guilty of petty theft to assess his punishment at confinement in the county jail not exceeding one year and by a fine not exceeding \$500. *Peck v. State*, 54 App. 81, 111 S. W. 1021, 16 Ann. Cas. 583.

A portion of a charge submitting the issue of the owner's possession of stolen sacks authorized a conviction if the jury were satisfied that defendant, at or about the time charged in the indictment, "fraudulently took from the possession of the sacks the property described in the indictment, and that they were the property of J. J. McQ., without the consent of said J. J. McQ., with intent to deprive the owner of the value of the same," etc. Held, that it was wholly meaningless and defective, in that the jury were not required to find that the property was taken from possession of the person as laid in the indictment. *Eubanks v. State*, 57 App. 153, 122 S. W. 35.

Where the issue of theft was raised by the state's case, and defendant admitted the manual taking, but claimed it was done under circumstances not imputing crime to him, but in pursuance of purchase, it was error to submit the issue of voluntary return of stolen property, as that doctrine necessarily implies there has been, in the first place, a criminal taking, and this charge was calculated to create a belief in the minds of the jury that the original taking was wrongful. *Eubanks v. State*, 57 App. 153, 122 S. W. 35.

An indictment for theft must aver possession of the property stolen, and that it was taken from possession of the owner or person holding for him, and in submitting the issue of possession it should be substantially in the terms of the indictment. *Eubanks v. State*, 57 App. 153, 122 S. W. 35.

In a prosecution for theft, under article 1340, declaring that theft of property of the value of \$50 or over shall be punished by confinement in the penitentiary not less than 2 nor more than 10 years, a charge failing to require the jury to find the value of the property taken was erroneous. *Johnson v. State*, 57 App. 308, 122 S. W. 877.

Defendant was charged with the theft of property over the value of \$50, in violation of article 1340, declaring such theft punishable by imprisonment. Defendant requested the court to charge that, when theft of property by the same person and from the same owner is committed on different occasions, each occasion constitutes a distinct offense, and that unless property of the value of \$50 was taken at one and the same time defendant must be acquitted. Held that, though such instruction was erroneous in so far that it directed an acquittal if the jury found the value of property taken at any one time to be less than \$50, it was sufficient to call the court's attention to error in omitting to require the jury to find the value of the property taken, and to consider such value as an ingredient of the offense. *Johnson v. State*, 57 App. 308, 122 S. W. 877.

Where defendant offered no explanation of his possession of the property alleged to have been stolen until the trial, when he swore that he obtained it from D., the evidence did not raise the issue of explanation of possession of property recently stolen, and the court was not required to charge thereon. *Cleveland v. State*, 57 App. 356, 123 S. W. 142.

Where, in a prosecution for cattle theft, only a count alleging possession in H., was submitted to the jury, and the proof did not conclusively show an abandonment of possession by N., under a contract to care for the cattle between N. and H., or a termination of his possession at the time of the theft, the court erred in refusing to charge that possession of the person so unlawfully deprived of property is constituted by the exercise of actual control or management of the property, and if at the time the cattle were taken they were in the possession of N. the jury should find defendant not guilty. *Bonner v. State*, 59 App. 350, 128 S. W. 1102.

In a prosecution for theft, a charge of the court which failed to instruct that the taking by defendant must have been without the consent of the prosecuting witness, whom the indictment alleged was the owner, and where the evidence failed to show that the taking was without his consent, is objectionable. *McConico v. State*, 61 App. 48, 133 S. W. 1047.

In a prosecution for theft, declarations of the defendant, introduced in evidence in explanation of his possession of the stolen property, were sufficient to authorize a charge on the law of explanation of the possession of recently stolen property. *Bacon v. State*, 61 App. 206, 134 S. W. 690.

In a prosecution for theft, on an information charging the property in one and the possession in another holding for him, a charge not requiring the jury to find that the property was taken without the consent of the party in possession is fatally defective. *Henley v. State*, 61 App. 428, 135 S. W. 133.

Where a house servant, on trial for stealing a watch from a room, was not in possession of the stolen property, though the evidence showed that he had disposed of it shortly after the alleged theft, an instruction upon the presumption arising from the possession of the recently stolen property is unnecessary. *Dixon v. State*, 62 App. 75, 136 S. W. 463.

An indictment for theft, charging that the property was taken without the consent of J. "and" L., the owners, was not insufficient for failing to state that the taking was without the consent of either. *Taylor v. State*, 62 App. 611, 138 S. W. 615.

In a larceny trial, it was proper to instruct that before convicting of felony it must be found beyond reasonable doubt that the bicycle stolen was of the reasonable cash market value of \$50 or over, and that if accused was deemed guilty beyond reasonable doubt, but the jury had reasonable doubt as to such value, he should be convicted of petty theft. *Robinson v. State*, 63 App. 373, 140 S. W. 228.

An instruction that, if the property was found recently after being stolen in defendant's possession, etc., he could be convicted, was not improper because the property was found in possession of the railway company to which accused had delivered it for shipment. *Davis v. State*, 63 App. 453, 140 S. W. 349.

An instruction in a prosecution for theft that by the "value of property" is meant the market value of the property at the time and place of the taking was not misleading, and properly defined the market value of the property as being at the place where stolen, though such a charge was not necessary; the term "market value" being in general use, and easily understood. *Williams v. State*, 63 App. 507, 140 S. W. 447.

Where defendant in a prosecution for the theft of a hog testified that, after keeping up the hogs in his pen a week or a week and a half, they were turned out and stayed around the house three or four days, and went back and forth in the woods, and that one of them seen by defendant went off in the woods, and defendant had never seen it since, a charge that theft is complete when the fraudulent taking occurs, which includes the intent to deprive the owner of the value of the property, if fraudulently taken and without the consent of the owner, and that it was immaterial that the person so taking it was from some cause afterwards deprived of the property, is warranted by the evidence. *Holloway v. State*, 63 App. 503, 140 S. W. 453.

In a prosecution for theft of property to the value of over \$50, a charge which failed to give the statutory definition of such theft, as prescribed by article

858, was not erroneous, where the charge required all the elements of the statutory offense to be found against accused before conviction. *Franklin v. State*, 63 App. 438, 140 S. W. 1091.

In a prosecution for the theft of a yearling which defendant killed, where it was shown that he concealed the carcass, and told one who remonstrated with him that he was doing the killing, a charge that if the taking was under a claim of right, by honest mistake, subsequent appropriation would not be theft was unnecessary. *Roberts v. State*, 64 App. 135, 141 S. W. 235.

In a prosecution for theft of lard thrown from a railroad car onto the right of way, and loaded by defendant into a wagon almost immediately thereafter, evidence held insufficient to present the issue of the accidental finding of lost property. *Roman v. State*, 64 App. 515, 142 S. W. 912.

Defendant, having been acquitted of burglary from a railroad car from which lard had been thrown onto the right of way, was then indicted for theft; the evidence showing that he was apprehended while in the act of loading a part of the lard into a wagon on the night that it was taken from the car. He requested the court to charge that, if another person threw the lard from the car, then the fact that defendant took the same from the right of way would not constitute theft, which the court gave with the addition, unless the jury believed that defendant either by himself or in connection with another took possession of the property with the intent at the time of defrauding the owner, and appropriating the same to his own use. Held that, though the charge as requested was not the law of the case, the amendment was in effect a peremptory instruction to find defendant guilty, and was erroneous. *Roman v. State*, 64 App. 515, 142 S. W. 912.

In a prosecution for the theft of cattle, a charge that, if the animal in question was the property of the prosecuting witness, yet defendant cannot be convicted if it went voluntarily into his lot or pasture, or got in there otherwise than through the act or agency of defendant, is not erroneous in authorizing a conviction if defendant drove the animal into his pasture, though not intending to steal it, or if the agent of defendant drove the animal into the pasture. *Baker v. State* (Cr. App.) 145 S. W. 607.

In a prosecution for horse theft, it appeared that the owner had once authorized accused's alleged accomplice to trade the horses, and accused testified that when he and the latter took the horses from the owner's pasture, the accomplice told accused that he owned the horses, and agreed to pay accused \$10 to take them to a certain place for him, and that accused took the horses from the owner's pasture under that belief. The court charged that if the jury believed that accused took the horses under the honest belief that they belonged to the accomplice, or under the belief that the accomplice had authority from the owner to take them, the jury should acquit, and also instructed that if the accomplice had authority from the owner to dispose of the horses and hired accused to take them to a certain place, and accused thought he had the right to do so by reason of such employment, the jury should acquit, and further instructed that accused's explanation of his possession of recently stolen property is admissible for him, if it was given on the first occasion for any explanation by him (that is, when he was first directly or circumstantially called upon to explain his possession), and in such case, if such explanation be not shown to be false, further evidence of guilt would be required to warrant a conviction. Held, that the instructions sufficiently presented the theory of accused's defense. *Burton v. State* (Cr. App.) 146 S. W. 186.

An instruction, on a trial for the larceny of the property of R. in the possession of T., which authorizes a conviction if the property was taken without the consent of R. and T., or either of them, is erroneous. *Davis v. State* (Cr. App.) 152 S. W. 1094.

Where, on a trial for larceny, the evidence of prosecutor's ownership of the property was uncertain, and the state introduced in evidence the testimony of accused on a former trial to the effect that the property belonged to a third person, and that accused sold it for him for a compensation, the refusal to charge that the jury could not find accused guilty, unless they believed that the property belonged to prosecutor, was reversible error. *Davis v. State* (Cr. App.) 152 S. W. 1094.

Where, on a trial for the larceny of a bale of cotton, the testimony of prosecutor as to his ownership thereof was uncertain, and the state introduced in evidence the testimony of accused on a former trial to the effect that the cotton was the property of another person, and that accused sold it for him for a compensation, the refusal to charge that, unless accused was connected with the original taking, he must be acquitted, though the cotton belonged to prosecutor, and was unlawfully taken by some other person, though accused knew it was taken at the time he received it and hauled it to market, was reversible error. *Davis v. State* (Cr. App.) 152 S. W. 1094.

An instruction that if accused purchased property claimed to have been stolen by him, or the jury had reasonable doubt thereof, they should acquit, fully presented his defense embodied in his testimony that he purchased the property from another. *Fennell v. State* (Cr. App.) 153 S. W. 127.

In a prosecution for the theft of cattle, where it appeared that defendants were both acting as hired hands for the owner of the herd into which the stolen cattle had gotten and had no interest in the cattle themselves, the jury should have been appropriately instructed as to its bearing on their possession. *McKnight v. State*, 70 App. 470, 156 S. W. 1188.

On a trial for cattle theft, where the testimony showed that soon after the theft the cattle were in accused's possession and sold by him, that he and the purchaser were indicted, and that the purchaser called on him for an explanation of his possession, this being the first time and first occasion he had been so call-

ed upon to explain, and that he then explained that he had not stolen the cattle, but had a bill of sale and a check showing payment for them, a charge on the possession of recently stolen property was properly given, since to justify such charge it is not necessary that the explanation should go minutely into the details of accused's alleged purchase of the stolen property. *Turner v. State*, 71 App. 477, 160 S. W. 357.

Where the evidence in a prosecution for hog theft raised the issue of a taking by mistake, the court should have granted a requested instruction that, even if accused was a principal in the taking, he could not be convicted if he believed at the time that the hog belonged to his father and that he had a right to take it under his father's authority. *Harris v. State*, 71 App. 463, 160 S. W. 447.

The claim of defendant, charged with theft of a calf, that he bought it from some one or other of the persons from whom he had recently bought cattle was presented sufficiently favorably by a charge to acquit if the jury believe from the evidence that he bought it from enumerated persons, or any one else, or if they have a reasonable doubt as to whether he did so. *Law v. State* (Cr. App.) 163 S. W. 90.

Defendant, charged with theft of a calf, is not entitled to a charge as to the nature of the possession which will alone warrant an inference of guilt, where the state does not rely on recent possession alone, but there are other cogent circumstances; the animal being recently branded with defendant's brand, and he admitting possession and claiming ownership through purchase from some one or other. *Law v. State* (Cr. App.) 163 S. W. 90.

On a trial for stealing a harness found in accused's possession, and which he claimed to have purchased from a trader, instructions that if the harness was bought by him from a trader, or if the jury had a reasonable doubt thereof, to acquit accused, and that if they believed that he bought the harness from a trader, or from any person, or got it from any person other than by acting in connection with M. and breaking and entering the barn of the prosecuting witness, to acquit accused, submitted accused's defensive plea in a very favorable light, and he could not complain thereof. *Whitfill v. State* (Cr. App.) 169 S. W. 681.

Where accused, on trial for theft, showed that, when first charged with the offense, he claimed that he bought the property from a certain third person for a specified price, the court should charge that if accused did not steal the goods, but bought them from the thief knowing them to be stolen, he was not guilty of theft, which was a separate offense. *Baldwin v. State* (Cr. App.) 175 S. W. 701.

In a prosecution for larceny of a gate, where the defendant admitted the taking, but testified that he did so because he lived 35 miles from where lumber could be bought, and that he took the gate only to use it temporarily until he could get some lumber, and so informed the prosecuting witness, and that he thought from his past dealings with the witness that there would be no objection, it was error not to give proper instructions as to the intent of defendant. *Kellar v. State* (Cr. App.) 176 S. W. 723.

In a prosecution for the larceny of a gate, where defendant admitted taking it, but claimed that it was with intent to use only temporarily, and then return it, it was error to instruct the jury that one could not borrow property without the express consent of the owner, and to refuse to submit the defense of want of felonious intent; since that amounted practically to a peremptory instruction to find the defendant guilty. *Kellar v. State* (Cr. App.) 176 S. W. 723.

39. **Verdict.**—See notes under C. C. P. art. 770.

Art. 1330. [859] Property must have some value.—The property must be such as has some specific value capable of being ascertained. It embraces every species of personal property capable of being taken.

See other decisions as to value, ante, article 1329, and post, article 1342, notes. *Hurley v. State*, 30 App. 333, 17 S. W. 455, 23 Am. St. Rep. 916; *Sands v. State*, 30 App. 578, 18 S. W. 86.

Pay check as subject of offense.—Under the statute, a pay check is the subject of theft. *Fulshear v. State*, 59 App. 376, 128 S. W. 134.

A pay check payable to order is the subject of theft, though it is not indorsed. *Fulshear v. State*, 59 App. 376, 128 S. W. 134.

Application of statute to indictment.—Where an indictment charged theft from the person and described the property stolen as a pocketbook containing one \$10 bill and two \$5 bills, all of the aggregate value of \$20, good and lawful money of the United States, the description is sufficient under art. 458, providing that where it is necessary to describe property in an indictment a general description by name, kind, and quality shall be sufficient, and this article and article 1337, post, both of which refer to the crime of theft, and, respectively, provide that the property must have some specific value, and that the term "property" as used in relation to theft includes money, bank bills, and goods of every description as well as agricultural products, and all other personal property, since any theft from the person is a felony and the grade of the offense does not depend upon the amount stolen, and the property alleged to have been stolen was not money, but a pocketbook and its contents, all of which was of the aggregate value of \$20. *Sims v. State*, 64 App. 435, 142 S. W. 572.

Art. 1331. [860] Asportation not necessary.—To constitute "taking," it is not necessary that the property be removed any distance from the place of taking; it is sufficient that it has been in the possession of the thief, though it may not be moved out of the pres-

ence of the person deprived of it; nor is it necessary that any definite length of time shall elapse between the taking and the discovery thereof; if but a moment elapse, the offense is complete.

See *Martin v. State*, 44 Tex. 172; *Cody v. State*, 31 App. 183, 20 S. W. 398; *Minter v. State*, 26 App. 217, 9 S. W. 561.

Taking and asportation.—See notes under articles 1329, ante, and 1351, post.

It must be proved that there was a taking of the property, but it is not necessary to prove that there was any asportation of it. To constitute a taking, it is not necessary that the property should have passed into the actual manual possession of the thief. Thus, where the defendant pointed out to a person a certain cow and calf on the range, falsely claiming that he owned them, and sold them to the person to whom he had pointed them out, and such person thereupon took possession of the cow and calf, it was held the acts of defendant constituted a taking effected through the innocent agency of the purchaser. *Doss v. State*, 21 App. 505, 2 S. W. 814, 57 Am. Rep. 618, overruling *Lott v. State*, 20 App. 230. So where the defendant called up a bunch of hogs, and sold them to a person who took and carried them away, this was held to be a taking by the defendant. When the theft is of an animal, it is a taking, whenever the animal is brought under the control of the thief. *Madison v. State*, 16 App. 436. Killing the cow of another on the range, though the animal never passed into the manual possession of the slayer, was held to be a taking. *Coombes v. State*, 17 App. 259. And killing a hog is taking it. *Hall v. State*, 41 Tex. 287; *Walker v. State*, 3 App. 70. But where the defendant sold a steer, claiming it as his property, and executed a bill of sale for it to the purchaser and received pay, the steer at the time being on the range, and not in the possession, actual or constructive, of the defendant or his vendee, it was held that there had been no taking. *Hardeman v. State*, 12 App. 207. A person may be guilty of a taking, although he be not present at the time and place of the taking, but the evidence must show his complicity as a principal in the original taking. See the following cases illustrating this doctrine: *Wright v. State*, 18 App. 356; *Trimble v. State*, Id. 632; *Watson v. State*, 21 App. 598, 1 S. W. 451, 17 S. W. 550; *Doss v. State*, 21 App. 505, 2 S. W. 814, 57 Am. Rep. 618; *Smith v. State*, 21 App. 107, 17 S. W. 552; *Welsh v. State*, 3 App. 413; *Wells v. State*, 4 App. 20; *Scales v. State*, 7 App. 361; *McCampbell v. State*, 9 App. 124, 35 Am. Rep. 726; *Cohea v. State*, 9 App. 173; *O'Neal v. State*, 14 App. 582; ante, art. 73.

Asportation is not necessary to constitute theft. The marking and branding of an animal without asporting it, and for the purpose of appropriation, will evidence a fraudulent taking. *Coward v. State*, 24 App. 590, 7 S. W. 332.

Defendant broke and entered a store containing a female figure on which was a dress and cloak. He had taken the cloak from the figure, rolled it up, and laid it on the floor, and was trying to take off the dress, but had not succeeded, having pulled it down to the bottom of the figure, by which method it could not be removed, and the storekeeper testified that it could only have been taken off over the head. Held, that there was no sufficient asportation of the dress to constitute theft thereof, and that defendant was therefore only guilty of the theft of the cloak. *Clark v. State*, 59 App. 246, 123 S. W. 131, 29 L. R. A. (N. S.) 323.

In a prosecution for theft, proof that defendant, or some one, had taken actual manual possession of the cotton and moved it some distance to the scales, that defendant informed the manager of the yard holding the cotton for the owner that he had cotton to be weighed and assisted him in weighing and sampling it, and received tickets issued by such owner, which he sold for cash, showed a "taking," within this article. *Reece v. State* (Cr. App.) 170 S. W. 317.

Necessity of thief's actual possession.—In *Lott v. State*, 20 App. 230, it was held that though asportation of the property was not essential to complete the theft, still there must have been a fraudulent actual taking of the property, and the property must have passed into the possession of the thief. But this doctrine of the *Lott* Case was expressly overruled in *Doss v. State*, 21 App. 505, 2 S. W. 814, 57 Am. Rep. 618, which holds that a fraudulent taking constitutes and completes the crime of theft, and that it is not necessary that the property should have passed into the actual manual possession of the thief. See the last cited case for an elaborate discussion of the question and a review of previous decisions. See, also, *Dukes v. State*, 22 App. 192, 2 S. W. 590; *Coombes v. State*, 17 App. 259; *Madison v. State*, 16 App. 436; *Hall v. State*, 41 Tex. 287; *Flynn v. State*, 42 Tex. 301; *Hardeman v. State*, 12 App. 207. Post, art. 1348, note. *Conner v. State*, 24 App. 245, 6 S. W. 138; *Coward v. State*, 24 App. 590, 7 S. W. 332; *Harris v. State*, 29 App. 101, 14 S. W. 390, 25 Am. St. Rep. 717.

Allegation of taking and asportation in indictment.—See note under article 1329, ante.

Art. 1332. [861] The "taking" must be wrongful.—The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.

See article 1348, post, and notes.

See *Guest v. State*, 24 App. 235, 5 S. W. 840; *Graves v. State*, 25 App. 333, 8 S. W. 471; *Cunningham v. State*, 27 App. 479, 11 S. W. 485; *Rumbo v. State*, 28

App. 30, 11 S. W. 680; *Nichols v. State*, 28 App. 105, 12 S. W. 500; *Williams v. State*, 30 App. 153, 16 S. W. 760; *Wilson v. State*, 20 App. 662; *White v. State*, 11 Tex. 769; *Smith v. State*, 35 Tex. 738; *Jones v. State*, 8 App. 648; *Hudson v. State*, 10 App. 216; *Lott v. State*, 24 App. 723, 14 S. W. 277; *Neel v. State*, 33 App. 408, 26 S. W. 726; *Lopez v. State*, 37 App. 649, 40 S. W. 972; *Billard v. State*, 30 Tex. 367, 94 Am. Dec. 317; *Maddox v. State*, 41 Tex. 205; *Siemers v. State* (Cr. App.) 55 S. W. 334.

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| 1. Offense under this article in general. | 5. Theft of lost property. |
| 2. Offense compared with and distinguished from offense under article 1348. | 6. Appropriation of estray. |
| 3. Offense distinguished from "swindling" or "embezzlement." | 7. Conversion of employer's property. |
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1. **Offense under this article in general.**—This statute is broad enough to comprehend any pretext by which the possession of the property is obtained, although such pretext be in itself illegal. *Lovell v. State*, 48 App. 85, 86 S. W. 753, 13 Ann. Cas. 561.

One can be prosecuted under this article for obtaining money from another for the purpose of bribing an officer. The fact that the owner of the money intended to commit a crime when he parted with his money will not avail the accused as a defense. The statute is very broad and does not say that the pretense must be a legal pretense, if true, but merely requires that if the taking though originally lawful, was obtained by any false pretext, etc., the party would be guilty of theft. *Lovell v. State*, 48 App. 85, 86 S. W. 760, 13 Ann. Cas. 561.

When the taking of the property was originally lawful, that is, when the property came into the possession of the accused not wrongfully, but lawfully, a conviction for theft can not be sustained unless it be shown that the accused obtained the property by some false pretext, or with the intent at the very time of obtaining the property of depriving the owner of the value thereof, and of appropriating the property to the use and benefit of the person taking; and it must also further appear that the property was so appropriated. *Porter v. State*, 23 App. 295, 4 S. W. 889; *Hornbeck v. State*, 10 App. 408; *Dow v. State*, 12 App. 343; *Morrison v. State*, 17 App. 34, 50 Am. Rep. 120; *Atterberry v. State*, 19 App. 401. See, also, *Keonio v. State*, 4 App. 173; *Berg v. State*, 2 App. 148; *Pitts v. State*, 3 App. 210; *Pitts v. State*, 5 App. 122; *Madden v. State*, 1 App. 204. In order to establish the character of theft specified in the preceding article it must be proved by the state: 1st, That the possession of property was obtained by false pretext; or 2d, that at the very time the possession of the property was obtained by the accused, there existed in his mind the fraudulent intent to deprive the owner of the value of the property, and to appropriate the same to his own use; and 3d, that he did so appropriate the property. The fraudulent intent must exist at the very time of acquiring the possession of the property. No subsequent fraudulent intent or appropriation of the property will suffice to constitute the original lawful taking theft. And the mere fact that subsequent to his lawful acquisition of the property, the accused appropriated it to his own use and benefit, is not sufficient to establish the falsity of the pretext by which he acquired possession, nor his fraudulent intent at the time of such acquisition. *Hernandez v. State*, 20 App. 151. Where property is taken with the consent of the owner, or with the consent of one owner where there are several, the taking is not wrongful but lawful. *Taylor v. State*, 18 App. 489. And so where it is taken with the consent of the agent or clerk of the owner. *Powell v. State*, 11 App. 401. As to consent of the owner for the purpose of entrapping the thief, see *Epeiden v. State*, 3 App. 156, 30 Am. Rep. 126; *Johnson v. State*, 3 App. 590; *Allison v. State*, 14 App. 122; *Pigg v. State*, 43 Tex. 108; *Alexander v. State*, 12 Tex. 540; *Robinson v. State*, 34 App. 71, 29 S. W. 40, 53 Am. St. Rep. 701.

This article provides two modes under which the acquisition of the property will constitute theft: 1, that the taker obtained the lawful possession of the property by some false pretext which induced or deceived the owner to surrender it to him; or, 2, that at the time he obtained the possession of it with the consent of the owner, he intended to deprive the owner of the value of the same and appropriate it to his own use. *Porter v. State*, 23 App. 295, 4 S. W. 889; *Stokely v. State*, 24 App. 509, 6 S. W. 538; *Boyd v. State*, 24 App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; *Cunningham v. State*, 27 App. 480, 11 S. W. 485; *Williams v. State*, 30 App. 153, 16 S. W. 760.

To constitute theft the taking of the property must have been wrongful, unless the possession of the property was obtained by some false pretext, or the taking was accompanied by the intent to deprive the owner of the value of the property. *Stokely v. State*, 24 App. 509, 6 S. W. 538.

Conversion by the accused of property lawfully obtained is not sufficient to establish the fraudulent intent at the time of the taking. *Stokely v. State*, 24 App. 509, 6 S. W. 538.

If the accused got possession of a horse, intending to comply with an agreement made with the owner, he would not be guilty of theft, but if he intended to appropriate the horse at all events, he would be guilty of theft. *Sheil v. State*, 32 App. 512, 24 S. W. 646.

Although the possession of the property is obtained by defendant lawfully, yet if it was obtained with the intent to deprive the owner of the value thereof, the offense of theft is complete, as contemplated by this article. *Harris v. State* (Cr. App.) 65 S. W. 922.

Where one procures the possession of personal property by the false and fraudulent statement that the check which he gives in payment is good, knowing at

the time that it is worthless with the intent thereby to deprive the owner of the value of the property, is theft under this article. *Bullard v. Stuart*, 46 Civ. App. 49, 102 S. W. 175.

Unless the accused intended at the time of taking to appropriate the property to his own use he would not be guilty under this statute of theft. *Flagg v. State*, 51 App. 602, 103 S. W. 856.

Where defendant accosted prosecutor and solicited that he purchase liquor, and prosecutor gave defendant a dollar for a quart of alcohol, and defendant kept the money without delivering any alcohol, a demand for return of the money was not essential to defendant's conviction for theft thereof. *Hawkins v. State*, 58 App. 407, 126 S. W. 268, 137 Am. St. Rep. 970.

One who negotiates for purchase of hogs, and obtains possession of them on his promise to send back the money, not intending to do so, but to appropriate to his own use, which he does, is guilty of larceny, though but for his fraud the title would have passed. *Anderson v. State* (Cr. App.) 177 S. W. 85.

Where C. paid defendant \$10, on her representation that for a fee of that amount she would obtain for him certain employment, which she never did, intending the title of the \$10 to pass to her, defendant was not guilty of "theft," but, at most, of "swindling." *Arnold v. State* (Cr. App.) 176 S. W. 159.

2. Offense compared with and distinguished from offense under article 1348.— See *Abbey v. State*, 35 App. 589, 34 S. W. 930.

A conviction for theft by means of false pretext may be had under an indictment charging theft in usual form. The evidence in this case shows that the accused acquired the possession of the alleged stolen horses with the consent of the owner, under a contract of hiring. Under this proof the trial judge charged the jury upon theft by means of false pretext, as defined by article 1332, and also theft, as defined by the act of March 8, 1887 (article 1348, post), i. e., fraudulent conversion of property without the consent of the owner. When said property has been obtained from the owner by virtue of a contract of bailment, held, that the proof authorized the charge first mentioned, but that the same was insufficient, inasmuch as it failed to instruct the jury explicitly that the fraudulent intent on the part of the accused must have existed at the very time he obtained possession of the property, and that no subsequent fraudulent intent would constitute theft. *Taylor v. State*, 25 App. 96, 7 S. W. 861.

The fact that the prosecution might have been maintained under article 1348 of the Penal Code, is no reason why it might not also be maintained under this article, if the facts bring it within this article. *Lewis v. State*, 48 App. 309, 87 S. W. 831.

Under this article the fraudulent intent must exist at the time of obtaining the money and the representations must be false, while under article 1348 the fraudulent intent rises subsequent to obtaining the goods. Appropriation is necessary under both articles. *Price v. State*, 49 App. 131, 91 S. W. 571.

3. Offense distinguished from "swindling" or "embezzlement".—The difference between theft by false pretext and swindling is that in theft the owner parting with the possession does not intend to part with the ownership of his property. In swindling the owner intends to part with both ownership and possession. *Taylor v. State*, 32 App. 110, 22 S. W. 149.

Where defendant was at a saloon and rooming house "moving around and drinking" and said to prosecutor that he was working there and that prosecutor had better give him his money to keep instead of taking it to his room, and the latter did so, and the defendant appropriated the money to his use, he was guilty of theft and not of embezzlement, the statement that he was working there being false. *Johnson v. State*, 46 App. 415, 80 S. W. 622.

Where one borrows money on pretense to pay a debt and promises to return when he reaches a certain place, but appropriates the money, it is not theft but swindling. *Bink v. State*, 50 App. 450, 98 S. W. 250.

Where parties by pretense of a footrace obtained money from the owner which he says he loaned to one man to bet on the race, which was to be returned to him in any event together with half of the winnings, if the one to whom he loaned won his bet, it was theft under this article and not swindling when he failed to get any of it back. *Glasgow v. State*, 50 App. 635, 100 S. W. 933.

Where by the fraud practiced the title to money is passed, the offense is "swindling" as defined by article 1241, post, and not theft, but if mere possession is obtained by false pretenses, and title does not pass, the person acquiring the money is guilty of "theft." *Lewis v. State* (Cr. App.) 171 S. W. 217.

4. Theft regardless of pretense.—Conversion of property, where one obtains it for the purpose of appropriating it to his own use is theft, regardless of any pretense. *Flynn v. State*, 47 App. 26, 83 S. W. 206.

5. Theft of lost property.—See *Rochell v. State*, 55 App. 152, 115 S. W. 583; *Moxie and Brackens v. State*, 54 App. 529, 114 S. W. 375; *Rhodes v. State*, 11 App. 563.

To constitute a finding theft, the intent to defraud the owner and appropriate the property must exist in the mind of the finder at the time he took possession. If the intent to steal did not exist at that time no subsequent intent to steal will render the original taking theft. *Stepp v. State*, 31 App. 349, 20 S. W. 753. And see *Reed v. State*, 8 App. 40, 34 Am. Rep. 732; *Wilson v. State*, 14 App. 205; *Warren v. State*, 17 App. 207; *Worthington v. State*, 53 App. 178, 109 S. W. 187.

The evidence in this case tends to show that the defendant found the lost property, and the question of notice of ownership turns upon the fact whether he knew the owner, or could he by ordinary inquiry have ascertained the ownership of the same. The proof was that the family name of the owner was plainly engraved on the property—a lady's watch—and that the defendant was in the vicinity of the place of its loss on the night it was lost, and knew of the presence there

of the person who lost it. Held sufficient to put the defendant upon notice of ownership. *Stepp v. State*, 31 App. 349, 20 S. W. 753.

Lost property, like any other, may be the subject of theft, although the finder come lawfully into possession of it. If, at the very time of finding and taking the lost property, the criminal intent to deprive the owner of the value of the property, and to appropriate it to the use and benefit of the taker, is formed in the mind of the taker, the taking will be theft. *Statum v. State*, 9 App. 273; *Robinson v. State*, 11 App. 403, 40 Am. Rep. 790; *Rhodes v. State*, 11 App. 563. The time of the taking is the time of the finding, and if the fraudulent intent did not exist at the time of the taking, no subsequent fraudulent intent in relation to the property will constitute theft. The following would be a proper charge upon this issue: "If you believe from the evidence that the property was lost, and that the defendant found it, he can not be convicted of the theft of it unless you believe from the evidence that at the time he found it, he fraudulently took it with the intent at that time to deprive the owner of the value of it, and to appropriate it to his own use or benefit. No fraudulent intent in the mind of the defendant in relation to the property, which was formed after he had taken the property, will authorize his conviction of the theft of such property." *Martinez v. State*, 16 App. 122; *Warren v. State*, 17 App. 207; *Reed v. State*, 8 App. 40, 34 Am. Rep. 732; *Wilson v. State*, 14 App. 205.

The finding of lost property is not per se theft, yet lost property can be stolen. *Robinson v. State*, 11 App. 403, 40 Am. Rep. 790.

The finder of lost property is not guilty of theft though he may expect reward, when he does not withhold and conceal it until he gets a reward. *Martin v. State*, 44 App. 538, 72 S. W. 386.

Where accused had found a pair of gloves, which the prosecuting witness had left in the post office, and, thinking that they belonged to another person, took them to give to such other person, but, on seeing a lost notice of the prosecuting witness, returned them to him, accused was not guilty of larceny; there being no intent on his part to appropriate the gloves to his own use. *Drummond v. State*, 71 App. 260, 158 S. W. 549.

Where a trunk was sold in which were goods unknown to both buyer and seller, the goods, so far as the parties were concerned, were lost, and the owner is deemed to still have constructive possession, so that they may be the subject of larceny by the finder. *Ellis v. Garrison* (Civ. App.) 174 S. W. 962.

For a person to be guilty of the theft of lost goods, there must have been an intent to steal at the time of the finding, and knowledge or reasonable means of ascertaining the owner. *Ellis v. Garrison* (Civ. App.) 174 S. W. 962.

6. Appropriation of estray.—When a person takes up a horse as an estray with no intention of stealing him, his afterwards appropriating him does not constitute theft. *McCarty v. State*, 36 App. 135, 35 S. W. 994.

Where a party takes up a horse and uses it, to convict him there must be shown an intent to steal it at the very time he took it up. *Gosler v. State* (Cr. App.) 56 S. W. 51.

7. Conversion of employer's property.—A servant who is in temporary custody of his employer's property is guilty of theft if he fraudulently appropriates the same to his own use. *Livingston v. State*, 38 App. 535, 43 S. W. 1008.

8. Money paid by mistake.—If at the time accused received more than his check on a bank called for, he intended to appropriate it to his own use, and did so appropriate it, it would be theft. *Fulcher v. State*, 32 App. 621, 25 S. W. 625.

9. Indictment and proof thereunder.—Willson's Cr. Forms, 634. See *Dow v. State*, 12 App. 343; *Morrison v. State*, 17 App. 34, 50 Am. Rep. 120; *Atterberry v. State*, 19 App. 401.

The matter alleged to be false should be fully set out and described, and the indictment to be good must by positive averment negative the existence of the facts or truth of the matters alleged to be false. *Warrington v. State*, 1 App. 168.

If the indictment sets out the false pretenses, etc., by which the theft was perpetrated, they must be proved as alleged. *Warrington v. State*, 1 App. 168.

Under an indictment for theft by wrongful taking against the owner's consent, proof is competent that the taking was with such consent, but obtained by false pretext, or with intent to deprive the owner of his property, and appropriate it to the use of the taker; upon which, with further proof of such an appropriation, a conviction may be had notwithstanding the form of the indictment. *Berg v. State*, 2 App. 148, noting that *Marshall's Case*, 31 Tex. 471, has been overruled.

The false pretext must be set out, and its truth negated by express averment, and the indictment must further aver the delivery of the property with the owner's consent, and also the intent with which it was obtained. *Jones v. State*, 8 App. 648.

Under an indictment for theft charging a fraudulent taking without the owner's consent, the state may prove that the taking was with the owner's consent, but obtained by false pretenses. *Hawkins v. State*, 58 App. 407, 126 S. W. 263, 137 Am. St. Rep. 970.

10. Evidence.—See *Worthington v. State*, 53 App. 178, 109 S. W. 187.

In a prosecution for theft of money by false pretenses, evidence held to warrant a conviction. *Lewis v. State* (Cr. App.) 171 S. W. 217.

In a prosecution for theft of money by false pretenses, evidence held not to raise the issue whether the money was loaned to accused. *Lewis v. State* (Cr. App.) 171 S. W. 217.

11. Charge of court.—See *Pones v. State*, 43 App. 201, 63 S. W. 1021; *Glasgow v. State*, 50 App. 635, 100 S. W. 933.

Art. 1333. [862] Possession and ownership need not be in same person.—It is not necessary, in order to constitute theft, that

the possession and ownership of the property be in the same person at the time of taking.

See notes under article 1329, ante.

Corporate property.—The property stolen belonged to Ben Irelson Company (a corporation). Ben Irelson owned most of the stock in the company and was manager and in control of the business. Possession and ownership were properly alleged to be in him. *Price v. State*, 55 App. 157, 115 S. W. 586.

Proof under indictment.—In view of this and the following article it was held that art. 457, providing that where one person owns the property, and another has possession, charge, or control of it, ownership may be alleged in either, and where property is owned in common, or jointly by two or more, ownership may be alleged to be in all or either, applied to the special owner of property as well as the actual owner thereof, and that the state made out its case when it proved the alleged owner to be a special joint owner with two others, and that, while all three had the care and management of the property, it was unnecessary to prove want of consent of the other joint owners, though to prove it would not be reversible error, nor prejudicial to accused. *Lockett v. State*, 59 App. 531, 129 S. W. 627.

— **As applied to burglary.**—Under this and the following article, an allegation, in an indictment for breaking and entering a house with intent to take personally, that such property belonged to a certain person, was supported by proof that he had the exclusive care, control, and management of the property. *Clark v. State*, 58 App. 181, 125 S. W. 12.

Art. 1334. [863] Possession; how constituted.—Possession of the person so unlawfully deprived of property is constituted by the exercise of actual control, care and management of the property, whether the same be lawful or not.

See notes under articles 1329 and 1333, ante.

See, also, *Conner v. State*, 24 App. 245, 6 S. W. 138; *Arcia v. State*, 28 App. 198, 12 S. W. 599; *Otero v. State*, 30 App. 450, 17 S. W. 1081; *Alford v. State*, 31 App. 299, 20 S. W. 553; *Swink v. State*, 32 App. 530, 24 S. W. 893; *Williams v. State*, 26 App. 131, 9 S. W. 357.

Possession or ownership in general.—Property left temporarily in the custody of another is in possession of the owner. And a joint owner who has exclusive possession is the owner. *Garling v. State*, 2 App. 44.

It is not necessary that the possession be lawful. *Crockett v. State*, 5 App. 526; *Moore v. State*, 8 App. 496; *King v. State*, 43 Tex. 351.

Possession or ownership is constituted by the concurrence of actual control, care and management of the property. *Pippin v. State*, 9 App. 269; *Ledbetter v. State*, 35 App. 195, 32 S. W. 903; *Tinney v. State*, 24 App. 112, 5 S. W. 831. See, also, *Dodd v. State*, 10 App. 370; *Conner v. State*, 24 App. 245, 6 S. W. 138; *Smith v. State*, 34 App. 124, 29 S. W. 775; *Emmerson v. State*, 33 App. 89, 25 S. W. 289.

Where property is accidentally left in a particular place, it is still in the possession, constructively, of the owner. *Statum v. State*, 9 App. 273.

In the preceding article the word "or" between the words "care" and "management" should be read "and" in construing said article. To constitute possession within the meaning of said article, there must be combined actual control, actual care, and actual management of the property. *Frazier v. State*, 18 App. 434, overruling upon this point *Erskine v. State*, 1 App. 405.

A railroad yardmaster having the care and control of freight at a certain point had the legal possession of goods in cars there. *McDonald v. State*, 70 App. 80, 156 S. W. 209.

Synonymous terms.—"Possession" and "custody" are not synonymous or convertible terms, and if property be in the mere temporary custody of a ward, servant, or other person, it is not in the possession of the ward, servant, or other person, but is in the possession of the owner. *Bailey v. State*, 18 App. 426; *Frazier v. State*, Id. 434; *Littleton v. State*, 20 App. 168; *Clark v. State*, 23 App. 612, 5 S. W. 178; *Thomas v. State*, 1 App. 289; *Burns v. State*, 35 Tex. 724; *Garling v. State*, 2 App. 44; *Crook v. State*, 39 App. 252, 45 S. W. 720, and cases cited; *Daggett v. State*, 39 App. 5, 44 S. W. 148, 842.

Abandonment of property.—A turbine water wheel is subject of theft, although it has been left on a railroad right of way for nine years. *Sikes v. State* (Cr. App.) 28 S. W. 688.

Community property in custody of widow.—The widow is the "owner" of unadministered community property in her actual custody. *Henry v. State*, 45 Tex. 84.

Animals on range.—Animals on their accustomed range are in the possession of their owner. *Deggs v. State*, 7 App. 359; *Jones v. State*, 3 App. 498; *Crockett v. State*, 5 App. 526; *Moore v. State*, 8 App. 496; *Cameron v. State*, 44 Tex. 652; *Bennett v. State*, 32 App. 216, 22 S. W. 684; *Mackey v. State*, 20 App. 603; *Hayes v. State*, 30 App. 404, 17 S. W. 940; *McGrew v. State*, 31 App. 336, 20 S. W. 740.

If, however, they are in the custody and care of a special owner, though on the range, they are in his possession. *Littleton v. State*, 20 App. 168; *Hall v. State*, 22 App. 632, 3 S. W. 338; *Williams v. State*, 26 App. 131, 9 S. W. 357, citing *Tinney v. State*, 24 App. 112, 5 S. W. 831, and *Alexander v. State*, 24 App. 126, 5 S. W. 840.

Theft of a cow is no less the taking from the original owner because a third person has previously taken it and changed the brand, where the cow returned to her accustomed range before the theft. *Taylor v. State*, 62 App. 611, 138 S. W. 615.

Animals on their accustomed range being in the possession of the owner, one who takes an animal disturbs the owner's possession and is guilty of larceny. *Dugat v. State* (Cr. App.) 148 S. W. 789.

Cattle running at large.—Cattle running at large, and not on accustomed range, are subject of theft. *Borer v. State* (Cr. App.) 28 S. W. 951.

Charge of court.—See notes under article 1329, ante.

Art. 1335. [864] Theft of one's own property, when.—No person can be guilty of theft by taking property belonging to himself, except in the following cases:

1. Where the property has been deposited with the person in possession as a pledge or security for debt.

2. Where it is in the possession of an officer of the law by process from a court of competent jurisdiction.

3. Where the property is in the possession of an executor or administrator for the purpose of administration.

4. In all other cases where the person so deprived of possession is, at the time of taking, lawfully entitled to the possession thereof as against the true owner.

Overton v. State, 43 Tex. 616; *Duren v. State*, 15 App. 624; *Seymore v. State*, 12 App. 391; *Barnes v. State*, 9 App. 128; *Smedly v. State*, 30 Tex. 214.

Taking under claim of right or belief of ownership.—See *Small v. State*, 18 App. 336; *Boyd v. State*, 28 App. 524, 13 S. W. 864; *McGowan v. State*, 27 App. 183, 11 S. W. 112; *Herber v. State*, 7 Tex. 69; *Thurman v. State*, 33 Tex. 634; *Howard v. State*, 25 App. 602, 8 S. W. 806; *Cudd v. State*, 25 App. 666, 8 S. W. 814; *Demint v. State*, 26 App. 370, 9 S. W. 738; *Thompson v. State*, 26 App. 466, 9 S. W. 760; *Wilson v. State*, 27 App. 577, 11 S. W. 638; *Parks v. State*, 29 App. 597, 16 S. W. 532; *Young v. State*, 34 App. 290, 30 S. W. 238.

Where property has been taken under a claim of right, if the accused appears to have had any fair color of title, or if the title of the prosecutor be brought into doubt at all, the court will direct an acquittal, it being improper to settle such disputes in the form of process affecting men's liberties or reputation. *Harris v. State*, 17 App. 177; *Evans v. State*, 15 App. 31; *McNair v. State*, 14 App. 78; *Smith v. State*, 42 Tex. 444; *Boyd v. State*, 18 App. 339; *Benton v. State*, 21 App. 554, 2 S. W. 885.

If property be taken under the belief at the time on the part of the taker that it belongs to him, it is not theft, although in fact the property does not belong to him. *Britt v. State*, 21 App. 215, 7 S. W. 255; *Owens v. State*, 21 App. 579, 2 S. W. 808; *Donahoe v. State*, 23 App. 457, 5 S. W. 245; *White v. State*, 23 App. 643, 5 S. W. 164; *Misseldine v. State*, 21 App. 335, 17 S. W. 768; *Bray v. State*, 41 Tex. 203; *Johnson v. State*, Id. 608; *Smith v. State*, 42 Tex. 444; *Mullins v. State*, 37 Tex. 337; *Billard v. State*, 30 Tex. 367, 94 Am. Dec. 317.

Taking from landlord without repaying advances.—"Croppers on shares" may commit the offense if they take cotton raised by them from the possession of the landlord without complying with their contract to repay advances before title should pass. *Connell v. State*, 2 App. 422. But if, by the contract, the landlord is not entitled to exclusive possession, it is not theft. *Bell v. State*, 7 App. 25.

Taking from bailee.—Under this article it is immaterial whether the fraudulent taking of his own property from his bailee would operate to charge the bailee; it would be theft. *Taylor v. State*, 7 App. 659; *State v. Stephens*, 32 Tex. 155.

— **Common law.**—At common law the taking of one's goods from a bailee was not larceny unless it operated to charge the bailee with their value, but it is otherwise under this Code. *Taylor v. State*, 7 App. 659; *State v. Stephens*, 32 Tex. 155.

Taking from officer.—The taking of his own property under either clause of this article must be fraudulent to constitute theft. The taking of one's own property from the possession of an officer who has levied on it is not necessarily theft; nor is the taking from an officer any more fraudulent than from an individual. *Billard v. State*, 41 App. 225, 53 S. W. 637.

Art. 1336. [865] Part owner can not commit, unless.—If the person accused of the theft be part owner of the property, the taking does not come within the definition of theft, unless the person from whom it is taken be wholly entitled to the possession at the time.

Taking by part owner in general.—Where the defendant was charged with the theft of property belonging to A, and the proof showed that A had purchased the property from the half brother of the defendant, and that said property was a portion of the estate of a deceased brother of the defendant and in which estate defendant owned an interest, and upon which estate there was no administration, it was held, that as the defendant had never parted with his inherited interest in said estate, and had not authorized the sale of said property, he was a part owner of said property, and his right to the possession thereof was as good as A's, the alleged owner's, and he was therefore not guilty of theft in taking said property. *Fairy v. State*, 18 App. 314.

Delegation of right to take.—Where an owner or joint owner of property is not entitled to the possession of it, he can not delegate to another person the right to take the same, and the consent of such owner or joint owner will not protect the person taking the property from amenability for the theft of it. *Duren v. State*, 15 App. 624.

Croppers on shares.—When "croppers on shares" took from the gin yard of their landlord, cotton raised by them, but baled up and in the landlord's possession, and upon which the landlord had a lien for unpaid advances, it was held to be theft. *Connell v. State*, 2 App. 422.

"Croppers on shares" may commit the offense if they take cotton raised by them from the possession of the landlord without complying with their contract to repay advances before title should pass. *Connell v. State*, 2 App. 422. But if, by the contract, the landlord is not entitled to exclusive possession, it is not theft. *Bell v. State*, 7 App. 25.

A rented land of B, it being the agreement that each should have an equal share of the crops produced when gathered, and that A's part of the crop should be bound for advances made to him by B. Before the crops were gathered or divided, A, without the consent of B, sold a bushel of the corn raised. Held, not to be theft, as under the rental contract B was not entitled to the exclusive possession of the crops. *Bell v. State*, 7 App. 25.

Where cotton in the open boll, alleged to have been stolen, was the joint property of defendant and his lessor under a contract to share the crops, and defendant, after having moved off the place, later returned to finish gathering the crop, a conviction of the defendant for theft could not be sustained, since the lessor could not divest defendant of his ownership and possession by having the cotton picked, and there was no such severance of defendant's relation to the cotton as would make his possession of it unlawful or his sale of it theft. *Gipson v. State*, 57 App. 290, 122 S. W. 557.

Partnership property.—Where the court charged that if the property was partnership property the jury should acquit, it was more liberal than this article required, and the defendant could not complain. *Warren v. State*, 51 App. 99, 100 S. W. 952.

Art. 1337. [866] "Property" defined.—The term "property," as used in relation to the crime of theft, includes money, bank bills, goods of every description commonly sold as merchandise, every kind of agricultural produce, clothing, any writing containing evidence of an existing debt, contract, liability, promise or ownership of property real or personal, any receipts for money, discharge, release, acquittance and printed book or manuscript, and, in general, any and every article commonly known as and called personal property, and all writings of every description; provided such property possesses any ascertainable value.

Cited, *McAdams v. State* (Cr. App.) 172 S. W. 792.

Property defined in general.—See *Ex parte Willke*, 34 Tex. 155; *Harberger v. State*, 4 App. 26, 30 Am. Rep. 157; *Bryant v. State*, 16 App. 144; *Block v. State*, 44 Tex. 620; *Lewis v. State*, 28 App. 140, 12 S. W. 784; *Kimbrough v. State*, 28 App. 367, 13 S. W. 218; *Green v. State*, 28 App. 493, 13 S. W. 784; *Davis v. State*, 32 App. 377, 23 S. W. 794.

Property, to be the subject of theft, must be such as has some specific value capable of being ascertained, and it embraces every species of personal property capable of being taken. *Collins v. State*, 20 App. 197. See, also, succeeding article.

"Property" includes any and every article commonly known and designated as personal property. *Brown v. State*, 23 App. 214, 4 S. W. 588.

Property severed from realty.—Doors, when severed from a house, become personal property and the subject-matter of theft. *Ex parte Willke*, 34 Tex. 155.

The common law rule that the severance and asportation of things annexed to the realty must be distinct and several acts, does not obtain in this state. Thus taking rails from a fence may be theft. *Harberger v. State*, 4 App. 26, 30 Am. Rep. 157.

The moment property is detached from real property it becomes personal property, and the taking thereof is theft. *Alvia v. State*, 42 App. 424, 60 S. W. 551.

Money.—National bank notes, and United States treasury notes, are "money" and "property." *Sansbury v. State*, 4 App. 99. See, also, *Taylor v. State*, 29 App. 466, 16 S. W. 302; *Otero v. State*, 30 App. 450, 17 S. W. 1081; *Menear v. State*, 30 App. 475, 17 S. W. 1082; *Cook v. State*, 4 App. 265.

In a prosecution for theft of \$1, current money of the United States, the court should charge that the evidence must show that the money taken was current money of the United States, in order to convict. *Johnson v. State*, 58 App. 442, 126 S. W. 597.

Bank-bills.—"Bank-bills" include "bank-notes." *Roth v. State*, 10 App. 27.

Checks.—A check drawn but not delivered, and stolen while in the possession of the drawer is "property" under this article. *Worsham v. State*, 56 App. 253, 120 S. W. 440, 441, 18 Ann. Cas. 134.

Deeds.—A deed executed and acknowledged has a value, so as to be the subject of theft. *Roberts v. State*, 61 App. 434, 135 S. W. 144.

Railroad tickets.—See *Patrick v. State*, 50 App. 496, 98 S. W. 840, 123 Am. St. Rep. 861, 14 Ann. Cas. 177.

Application of statute to indictment.—In view of the provision herein that the term "property," in relation to theft, includes every article commonly known and called personal property, it was held that, since paper currency of the United States was "property" within such definition, an indictment, charging theft of \$50 in paper currency of the value of \$50, was not fatally defective for failure to allege that such currency was money, or, if not money, for failure to describe it more specifically. *Diaz v. State*, 62 App. 317, 137 S. W. 377.

Where an indictment charged theft from the person and described the property stolen as a pocketbook containing one \$10 bill and two \$5 bills, all of the aggregate value of \$20, good and lawful money of the United States, the description is sufficient under art. 458, providing that where it is necessary to describe property in an indictment a general description by name, kind, and quality shall be sufficient, and this and article 1350, ante, both of which refer to the crime of theft, and, respectively, provide that the property must have some specific value, and that the term "property" as used in relation to theft includes money, bank bills, and goods of every description as well as agricultural products, and all other personal property, since any theft from the person is a felony and the grade of the offense does not depend upon the amount stolen, and the property alleged to have been stolen was not money, but a pocketbook and its contents, all of which was of the aggregate value of \$20. *Sims v. State*, 64 App. 435, 142 S. W. 572.

Art. 1338. [867] Animals of domestic breed included.—Within the meaning of "personal property" which may be the subject of theft, are included all domesticated animals and birds, when they are proved to be of any specific value.

Dog.—A dog is a subject of theft, and if value sufficient be alleged and proved, punishment may be by confinement in the penitentiary. *Hurley v. State*, 30 App. 333, 17 S. W. 455, 28 Am. St. Rep. 916.

Chicken.—Under this article on a prosecution for theft of a chicken, failure to prove its value necessitates reversal of a judgment of conviction. *Hasley v. State*, 50 App. 45, 94 S. W. 899.

Art. 1339. [868] Particular penalties exclude general punishment.—Theft of certain particular kinds of property, as of a horse, property wrecked, etc., have a punishment affixed differing from the general punishment of the crime of theft; whenever, therefore, the law provides a particular punishment for theft committed in regard to a special kind of property, theft of such property is not included within the law affixing a general penalty to the offense; but in other cases, whenever it is declared to be an offense to steal or otherwise fraudulently appropriate property, the provision is intended to include any and every species of personal property according to its general and broadest signification.

Cited, *Sparks v. State* (Cr. App.) 174 S. W. 351.

Art. 1340. [869] Theft of fifty dollars and over.—Theft of property of the value of fifty dollars or over shall be punished by confinement in the penitentiary not less than two nor more than ten years. [Amend. 1895, p. 15.]

See notes under article 1342, post.

See *Fowler v. State*, 9 App. 149; *Sager v. State*, 11 App. 110; *Johnson v. State*, 18 App. 7.

Indictment.—*Willson's Cr. Forms*, 634.

Art. 1341. [870] Petty theft; how punished.—Theft of property under the value of fifty dollars shall be punished by imprisonment in the county jail not exceeding two years, during which time the prisoner may be put to hard work on the county roads or otherwise, and by fine not exceeding five hundred dollars, or by such imprisonment without fine. [Id.]

See notes under the following article.

Application of statute to bail.—In view of this article, making petty theft punishable by imprisonment in jail not exceeding two years and by fine not exceeding \$500, or by such imprisonment without fine, and of Code Cr. Proc. 1911, art. 646, requiring that the defendant be personally present for trial of an offense punishable by imprisonment in jail, a bail bond in the sum of \$100, conditioned for the defendant's appearance for trial on the charge of the theft of a pair of shoes worth \$4, was not excessive. *Willis v. State* (Cr. App.) 150 S. W. 904.

Indictment.—*Willson's Cr. Forms*, 634.

Art. 1342. [871] General penalties not applicable, when.—The two preceding articles do not apply to theft of property from the person, nor to cases of theft of any particular kind of property where the punishment is specially prescribed.

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| 1. Punishment in general. | 7. Alleging and proving value. |
| 2. Punishment specially prescribed. | 8. ——— Animals. |
| 3. Conviction of misdemeanor in case of felony per se. | 9. ——— Money. |
| 4. ——— Theft from the person. | 10. ——— Property carried to another county. |
| 5. Value as determining degree of offense in general. | 11. ——— Felony per se. |
| 6. Value defined. | 12. Value as question for jury. |
| | 13. Charge of court. |

1. **Punishment in general.**—For decisions as to punishment, see *Irvin v. State*, 25 App. 588, 8 S. W. 681; *Cunningham v. State*, 27 App. 479, 11 S. W. 485; *Berry v. State*, 27 App. 483, 11 S. W. 521; *Brown v. State*, 28 App. 65, 11 S. W. 1022; *Lincecum v. State*, 29 App. 328, 15 S. W. 818, 25 Am. St. Rep. 727.

2. **Punishment specially prescribed.**—The theft of a \$1,200 automobile is punishable under Acts 33d Leg. c. 100, § 1, providing that any one who shall steal any motor vehicle worth over \$35 shall be imprisoned in the county jail for not less than six months nor more than one year, and not under the statute relating to the theft of property worth over \$50, by which a penitentiary sentence is authorized in view of article 1342, providing that the articles of the Code prescribing the penalty for theft of property worth over \$50 do not apply to the theft of any particular property where the punishment is specially prescribed. *Sparks v. State* (Cr. App.) 174 S. W. 351.

3. **Conviction of misdemeanor in case of felony per se.**—If the theft be a felony per se the accused cannot be convicted of a misdemeanor theft. *Roberts v. State*, 33 App. 83, 24 S. W. 895.

4. ——— **Theft from the person.**—Where indictment charges theft from the person only the defendant can not be convicted of petty theft. *Roberts v. State*, 33 App. 83, 24 S. W. 895.

5. **Value as determining degree of offense in general.**—See *Clark v. State*, 26 App. 486, 9 S. W. 767; *White v. State*, 33 App. 94, 25 S. W. 290.

Where the accused, under the pretense of making change for a twenty dollar bill of the value of twenty dollars, after getting said bill in his possession stated to the person who had handed it to him that he could not change it, and, pretending to return the said bill, fraudulently returns instead thereof a one dollar bill, it was held, that he had taken property of the value of twenty dollars and was guilty of felony. *Walters v. State*, 17 App. 226, 50 Am. Rep. 128.

Felony theft is for theft of property over the value of twenty dollars, and the penalty is from two to ten years in the penitentiary. *Cunningham v. State*, 27 App. 479, 11 S. W. 485; *Berry v. State*, 27 App. 483, 11 S. W. 521; *Stallings v. State*, 29 App. 220, 15 S. W. 716; *Spradling v. State*, 30 App. 595, 17 S. W. 1117.

A dog is a domesticated animal and, therefore, the subject of theft. To steal a dog of over twenty dollars in value is felony. *Williamson v. State*, 30 App. 330, 17 S. W. 722.

An employé, having dominion and custody of certain of his employers' property, without their knowledge or consent, on January 20, sold twenty sacks of cotton-seed meal for \$1 per sack, which he delivered in three successive trips from the place of storage to the place of delivery. The defense was, that each sale was a separate transaction running through a week. The court charged the jury that before they could convict of a felony they must be satisfied beyond a reasonable doubt that defendant took during one day a sufficient amount of cotton-seed meal to be of the reasonable value of \$20 or over. Held error. The felonious character of a theft can not be fixed by the amount which may be stolen in one day. The converse is the general rule, that property taken at one time and one place constitutes one transaction and one offense, and no aggregation of distinct and separate misdemeanors will make a felony. But see the opinion for exceptions to the rule, to which category this case does not belong. *Cody v. State*, 31 App. 183, 20 S. W. 398.

Where the value of lard taken from a railroad car and thrown on the right of way was more than \$50, that the lard loaded by defendant in his wagon shortly thereafter, at the time he was arrested, was less than \$50 did not raise the issue of misdemeanor, since, if he was not connected with the original taking as principal or otherwise, his going to the place and loading the lard in his wagon would not render him guilty of theft at all, and, if he was connected with the original taking, the degree of the offense was determined by the value of all the lard taken from the car. *Roman v. State*, 64 App. 515, 142 S. W. 912.

6. **Value defined.**—"Value" is the market value of the article if it has such value, and if not, the amount it would cost to replace it. *Martinez v. State*, 16 App. 122; *Cannon v. State*, 18 App. 172; *Saddler v. State*, 20 App. 195; *Rollins v. State*, 32 App. 567, 25 S. W. 125.

And see *Clark v. State*, 23 App. 612, 5 S. W. 178, to the effect that the allegation of value has reference to the market value in the county of the prosecution.

7. **Alleging and proving value.**—See notes on evidence under article 1329, ante. The value of the property stolen must be alleged, except where the theft of particular kinds of property is declared an offense, as in the case of certain animals, and also except in the case of theft from the person. It is only in cases where the character of the offense and its punishment are made dependent upon the value of the property that it is necessary to allege value. *Shaw v. State*, 23 App. 493, 5 S. W. 317; *Collins v. State*, 20 App. 197; *Hall v. State*, 15 App. 40; *Pittman v. State*, 14 App. 576; *Cady v. State*, 4 App. 238; *Radford v. State*, 35 Tex. 15; *Boyle v. State*, 37 Tex. 359; *Sheppard v. State*, 1 App. 522, 28 Am. Rep. 422; *Lunn v. State*, 44 Tex. 85; *Cook v. State*, 2 App. 290; *Lopez v. State*, 20 Tex. 780; *Johnson v. State*, 29 Tex. 492. An indictment for the theft of a watch left with a jeweler to be repaired, need only allege the value of the watch, not the value of the repairs. *State v. Stephens*, 32 Tex. 155. An indictment charging the

theft of several articles may allege an aggregate value to the whole; but if the value affects the penalty it is better to allege the value of each article, and thus provide against a possible failure to prove the theft of some of them. *Meyer v. State*, 4 App. 121; *Doyle v. State*, Id. 253; *Ware v. State*, 2 App. 547; *Thompson v. State*, 43 Tex. 270. The allegation of value has reference to the market value of the property in the county of the prosecution. *Clark v. State*, 23 App. 612, 5 S. W. 173; *Saddler v. State*, 20 App. 195; *Martinez v. State*, 16 App. 122. See, also, *Sands v. State*, 30 App. 578, 13 S. W. 86; *Watts v. State*, 6 App. 263.

In cases where the character of the offense and its punishment are made dependent upon the value of the property, such value must be alleged. To be the subject of theft, unless it be a particular kind of property, the taking of which is theft per se, the stolen property must have some specific value. *Ellison v. State*, 25 App. 328, 8 S. W. 462.

The property stolen must have some specific value capable of being ascertained, but it is only in cases where the character of the offense and its punishment is made dependent upon the value of the property stolen that value need be alleged or proved. *Green v. State*, 28 App. 493, 13 S. W. 784.

Value not being an essential element of theft from the person, it need not be either alleged or proved. *Green v. State*, 28 App. 493, 13 S. W. 784.

To sustain a felony conviction the proof must show that the value of the property taken was twenty dollars or over. *Langford v. State*, 8 Tex. 115; *Simpson v. State*, 10 App. 681; *Pittman v. State*, 14 App. 576; *Hall v. State*, 15 App. 40; *Moore v. State*, 17 App. 176.

Where it is necessary to allege the value of property, it is also necessary to prove it. *Radford v. State*, 35 Tex. 15; *Cady v. State*, 4 App. 238; *Cook v. State*, 2 App. 290; *Simpson v. State*, 10 App. 681; *Pittman v. State*, 14 App. 576; *Hall v. State*, 15 App. 40; *Lunn v. State*, 44 Tex. 85.

On the trial of one jointly charged with others, it is only necessary to prove the value of the property taken by all of the parties committing the theft, without showing the value of the property taken by each one. And if the value of the property taken by all the thieves acting together in the theft amounts to twenty dollars, they are each guilty of a felony. *Clay v. State*, 40 Tex. 67.

Where an indictment charges the theft of several different articles and alleges the aggregate value of the property, but does not allege the separate value of the articles, the proof must establish the theft of each article, or the conviction will not be sustained. *Thompson v. State*, 43 Tex. 268; *Meyer v. State*, 4 App. 121; *Doyle v. State*, Id. 253; *Ware v. State*, 2 App. 547.

When the property taken was charged to be two hundred pounds of cotton of the aggregate value of six dollars, and the proof showed the theft of seventy-five pounds of the aggregate value of three dollars, it was held that this variance was immaterial, as the charge and conviction were for a misdemeanor. *Duren v. State*, 15 App. 624.

And the proof must show that property of the value of twenty dollars or over was taken at one time. *Lacey v. State*, 22 App. 657, 3 S. W. 343.

Where different articles are alleged to have been stolen, and the values are fixed of each separate article, the evidence must show the taking of articles of the value of \$50 or over at one time to sustain a conviction for felonious theft, under article 1340, making the theft of property of the value of \$50 or over punishable by imprisonment in the penitentiary. *Johnson v. State*, 57 App. 308, 122 S. W. 877.

A complaint and information, charging accused with stealing money of the value exceeding \$1, was not insufficient to support a conviction of petty theft, as failing to show that the offense was not a felony, because of the failure to allege that the money was of a value of less than \$50, since the complaint did not charge a felony in the absence of an allegation that the money was of the value of \$50, or over, and it could not have misled accused, especially where he made no objection in the court below. *McAdams v. State* (Cr. App.) 172 S. W. 792.

8. — **Animals.**—The value of an animal stolen need not be alleged or proved. *Lopez v. State*, 20 Tex. 781, *Johnson v. State*, 29 Tex. 492; *Davis v. State*, 40 Tex. 134.

The punishment formerly prescribed by article 1355 depending upon value, it was held that the indictment must allege value, and the proof must establish it. *Blunt v. State*, 9 App. 234; *Lunn v. State*, 44 Tex. 85; *Hall v. State*, 15 App. 40. And see *Whitsett v. State*, 9 App. 198; *Hargrove v. State*, 33 App. 165, 25 S. W. 967; *Spradling v. State*, 30 App. 595, 17 S. W. 1117; *Cannon v. State*, 18 App. 172.

If the property be hogs their value must be proved. *Hall v. State*, 15 App. 40; *Lunn v. State*, 44 Tex. 85; *Pittman v. State*, 14 App. 576. The above decisions were rendered under the former law which did not punish hog theft as a felony unless the value was \$20 or over.

9. — **Money.**—Where money was described as "ten dollars, lawful money," the description was held to be sufficient, and that it was unnecessary to further allege the value of the money. *Warren v. State*, 29 Tex. 369. But it was afterward held that the value of the money must be alleged. *Boyle v. State*, 37 Tex. 359, and such is the rule at present.

Where the property stolen is money its value must be proved. *Simpson v. State*, 10 App. 681; *Cook v. State*, 2 App. 290; *Lavarre v. State*, 1 App. 685; *Martinez v. State*, 41 Tex. 164; *Boyle v. State*, 37 Tex. 360. It was formerly held otherwise. *Warren v. State*, 29 Tex. 369.

10. — **Property carried to another county.**—Prosecution being in the county into which the stolen property was carried, its value in that county and not in the county of the original taking must be proved, it being necessary to show a complete offense in the county of the forum. *Clark v. State*, 23 App. 612, 5 S. W. 178, citing *Roth v. State*, 10 App. 27, and *Gage v. State*, 22 App. 123, 2 S. W. 638, and for review of rules applicable. *Martinez v. State*, 16 App. 122; *Saddler v. State*, 20 App. 195

11. — **Felony per se.**—Value need not be either alleged or proved in theft cases made by statutes felony per se. Art. 1339, ante.

In charging theft from the person, it is not necessary to allege the value of the thing taken. *Campbell v. State*, 61 App. 504, 135 S. W. 548; *Watts v. State* (Cr. App.) 171 S. W. 202.

Where the theft is from the person, it is a felony per se, and the value of the property taken need not be alleged or proved. *Shaw v. State*, 23 App. 493, 5 S. W. 317. See, also, *Bennett v. State*, 16 App. 236; *Harris v. State*, 17 App. 132; *Green v. State*, 28 App. 493, 13 S. W. 784.

Not necessary to allege value in thefts that are made felonies per se, that is, theft from the person, or of a horse, ass, mule, cattle or hog. In other thefts, value must be alleged and proved. *Ellison v. State*, 25 App. 328, 8 S. W. 462; *White v. State*, 33 App. 94, 25 S. W. 290; *Lunn v. State*, 44 Tex. 85; *Johnson v. State*, 29 Tex. 492; *Lopez v. State*, 20 Tex. 780.

Whenever punishment is affixed by law to the theft of a particular kind of property, it is unnecessary to either allege or prove the value thereof, the offense being made per se a felony; but with respect to all other classes of property value must be both alleged and proved, as the value determines the grade of the offense and the punishment. *Johnson v. State*, 57 App. 308, 122 S. W. 877.

12. **Value as question for jury.**—See notes under article 1329, ante.

13. **Charge of court.**—See notes under article 1329, ante.

Art. 1343. [872] Voluntary return of stolen property.—If property, taken under such circumstances as to constitute theft, be voluntarily returned within a reasonable time, and before any prosecution is commenced therefor, the punishment shall be by fine not exceeding one thousand dollars. [Act Feb. 12, 1858, p. 181.]

Voluntary return in general.—See *Dalton v. State*, 50 App. 523, 98 S. W. 855; *Taylor v. State* (Cr. App.) 75 S. W. 35; *Ware v. State*, 47 App. 541, 84 S. W. 1065; *Schultz v. State*, 30 App. 94, 16 S. W. 756; *Bennett v. State*, 17 App. 143; *Ellison v. State*, 25 App. 328, 8 S. W. 462; *Anderson v. State*, 25 App. 593, 9 S. W. 43; *Bennett v. State*, 28 App. 342, 13 S. W. 142; *Sands v. State*, 30 App. 579, 18 S. W. 86; *Boze v. State*, 31 App. 347, 20 S. W. 752; *Moxie and Brackens v. State*, 54 App. 529, 114 S. W. 375; *Purcell v. State*, 29 App. 1, 13 S. W. 993; *Hyatt v. State*, 32 App. 580, 25 S. W. 291.

A voluntary return of stolen property, within the meaning of the preceding article, must be made under the following circumstances: 1. The return must be voluntary, that is, willingly made; not made under the influence of compulsion, fear of punishment, or threats. If, however, it be made under the influence of repentance for the crime, and with the desire to make reparation to the injured owner, it will be voluntary, although it may also be influenced by fear of punishment. 2. It must be made within a reasonable time after the theft, and before prosecution for the theft has been commenced. 3. It must be an actual, not merely a constructive return of the property into possession of the owner. 4. The property returned must be the identical property taken, and all of it unchanged. *Bird v. State*, 16 App. 523; *Owen v. State*, 44 Tex. 248; *Stephenson v. State*, 4 App. 591; *Trafton v. State*, 5 App. 480; *Shultz v. State*, Id. 390; *Horseman v. State*, 43 Tex. 353; *Moore v. State*, 8 App. 496; *Allen v. State*, 12 App. 190; *Wheeler v. State*, 15 App. 607; *Bennett v. State*, 17 App. 143; *Dupree v. State*, Id. 591; *Schultz v. State*, 20 App. 315; *Stapp v. State*, 31 App. 349, 20 S. W. 753.

Where the stolen animal had been conveyed thirty miles, and was returned back ten miles of that distance, it was held to be not a return of the property within the meaning of the preceding article. Turning an animal loose upon the range is not a return of it. *Moore v. State*, 8 App. 496.

Unless possession thereof had been obtained with the owner's consent. *McCracken v. State*, 6 App. 507; *Brill v. State*, 1 App. 572.

A return of stolen animals on the evening of the day on which they were stolen, is a return of the property "within a reasonable time." *Ingle v. State*, 1 App. 307.

When, as in this case, the evidence on a trial for theft tends to show a voluntary return of the stolen property by the accused to the owner within a reasonable time, and before prosecution has been instituted, it devolves upon the trial court to charge the jury upon the law applicable to such defense. See the statement of the case in *Guest v. State*, 24 App. 235, 5 S. W. 840, for evidence held to raise the issue of a voluntary return of the alleged stolen property, within the statutory meaning of that defense. *Guest v. State*, 24 App. 530, 7 S. W. 242. And see *Kellar v. State* (Cr. App.) 176 S. W. 723.

And note this case—theft of lost property—on "reasonable time" as applied to voluntary return, and the intent in retaining possession of lost property found. *Stapp v. State*, 31 App. 349, 20 S. W. 753.

Return on demand.—Return of the stolen property upon the demand of the owner is not a voluntary return. *Harris v. State*, 29 App. 101, 14 S. W. 390, 25 Am. St. Rep. 717.

Payment for property.—Payment for the property is not a voluntary return. *Shultz v. State*, 5 App. 390; *Trafton v. State*, Id. 480.

Return after accused found in possession or taken in act.—A thief caught in the possession of the stolen property cannot claim the benefit of the preceding article by offering to give up the stolen property or pay for it. *Grant v. State*, 2 App. 164.

The offer of the thief to return the property comes too late after he has been caught in possession. *Harris v. State*, 29 App. 101, 14 S. W. 390, 25 Am. St. Rep. 717; *Boze v. State*, 31 App. 347, 20 S. W. 752.

When defendant was found in possession of the hogs recently marked, he offered to return them to the owner; held, this was not a voluntary return. *Blount v. State*, 34 App. 640, 31 S. W. 652.

Where defendant knows that stolen property has been discovered in his possession, he cannot, by thereafter returning the same, reduce his punishment. *Elkins v. State*, 35 App. 206, 32 S. W. 1046.

When the proof shows that accused was detected in the theft it is too late to make a voluntary return, but the evidence must show that he knew he was detected. *Elkins v. State*, 35 App. 206, 32 S. W. 1047.

To constitute "voluntary return" of property, it must be willingly restored to the owner within a reasonable time, the motive inducing its return being immaterial, but a return after accused is found in possession or taken in the act, or after prosecution is instituted, is not voluntary. *Petty v. State*, 59 App. 586, 129 S. W. 615.

In a prosecution for misdemeanor theft, no charge on the voluntary return of stolen property is necessary, where the evidence showed that the property was not returned until after prosecution was begun. *Stubbs v. State*, 71 App. 390, 160 S. W. 87.

Art. 1344. [873] "Steal" or "stolen" include, what.—The words "steal" or "stolen," when used in this code in reference to the acquisition of property, include property acquired by theft.

Cited, *Sparks v. State* (Cr. App.) 174 S. W. 351.

Synonymous terms.—"Steal" and "stolen" are synonymous with "theft." *Carr v. State*, 9 App. 463; *Sands v. State*, 30 App. 578, 18 S. W. 86.

Application of statute to recognizance and indictment.—Recognizance for offense under article 1349, recited that the defendant stands charged with "receiving and concealing stolen property of the value of ten dollars," etc. It was objected to the recognizance that it was insufficient and invalid because it used the word "stolen" instead of the statutory words "acquired in such manner that the acquisition comes within the meaning of the term 'theft.'" Held, that under our Code the word "stolen" was sufficient in the recognizance, though it would not be in an indictment. *Sands v. State*, 30 App. 579, 18 S. W. 86.

Art. 1345. [874] Stealing agricultural products.—The stealing or feloniously taking any growing, standing or ungathered Indian corn, wheat, cotton, potatoes, rice or other agricultural product, shall hereafter be deemed theft; and any person who shall hereafter steal or feloniously take, pluck, sever or carry away any Indian corn, or wheat, cotton, potatoes, rice or other agricultural product, growing, standing or remaining ungathered in any plantation, field or other ground, shall, on conviction thereof, be deemed guilty of theft, and suffer punishment as in other cases of theft.

Fraudulent intent.—See notes under article 1329, ante.

Indictment.—Willson's Cr. Forms, 635.

Evidence.—Accused was charged in an information with unlawfully and fraudulently stealing from the possession of A, one bushel of corn, of the value of 40 cents, and that the offense was committed in a county named, upon a date specified. The evidence showed that accused sold two bushels of corn for 50 cents a bushel, that the corn at the time was in the field and ungathered, that later the corn was gathered by the purchaser, that the corn belonged to another person than accused, and that the latter was not present when the corn was gathered. Held, that the evidence did not support the indictment. *Carson v. State*, 57 App. 30, 121 S. W. 860.

Charge of court.—On prosecution for stealing corn under article 1345, the court should charge the jury that they must believe that defendant took the corn either fraudulently or feloniously. *McKinney v. State* (Cr. App.) 28 S. W. 816.

Art. 1346. [875] Stealing record books or filed papers.—If any person shall take and carry away any record book or filed paper from any clerk's office, public office, or other place where the same may be lawfully deposited, or from the lawful possession of any person whatsoever, with intent to destroy, suppress, alter or conceal, or in any wise dispose of the same, so as to prevent the lawful use of such record book or filed paper, he shall be deemed guilty of theft, and punished by imprisonment in the penitentiary not less than three nor more than seven years. [Act Feb. 12, 1878, p. 181.]

Indictment.—Willson's Cr. Forms, 636.

See *Witte v. State*, 21 App. 88, 17 S. W. 723.

Art. 1347. [876] Stealing from a wreck.—If any person, with intent to deprive the true owner of the value thereof, shall appropriate to his own use, or dispose of to his own benefit, any property taken or driven on shore from any vessel wrecked, stranded or burn-

ed on the seashore, or on any river, bay or harbor of the state, he shall be punished by confinement in the penitentiary not less than two nor more than five years.

Indictment.—Willson's Cr. Forms, 637.

Art. 1348. [877] Conversion by a bailee is theft.—Any person having possession of personal property of another by virtue of a contract of hiring or borrowing, or other bailment, who shall, without the consent of the owner, fraudulently convert such property to his own use with intent to deprive the owner of the value of the same, shall be guilty of theft, and shall be punished as prescribed in the Penal Code for theft of like property. [Act March 8, 1887, p. 14.]

See article 1332, and notes.

See *Rumbo v. State*, 28 App. 30, 11 S. W. 680; *Nichols v. State*, 28 App. 105, 12 S. W. 500; *Williams v. State*, 30 App. 153, 16 S. W. 760; *Frank v. State*, 30 App. 381, 17 S. W. 936; *Leonard v. State*, 56 App. 307, 120 S. W. 183; *Cannon v. State*, 38 App. 322, 42 S. W. 981; *Von Senden v. State* (Cr. App.) 45 S. W. 725.

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| 1. Nature and elements of offense in general. | 6. Indictment and information. |
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1. **Nature and elements of offense in general.**—The fraudulent intent need not exist at the time of obtaining possession of the property. It is the fraudulent conversion, and not the fraudulent taking that forms the gist of this offense. *Taylor v. State*, 25 App. 96, 7 S. W. 861.

The proof shows that the accused borrowed a horse from the owner in the Indian Territory and rode it into Cooke county, Texas, where, without the consent of the owner, and with the fraudulent intent to convert and appropriate the said property to his own use, he sold it. Held, that such facts constitute the crime of theft as defined by this article. *Brooks v. State*, 26 App. 184, 9 S. W. 562. See, also, *Harris v. State*, 29 App. 101, 14 S. W. 390, 25 Am. St. Rep. 717.

The constituent elements of this offense are: 1, possession by virtue of bailment; 2, fraudulent conversion of same by bailee to his own use without consent; 3, conversion by the bailee with intent to deprive the owner of the value, etc. "Intent to appropriate" is not an essential ingredient. *Purcell v. State*, 29 App. 1, 13 S. W. 993.

The fact that a bank by mistake, paid defendant \$500 more than his check called for, which he converted to his own use, did not justify conviction under this article. *Fulcher v. State*, 32 App. 621, 25 S. W. 625.

An agreement held to be a contract of hiring within the statute and not a gratuitous loan. *Neel v. State*, 33 App. 408, 26 S. W. 726.

To bring accused within the provisions of the statute he must be a party to the contract of bailment. *Calkins v. State*, 34 App. 251, 29 S. W. 1081.

Under this article, the state is not bound to prove that accused resorted to false pretenses, or entertained at the time he acquired possession, the intention to deprive the owner of the use, etc. He may have obtained the property in good faith, without intending to appropriate it, or to deprive the owner of its value, but having acquired possession by borrowing, a subsequent appropriation, such as is described in the statute, makes him guilty. *Abbey v. State*, 35 App. 590, 34 S. W. 930.

A conversion of property bailed constitutes theft under this article. *Malz v. State*, 36 App. 447, 34 S. W. 267, 37 S. W. 758.

Actual sale is not necessary to a conversion, and theft by bailee and conversion can be made before termination of bailment. See *Steadham v. State*, 40 App. 43, 48 S. W. 177; *Elton v. State*, 40 App. 342, 50 S. W. 379, 51 S. W. 245.

Under the statute it does not matter whether or not the party intended to convert the property at the time he acquired possession; it does not matter whether or not he resorted to any false pretenses or representations; and if he acquired possession by borrowing, hiring or as a bailee, and did convert, he is guilty. *Lopez v. State*, 37 App. 649, 40 S. W. 972.

A fraudulent conversion is an essential element of the offense. *Smith v. State*, 45 App. 251, 76 S. W. 434.

One is not guilty under this article who keeps a gun, which he has repaired, for the charges. *Simpson v. State* (Cr. App.) 96 S. W. 925.

One is guilty under this article who appropriates to his own use property which he borrows from one who is not the owner but who is in lawful possession of the same at the time of borrowing and ownership can be alleged in the temporary possession of the property. *Piper v. State*, 56 App. 121, 119 S. W. 869.

Where the tenant is bound under his lease to pick the cotton crop, have it ginned and sold, and deposit in a bank a certain per cent. of the proceeds as rent, and he retains the entire money, he is not guilty of theft as a bailee, because the landlord has neither delivered to him this specific property, nor has he such an ownership that the tenant by converting the money is guilty of theft. *Northcutt v. State*, 60 App. 259, 131 S. W. 1128, 32 L. R. A. (N. S.) 822.

Where the purchaser of land moved into possession, and the seller left certain harvester canvases on the land, because not ready to move them, and there was

no false pretext used by the purchaser to obtain possession of them, his subsequent theft of these canvases is the crime defined by this article, making a fraudulent conversion by bailee theft, and in a prosecution for such conversion the defendant should be tried under the bailment statute, and charges presenting the issue of theft by a bailee should be given. *Whitaker v. State*, 62 App. 36, 136 S. W. 1072.

If the owners of mules authorized accused to sell them, he would not be guilty of theft, even though he failed to apply the proceeds on a note executed by him and guaranteed by them as agreed. *Thompson v. State* (Cr. App.) 150 S. W. 181.

Where defendant, engaged to be married to prosecuting witness, procured diamond rings from her on pretense of having them repaired at his expense and then pawned them, there being no question of agency, he could be convicted of theft by bailee. *Creale v. State*, 71 App. 9, 158 S. W. 268.

Where defendant was in possession of a cow belonging to another under an agreement to borrow the cow, and fraudulently converted it to his own use without the owner's consent and with intent to deprive the owner of the value thereof, there was a conversion. *Barrow v. State*, 71 App. 549, 160 S. W. 458.

A bailee converting the money of his bailor to his own use was guilty of the theft thereof, though the money was delivered to him for an illegal purpose. *Himmelfarb v. State* (Cr. App.) 174 S. W. 586.

Under an indictment charging theft by a bailee of money received for the purpose of buying barroom fixtures and whisky, it was sufficient to sustain a conviction that the money was received for the purpose of buying whisky alone. *Himmelfarb v. State* (Cr. App.) 174 S. W. 586.

2. "Bailment" defined.—The word "bailment" has a well understood meaning and need not further be defined. *Malz v. State*, 36 App. 452, 34 S. W. 267, 37 S. W. 748.

A bailment is a delivery of personal property to another for some purpose, express or implied, that such purpose shall be carried out. *Fulcher v. State*, 32 App. 621, 25 S. W. 625. And see *Neel v. State*, 33 App. 408, 26 S. W. 726; *Malz v. State*, 36 App. 447, 34 S. W. 267, 37 S. W. 748; *Abbey v. State*, 35 App. 539, 34 S. W. 930; *Taylor v. State*, 25 App. 96, 7 S. W. 861; *Jaimes v. State*, 32 App. 473, 24 S. W. 297.

An essential of a bailment is the delivery of property by the bailor to the bailee for a particular purpose, and without such a delivery there can be no bailment, and it is also requisite that title to the property shall remain in the bailor. *Northcutt v. State*, 60 App. 259, 131 S. W. 1128, 32 L. R. A. (N. S.) 822.

The Penal Code defines "bailment" as a contract of borrowing or hire. "A bailment is a delivery of goods for some purpose on a contract, express or implied, that after the purpose has been fulfilled, they should be redelivered to the bailor, or afterwards dealt with according to his directions or kept until he reclaims them." *Northcutt v. State*, 60 App. 259, 131 S. W. 1128, 32 L. R. A. (N. S.) 822.

3. Nature of particular bailment.—Where the owner of a piano stored it in defendant's house for the owner's benefit, in consideration of which defendant's child was to have the use thereof for practice, the agreement constituted a bailment of hiring, as distinguished from a bailment of borrowing. *Height v. State* (Cr. App.) 150 S. W. 908.

4. Compared with and distinguished from other offenses.—See *Fulcher v. State*, 32 App. 621, 25 S. W. 625.

The constituent elements of the species of theft defined by this article, are essentially different from those of theft in general, and from theft by means of false pretext, inasmuch as, to constitute the theft denounced by this article, the fraudulent intent refers to and must concur with the act of conversion, and need not exist at the time of obtaining the possession of the property. Proof, therefore, which would support a conviction for the theft defined by this article, would not authorize a conviction for theft under an indictment for general theft; and inasmuch as the indictment was in general form, the charge of the court upon the theft defined by this article was unwarranted and erroneous. See the opinion in extenso for an elucidation of the principle. *Taylor v. State*, 25 App. 96, 7 S. W. 861.

Conviction cannot be sustained under an indictment charging theft in general terms—and vice versa. *Torres v. State*, 33 App. 125, 25 S. W. 128; *Williams v. State*, 30 App. 153, 16 S. W. 760.

A conviction for theft of a horse, on a general indictment for theft, is not supported by evidence that defendant borrowed the horse and thereafter converted him to his own use. *Mangum v. State*, 38 App. 231, 42 S. W. 291.

Although one may be guilty of theft under this article, that is no reason why he may not be prosecuted for embezzlement of property acquired by bailment under article 1416 in a proper case. *Wilson v. State*, 47 App. 159, 82 S. W. 652.

The fact that a prosecution may be maintained under this article is no reason why it might not also be brought under article 1332, if the facts bring it within the latter article. *Lewis v. State*, 48 App. 309, 87 S. W. 831.

Under this article the fraudulent intent arises after obtaining possession of the goods, while under article 1332 such intent must exist at the time of gaining possession of the goods and the representations must be false. Appropriation is necessary under both articles. *Price v. State*, 49 App. 131, 91 S. W. 571.

Where the charge is embezzlement under article 1416, it is error for the court to fail to charge on this crime, and to charge on conversion of property by bailee under this article. *Maulding v. State*, 53 App. 220, 108 S. W. 1182.

In a conversion under bailment, the fraudulent matters occur after obtaining lawful possession of the property. If the fraudulent purpose existed at the time of getting the property, and false pretenses were employed to get possession, with the then existing purpose of appropriating the property, and appropriation did occur, it would be "theft" under the general statute, and not under the statute with reference to conversion under a contract of hiring or borrowing. *Pickrell v. State*, 60 App. 572, 132 S. W. 938.

The word "bailee" as used in the embezzlement statute, which punishes the fraudulent conversion by a bailee, does not include all bailments, but only those

for the sole benefit of the bailor, where there is a fiduciary relation between the parties; hence as there must be a fraudulent taking to constitute the crime of theft denounced by article 1329, the conversion of property by a bailee, where the bailment is for mutual benefit, falls within the purview of article 1348, making such conversion an offense, being neither theft nor embezzlement. *Johnson v. State*, 71 App. 206, 159 S. W. 849.

5. **Venue.**—See notes under C. C. P. art. 258.

6. **Indictment and information.**—See C. C. P. arts. 451 et seq., and notes thereunder.

Willson's Cr. Forms, 178, 637a.

See *Collins v. State*, 56 App. 385, 118 S. W. 1038.

Not necessary under this article to allege the particular character of the bailment which makes the conversion theft. *McCarty v. State*, 45 App. 510, 78 S. W. 506.

Where the allegations are that the contract of hiring was with an agent of the owner, the indictment should allege that the person who made the contract with the defendant was the agent of the owner in positive terms, and should also allege that the conversion was without the consent of the agent as well as without the consent of the owner. *McCarty v. State*, 45 App. 510, 78 S. W. 506.

As the intent to appropriate the property is not expressly made an element of this offense as in the case of general theft, it is not necessary to allege it as specifically, nor in the same manner, as is required in general theft. *Purcell v. State*, 29 App. 1, 13 S. W. 993.

When indictment charges theft by a contract of bailment, it must allege that the accused was a party to the contract. *Calkins v. State*, 34 App. 251, 29 S. W. 1081. But a theft of pledged property may be charged under general indictment. *Smith v. State (Cr. App.)* 29 S. W. 785.

An indictment under this article alleging defendant at a certain time had possession of two mules, the property of W. and the possession thereof acquired by defendant by virtue of a contract of hiring and borrowing made with W. and defendant did then, without consent of W., fraudulently convert the mules to his own use, with intent to deprive the owner of their value, is insufficient, because not alleging defendant was bailee of W. or hired or borrowed the mules of W. by virtue of a contract between W. and himself. *Smith v. State*, 38 App. 232, 42 S. W. 302.

An averment that defendant had possession of the property in question, which he acquired by virtue of a contract of hiring and borrowing made with a third person named, sufficiently alleges a contract made with the third person. *Elton v. State*, 40 App. 339, 50 S. W. 379, 51 S. W. 245, overruling *Smith v. State*, 38 App. 232, 42 S. W. 302.

Indictment held sufficient under this article. *Young v. State*, 45 App. 247, 75 S. W. 798.

Ownership can be alleged in the temporary possession of the property. *Piper v. State*, 56 App. 121, 119 S. W. 869.

An indictment for theft of a horse by conversion, alleging that the horse belonged to R., that accused acquired possession of it under a contract of hiring with T. thereunto duly authorized by R., that T. was then and there the agent, clerk, and employé of R., etc., sufficiently alleged T.'s authority to make the contract of hiring. *Evans v. State*, 70 App. 79, 155 S. W. 531.

7. — **Description of property.**—See notes under C. C. P. art. 458.

8. **Evidence.**—See C. C. P. arts. 783 et seq., and notes thereunder.

See *Taylor v. State*, 50 App. 377, 97 S. W. 473; *Piper v. State*, 56 App. 121, 119 S. W. 869; *Collins v. State*, 56 App. 385, 118 S. W. 1038.

Theft by bailee and conversion can be proved by circumstances. *Steadham v. State*, 40 App. 43, 48 S. W. 177; *Elton v. State*, 40 App. 342, 50 S. W. 379, 51 S. W. 245.

The proof must show the accused a party to the bailment. *Calkins v. State*, 34 App. 251, 29 S. W. 1081.

Conversion under this article can be proved by circumstances as well as by direct and positive testimony. *Jeffreys v. State*, 51 App. 566, 103 S. W. 887.

In a trial of a bailee for theft of a horse placed in his charge, evidence that defendant borrowed money on the horse was not of itself proof of a conversion of the horse; defendant retaining possession thereof, and the owner being in a position to at any time reclaim it. *McAlister v. State*, 59 App. 237, 128 S. W. 123.

Evidence in a prosecution for theft as a bailee held not to show a bailment for hire, but to show a loan, if anything. *Thompson v. State (Cr. App.)* 150 S. W. 181.

In a prosecution for theft of a piano as bailee, evidence held to warrant a finding that defendant fraudulently converted the piano to his own use in D. S. county, and removed the piano without the owner's knowledge to New Mexico. *Height v. State (Cr. App.)* 150 S. W. 908.

Where, in a prosecution for fraudulent conversion of a horse alleged to have been obtained under a contract of borrowing, defendant claimed that he had purchased the horse from prosecutor and it appeared that he had possession thereof for several months before he sold it and before prosecutor sought to have him arrested, evidence that prosecutor had not inquired concerning defendant or the horse or asked the sheriff to investigate the matter and find accused was admissible. *Gamboia v. State (Cr. App.)* 155 S. W. 249.

In a prosecution for theft of diamond rings which defendant pawned, testimony of the prosecuting witness that after she had refused to let defendant have her rings and defendant took them from her fingers, stating that he would have them repaired and return them, and that they went that evening to a picture show, is sufficient evidence on which to base a charge as to theft by bailee. *Creale v. State*, 71 App. 9, 158 S. W. 268.

On a trial for theft by a bailee, the prosecuting witness was properly permitted to testify that he never consented that accused might convert the money turned over to him to his own use. *Himmelfarb v. State* (Cr. App.) 174 S. W. 586.

On a trial for theft by a bailee, where it appeared that accused obtained money from a negro for the ostensible purpose of purchasing fixtures and whisky and procuring a license for a saloon which the negro was to conduct, and there was evidence that accused told the negro that he had applied to C. for a license, and that the negro then inquired of C. whether such application had been made, it was not error to permit C. to testify that accused never applied for a license, and that a negro inquired of him whether accused had so applied, though he could not identify the prosecuting witness as the negro who made the inquiry. *Himmelfarb v. State* (Cr. App.) 174 S. W. 586.

On a trial for theft by a bailee, where it appeared that accused used the money turned over to him by the prosecuting witness for another purpose in purchasing a car load of pool tables, the bill of lading for such pool tables was properly admitted in evidence. *Himmelfarb v. State* (Cr. App.) 174 S. W. 586.

Where accused agreed to rent a building to the prosecuting witness for a saloon, and at different times received money from him for the ostensible purpose of purchasing fixtures and liquors and procuring a license, evidence as to the entire transaction was admissible on a trial for theft of the money received for the purpose of buying whisky. *Himmelfarb v. State* (Cr. App.) 174 S. W. 586.

9. — Other offenses.—See notes under C. C. P. art. 783.

10. Question for jury.—Facts constituting fraudulent conversion as question for jury. *Jaimes v. State*, 32 App. 473, 24 S. W. 297.

11. Charge of court.—See C. C. P. arts. 735 et seq., and notes thereunder.

See *Taylor v. State*, 50 App. 377, 97 S. W. 473; *Smith v. State*, 45 App. 251, 76 S. W. 434.

Where the indictment alleges acquisition under contract of hiring and borrowing, and the evidence shows a hiring, it is error to restrict the jury in the charge to consideration of question of borrowing. *Harrison v. State*, 42 App. 509, 60 S. W. 963.

On prosecution for theft by bailment, an instruction that if defendant hired a wagon and harness in H. county for the purpose of going to J. county, and thus obtained the property, and then, while in H. county, conceived the idea of going elsewhere, with no intention of paying for the use of the property, and with the intention of moving out of the country with same, and did so, without the consent of the owner, and with the intent before leaving H. county of depriving the owner of the value of the same and to convert it to his own use, he was guilty, was objectionable as declaring him guilty for merely conceiving the offense. *Pickrell v. State*, 60 App. 572, 132 S. W. 938.

One who has a lien upon property or holds it as a pledge is not the owner, so that where, in a prosecution for theft of a pair of mules as bailee, the evidence made it an issue whether title to the mules had passed to the persons from whom the theft was charged to have been committed, or whether such persons merely held it to secure a debt from accused, it was error not to submit the issue. *Thompson v. State* (Cr. App.) 150 S. W. 181.

In a prosecution for the conversion of a cow in possession of accused, an instruction defining theft and stating the punishment therefor was proper, where the law as to conversion by bailee provided that a person guilty of that offense should be punished in the same manner as if guilty of theft. *Barrow v. State*, 71 App. 549, 160 S. W. 458.

12. Punishment.—Acts 25th Leg. 1897, p. 83, c. 67, which punishes the offense defined by article 1353 by imprisonment for not less than 2 or more than 10 years, did not abrogate the punishment for theft as a bailee by changing the punishment for theft under article 1353 after the enactment of article 1348, as the latter article merely provided that whatever punishment was prescribed at any time by the Penal Code should be applicable to theft by a bailee. *Brown v. State*, 57 App. 570, 124 S. W. 101.

Art. 1349. [878] Receiving stolen property.—If any person shall receive or conceal property which has been acquired by another in such manner as that the acquisition comes within the meaning of the term theft, knowing the same to have been so acquired, he shall be punished in the same manner as if he had stolen the property. [Act Feb. 12, 1858, pp. 180-81; amended, Act 1897, p. 26.]

See *Murio v. State*, 31 App. 210, 20 S. W. 356; *Arcia v. State*, 28 App. 198, 12 S. W. 599; *Jackson v. State*, 47 App. 85, 79 S. W. 521, 80 S. W. 631. C. C. P. art. 247.

For a comprehensive construction of this article, see *Piper v. State*, 56 App. 121, 119 S. W. 869.

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1. **Nature and elements of offense in general.**—To sustain a conviction for receiving, etc., stolen property, it must satisfactorily appear, beyond a reasonable doubt, (1) That the property was acquired by theft, and (2) that the defendant, knowing it to have been so acquired, received or concealed the same. *Wilson v. State*, 12 App. 481; *Mooney v. State* (Cr. App.) 176 S. W. 52.

In order to constitute the offense of receiving stolen property, knowing it to be stolen, the fraudulent intent to secure profit from the act or to protect the thief, and the knowledge that the property was stolen, must concur with the commission of the act. The receiving of the property with intent to restore it to the owner without reward, or with any other innocent intent, although with knowledge that it was stolen, will not constitute the offense. *Arcia v. State*, 26 App. 193, 9 S. W. 685.

The gist of this offense is receiving the stolen property "knowing" it to have been stolen. *Grande v. State*, 37 App. 51, 38 S. W. 613.

A person may be guilty of receiving stolen property without concealing it, but he can not be guilty of concealing it without receiving it. *Thurman v. State*, 37 App. 646, 40 S. W. 795.

The original theft of the property by another must be proved, and then that the accused received the same knowing it to be stolen. *Johnson v. State*, 42 App. 440, 60 S. W. 667; *Wilson v. State*, 12 App. 481.

One cannot be convicted under this article when it is shown that he purchased the goods from one who had the legal power to sell them, though that sale involved a breach of trust by the latter. *Bismark v. State*, 45 App. 54, 73 S. W. 965.

Where accused was apprehended as he was loading stolen lard into a wagon on a railroad right of way, the court properly charged that he was not guilty of theft, unless he was connected with the original taking of the lard from the railroad car, since, if he was not so connected, he was only guilty of receiving stolen goods. *Roman v. State*, 64 App. 515, 142 S. W. 912.

To constitute the crime of receiving stolen property knowing it to have been stolen, actual knowledge of the theft is necessary; and it is not sufficient merely that there be knowledge of facts sufficient to satisfy a man of ordinary intelligence and caution that the property was stolen. *Forrester v. State* (Cr. App.) 152 S. W. 1041.

A person who, knowing that goods were stolen, directed the thief to deliver them to him by placing them in his barn was guilty of receiving stolen goods, even conceding that an agreement between accused and the thief, pursuant to which the goods were stolen, would have authorized the state at its option to prosecute accused as an accomplice to the thief. *Kaufman v. State*, 70 App. 438, 159 S. W. 58.

2. **Distinguished from theft or embezzlement.**—A conviction for the offense of receiving stolen property can not be had under an indictment charging theft. *Brown v. State*, 15 App. 581; *Chandler v. State*, Id. 587; *Gaither v. State*, 21 App. 527, 1 S. W. 456; *Wheeler v. State*, 34 App. 350, 30 S. W. 913; *Fernandez v. State*, 25 App. 538, 8 S. W. 667; *Gray v. State*, 24 App. 611, 7 S. W. 339.

That the defendant, subsequent to the theft of the property, and with knowledge that it was stolen, aided the thief to dispose of it, or purchased it from the thief, are facts sufficient to support a conviction for receiving stolen property, knowing it to be stolen, but not to support a conviction for theft. *Prator v. State*, 15 App. 363.

Evidence in a theft case tending to establish the offense of receiving stolen property, knowing it to be stolen, the trial court erred in omitting to charge the jury that if they believed the evidence to establish such a receiving of the stolen property, and not an actual complicity in the taking of the property, the accused could not be convicted of theft. *Fernandez v. State*, 25 App. 538, 8 S. W. 667.

The receiving of stolen property, though with guilty knowledge, will not support a conviction for theft, and the court, when the issue is raised, by the evidence, should so instruct the jury. *Wheeler v. State*, 34 App. 350, 30 S. W. 913.

Receiving stolen property is a distinct offense from theft. *Gray v. State*, 24 App. 611, 7 S. W. 339; *Pollard v. State*, 33 App. 197, 26 S. W. 70.

A mere receiver of stolen property cannot be convicted of accessory to theft thereof. *Street v. State*, 39 App. 134, 45 S. W. 577.

If not in some way connected with the original taking so as to make him a principal, accused could not be convicted of theft, though he received the property knowing it to be stolen. *Jackson v. State*, 47 App. 85, 79 S. W. 521, 80 S. W. 631; *McDonald v. State*, 34 App. 556, 35 S. W. 286.

Accused drove a herd of cattle to town for shipment to market. A third person drove another's cattle into the herd, and requested accused to take them to market and remit to him the money after a sale of the cattle. The third person was seen in conjunction with accused in driving the cattle. Held, that accused, if not engaged in the original taking, could at most be convicted of receiving stolen property, knowing it to be stolen. *Lee v. State*, 57 App. 177, 122 S. W. 389.

The offenses of theft of property, of being an accomplice to the theft of such property, and of receiving and concealing the same property are entirely separate and distinct offenses, and, under an indictment charging one of such offenses, a party cannot be convicted of either of the others. *Kaufman v. State*, 70 App. 438, 159 S. W. 58.

The owner of certain personal property went to a bathing beach, and, before going in, deposited the property with the bathhouse keeper. R. in some way obtained possession of the check, presented it to the keeper, and obtained the property, and the next day part of it was found in accused's possession, concealed in a safety deposit vault. Held, that the evidence showed pure theft on the part of R., and did not raise the issue of embezzlement. *Goldstein v. State* (Cr. App.) 171 S. W. 709.

3. **Accomplice.**—See notes under article 79, ante, and C. C. P. art. 801.
4. **Receiver as accomplice to theft.**—See notes under article 79, ante.
5. **Immunity from prosecution.**—See notes under C. C. P. art. 37.
6. **Venue.**—See C. C. P., art. 248, and notes thereunder.
7. **Indictment.**—Willson's Cr. Forms, 691.

See *Brothers v. State*, 22 App. 447, 3 S. W. 737; *Trimble v. State*, 18 App. 632.

It is unnecessary to allege the name of the thief by whom the property was stolen, or the time or place of the theft; but the name of the owner of the property, if known, should be alleged, and the name of the person from whom the property was received by the defendant, or that the names of such persons were unknown to the grand jury. *State v. Perkins*, 45 Tex. 10. It need not be alleged that the stolen property was received or concealed by the defendant, without the consent of the owner, or with the intent to deprive the owner of the value of it, and to appropriate it to the defendant's use or benefit. It is not necessary to charge that the defendant received or concealed the property with intent to defraud any person. *Nourse v. State*, 2 App. 504. Nor is it necessary to allege the facts which constituted the theft of the property. *Brothers v. State*, 22 App. 447, 3 S. W. 737; *Hodges v. State*, Id. 415, 3 S. W. 739. The indictment may charge both receiving and concealing, and a conviction may be had upon proof of either. *Nourse v. State*, 2 App. 304.

Not necessary for indictment to allege name of a person from whose possession property was taken, nor to allege the essential elements of theft. *Trail v. State* (Cr. App.) 57 S. W. 92.

An indictment alleging that accused unlawfully received and concealed certain cattle, that such cattle had theretofore been acquired by another person in such manner that its acquisition was a theft, and that accused received and concealed the cattle knowing them to have been so acquired, sufficiently alleged accused's knowledge that the cattle were stolen at the time he received them. *Mooney v. State* (Cr. App.) 164 S. W. 828.

An indictment for receiving stolen property knowing that it had been stolen and bringing it into this state need not allege the time and place of the original taking, though it must allege that it was fraudulently received and concealed with knowledge that it had been acquired by theft, and the name of the owner if known, and the name of the person from whom received. *Zweig v. State* (Cr. App.) 171 S. W. 747.

8. — **Allegation of ownership.**—See notes under C. C. P., art. 457.

9. — **Proof and variance.**—Under an indictment alleging that the stolen property was received from a certain person, the State must prove that the property was received from the particular person mentioned. Proof that the property was received from some other person would not support a conviction. *Moseley v. State*, 36 App. 578, 37 S. W. 736, 38 S. W. 197.

There is not a variance between an indictment for receiving stolen property, alleging ownership of the property in M., and proof that it was part of the stock of a business, which, while owned by him, was conducted under the name of City Lumber Company. *Hogg v. State* (Cr. App.) 146 S. W. 195.

There is a variance between allegation in an indictment that accused received stolen property from some person to the grand jurors unknown, and proof that witnesses, who testified before the grand jury, knew that the property was received from a particular person. *Williams v. State* (Cr. App.) 153 S. W. 1136.

10. **Evidence.**—See C. C. P., arts. 783 et seq., and notes thereunder.

For evidence held sufficient to sustain a conviction, see *Shaw v. State*, 27 Tex. 750; *Doon v. State*, 42 Tex. 237; *Nourse v. State*, 2 App. 304; *Tucker v. State*, 23 App. 512, 5 S. W. 180; *Moseley v. State*, 35 App. 210, 32 S. W. 1042; *Moseley v. State*, 36 App. 578, 37 S. W. 736, 38 S. W. 197; *Mooney v. State* (Cr. App.) 176 S. W. 52.

It was held error to reject evidence offered by the defendant to prove that before he received the cattle from the thief, the said thief had claimed the same as his property, and had bargained them to another party. *Harwell v. State*, 22 App. 251, 2 S. W. 606.

Explanation of possession of stolen property. *Brothers v. State*, 22 App. 447, 3 S. W. 737; *Williams v. State*, 45 App. 240, 75 S. W. 509.

For evidence held insufficient to sustain a conviction, see *Estes v. State*, 23 App. 600, 5 S. W. 176; *Brothers v. State*, 22 App. 447, 3 S. W. 737; *Bryan v. State*, 54 App. 59, 111 S. W. 1035.

It being necessary to authorize a conviction for receiving stolen property, knowing it to be stolen, that the theft of the property should be established, the acts and declarations of the thief are admissible to prove the theft, but the court in its charge to the jury should explain the purpose for which such testimony is admitted, and direct the jury to not consider it for any other purpose. *Tucker v. State*, 23 App. 512, 5 S. W. 180.

On a trial for receiving, etc., stolen property, the state was properly allowed to read in evidence the indictment, judgment of conviction, and sentence against the party from whom defendant received the property, for the theft of the same—the purpose of the evidence being limited by the charge. *Cooper v. State*, 29 App. 8, 13 S. W. 1011, 25 Am. St. Rep. 712.

To constitute the crime of receiving stolen property, it is essential, under article 1349, that the accused must have known, at the time he received it, that it was stolen; but such guilty knowledge will be implied if the circumstances were such as should have been sufficient to satisfy a man of ordinary intelligence and caution that the property was stolen. *Murio v. State*, 31 App. 210, 20 S. W. 356; *Cas-tieberry v. State*, 35 App. 382, 33 S. W. 875, 60 Am. St. Rep. 53.

On a prosecution for receiving stolen property the bare fact that defendant is found in the possession of the stolen property is not sufficient to support a con-

viction, the evidence must further show that he knew the same to have been stolen. *Castleberry v. State*, 35 App. 382, 33 S. W. 875, 60 Am. St. Rep. 53.

A state's witness was allowed, over defendant's objection, to testify what certain books belonging to a railway company would show; held inadmissible. *Wade v. State*, 37 App. 401, 35 S. W. 663.

The fact that defendant bought the property for less than its value from an unknown party and represented that he gave more for it than he did, does not show that he knew it was stolen. *Trail v. State* (Cr. App.) 57 S. W. 93.

Where, on a trial for the theft of a horse, and for receiving the horse, knowing that it was stolen, and concealing it, there was no evidence that accused received or concealed the horse in the county, unless he stole it in the county, and the circumstances justified a finding that he committed the theft of the horse in the county, a conviction of receiving and concealing the horse in the county, but acquitting him of the theft thereof, was unwarranted by the evidence. *Arrington v. State*, 62 App. 357, 137 S. W. 669.

Evidence examined, and held sufficient to show that the person from whom accused was charged with receiving stolen property was unknown to the grand jury as alleged in the indictment. *Yantis v. State* (Cr. App.) 144 S. W. 947.

Evidence, on trial for receiving stolen property, held to authorize a finding that defendant knew it was stolen. *Hogg v. State* (Cr. App.) 146 S. W. 195.

In a prosecution for receiving or concealing stolen goods, the sworn written confession of the original thief that he stole the property, as well as the indictment charging him therewith, and the verdict and judgment of conviction and sentence were admissible in evidence to show that the property was stolen, but not as substantive evidence of accused's guilt; the court limiting their consideration to that purpose. *Meek v. State*, 71 App. 433, 160 S. W. 698.

In a prosecution for receiving or concealing stolen goods, which were shown to include certain pipes, evidence that witness found two pipes buried in the ground, which were part of the stolen property, and delivered them to the owners, was admissible over an objection, shown by bill of exceptions only, that it was not shown that accused was connected with the hiding of the pipes or knew of their being stolen at the time, so that the evidence was immaterial. *Meek v. State*, 71 App. 433, 160 S. W. 698.

Evidence, that, after cattle came into defendant's possession, a few days before he sold them, the brand on them was changed, is evidence of his knowing, when receiving them, that they were stolen. *Stanfield v. State* (Cr. App.) 165 S. W. 216.

In a prosecution for receiving stolen goods, all evidence which would have been admissible on a trial of the thief to show that he was guilty of theft was admissible to show that the goods delivered to accused were stolen goods; the state being also required to prove that accused, at the time he received the goods, knew that they were stolen, and, with such knowledge, concealed them. *Goldstein v. State* (Cr. App.) 171 S. W. 709.

Evidence was admissible that the wife of accused took the stolen ball from a bureau drawer and delivered it to the officers in the presence of accused. *Henderson v. State* (Cr. App.) 172 S. W. 793.

It is proper, if not necessary, to permit the state to prove the allegation, in an indictment for receiving stolen property, that the property was received by accused from a person to the grand jurors unknown, and the district attorney and grand jurors may testify to the efforts made to ascertain the identity of the unknown person. *Mooney v. State* (Cr. App.) 176 S. W. 52.

On a trial for receiving stolen cattle, it was not error to permit witnesses to testify that the alleged stolen cattle belonged to them. *Mooney v. State* (Cr. App.) 176 S. W. 52.

11. — Hearsay.—See notes under C. C. P., art. 783.

12. — Declarations.—See notes under C. C. P., art. 811.

13. — Other offenses.—See notes under C. C. P., art. 783.

14. Charge of court.—See C. C. P., arts. 735 et seq., and notes thereunder.

See *Mickey v. State*, 49 App. 255, 91 S. W. 587; *Felts v. State*, 53 App. 48, 108 S. W. 654; *Bismark v. State*, 45 App. 54, 73 S. W. 965; *Santee v. State* (Cr. App.) 37 S. W. 436; *Thurman v. State*, 37 App. 646, 40 S. W. 795; *Collins v. State*, 39 App. 441, 46 S. W. 933; *Bryan v. State*, 54 App. 59, 111 S. W. 1035; *Pollard v. State*, 33 App. 197, 26 S. W. 70.

In authorizing the jury to convict without proof of the criminal intent, and in omitting to instruct correctly upon the question of intent, and finally in refusing a special charge to supply the omission, the trial court erred in this case. *Arcia v. State*, 26 App. 193, 9 S. W. 685.

Note charge of the court in this case held correct. *Morgan v. State*, 31 App. 1, 18 S. W. 647.

Erroneous charge. *Ramsey v. State*, 34 App. 16, 28 S. W. 808.

Where defendant claimed to have bought the goods he was charged with receiving, the court should have given a distinct charge as to the purchase, whether asked or not. *Wheeler v. State*, 34 App. 350, 30 S. W. 913.

On a trial for receiving stolen property it is error to charge on recent possession without also charging upon knowingly receiving same. *Grande v. State*, 37 App. 51, 38 S. W. 613.

The indictment contained two counts, one for theft and the other for receiving stolen property; held, the defendant could not be heard to complain of a defective charge on theft on conviction of receiving stolen property. *Rosson v. State*, 37 App. 87, 38 S. W. 788.

A charge of the court which instructs the jury that if defendant received the property in one county, and brought it into another, the court of the county where said property was brought would have jurisdiction, is erroneous. *Thurman v. State*, 37 App. 646, 40 S. W. 795.

Where an indictment contains first count for theft and second count for receiving stolen property, charge as to possession of property recently stolen held erroneous, because jury might have applied it to second count in absence of explanation. *Trail v. State* (Cr. App.) 57 S. W. 92.

Where there is evidence tending to show that defendant received the animal from one who he believed to be rightly in possession of it, this issue should be submitted to the jury. *Harris v. State* (Cr. App.) 57 S. W. 834.

Accused was arrested in D. county while in the possession of stolen property shortly after it was stolen, and stated that the property had been sent to him at that place. On a trial for receiving the stolen property in V. county the court charged that if the property was received by accused in D. county, or in any place except V. county, or if they had a reasonable doubt as to whether he received it in V. county, they should acquit accused. Held, that this property presented the question of the possession of recently stolen property. *Yantis v. State* (Cr. App.) 144 S. W. 947.

A person who, knowing that goods were stolen, directed the thief to deliver them to him by placing them in his barn received the goods when they were placed in the barn, although he was not personally present and did not manually receive them, and hence the court properly so charged and refused to charge an alibi, though there was evidence showing accused's absence when the goods were placed in his barn. *Kaufmar v. State*, 70 App. 438, 159 S. W. 58.

While it might be proper to charge on the subject, where the evidence tends to show that accused's intention in receiving or concealing property was innocent, the refusal of such a charge is not reversible error, where the evidence does not suggest that accused's intention was innocent. *Meek v. State*, 71 App. 433, 160 S. W. 698.

An instruction, in a prosecution for receiving or concealing stolen goods, that the jury could not convict unless they believed beyond a reasonable doubt that the original thief took the property from the owners' possession without their consent, or the consent of either of them, with intent to deprive them of its value and appropriate it to his own use, and that accused knew the property was stolen and received and concealed it, was not objectionable on the ground that it authorized a conviction, even though one of the owners consented to the taking of the property. *Meek v. State*, 71 App. 433, 160 S. W. 698.

Since article 1349 punishes one who shall receive "or" conceal property known to have been stolen, a charge that accused must have "both received and concealed" the stolen property erred in favor of accused, so that he cannot complain thereof. *Meek v. State*, 71 App. 433, 160 S. W. 698.

In a prosecution for receiving or concealing stolen goods, accused requested an instruction that the corpus delicti consists of two facts, first, of the fact that the property received had been stolen, and, second, that accused received it, and that to authorize a conviction the jury must believe from evidence outside of accused's confession that the property was stolen, and that accused received it, and that the state must prove such facts beyond a reasonable doubt, which instruction was refused, but the court charged that to warrant a conviction the evidence must show beyond a reasonable doubt that the property was acquired by theft, and that accused, knowing it to have been stolen, received and concealed it, and that the jury could not convict accused unless they believed, beyond a reasonable doubt, that the alleged thief took the property from the owners without their consent, or the consent of either of them, with intent to deprive them of its value, and that accused knew that the property had been stolen and received and concealed it. Held that, in view of accused's full confession and other evidence tending to show that he knowingly received and concealed stolen property, the requested charge was properly refused as not called for by the evidence and as improperly limiting the effect of part of it, and the charge given was correct. *Meek v. State*, 71 App. 433, 160 S. W. 698.

15. — **Assumption as to facts.**—See notes under C. C. P., art. 736.

16. **Verdict.**—See C. C. P., art. 770.

17. **Punishment.**—A change in the statute made is in the last clause. The old article read: "He shall be punished in the same manner as by law the person stealing the same would be liable to be punished."

This offense is punishable the same as the theft of the property. *Nourse v. State*, 2 App. 305; *Vincent v. State*, 10 App. 330.

As to punishments, see *Spradling v. State*, 30 App. 595, 17 S. W. 1117.

In a case tried before the change was made, a boy under sixteen years of age had stolen property over the value of twenty dollars, and defendant, a man, concealed said property. It was contended upon the trial that an adult could not be sent to the reformatory, could not be punished in like manner as the youthful thief, and hence could not be punished at all; held, the intention of the statute was to assess a penalty the same as if defendant himself had stolen the property. *Ramsey v. State*, 34 App. 16, 28 S. W. 808.

An adult convicted of fraudulently receiving property of more than twenty dollars in value stolen by a person under the age of sixteen years should be punished by imprisonment in the penitentiary not less than two nor more than ten years. *Ramsey v. State*, 34 App. 16, 28 S. W. 808.

18. **Recognizance.**—See notes under C. C. P., art. 919.

Recognizance for offense under this article recited that the defendant stands charged with "receiving and concealing stolen property of the value of ten dollars," etc. It was objected to the recognizance that it was insufficient and invalid because it used the word "stolen" instead of the statutory words "acquired in such manner that the acquisition comes within the meaning of the term 'theft.'" Held that under our Code the word "stolen" was sufficient in the recognizance, though it would not be in an indictment. *Sands v. State*, 30 App. 579, 18 S. W. 86.

CHAPTER TEN
OF THEFT FROM THE PERSON

Art. 1350. Punishment for. 1351. Ingredients of the offense.	Art. 1352. Attempt to commit the offense.
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Article 1350. [879] Punishment for.—If any person shall commit theft by privately stealing from the person of another, he shall be punished by confinement in the penitentiary not less than two nor more than seven years.

Felony.—Any theft from the person is a "felony." *Chitwood v. State*, 44 App. 439, 71 S. W. 973; *Campbell v. State*, 61 App. 504, 135 S. W. 548.

Indictment.—Willson's Cr. Forms, 638.

Art. 1351. [880] Ingredients of the offense.—To constitute the offense it is necessary that the following circumstances occur:

1. The theft must be from the person; it is not sufficient that the property be merely in the presence of the person from whom it is taken.

2. The theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away.

3. It is only necessary that the property stolen should have gone into the possession of the thief; it need not be carried away in order to complete the offense.

For other rules and decisions pertinent to this offense, see notes to preceding chapter.

See Article 1350 and note.

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| 1. Nature and elements of offense. | 7. — Proof and variance. |
| 2. Compared with and distinguished from ordinary theft. | 8. Evidence. |
| 3. Distinguished from robbery. | 9. Charge of court. |
| 4. Venue. | 10. — Duplicity. |
| 5. Indictment. | 11. — Description of property and money. |
| 6. — Description of property. | |

1. **Nature and elements of offense.**—"Theft from the person" may be committed either by taking without the knowledge of the person from whom the property is taken, or by taking so suddenly as not to allow time to make resistance before the property is taken. *Johnson v. State*, 55 App. 411, 117 S. W. 964; *Grant v. State*, 59 App. 123, 127 S. W. 173; *Woodard v. State*, 9 App. 412.

In this offense, as in ordinary theft, the taking of the property includes the carrying away of the same, and if the property was taken too suddenly to allow time for resistance, it was also carried away too suddenly to allow time for resistance. In other words asportation is no more necessary to constitute theft from the person, than it is to constitute ordinary theft. *Dukes v. State*, 22 App. 192, 2 S. W. 590; *Flynn v. State*, 42 Tex. 301; ante, art. 1331, note.

In theft from the person, as in general theft, the property must be taken without the consent of the owner, or, if the possession was lawfully obtained, it must have been obtained by the taker by some false pretext, or with the present intent to deprive the owner of the value of the property and appropriate it to his (the taker's) own use, and there must be an actual appropriation. See the statement of the case for evidence held insufficient to support a conviction for theft from the person, because insufficient to establish the fraudulent intent at the time of the taking. If the accused, when he obtained possession of the property, did so without false pretext or fraudulent intent, and believed that he had the consent of the owner to the taking, he would not be guilty of theft, even though he subsequently converted the property to his own use. This rule, applying to the state of case made by the proof, should have been given in the charge to the jury. *Graves v. State*, 25 App. 333, 8 S. W. 471. And see, also, *Taylor v. State*, 25 App. 96, 7 S. W. 861; *Nichols v. State*, 28 App. 105, 12 S. W. 500; *McCullum v. State*, 29 App. 162, 14 S. W. 1020.

Evidence that the owner of stolen money felt some one touch his pocket containing his purse, and that on looking around quickly he saw defendant's hand holding the purse pass from his to defendant's pocket, is sufficient to prove theft from the person, hereunder. *Green v. State*, 28 App. 493, 13 S. W. 784.

If prosecutor knew when defendant put his hand into his pocket, and permitted him to take his money, then defendant would not be guilty of theft, but if prosecutor knew nothing about it until defendant got a hold of his pocketbook, then it would be theft it matters not at what instant thereafter he discovered it. *Files v. State*, 36 App. 206, 36 S. W. 93; *McLin v. State*, 29 App. 171, 15 S. W. 600.

Theft from the person may be committed by taking property from the possession of another in a public place; the statute requiring a private taking having reference to the manner, and not the place, of taking. *Clemmons v. State*, 45 S. W. 911, 39 App. 279, 73 Am. St. Rep. 923.

Where money is suddenly snatched from the hand of the owner, so as not to allow time for resistance, the offense is complete. It is not necessary that it be carried away, and it is not necessary that it be taken without the knowledge of the owner, when it is suddenly taken. *Clemmons v. State*, 39 App. 279, 45 S. W. 911, 73 Am. St. Rep. 923.

The theft must be "from" the "person," and not merely from the presence of the taking of any one will be sufficient. *Grissom v. State*, 40 App. 146, 49 S. W. 93.

Merely inserting the hand in the pocket of another far enough to touch money contained therein, but not securing it, will not constitute a theft from the person *Tarrango v. State*, 44 App. 385, 71 S. W. 597.

If a person knows at the time that money is being extracted from his pocket the accused cannot be convicted under the first paragraph of this subdivision, but under the second paragraph if he knows it, but it is taken from his person so suddenly, as not to allow time for resistance then the offense is complete. *Roquemore v. State*, 50 App. 542, 99 S. W. 549.

It is not necessary that the theft occur in a concealed manner and out of observation of others. *Black v. State*, 52 App. 8, 104 S. W. 897.

2. Compared with and distinguished from ordinary theft.—In this offense the punishment is not graded by the value of the property taken, as in ordinary theft, but the offense is per se a felony, if the article taken be of any value. It is not necessary therefore to allege or prove the value of the property taken. *Bennett v. State*, 16 App. 236; *Shaw v. State*, 23 App. 493, 5 S. W. 317; *Harris v. State*, 17 App. 132; *Flynn v. State*, 42 Tex. 301.

The offense of theft from the person being essentially different from ordinary theft, a conviction thereof can not be had under an indictment for ordinary theft. *Harris v. State*, 17 App. 132; *Black v. State*, 52 App. 8, 104 S. W. 897.

Where indictment charges theft from the person only the defendant can not be convicted of petty theft. *Roberts v. State*, 33 App. 83, 24 S. W. 895.

Indictment may include counts for theft and theft from the person. *Flynn v. State*, 47 App. 26, 83 S. W. 206.

"Theft from the person" is sui generis; is an offense distinct from any other theft, and the punishment prescribed therefor is not graded the same as in other theft. It is a felony, without regard to the value of the property stolen. Under an ordinary indictment for theft a party cannot be convicted for privately stealing from the person. *Gage v. State*, 22 App. 123, 2 S. W. 638.

Since the statute defines theft from the person as a distinct offense, and essentially different from ordinary theft, one cannot be convicted of theft from the person under an indictment for ordinary theft. *Nichols v. State*, 28 App. 105, 12 S. W. 500.

Indictment containing counts in theft, theft from the person, and robbery. *Hooten v. State*, 53 App. 6, 108 S. W. 651.

3. Distinguished from robbery.—Where force is used, the court should charge on robbery and not theft from the person. *Gallagher v. State*, 34 App. 306, 30 S. W. 557.

The mere snatching money from another's hand is not robbery, but is theft from the person. *Johnson v. State*, 35 App. 140, 32 S. W. 537.

4. Venue.—See notes under C. C. P. art. 245.

5. Indictment.—Willson's Cr. Forms, 638.

As to indictment for theft in general, see notes under article 1329, ante.

To constitute this offense the theft must be from the person, and not merely in the presence of the dispossessed party, and be committed without his knowledge, or so suddenly as to preclude resistance before asportation. If an indictment contains these allegations, in addition to those necessary to charge theft in general, it is substantially sufficient. *Woodard v. State*, 9 App. 412. But it will be insufficient without said allegations that the property was taken without the knowledge of the person dispossessed, or so suddenly as not to allow time to make resistance before it was carried away. *Kerry v. State*, 17 App. 178, 50 Am. Rep. 122; *Gage v. State*, 22 App. 123, 2 S. W. 638. The indictment must allege, and the proof must show, the ownership of the property and that the property was taken without the owner's consent. *Anderson v. State*, 14 App. 49.

The indictment, to warrant a conviction, must state everything which is essential to the proof of the crime,—that is, that the offense was "committed without the knowledge of the person from whom the property was taken, or so suddenly as not to allow time to make resistance before the property is carried away;" and the proof must correspond with the allegation. *Gage v. State*, 22 App. 123, 2 S. W. 638.

It is not necessary to either allege or prove the value of the property taken. *Shaw v. State*, 23 App. 493, 5 S. W. 317.

Indictment approved. *McCollom v. State*, 29 App. 162, 14 S. W. 1020.

An indictment for theft from the person must allege that the property was taken from the person, it is not sufficient to allege that it was "unlawfully, fraudulently and privately taken from his possession." *Jones v. State*, 39 App. 387, 46 S. W. 250.

It is not sufficient under this article as is ordinarily the case, to follow its language, but inasmuch as article 1351 defines what circumstances must occur to constitute the offense of theft by privately stealing from the person of another, the indictment must charge and set out the particular means whereby the alleged theft was committed. *Bush v. State*, 53 App. 213, 109 S. W. 185, 186.

An indictment, charging that defendant stole from a person named corporeal, personal property then and there belonging to such person, to wit, one purse containing money and checks, sufficiently charged the offense of theft from the person. *Wilson v. State*, 71 App. 426, 160 S. W. 967.

Form of indictment for theft from the person held sufficient, see *Burrus v. State* (Cr. App.) 172 S. W. 981.

6. — **Description of property.**—See notes under C. C. P. arts. 458, 468.

7. — **Proof and variance.**—Where the indictment alleged that the watch and chain stolen were together of the value of \$35 evidence of the value of the watch alone was properly admitted. *Bennett v. State*, 16 App. 236.

An averment of the theft of "United States paper currency money of a certain value" is sustained by proof that the stolen property was either United States treasury notes, or national bank notes, or United States gold or silver certificates. *Kimbrough v. State*, 28 App. 367, 13 S. W. 218.

The indictment alleged theft by privately taking from the person. It devolved upon the state to show that said money was taken privately, that is, without the knowledge of the party robbed. *Files v. State*, 36 App. 206, 36 S. W. 93.

An indictment for theft from the person, of several articles supports a conviction based on a taking of any one of the articles. *Grissom v. State*, 40 App. 146, 49 S. W. 93.

Under an indictment for theft from the person charging that the property taken was United States currency, it was competent to prove that either treasury notes, national bank bills, or United States gold or silver certificates were taken. *Dennis v. State* (Cr. App.) 74 S. W. 559.

Where an indictment charges theft of bills "in the currency of the United States of America," or theft of "current money of the United States of America," giving the denomination and value thereof, the allegation may be proved by theft of United States legal treasury notes, or of United States demand notes, or United States gold or silver certificates, or of national bank bills of the United States. *Berry v. State*, 80 S. W. 630, 46 App. 420.

In a prosecution for theft from the person, where the indictment charged that accused had stolen a pocketbook containing one \$10 bill and two \$5 bills, all of the aggregate value of \$20 good and lawful money of the United States, the prosecuting witness testified that his pocketbook contained about \$25, there being two \$5 bills, a \$10 bill, and about \$5 in specie, and that the pocketbook was a small leather purse for carrying money in. Held, that though the indictment be interpreted as charging a theft of money, and though the witness failed to testify that the money stolen was current money of the United States, there was no variance. *Sims v. State*, 64 App. 435, 142 S. W. 573.

8. **Evidence.**—Evidence held sufficient to convict, see *Boyd v. State* (Cr. App.) 29 S. W. 157; *Shaw v. State*, 23 App. 493, 5 S. W. 317; *Woodard v. State*, 9 App. 412; *Flynn v. State*, 42 Tex. 301; *Johnson v. State*, 55 App. 411, 117 S. W. 964; *Nelson v. State*, 48 App. 471, 88 S. W. 807; *Johnson v. State*, 62 App. 284, 136 S. W. 1058; *Brooks v. State* (Cr. App.) 151 S. W. 549. Contra, *Graves v. State*, 25 App. 333, 8 S. W. 471; *Johnson v. State*, 52 App. 510, 107 S. W. 845; *Thomas v. State*, 51 App. 329, 101 S. W. 797; *Placker v. State*, 58 App. 216, 125 S. W. 409.

On trial for theft from the person the same rules as to recent possession, and explanation of possession apply as in other theft cases. *Roberts v. State*, 33 App. 83, 24 S. W. 895.

The indictment charged in one count theft, and in another count theft from the person; the testimony of the prosecutor made out a case of theft from the person, that of defendant a case of theft only. The jury found defendant guilty of theft from the person. The verdict will not be disturbed. *Blount v. State*, 35 App. 376, 33 S. W. 872.

The evidence showed that defendant slipped his hand into W.'s pocket and took his pocket book; that W. discovered the fact just as defendant withdrew his hand; held, sufficient proof of theft. *Files v. State*, 36 App. 206, 36 S. W. 93.

Evidence in explanation of possession of alleged stolen money held admissible. *Britain v. State*, 52 App. 169, 105 S. W. 817.

Evidence held insufficient to sustain a conviction of theft from the person, committed by a taking privately and without the knowledge of the person from whom the property was taken. *Grant v. State*, 59 App. 123, 127 S. W. 173.

Evidence, on a trial for theft from the person, that the prosecuting witness felt something brush against his person, and upon feeling ascertained that his pocketbook had been taken, that accused ran away, and was chased by the prosecuting witness and arrested by officers, who were called, and that upon the following morning the pocketbook was found in a private inclosure near the point where accused was arrested, was sufficient to sustain a conviction. *Johnson v. State*, 70 App. 347, 156 S. W. 1181.

On a trial for theft from the person, evidence held sufficient to support a conviction on the theory that accused either committed the theft, or was a principal if it was committed by another. *Black v. State*, 72 App. 481, 162 S. W. 521.

9. **Charge of court.**—Where the indictment charged that the property was taken "so suddenly as not to allow time to make resistance before said property was carried away" and the prosecuting witness testified that he was awakened by some one putting his hand into his pocket but did not know that the money was taken until the person was gone, held error for the court to instruct the jury to convict if defendant took the money "so suddenly" or if he took it "without the knowledge," etc. *Swartz v. State* (Cr. App.) 27 S. W. 136.

The indictment charged defendant with taking the property so suddenly as to not allow time for resistance, the court instructed on the phase of the case and also as to the offense when committed without the knowledge of prosecutor; held error, but in this case the charge was not excepted to, the evidence was overwhelming and the case will not be reversed. *Robinson v. State*, 37 App. 195, 39 S. W. 107.

In a prosecution for theft from the person, an instruction to acquit if defendant took the property with prosecutor's consent, and afterwards formed the intent to appropriate it, is sufficient, as bearing on defendant's claim that he had prosecutor's consent to take the property. *O'Toole v. State*, 51 S. W. 244, 40 App. 578.

It is not error to quote the whole definition of the law in a charge and then ap-

ply the particular phase of the law applicable to the facts, in instructing the jury. *Mathis v. State* (Cr. App.) 65 S. W. 523.

The court should have charged that if, prior to the taking of the money, prosecutor told defendant to take care of him in case he got too drunk to take care of himself, and defendant believed prosecutor intended him to take his money from him, or in case they had a reasonable doubt as to whether that was true, in either case they should acquit. *McMahan v. State*. 50 App. 244, 96 S. W. 17.

Where the evidence shows that defendant was engaged to be married to the prosecuting witness, and that, upon noticing that the prongs on her diamond rings needed tightening, stated that if she would let him have them he would have them repaired, to which she replied that she could have it done herself, whereupon he took them from her fingers, there is not sufficient evidence to raise an issue of theft from the person, authorizing the giving of a requested instruction by defendant on that issue. *Creale v. State*, 71 App. 9, 158 S. W. 268.

10. — **Duplicity.**—See notes under C. C. P. art. 481.

11. — **Description of property and money.**—See notes under C. C. P. arts. 458, 468.

Art. 1352. [880a] Attempt to commit the offense.—If any person shall attempt to commit the offense of theft from the person, as defined in the two preceding articles, he shall be punished by confinement in the penitentiary not less than one nor more than three years. [Act 1909, p. 70.]

CHAPTER ELEVEN

THEFT OF ANIMALS

Art.	Art.
1353. Theft of horse, etc.	1356. Wilfully driving stock from range,
1354. Theft of cattle.	theft.
1355. Theft of sheep, hogs, etc., how punished.	1357. Party may drive stock in range.
	1358. What proof sufficient for the state.

Article 1353. [881] Theft of horse, etc.—If any person shall steal any horse, ass or mule, he shall be punished by confinement in the penitentiary not less than two nor more than ten years. [Act Feb. 12, 1858, p. 181; amended Act 1897, p. 83.]

See notes under chapter 9.

Cited, *Sparks v. State* (Cr. App.) 174 S. W. 351.

Explanatory.—Amended in revising (1879) by omitting the words "gelding, mare, colt," which were contained in the original article.

Effect of amendment.—Act 1897 did not abrogate the punishment for theft as a bailee by changing the punishment for theft under article 1353 after the enactment of article 1359, as the latter article merely provided that whatever punishment was prescribed at any time by the Penal Code should be applicable to theft by a bailee. *Brown v. State*, 57 App. 570, 124 S. W. 101.

Distinguished from other offenses.—Where a person takes up a horse as an estray, without the present intention of committing theft thereof, his appropriation of the horse thereafter, without a compliance with the estray laws, does not constitute theft of the horse, but merely a violation of the estray laws. *McCarty v. State*, 36 App. 135, 35 S. W. 994.

Defendant was convicted under a general indictment for the theft of a horse. It appeared that the owner of the horse loaned it to defendant for use in working his crop, and defendant afterwards took the horse out of the county, and sold it. There was no evidence of an intention to convert the horse to defendant's own use when he acquired possession of it. Held, that the conviction could not be sustained, since the prosecution should have been made under art. 1348, for conversion of the property while in defendant's possession under a contract of borrowing. *Mangum v. State*, 38 App. 231, 42 S. W. 291.

One assisting a person, having possession as employé, of horses of another, in driving them away with the purpose of appropriating them is not guilty of theft, but is guilty of embezzlement. *Pearce v. State*, 50 App. 507, 98 S. W. 861.

Punishment under statute exclusive.—A prosecution for horse theft is properly based on this article and the punishment prescribed therein is properly inflicted and not that stated under article 1329. *Beard v. State*, 45 App. 522, 78 S. W. 348.

Principals.—See notes under article 74, ante.

Indictment.—Willson's Cr. Forms, 639.

Conviction of driving from accustomed range on indictment for theft, see notes under arts. 1356, 1386.

Description of animal, see notes under C. C. P. art. 458.

Indictment can charge theft of one head of cattle under this article. *Warren v. State* (Cr. App.) 105 S. W. 817.

— **Ownership.**—See notes under C. C. P. art. 457.

Evidence.—See notes under chapter 9, and see C. C. P. art. 783 et seq.

Evidence held sufficient to sustain conviction. *Lopez v. State*, 46 App. 473, 80 S. W. 1016.

Evidence held insufficient to support conviction. *Young v. State*, 47 App. 468, 83 S. W. 808; *Shilling v. State*, 52 App. 326, 106 S. W. 357.

Charge.—Where, on a prosecution for horse theft, defendant claimed that he took the horse merely for the purpose of using it, and with intent to return it, it having been turned over to him by one who stated that he had borrowed it from the owner, an instruction that, if accused took the horse with intent not to deprive the owner of the value of it, but merely to use it, the jury should acquit, was proper. *Windom v. State*, 44 App. 514, 72 S. W. 193.

Art. 1354. [882] Theft of cattle.—If any person shall steal any cattle or hog, he shall be punished by confinement in the state penitentiary not less than two nor more than four years. [Act May 17, 1873, p. 80.]

See notes under articles 74, 77, and 79, and chapter 9, ante.

See *Smith v. State*, 24 App. 290, 6 S. W. 40; *Coward v. State*, 24 App. 590, 7 S. W. 332; *Spoonmore v. State*, 25 App. 358, 8 S. W. 280; *Davis v. State*, 55 App. 495, 117 S. W. 159; *Warren v. State*, 51 App. 616, 103 S. W. 833; *Parks v. State*, 46 App. 100, 79 S. W. 301; *O'Quinn v. State*, 55 App. 18, 115 S. W. 39; *McBride v. State*, 48 App. 213, 88 S. W. 237; *Sparks v. State* (Cr. App.) 174 S. W. 351.

Indictment.—Willson's Cr. Forms, 640.

Allegations of ownership, see notes under C. C. P. art. 457.

Description of property, see notes under C. C. P. art. 458.

Evidence.—Evidence relating to brands generally, see C. C. P. art. 783 et seq. And see, also, *Vernon's Sayles' Civ. St.* 1914, art. 7160.

Evidence held to sustain conviction for theft of hogs. *Clark v. State* (Cr. App.) 36 S. W. 273; *Wright v. State*, 40 App. 45, 48 S. W. 191; *Areola v. State*, 40 App. 51, 48 S. W. 195; *Pate v. State*, 47 App. 373, 83 S. W. 695; *Gibson v. State*, 47 App. 489, 83 S. W. 1119; *Wright v. State*, 47 App. 433, 84 S. W. 593. *Contra*, *Smith v. State*, 44 App. 81, 68 S. W. 510; *Womack v. State*, 48 App. 148, 86 S. W. 1015; *Fruger v. State*, 54 App. 638, 114 S. W. 794.

Admissibility of evidence, see *Tankersley v. State*, 51 App. 224, 101 S. W. 997; *Thompson v. State*, 42 App. 140, 57 S. W. 805.

Art. 1355. [883] Theft of sheep, goat, etc.; how punished.—If any person shall steal any sheep or goat, he shall be punished by confinement in the state penitentiary for not less than two nor more than four years. [Art. 748 Rev. P. C. 1879; art. 883 Rev. P. C. 1895; Act 1893, ch. 26; Amended Act 1905, p. 16.]

See notes under chapter 9.

See *Ellis v. State*, 27 App. 190, 11 S. W. 111; *Sparks v. State* (Cr. App.) 174 S. W. 351.

Explanatory.—This article was amended in the revision of 1879 so as to make the offense a felony or misdemeanor dependent upon the value of the property, it being a felony under the original article as at present without regard to the value of the property taken. Decisions as to felony or misdemeanor are included in the notes under article 1342, ante.

Indictment.—Willson's Cr. Forms, 641.

Art. 1356. [884] Wilfully driving stock from range, theft.—If any person shall wilfully take into possession and drive, use or remove from its accustomed range, any live stock not his own, without the consent of the owner, and with intent to defraud the owner thereof, he shall be deemed guilty of theft, and, on conviction, shall be confined in the penitentiary not less than two nor more than five years, or be fined in a sum not to exceed one thousand dollars, or by both such imprisonment and fine, at the discretion of the jury trying the case. [Act Nov. 12, 1866, p. 188.]

Offense in general.—To come within this article, the driving must be "wilful," that is, committed with evil intent, etc., a fact that is presumed from the driving. *Owens v. State*, 19 App. 242.

To constitute this offense it is essential that the act be wilfully committed, that is, with evil intent, or without reasonable ground to believe that it was lawful. *Yoakum v. State*, 21 App. 260, 17 S. W. 254.

On trial for removing horse from its accustomed range the question of intent is not in issue. *Beachamp v. State* (Cr. App.) 28 S. W. 807.

Distinguished from theft in general.—This article contemplates the driving of stock from its accustomed range and not the bare theft of an animal running at large near the house of its owner, taken in custody by a thief, carried to another or adjoining neighborhood and sold. *Terry v. State*, 43 App. 353, 66 S. W. 452.

Conviction and verdict under indictment for theft.—See notes under art. 1386, post, and C. C. P. art. 770.

Under an indictment for the theft of an animal, the defendant may be convicted of this offense. *Counts v. State*, 37 Tex. 593; *Campbell v. State*, 42 Tex. 591; *Bawcom v. State*, 41 Tex. 189; *Marshall v. State*, 4 App. 549; *Powell v. State*, 7 App. 467; *Turner v. State*, Id. 596; *Foster v. State*, 21 App. 80, 17 S. W. 548; *Smith v. State*, 21 App. 133, 17 S. W. 558; *McElmurray v. State*, 21 App. 691, 2

S. W. 892; *Campbell v. State*, 22 App. 262, 2 S. W. 825; *Guest v. State*, 24 App. 530, 7 S. W. 242.

If the proof upon which the state depends leaves it in doubt whether the offense is theft per se or wilfully driving stock from the range, the indictment should charge both in different counts. *Smith v. State*, 34 Tex. 612.

Where conviction was had under article 1356 on an indictment for cattle theft and a new trial was granted the defendant, it was held that on another trial he might be convicted of the theft as charged in the indictment. *Campbell v. State*, 22 App. 262, 2 S. W. 825, overruling *Sisk v. State*, 9 App. 90.

Conviction for the theft of an animal will bar a subsequent prosecution under this article. *McElmurray v. State*, 21 App. 691, 2 S. W. 892.

Though under an indictment charging theft of cattle in the usual form, a conviction may be had either for the theft defined in article 1356, or for the misdemeanor of driving cattle from their accustomed range as defined in article 1386, the verdict, to be sufficient, must show with reasonable certainty of which offense, the felony or the misdemeanor, the accused was found guilty. *Guest v. State*, 24 App. 530, 7 S. W. 242. And on the same subject, see *Id.*; *Taylor v. State*, 25 App. 96, 7 S. W. 861; *Spoonemore v. State*, 25 App. 358, 8 S. W. 280; *Woods v. State*, 26 App. 490, 10 S. W. 108; *Lopez v. State*, 28 App. 343, 13 S. W. 219.

Conviction under article 1356 cannot be held under an indictment charging theft of such animals. *Long v. State*, 33 App. 461, 46 S. W. 821, 73 Am. St. Rep. 954 (overruling *Counts v. State*, 37 Tex. 593; *Campbell v. State*, 42 Tex. 591; *Bawcom v. State*, 41 Tex. 189; *Marshall v. State*, 4 App. 549; *Powell v. State*, 7 App. 467; *Turner v. State*, *Id.*, 596; *Foster v. State*, 21 App. 80, 17 S. W. 548; *Smith v. State*, 21 App. 133, 17 S. W. 558, and *Guest v. State*, 24 App. 530, 7 S. W. 242).

It is error to charge that defendant can be convicted of driving stock from accustomed range, under an indictment for theft. *Chambers v. State* (Cr. App.) 59 S. W. 261.

Venue.—See notes under C. C. P. art. 245.

Indictment.—Willson's Cr. Forms, 642.

See *Shubert v. State*, 20 App. 320; *Woods v. State*, 26 App. 490, 10 S. W. 108.

The indictment for this offense need not aver an intention to appropriate the animals to the use of the defendant. *Smith v. State*, 34 Tex. 612. It is proper, and perhaps necessary, to allege the ownership of the animals. *Smith v. State*, 43 Tex. 433; *State v. Faucett*, 15 Tex. 585. It may allege that the animal was driven out of the instead of its accustomed range. *Fowler v. State*, 38 Tex. 559.

If the driving includes several different animals belonging to different owners, all may be embraced in one count. *Long v. State*, 43 Tex. 467.

An indictment which used the word "deprive" instead of the statutory word "defraud" in alleging the intent, was held sufficient. *Shubert v. State*, 20 App. 320.

It need not describe the "range." *Foster v. State*, 21 App. 80, 17 S. W. 548; *State v. Thompson*, 40 Tex. 515. Nor state the distance the animal was driven. *Darnell v. State*, 43 Tex. 147.

Burden of proof as to mitigation or justification.—It devolves on the defense to prove mitigating or justifying facts. *Owen v. State*, 19 App. 242.

Admissibility of evidence.—In a prosecution for wilfully driving a Jersey bull from his accustomed range, it was no defense that defendant did the act charged in order to protect his Hereford cows from being served; and evidence of the difference in value between calves of Hereford cows from a Hereford sire and from a Jersey sire was properly excluded. *Buster v. State* (Cr. App.) 163 S. W. 730.

Charge of court.—It is error to charge that a party acting under another's authority must know that the latter had a right to give it, and that A. can not give B. authority over more than one brand. *Wills v. State*, 40 Tex. 69. Having admitted proof that other property of like character was driven at the same time and from the same place as the property described in the indictment, the trial court erred in omitting in its charge to limit the jury as to the legitimate purposes for which such proof could be considered. In instructing the jury upon the law relating to this offense, the charge need not explain the legal signification of the word "wilfully," though it would not be improper to do so. *Wheeler v. State*, 23 App. 598, 5 S. W. 160.

Art. 1357. [885] Party may drive stock in range.—Nothing in the preceding article contained shall be construed to prevent any person from driving his own and other stock that may be mixed therewith to the nearest convenient point within the usual range of such stock, for separation. [*Id.*, p. 187.]

Art. 1358. [886] What proof sufficient for the state.—In any prosecution under article 1356, it shall only be necessary for the state to prove the act of driving, using or removing from its accustomed range, any live stock not belonging to, or under the control of, the accused; and it shall devolve upon the accused to show any fact under which he can justify or mitigate the offense. [*Id.*, p. 188.]

Burden of proof.—It only devolves upon the state to prove the act of driving, using, or removing from its accustomed range any live stock not belonging to or under the control of the accused. It devolves upon the accused to show any fact in justification or mitigation of the act. *Owens v. State*, 19 App. 242.

CHAPTER TWELVE

MISCELLANEOUS PROVISIONS RELATING TO THE RECOVERY OF STOLEN ANIMALS AND THE DETECTION AND PUNISHMENT OF THIEVES

Art.	Art.
1359. Want of bill of sale prima facie evidence of illegal possession.	1367. Required to keep record of cattle purchased or slaughtered.
1360. Driving stock to market without bill of sale.	1368. Penalty for purchasing slaughtered cattle, unless, etc.
1361. Butchering unmarked or unbranded animals.	1369. The record provided for to be open for inspection, etc.
1362. Not applicable to animals raised by butcher.	1370. Duty of county attorney.
1363. Butcher failing to make report of animals slaughtered.	1371. Inspector to keep record.
1364. Before engaging in business of slaughter and sale of animals, what is required.	1372. Counties exempt.
1365. Butchers and slaughterers required to file bond.	1373. Auctioneer selling animal without written statement, etc.
1366. Penalty for failure to make bond.	1374. Auctioneer failing to report sales of animals.
	1375. This chapter not to apply to Karnes county.

Article 1359. [887] Want of bill of sale prima facie evidence of illegal possession.—Upon the trial of any person charged with the theft of any animal of the horse, ass or cattle species, the possession of such stolen animal by the accused, without a written transfer or bill of sale, containing a specific description of such animal, shall be prima facie evidence against the accused that such possession was illegal. [Act Nov. 13, 1886, p. 223; amended, Act 1899, p. 87.]

See notes under art. 7171, Vernon's Sayles' Civ. St. 1914.

As to charging this article in a prosecution for theft, see notes under 1329, ante. See *Willey v. State*, 22 App. 408, 3 S. W. 570; *Gilleland v. State*, 24 App. 524, 7 S. W. 211; *Graves v. State*, 28 App. 354, 13 S. W. 149; *Abrigo v. State*, 29 App. 143, 15 S. W. 408.

Explanatory.—Articles 1359 to 1363, 1366, 1369, 1373, 1374, seem to be exactly the same as the old ones, but 1365, 1367, 1368, and 1372, have all been changed.

Constitutionality.—Act Nov. 13, 1866, to regulate the sale, etc., of livestock, held constitutional. *State v. Dietz*, 30 Tex. 511; *Faith v. State*, 32 Tex. 373.

Rule prior to statute.—Prior to the enactment of this article, the absence of a written conveyance was not prima facie evidence of illegal possession. *Espy v. State*, 32 Tex. 375.

Bill of sale as evidence in general.—See notes on evidence under article 1329.

It is not a valid objection to a bill of sale that it was recorded in the wrong book. *Britt v. State*, 21 App. 215, 2 S. W. 255.

A bill of sale to be admissible in evidence must be filed among the papers of the cause at least three days before the commencement of the trial, and notice of such filing given to the opposite party or his attorney, or its execution must be proved. If the bill of sale be subscribed by a witness, its execution can not be proved by another witness, unless the absence of the subscribing witness is accounted for. It is no objection to a bill of sale that it was not recorded until after the date of the alleged theft, and an unrecorded, unacknowledged bill of sale is admissible evidence to prove ownership in a prosecution for theft. The property mentioned in the bill of sale must be identified as the alleged stolen property. *Morrow v. State*, 22 App. 239, 2 S. W. 624.

Where, on trial for the theft of a horse, the bill of sale given by defendant to the person to whom he sold the horse is proved by witnesses who saw defendant execute it, it is not necessary to file such bill of sale with the record three days before the trial, as the rule requiring instruments to be so filed only applies to those the execution of which is not proved aliunde. *Williams v. State*, 30 App. 153, 16 S. W. 760.

On the trial for theft of a cow, a bill of sale to the alleged owner describing the cow in question is admissible in evidence, though not recorded. *Wilson v. State*, 32 App. 22, 22 S. W. 39.

On the trial for theft, a bill of sale, made by defendant, of the animal alleged to have been stolen, is admissible in evidence, though it was not acknowledged or recorded. *Lockwood v. State*, 32 App. 137, 22 S. W. 413.

An instruction that the law requires a butcher to take a bill of sale to cattle bought and slaughtered by him as such butcher, but no law exists requiring a purchaser of hogs to take a bill of sale therefor to show his good faith in the possession, held proper. *Wheeler v. State*, 38 App. 71, 41 S. W. 615.

Rebuttal of presumption.—The presumption of illegal possession arising from the absence of a written conveyance may be rebutted by parol proof of any fact tending to show legality of possession. *Wills v. State*, 40 Tex. 69; *Garcia v. State*, 12 App. 335; *Flores v. State*, 13 App. 665; *Gomez v. State*, 15 App. 64; *Schindle v. State*, Id. 394; *White v. State*, 21 App. 339, 17 S. W. 727.

The presumption from failure to produce a written conveyance is not conclusive, and may be rebutted by competent evidence. *Flores v. State*, 13 App. 665; *Garcia v. State*, 12 App. 335.

Art. 1360. [888] Driving stock to market without bill of sale.—Any person who may be found in any county of this state driving to market any animals, such as are specified in the preceding article, and who has not in his possession a bill of sale or transfer for each and all of said animals, containing their marks and brands, or a list of such marks and brands of any of such animals as were raised by himself, both said bill of sale and list being duly certified as recorded by the clerk of the county court of the county from which such animals have been driven, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding two thousand dollars. [*Id.*, p. 224; amended, Act 1899, p. 87.]

See notes under arts. 7170-7172 Vernon's Sayles' Civ. St. 1914.

Constitutionality.—See note under article 1359.

Repeal of former law.—The repeal of the act of 1863 (P. D., art. 2417) by this act did not abate prosecutions. *Gill v. State*, 30 Tex. 514.

The act of May 22, 1871, not applying to certain counties, the act of 1866 was not repealed as to those counties. *Id.* But see *Monroe v. State*, 3 App. 341.

Offense.—It is no violation of the statute for one to drive cattle of his own raising to the market in the county of his residence and where the cattle were raised without having in his possession a recorded list of his marks and brands. *Senterfit v. State*, 41 Tex. 186.

Venue.—See notes under C. C. P. art. 258.

Indictment.—Willson's Cr. Forms, 643.

The indictment (under P. D., art. 2417) need only charge generally "that defendant did butcher beef for the market of B., and did fail to return a list of the marks and brands," etc. *Schutze v. State*, 30 Tex. 508.

Charge of court.—The court must not charge in the face of the evidence as to complicity, and upon an assumption not warranted by the evidence. *Bergstrom v. State*, 36 Tex. 336.

Art. 1361. [889] Butchering unmarked or unbranded animals.—If any butcher or other person, engaged in the slaughter of animals, shall kill, or cause to be killed, any unmarked or unbranded animal for market, or shall purchase and kill, or cause to be killed, any animal, without having taken a bill of sale or written transfer from the person selling the same, he shall be fined not less than fifty nor more than three hundred dollars. [Act Nov. 13, 1866, p. 244; amended, Act 1899, p. 87.]

See notes under article 1359, ante.

What constitutes offense.—Where a butcher slaughters two unmarked cattle for a stranger and then buys them and sells them, he is properly convicted under this article. *Hunt v. State*, 33 App. 93, 25 S. W. 127.

Indictment.—Willson's Cr. Forms, 644, 645.

Art. 1362. [890] Not applicable to animals raised by butchers.—The preceding article shall not apply to the slaughter of any animal raised by the person slaughtering the same. [*Id.*; amended, Act 1899, p. 87.]

Constitutionality.—See notes under article 1359, ante.

Art. 1363. [891] Butcher failing to make report of animals slaughtered.—If any person engaged in the slaughter and sale of animals for market in any county, city, town or village in this state, shall fail to report to the commissioners' court of the county in which he transacts such business, at each regular term thereof, the number, color, age, sex, marks and brands of every animal slaughtered by him since the last term of said court, accompanied with a bill of sale or written conveyance to him of every animal slaughtered, save such as were raised by himself, which shall be specified, he shall be punished by a fine of not less than fifty nor more than three hundred dollars. [*Id.*; amended, Act 1899, p. 87.]

See note under article 1372, post.

Historical.—The above provision was re-enacted in 1907 as an amendment of art. 4943 Rev. St. 1895. See art. 7173 Vernon's Sayles' Civ. St. 1914.

Constitutionality.—See notes under article 1359 ante.

This article does not conflict with section 10 of the Bill of Rights. *Aston v. State*, 27 App. 574, 11 S. W. 637.

Conflict with revised civil statutes.—There is no conflict between this article and article 4943 of the Revised Statutes of 1895 (Vernon's Sayles' Civ. St. 1914, art. 7173). *Dreyer v. State*, 10 App. 97.

Substantive offense.—This article defines a substantive offense, not limited by or dependent upon any other enactment, and is a general law in force throughout the state. *Dreyer v. State*, 10 App. 97.

Report contemplated by statute.—A butcher cannot excuse himself for failure to report to the county commissioners court at each regular term by producing a report for said term sworn to and filed at a later term. *Bruns v. State*, 33 App. 415, 26 S. W. 722.

Indictment.—Willson's Cr. Forms, 646, 647.

Indictment should allege, not only that defendant was a butcher, but that he had slaughtered a number of animals, etc., and had failed to make a report of the same. *Braun v. State*, 40 App. 241, 49 S. W. 620.

When indictment alleged that the defendant was engaged in the butcher business on the 11th day of February, and that he did not make a report at first meeting of the commissioners' court, which was on the same day, it is fatally defective in not alleging that he was engaged in the business prior to said 11th day of February. *Braun v. State*, 40 App. 241, 49 S. W. 620.

An indictment for this offense held insufficient. *Kinney v. State*, 21 App. 348, 17 S. W. 423.

An indictment charging that defendant failed to make report "of all animals purchased and slaughtered by him," held defective in that it only partially stated the offense. *Kinney v. State*, 21 App. 348, 17 S. W. 423.

Former laws.—See *Bergstrom v. State*, 36 Tex. 336; *Monroe v. State*, 3 App. 341; *Schultze v. State*, 30 Tex. 508.

Art. 1364. Before engaging in business of slaughter and sale of animals, what is required.—Before engaging in the business of slaughter and sale of animals for market, every person, firm or corporation, desiring to so engage, must first register his name or their names with the county clerk, indicating their purpose to engage in such business, and, upon failure to so first register their names, they may be fined in any sum not less than five dollars nor more than twenty-five dollars. Provided, nothing in this law shall be construed to apply to slaughter houses in this state slaughtering as many as three hundred cattle per day. [Act 1907, p. 240.]

Constitutionality.—See notes under article 1359 ante.

Indictment.—Willson's Cr. Forms, 647.

Art. 1365. [892] Butchers and slaughterers required to file bond.—Every person, before he shall set up and carry on the trade or occupation of a butcher or slaughterer of cattle in the state of Texas, shall file a bond, to be approved by the county judge of the county in which he resides to carry on the business, in a sum not less than two hundred dollars, nor more than one thousand dollars, payable to the state of Texas, conditioned that he shall keep a true and faithful record, in a book kept for that purpose, of all cattle purchased or slaughtered by him, with a description of the animal, including marks, brands, age, color, weight and from whom purchased and the date thereof, that he will have the hide and ear of such animal inspected by the inspector, or some magistrate of the county, within twenty days after it is slaughtered, and that he will not purchase any cattle that has been slaughtered by another, unless the hide and ears of such slaughtered animal accompany said animal offered for sale, and that he will not purchase any animal that has been slaughtered by another, when the ear marks or brands on the hide accompanying such animal, when offered for sale, have been changed, mutilated or destroyed. [Act April 6, 1889, § 1; amend. 1893, p. 38; amended, Act 1899, p. 87.]

Constitutionality.—See notes under article 1359, ante.

Repeal as to Mitchell county.—Act Feb. 20, 1909 (Laws 1909, c. 14), exempting Mitchell county from the operation of Rev. St. 1895, arts. 5002-5042 (Vernon's Sayles' Civ. St. 1914, arts. 7256-7304) relating to the inspection of hides and animals, did not repeal as to such county this article, originally taken from Rev. St. 1895, art. 4948, under chapter 3 of tit. 102, relating to the sale, slaughter, and shipment of animals. *Grable v. State*, 62 App. 108, 136 S. W. 775.

Indictment.—Willson's Cr. Forms, 647.

Art. 1366. [893] Penalty for failure to make such bond.—Every person who shall carry on the business of butcher or slaughterer

of animals, without having filed with the clerk of the county court of the county in which he conducts such business the bond provided for in article 1365, shall be fined in any sum not less than five dollars nor more than two hundred dollars. [Id., § 2; amend., Id.; amended, Act 1899, p. 87.]

Constitutionality.—See notes under article 1359, ante.

Indictment.—Willson's Cr. Forms, 647.

Art. 1367. [894] Required to keep record of cattle purchased or slaughtered.—Every person who shall carry on the business of butcher or slaughterer of animals and shall fail to keep a true and faithful record, in a book kept for the purpose, of all cattle purchased and slaughtered by him, together with a description of each animal, including brand, age, color, weight and from whom purchased and the date of purchase, or shall fail to give the hide and ears of such animal or animal's inspected by the inspector or some magistrate, within twenty days after such animal is slaughtered, shall be fined in any sum not less than twenty dollars nor more than two hundred dollars. [Id., § 3; amended, Act 1899, p. 87.]

Constitutionality.—See notes under article 1359, ante.

Indictment.—Willson's Cr. Forms, 648.

Art. 1368. [895] Penalty for purchasing slaughtered cattle, unless accompanied by hide and ears, etc.—Any person engaged in butchering or slaughtering, and who shall purchase any cattle that have been slaughtered by another without the hide and ears of such animal accompanying the same, or shall purchase any animal that has been slaughtered by another when the ear mark or brand on the hide accompanying the same, when offered for sale, have been changed, mutilated or destroyed, shall be fined in any sum not less than fifty nor more than two hundred dollars. [Id., § 4; amend. Id.; amended, Act 1899, p. 87.]

Constitutionality.—See notes under article 1359, ante.

Indictment.—Willson's Cr. Forms, 649.

Art. 1369. [896] The record provided for in article 1367 to be open for inspection.—The record provided for in article 1367 of this charter shall be open to the inspection of all parties; and any butcher refusing to permit such inspection at any reasonable hour shall be fined in any sum not exceeding twenty-five dollars. [Id., § 5; amended, Act 1899, p. 87.]

Constitutionality.—See notes under article 1359, ante.

Art. 1370. [897] Duty of county attorney.—In addition to the criminal prosecution that may be brought under this law, it is the duty of the county attorney to bring a civil action against any butcher or slaughterer of animals for any violations of the terms of the bond prescribed in article 1365. [Act 1893, p. 38; amended, Act 1899, p. 87.]

See Willson's Cr. Forms, 651.

Constitutionality.—See notes under article 1359, ante.

Art. 1371. [898] Inspector to keep record.—It shall be the duty of the inspector or magistrate to keep a record of the marks, brands, color and general description of such hides, and for whom inspected, with the date of inspection, and return a copy of the same to the clerk of the county court of the county in which it was inspected within thirty days after said inspection; and said inspector or magistrate shall be entitled to receive ten cents for each hide so inspected, to be paid by the party having the hide inspected; and any inspector or magistrate failing to keep such book, or failing to make such report as above provided for, may be fined in any sum not less than one dollar nor more than twenty-five dollars. [Id.; amended, Act 1899, p. 87.]

Constitutionality.—See notes under article 1359, ante.

Art. 1372. [899] Counties exempt.—The provisions of this law shall not apply to either of the following counties: Denton, Comanche, Clay, Van Zandt, Galveston, Harris, Montgomery, Walker, San Jacinto, Chambers, Liberty, Jefferson, Hardin, Newton, Jasper, Tyler, Polk, Trinity, Houston, Cherokee, Nacogdoches, Angelina, San Augustine, Sabine, Shelby, Panola, Rusk, Smith, Gregg, Harrison, Marion, Upshur, Wood, Rains, Hopkins, Franklin, Camp, Titus, Morris, Cass, Bowie, Red River, Delta, Lamar, Fannin, Grayson, Collin, Hunt, Dallas, Tarrant, Johnson, Ellis, Kaufman, Van Zandt, Henderson, Anderson, Navarro, Hill, McLennan, Limestone, Freestone, Leon Madison, Grimes, Waller, Austin, Fayette, Bastrop, Lee, Fort Bend, Washington, Burleson, Brazos, Milam, Robertson, Falls, Bell, Williamson, Travis, Bexar, Bee, Calhoun, DeWitt, Goliad, Refugio, Wharton, Matagorda, Brazoria, Lavaca, Comal, Hays, Caldwell, Guadalupe, Karnes, Gillespie, Blanco, Llano, Kendall, Kimball, Mason, Kerr, Bandera, Sutton, Gonzales and Colorado. It is further provided that Palo Pinto county is exempted from the operation of this law. [Act 1889, p. 84; Act 1893, p. 38; Act 1899, p. 87; Act 1905, p. 104; Act 1909, p. 74; Act 1911, ch. 14; Act 1915, ch. 65; Act 1915, 1st S. S., p. 35, ch. 17, § 1, amending art. 1372 Rev. Pen. Code, 1911.]

See Willson's Cr. Forms, 647.

Constitutionality.—See notes under article 1359, ante.

Application to article 1363.—This article in exempting certain counties from "the provisions of this law," means the provisions of the law of 1893 brought forward by the codifiers, and not at all to article 1363, though it is found in the same chapter of the Penal Code. *Braun v. State*, 40 App. 241, 49 S. W. 620.

Art. 1373. [901] Auctioneer selling animal without written statement, etc.—If any auctioneer or other person shall sell at auction any horse, mule or ox, without first requiring from the party for whom such sale is made, a written statement signed by him of the manner in which, and the name and residence of the person from whom, he acquired such animal, he shall be fined not less than fifty nor more than one hundred dollars. [Act April 14, 1874, p. 98; amended, Act 1899, p. 89.]

Constitutionality.—See notes under article 1359, ante.

Indictment.—Willson's Cr. Forms, 652.

Art. 1374. [902] Auctioneer failing to report sales of animals.—If any auctioneer or other person shall sell at auction any horse, mule or ox, and shall fail, within ten days after such sale, to file with the clerk of the county court the written statement specified in the preceding article, duly attested with his certificate as to its genuineness, and accompanied with a further certificate containing an accurate description of the animal sold, together with the names and residences of the seller and purchaser, he shall be punished as prescribed in the preceding article. [Id.; amended, Act 1899, p. 89.]

Constitutionality.—See notes under article 1359, ante.

Indictment.—Willson's Cr. Forms, 653.

Art. 1375. This chapter not to apply to Karnes county.—The provisions of chapter 12, title 17, of the Penal Code, in so far as the same relate to and require the inspection by a magistrate, or an inspector, of the ears and hides of animals slaughtered by butchers, shall not apply to Karnes county. [Act 1909, p. 132.]

Historical.—The amendment, in 1915, of art. 1372, ante, may supersede this article.

Constitutionality.—See notes under article 1359, ante.

CHAPTER THIRTEEN

ILLEGAL MARKING AND BRANDING AND OTHER OFFENSES RELATING TO STOCK

Art. 1376. Illegal marking and branding.	Art. 1383. Having possession of hide without owner's consent.
1377. Altering or defacing mark or brand.	1384. Having possession of hide with brand cut out, etc.
1378. Using mark or brand not on record.	1385. Milking another's cow.
1379. Same subject.	1386. Driving cattle from range.
1380. Killing unmarked or unbranded cattle, etc.	1387. Preceding article qualified.
1381. Procedure in prosecutions for.	1388. Procedure in such cases.
1382. Skinning cattle.	1389. False pedigree and certificate of sale.

Article 1376. [903] Illegal marking and branding.—Every person who shall mark or brand any horse, mule, ass or cattle, or who shall mark any sheep, goat or hog, not being his own, and without the consent of the owner, and with intent to defraud, shall be punished in the same manner as if he had committed a theft of such animal.

See Vernon's Sayles' Civ. St. 1914, arts. 7151-7160, and notes thereunder.

Indictment.—Willson's Cr. Forms, 654.

See State v. Faucett, 15 Tex. 584; Cresap v. State, 28 App. 529, 13 S. W. 992; Mayes v. State, 33 Tex. 340; Adams v. State, 16 App. 162; House v. State, 15 App. 522.

The indictment should allege the name of the owner of the animal, or that the owner is unknown. State v. Haws, 41 Tex. 161; State v. Faucett, 15 Tex. 584.

The indictment must allege that the act was done "without the consent of the owner" and "with intent to defraud." State v. Hall, 27 Tex. 333.

Where the indictment charges the illegal marking or branding of a horse, mule, ass, or cattle, it need not allege value; but, if the animal be a sheep, goat, or hog, value must be alleged. If the value alleged be less than twenty dollars, value need not be proved, as in such case the offense alleged is a misdemeanor, and its punishment is not graded by the value of the animal. Melton v. State, 20 App. 202.

— **Description of animal.**—See notes under C. C. P. art. 458.

— **Proof and variance.**—Where an indictment alleged that the animal was the property of Joseph R., and the evidence proved it to be the property of Napoleon R., the variance was held fatal. Mayes v. State, 33 Tex. 340.

Allegations that the act was done "without the consent of the owner" and "with intent to defraud" must be proved. Fossett v. State, 11 App. 40.

Evidence.—As to evidence relating to brands, see C. C. P. arts. 783 et seq., and also Vernon's Sayles' Civ. St. 1914, art. 7160.

And "want of consent" can not be proved by the declarations of the owner to a third person. West v. State, 32 Tex. 651; Cresap v. State, 28 App. 529, 13 S. W. 992.

See a case for evidence which negated any criminal intent. Taylor v. State, 35 Tex. 496.

Charge of court.—The court instructed the jury if they believed that the defendant had permission from S. to mark his hogs, and if they found that defendant at the time he marked the hogs believed that they belonged to S. and that he had a right to mark them, they should acquit him; held, correct. Goree v. State (Cr. App.) 34 S. W. 119.

Failure of court to limit effect of evidence as to brands; held, error. Childers v. State, 37 App. 392, 35 S. W. 654.

Former jeopardy.—See notes under C. C. P. art. 9.

Art. 1377. [904] Altering or defacing mark or brand.—Every person who shall alter or deface the mark or brand of any horse, mule, ass or cattle, or shall alter or deface the mark of any sheep, goat or hog, not being his own property, and without the consent of the owner, and with intent to defraud, shall be punished in the same manner as if he had committed a theft of such animal. [Act Feb. 12, 1858, pp. 181-82.]

Laws 1893, p. 25 (art. 1355, ante) considered in connection with Pen. Code (1879) art. 760, provides a punishment without further legislation for subsequent alteration of marks of hogs. Barfield v. State (Cr. App.) 43 S. W. 333.

Nature and elements of offense.—Putting a new brand on an animal already branded, without the consent of the owner, is an "altering" of the brand within the meaning of this article, although such new brand may not interfere with the figure of the old brand, and may be on another part of the animal. Linney v. State, 6 Tex. 1, 55 Am. Dec. 756; Boyd v. State, 24 App. 570, 6 S. W. 853, 5 Am.

St. Rep. 908; *Coward v. State*, 24 App. 590, 7 S. W. 332; *Alford v. State*, 31 App. 299, 20 S. W. 553.

"Altering" and "defacing" are not synonymous. Defacing means obliterating. Altering means changing to another brand. *Linney v. State*, 6 Tex. 1, 55 Am. Dec. 756.

To constitute this offense, it is not necessary that the original sear of the old brand should be changed. The alteration may be effected by so clipping the hair on the original brand, as to change it into another brand. If the defendant, with fraudulent intent, altered the brand on an animal not his own, without the consent of the owner, he is guilty of this offense, no matter with what instrument or means he effected the alteration. *Slaughter v. State*, 7 App. 123.

It is not essential, to constitute an alteration of a brand, that the original scar be changed. *Slaughter v. State*, 7 App. 123.

Indictment.—Willson's Cr. Forms, 655.

See *Davis v. State*, 13 App. 215; *House v. State*, 15 App. 522; *Alford v. State*, 31 App. 299, 20 S. W. 553.

— **Proof and variance.**—When the indictment described the brand which it was alleged was altered, and then described the brand as it appeared after the alleged alteration, it was held that the alteration must be proved as alleged, as it was descriptive of the offense. See this case for an indictment held good, and for a fatal variance between the alteration as alleged, and that proved. *Davis v. State*, 13 App. 215.

Where the indictment charged the alteration of the brand on six head of cattle, describing the alteration, and the proof showed that the brand on some of the cattle had been altered as described, but on others the alteration was different from that alleged, it was held that the indictment was sustained; that proof of the alteration as described in the indictment of the brand on any one of the animals was sufficient to sustain the indictment in this respect, and that it was competent for the state to prove the alteration of the brands upon the other cattle, although variant from the alteration described in the indictment, as such proof was *res gestæ*, the alterations all having been made at the same time and place, and constituted but one transaction. *House v. State*, 15 App. 522.

On a trial for illegally altering the brand on animals, where the evidence showed that the offense was committed after the animals had strayed from the ranch of the alleged owner into the adjoining pasture of another party than the alleged owner, and it was insisted by the defense that the party having actual care, control, and possession of the premises where the offense was committed was the party properly in possession of the animals, and that the facts proved constituted a variance between the allegations and proof of ownership, held, that the objection was not tenable. Cattle can not by their act or volition change ownership in themselves from one person to another. *Alford v. State*, 31 App. 299, 20 S. W. 553.

Where the indictment charging defendant with defacing a cattle mark with intent to defraud alleged that the ownership and possession of the cow was in W.'s brother, and the evidence showed that the mark was defaced while the cow was in possession of W., to whom the brother had loaned her for milking purposes, there was a fatal variance. *Williams v. State*, 42 App. 18, 57 S. W. 93.

Evidence.—Evidence held insufficient to sustain a conviction. *House v. State*, 15 App. 522.

A copy of a record of a cattle-brand was certified to as follows: "State of T., County of Y. I, J., clerk of the county court in and for said county, do hereby certify that the foregoing is a true copy of the record of the mark and brand of W." Held sufficient to authorize its admission in evidence on a trial for theft. *Byrd v. State*, 26 App. 374, 9 S. W. 759.

The description of a horse-brand, followed by a certificate of the clerk of the county court that it is a true copy of the record of the brand, shows, with reasonable certainty, that it was recorded in that county. *Thompson v. State*, 26 App. 466, 9 S. W. 760.

Charge of court.—The penalty for the offense must be correctly charged. *Burford v. State*, 44 Tex. 525.

The charge of the court should confine the jury to the alteration alleged in the indictment. *House v. State*, 15 App. 522.

On a trial for altering the brand of cattle, where the court had charged that before the jury could convict they must believe beyond a reasonable doubt that defendant altered the brand with intent to defraud the owner, it was proper to refuse to charge for defendant if he believed that the animal had been stolen, and changed the brand with intent to prevent the thief from recovering it. *Childers v. State*, 37 App. 392, 35 S. W. 654.

On trial for changing the brand on an animal with intent to defraud, where the question of ownership depended largely on evidence as to the original brand, which had not been recorded, it was error for the court to fail to charge that such brand could be considered only as a flesh mark, and not as evidence of ownership, since Rev. St. 1895, art. 4930 (*Vernon's Sayles' Civ. St.* 1914, art. 7160) provides that no unrecorded brand shall be evidence of ownership. *Childers v. State*, 37 App. 392, 35 S. W. 654.

On trial for changing the brand on an animal with intent to defraud, where the evidence as to the ownership was circumstantial, it was error to refuse to give a charge on circumstantial evidence. *Childers v. State*, 37 App. 392, 35 S. W. 654.

Art. 1378. [905] Using mark or brand not on record.—If any person shall mark or brand any unmarked or unbranded stock with

a mark or brand, not upon record, he shall be punished by fine not exceeding five hundred dollars. [Act Nov. 12, 1866, p. 188.]

Indictment.—Willson's Cr. Forms, 656.

Art. 1379. [906] Same subject.—If any person shall alter or change any mark or brand upon any stock of his own, or that is under his control, without first having such changed mark or brand recorded, he shall be punished as prescribed in the preceding article. [Id.]

Indictment.—Willson's Cr. Forms, 657.

Art. 1380. [907] Killing unmarked or unbranded cattle.—If any person shall knowingly kill any unmarked or unbranded animal of the cattle species, or any unmarked hog, sheep or goat, not his own, he shall be fined not less than twenty-five nor more than one hundred dollars. [Id.]

Indictment.—Willson's Cr. Forms, 658.

See *Lawrence v. State*, 20 App. 536.

Art. 1381. [993] Procedure in prosecutions for.—In prosecutions under the preceding article, it shall only be necessary for the state to allege and prove that the animal killed was not the property of the accused, without stating or proving the true owner of such animal.

Indictment.—Willson's Cr. Forms, 658.

Art. 1382. [909] Skinning cattle.—If any person shall remove the hide, or any part thereof, from any cattle not his own, and without the consent of the owner, he shall be fined in a sum not less than twenty nor more than one hundred dollars; and the removal of each separate hide from each animal shall constitute a separate offense. [Act April 2, 1887, p. 105.]

Indictment.—Willson's Cr. Forms, 659.

Art. 1383. [910] Having possession of hide without owner's consent.—If any person shall be found in possession of any hide of any cattle not his own, and possession of said hide is obtained without the consent of the owner or his legal representative, he shall be fined in a sum not less than twenty nor more than one hundred dollars. [Id.]

Indictment.—Willson's Cr. Forms, 672.

Art. 1384. [911] Having possession of hide with brand cut out, etc.—If any person be found in possession of any hide of any cattle with brand cut out or disfigured, and shall offer the same for sale, he shall be fined in a sum not less than twenty nor more than one hundred dollars; and the possession and offer of sale of each hide with the brand cut out or disfigured shall constitute a separate offense; provided, that nothing in this act shall prevent any person who shall be guilty of the offense of theft of such hide from being prosecuted and convicted for such offense. [Id.]

Indictment.—Willson's Cr. Forms, 673.

Art. 1385. [912] Milking another's cow.—If any person, without the consent of the owner, shall take up, use or milk any cow, not his own, he shall, for every such offense, be punished by fine not exceeding ten dollars. [Act Nov. 12, 1866, p. 188.]

Indictment.—Willson's Cr. Forms, 660.

Compare this article with article 1232.

Art. 1386. [913] Driving live stock from range.—If any person shall wilfully kill, or destroy, or drive, or remove from its accustomed range, any live stock, not his own, without the consent of the owner, under such circumstances as not to constitute theft, he shall, nevertheless, be guilty of a misdemeanor, and shall be punished by fine not exceeding one thousand dollars. [Id.]

Conviction and verdict under indictment for theft.—Though under an indictment charging theft of cattle in the usual form, a conviction may be had either

for the theft defined in article 1356, or for the misdemeanor of driving cattle from their accustomed range as defined in article 1386, the verdict, to be sufficient, must show with reasonable certainty of which offense, the felony or the misdemeanor, the accused was found guilty. *Guest v. State*, 24 App. 530, 7 S. W. 242. And on the same subject, see *Taylor v. State*, 25 App. 96, 7 S. W. 861; *Spoone-more v. State*, 25 App. 358, 8 S. W. 280; *Woods v. State*, 26 App. 490, 10 S. W. 108; *Lopez v. State*, 28 App. 343, 13 S. W. 219. And see *Foster v. State*, 21 App. 80, 17 S. W. 548, and authorities cited. *Guest v. State*, supra, is overruled by *Long v. State*, 39 App. 461, 46 S. W. 821, 73 Am. St. Rep. 954. See, also, *Chambers v. State* (Cr. App.) 59 S. W. 261; *Counts v. State*, 37 Tex. 593; *Campbell v. State*, 42 Tex. 591; *Turner v. State*, 7 Tex. App. 596; *Smith v. State*, 21 App. 133, 17 S. W. 558.

Indictment.—Willson's Cr. Forms, 661.

Evidence.—Evidence held insufficient to support conviction. *Newport v. State* (Cr. App.) 77 S. W. 224.

Charge.—Where, in a prosecution for driving cattle from their accustomed range, the evidence showed that the animal in question got into defendant's herd as it was being driven past prosecutor's premises, and that defendant tried to prevent it from following the herd, refusal to charge that, if defendant did not purposely drive the animal, he would not be guilty, was error. *Day v. State*, 47 App. 178, 82 S. W. 657.

Art. 1387. [914] Preceding article qualified.—Nothing in the preceding article shall be construed to prevent any person from driving his own and other stock, which may be mixed therewith, until the same can be conveniently separated; provided, that nothing herein shall be construed to authorize any person under any circumstances to remove any live stock, not his own, from their usual range. [Id., p. 187.]

See article 1357, ante.

Art. 1388. [915] Procedure in such cases.—In any prosecution under article 1386, it shall only be necessary to prove the act of killing, or destroying or driving, using, or removing from the range of any stock not belonging to, or under the control of, the accused; and it shall devolve upon the accused to show any fact under which he can justify or mitigate the offense. [Id.]

See article 1358, and note thereto.

Art. 1389. [916] False pedigree and certificate in sale of animals; penalty.—Any person who shall knowingly and wilfully furnish or give to a purchaser of any animal any false pedigree or false certificate of sale of such animal, and every person who shall knowingly and wilfully use, for the purpose of deceiving, any false pedigree or false certificate of sale of any animal, whether such false pedigree or false certificate of sale was furnished, given or procured in this state or elsewhere, shall, upon conviction thereof, be punished by a fine in any sum not less than twenty-five nor more than five hundred dollars, or be imprisoned in the county jail for a term not exceeding six months, or by both such fine and imprisonment. [Act April 13, 1891, § 1.]

Indictment.—Willson's Cr. Forms, 674.

CHAPTER FOURTEEN

OFFENSES RELATING TO ESTRAYS

Art. 1390. Unlawfully disposing of an es-tray.	Art. 1391. Taking up and using without complying with the law.
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Article 1390. [917] Unlawfully disposing of an estray.—If any person shall unlawfully remove, sell or in any other manner dispose of, any animal which has been taken up by him as an estray, he shall be punished by fine not exceeding two hundred and fifty dollars. [Act Feb. 12, 1858, p. 184.]

See notes under the following article.

See *Vernon's Sayles' Civ. St.* 1914, arts 7185-7208.

Gravamen of offense.—The gist of the offense is the unlawful disposition of the animal. *Brogden v. State*, 44 Tex. 103.

Venue.—See notes under C. C. P., art. 258.

Indictment.—Willson's Cr. Forms, 662.

To charge that the defendant unlawfully killed the animal, charges an unlawful disposition of it, and the manner of the disposition. *Brogden v. State*, 44 Tex. 103.

An indictment charging defendant with unlawfully taking up and using a horse "coming within the meaning of an estray" without the consent of the owner, held insufficient. *State v. Meschac*, 30 Tex. 518.

An indictment charging that defendant did take up and use an estray without complying with the estray laws, need not state the age, color, sex, marks or brands of the animal taken up. *State v. Crist*, 32 Tex. 99.

An allegation that the animal was an estray was a sufficient allegation that the ownership was unknown. *State v. Anderson*, 34 Tex. 611.

Description of the animal taken up held sufficient. *State v. Anderson*, 34 Tex. 611.

Indictment held not defective though it stated that the owner of the animal was known to the grand jury. *State v. Fletcher*, 35 Tex. 749.

An indictment for the theft of an animal which had been taken up as an estray should allege ownership in the taker-up, and not that the ownership is unknown. *Swink v. State*, 24 S. W. 893, 32 App. 530.

Charge of court.—An indictment contained two counts. The first charged the sale of an estray animal without having given legal notice of the sale, and the second charged the selling of the estray, when three adult bidders besides the family of the taker-up were not present. The state, on the trial, abandoned the first count, electing to proceed on the second. But the court submitted both counts to the jury in its charge. Held, error, because the matters charged in the first count were no longer in issue, and the charge should have limited the jury to a consideration of the second count only. It was further held that the term "family" as used in article 4967, Revised Statutes 1895 (*Vernon's Sayles' Civ. St.* 1914, art. 7198), means the collective body of persons who live in one house, under one head or manager, and that in this case the court should have so instructed the jury. *Goode v. State*, 16 App. 411.

Evidence.—In a prosecution for the theft of a horse under an indictment alleging the owner thereof as unknown, it is not necessary, where the evidence shows, on trial, that the horse had no known owner, to prove diligent search by the grand jury to ascertain the owner. *McCarty v. State*, 36 App. 135, 35 S. W. 994.

Evidence that a horse broke into defendant's pasture, and was there for three years, and that defendant's boys were seen to use it, where there is no evidence that defendant ever handled the horse, or used it in any way, does not justify a conviction for violation of the estray law. *Thompson v. State*, 37 App. 654, 40 S. W. 997.

Art. 1391. [1918] Taking up and using without complying with the law.—If any person shall, without complying with the laws regulating estrays, take up and use, or otherwise dispose of, any animal coming within the meaning of an estray, he shall be punished as prescribed in the preceding article. If the unlawful taking or disposition of an estray animal be effected in such manner as to come within the meaning of theft, the person guilty of the same shall be punished for that offense. [Id.]

See notes under article 1332, ante, as to theft of estray.

It is now made illegal by express statutory provision to use any horse, etc., taken up as estray, for any purpose whatever, until the party taking up such animal shall have given the required bond. *Vernon's Sayles' Civ. St.* 1914, arts. 7185, 7186, 7191. But after giving such bond the taker-up may use the animal in moderation. *Vernon's Sayles' Civ. St.* 1914, art. 7202.

Nature and elements of offense.—The penalty is not confined to cases in which an estray animal is taken up by a citizen on his own land or premises, but extends to all cases in which such an animal is taken up and used by any one contrary to the intent of the statute. *State v. Apel*, 14 Tex. 428.

Under a former statute, it was held that a person who took up and used an estray horse without having legally advertised the same, and without having first made oath and estrayed the same according to law, was guilty of this offense. *State v. Armontrout*, 21 Tex. 472.

And "oxen," other than "work oxen," are included in the term "cattle." *State v. Moreland*, 27 Tex. 726.

Under former statutes it was necessary to allege and prove the value of the animal, because the punishment was regulated by such value. *State v. McCormack*, 22 Tex. 297; *Tharp v. State*, 28 Tex. 696; *Osborn v. State*, 33 Tex. 545. But as the punishment for this offense, and also for the offense defined in article 1390 is not regulated or affected by the value of the animal, it is no longer necessary to allege or prove the value of the animal in a prosecution for either offense. It is essential that the evidence should show that the offense was committed in the county of the prosecution. *Tharp v. State*, 28 Tex. 696.

To constitute this offense the defendant must have "taken up and used" the animal. "Taking up" without "using" would not constitute the offense, and the indictment should charge, and the proof show both a taking up and a using of the animal. *Davis v. State*, 30 Tex. 352.

A "gelding" is included in the generic term "horse" used in the estray law. *Owens v. State*, 38 Tex. 555.

This offense is in the nature of theft, and a prosecution for it is not barred until the lapse of two years after the cessation of the unlawful use of the animal. *Davis v. State*, 2 App. 162.

The statute contemplates that the animal must not only be taken up but must be used. When a hog was taken up and kept in a pen and fed for some time, and was then turned out and it died, this statute was not violated. *Williams v. State* (Cr. App.) 78 S. W. 928.

"Estray" defined.—An "estrays" is the property of the owner, though such owner be unknown, and may be the subject of theft or of misdemeanor. If the owner be known at the time of the indictment his name and ownership should be alleged, and that the act of the defendant with respect to the animal was without such owner's consent. The word "estrays," as used in our statutes, does not mean an animal using its accustomed range, or which belongs to the neighborhood, the owner being known, or who might be known on reasonable inquiry. But our statutes do not restrict the meaning of the word to animals whose owners are unknown, but includes animals whose owners are known, but are remote, or animals whose owners would not follow and reclaim them with reasonable diligence. *State v. Apel*, 14 Tex. 428; *State v. Fletcher*, 35 Tex. 740.

Indictment.—Willson's Cr. Forms, 663.

See *State v. Carabin*, 33 Tex. 697; *State v. Apel*, 14 Tex. 431; *State v. Fletcher*, 35 Tex. 740; *Swink v. State*, 32 App. 530, 24 S. W. 893.

Under former statutes (Hart. Dig., art. 1254, and O. C. 775a, 775b) it was necessary to allege the value of the animal, the penalty being fixed thereby, *State v. McCormack*, 22 Tex. 297; *Osborn v. State*, 33 Tex. 545; and it was also requisite to prove it on trial. *Tharp v. State*, 28 Tex. 696.

"Without complying with the laws regulating estrays," is an essential ingredient of this offense and cannot be omitted in the indictment. *State v. Hutchinson*, 26 Tex. 111.

To allege "without estraying the same in the manner prescribed by law," was held sufficient. *State v. Moreland*, 27 Tex. 726.

It must be averred that the animal was an "estrays," not that it was an animal "coming within the meaning of an estrays." *State v. Meschac*, 30 Tex. 518.

It is not necessary in the indictment to allege the age, sex, color, brand, etc., of the animal. *State v. Crist*, 32 Tex. 99; *State v. Anderson*, 34 Tex. 611. Seemingly it was held otherwise in *State v. Meschac*, 30 Tex. 518.

Certainty to a common intent in the description of the stray animal is all that is required in the indictment. *State v. Ivy*, 33 Tex. 646.

To describe the animal as "one horse" is sufficient. *State v. Ivy*, 33 Tex. 646; *State v. Carabin*, Id. 697. Or as "one gelding." *State v. Crist*, 32 Tex. 99; *Owens v. State*, 38 Tex. 555. Or, as "ox," oxen being included in the term "cattle," but not meaning "work oxen." *State v. Moreland*, 27 Tex. 727.

The allegation that the animal was an estray is a sufficient allegation that the ownership was unknown. *State v. Anderson*, 34 Tex. 611.

"Did take up and trade off," charges both taking up and using. *State v. Dunham*, 34 Tex. 675.

Evidence.—When the state shows the taking up and using of an estray, the burden is on the defendant to justify his action. *Ashcroft v. State*, 32 Tex. 108.

Evidence held insufficient to support conviction for violation of estray law. *Thompson v. State*, 37 App. 654, 40 S. W. 997.

CHAPTER FIFTEEN

OFFENSES AGAINST LABELS, TRADE MARKS, ETC.

Art.	Art.
1392. Trade marks of carbonated goods, etc., how established.	1394. Penalties.
1393. Possession prima facie evidence.	1395. Counterfeiting trade marks, etc.
	1396. Unlawfully using, penalty.

Article 1392. [918a] Trade marks of carbonated goods, etc., how established.—All manufacturers or dealers in carbonated goods, mineral waters, soda water, wine, cider, or other beverage, or manufacturers of medicine or other compound requiring the use of kegs, casks, barrels, boxes, syphons, bottles, or any other vessels for containers, upon which the names, brands, marks, or trade marks, or other designation of ownership or proprietorship, is stamped, engraved, etched, blown in, impressed, or otherwise produced upon such boxes, syphons, bottles, or any other vessels for containers, may file in the office of the county clerk of the county in which the principal place or office of business is situated, a fac simile or description of the name or names, marks or devices, so used by such manufacturer or dealer in such wares herein enumerated, and cause such description to be published in a public newspaper published in

such county for three successive weeks; and the act of so filing and causing to be recorded by the county clerk, and publishing, shall operate as a trade mark, securing to the said manufacturer the full protection of the law as a trade mark, entitling the said manufacturer to the sole and exclusive use in Texas of said mark, name, or device; for which services the clerk shall be allowed the sum of one dollar, to be paid by the party having such brands, etc., recorded.

Unlawful to use, etc., trade mark of another.—It is hereby declared to be unlawful for any person or persons, corporate or otherwise, other than the proprietor, or by his written consent, to fill, for the purpose of traffic, or for sale, with any compound whatever, any box, syphon, bottle or other container so marked, recorded in the office of the county clerk, and published as provided in this article, or to deface, erase, obliterate, cover up or otherwise remove or cancel any such mark or device. [Acts 1893, p. 125; amended, Act 1901, p. 288.]

See notes under art. 703, Vernon's Sayles' Civ. St. 1914.

Indictment.—Willson's Cr. Forms, 719.

Art. 1393. [918b] Possession prima facie evidence, etc.—To knowingly and wilfully have in possession, otherwise than by contract with the proprietor of the goods herein enumerated, or with his duly accredited agents, any of the vessels in said article enumerated, or to use, buy, sell, or dispose of any such vessel, with or without contents of any kind, except by authority of the proprietor, or to wantonly and wilfully break, damage, mar, injure, or destroy any such vessel, is declared hereby to be prima facie evidence of such unlawful use, and shall constitute a misdemeanor, punishable by fine, upon conviction in a court of competent jurisdiction, an employé being equally liable with the principal so offending. [Id.]

Indictment.—Willson's Cr. Forms, 719.

Art. 1394. [918c] Penalties.—Any person violating any of the provisions of the two preceding articles shall be deemed guilty of a misdemeanor, and, upon conviction before a justice of the peace, shall be fined for such unlawful use of each and every box, five dollars, for each and every syphon, five dollars, for each and every bottle, five dollars, and for every other receptacle, except a fountain, five dollars, and for each fountain, twenty-five dollars; the fines so designated to be the minimum in each case, the maximum not to exceed double the minimum. [Id.]

Indictment.—Willson's Cr. Forms, 719.

Art. 1395. [918d] Counterfeiting trade mark, etc.; penalty.—Whenever any person, association, private corporations or union of working men, incorporated or unincorporated, have adopted, or shall hereafter adopt, for their protection any label, trade mark, design, device, imprint or form of advertisement, indicating that goods to which such label, trade mark, design, device, imprint, or form of advertisement, shall be attached, were manufactured by such person, association, private corporations or union, or by a member or members of such association or union, it shall be unlawful for any person, inclusive of officers, agents, receiver or receivers of corporations, to counterfeit or imitate such label, trade mark, design, device, imprint or form of advertisement, or to use such counterfeit or imitation of such label, trade mark, design, device, imprint, or form of advertisement, knowing the same to be counterfeit or imitation, or to aid, assist, countenance or knowingly permit such counterfeit or imitation, or the use of such counterfeit or imitation, for his own use or benefit, or for the use or benefit of any corporation of which he may then be an officer, agent or receiver. Every person, whether in his individual capacity or as an officer, agent or

receiver of a corporation, violating this article, shall, upon conviction, be punished by fine of not less than twenty-five nor more than one hundred dollars; and each day's violation of this article shall be considered a separate offense. [Act 1895, p. 108.]

See art. 705, Vernon's Sayles' Civ. St. 1914, and notes thereunder.

Indictment.—Willson's Cr. Forms, 719.

Art. 1396. [918e] Unlawfully using; penalty.—Every person, whether in his individual capacity or as the officer, agent or receiver of a corporation, who shall wilfully and knowingly use or display the genuine label, trade mark, design, device, imprint, or form of advertisement, or name of any such person, association or union, incorporated or unincorporated, not being authorized to use or display the same, or shall aid, assist, countenance or knowingly permit the use of same, not being authorized to use the same, shall, upon conviction, be punished by fine of not less than twenty-five nor more than one hundred dollars. [Id.]

Indictment.—Willson's Cr. Forms, 719.

CHAPTER SIXTEEN

OFFENSES RELATING TO THE PROTECTION OF STOCK RAISERS IN CERTAIN LOCALITIES

Art.		Art.	
1397.	Inspector giving a fraudulent certificate.	1408.	Failing to take bill of sale in purchasing animals.
1398.	Inspector to examine hides.	1409.	Agent selling without power of attorney.
1399.	Inspector failing to keep books.	1410.	Using more than one brand or mark.
1400.	Certified by inspector.	1411.	Branding or marking outside of a pen.
1401.	Return of certificate.	1412.	Clerk improperly recording brand.
1402.	Counterbranding cattle without consent of owner.	1413.	Agent of railroad, etc., receiving for shipment uninspected animals.
1403.	Clandestine driving cattle across the Rio Grande.	1414.	Counties exempted.
1404.	Shipping hides imported from Mexico, without inspection.	1414a.	Other counties exempted.
1405.	Selling hides without inspection.	1414b.	Same.
1406.	Driving cattle out of county to market, without road brand.	1415.	Counties placed under the law.
1407.	Driving stock out of county without owner's consent.	1415a.	Same.

Article 1397. [919] Inspector giving a fraudulent certificate.—Any inspector of hides and animals who shall give a certificate of inspection without having first made such inspection in accordance with law, or who shall fraudulently issue any certificate of inspection of any hides or animals, shall be fined not less than fifty nor more than five hundred dollars. [Act Aug. 23, 1876, p. 302, § 31.]

See Vernon's Sayles' Civ. St. 1914, arts. 7256-7305a, and notes thereunder.

Constitutionality.—The articles of this chapter have been held to be constitutional, not coming within the meaning of a "local law" as those words are used in sec. 23, art. 16, of the constitution. *Lastro v. State*, 3 App. 363.

Indictment.—Willson's Cr. Forms, 664, 666.

Art. 1398. [920] Inspector or deputy failing to examine hides, etc.; penalty.—If any inspector or deputy inspector of hides and animals shall knowingly fail or refuse to faithfully examine and inspect all hides or animals known or reported to him as sold, or as leaving or going out of the county for sale or shipment, and all animals driven or sold in his district for slaughter, packeries or butcheries, shall be fined not less than twenty-five dollars nor more than two hundred dollars. [Act April 4, 1889, § 1.]

Indictment.—Willson's Cr. Forms, 665.

Art. 1399. [921] Inspector failing to keep book and record; penalty.—Any inspector of hides and animals who shall fail to provide and keep a well-bound book, and record therein a correct statement, showing the number, ages and marks and brands of each ani-

mal inspected by him or by his deputy or deputies, and the number and all the marks and brands of all hides inspected by him or by his deputies, and whether the hides are dry or green, and the name or names of the vendor or vendors and of the purchaser or purchasers of said animals or hides, shall be fined not less than fifty dollars nor more than three hundred dollars. [Id., § 2.]

Indictment.—Willson's Cr. Forms, 667, 668.

Art. 1400. [922] Certificate by inspector.—Any inspector or deputy inspector of hides and animals who shall fail to correctly state in his certificate of inspection, or in his certificate of acknowledgment, all the marks and brands of all animals and hides inspected by him, shall be fined not less than twenty-five dollars nor more than three hundred dollars. [Id., § 3.]

See Willson's Cr. Forms, 669.

Art. 1401. [923] Return of certified copies, etc.—Any inspector of hides and animals who shall fail to return a certified copy of all entries made in his record during each month to the clerk of the county court of his county, on the last day of each month, shall be fined not less than fifty nor more than three hundred dollars. [Id., § 4.]

See Willson's Cr. Forms, 670.

Art. 1402. [924] Counterbranding cattle without consent of owner.—Any person who shall counterbrand any cattle without the consent of the owner, or his agent, shall be fined not less than ten nor more than fifty dollars for each animal so counterbranded. [Act Aug. 23, 1876, p. 302, § 32.]

See, ante, chap. 13, of this title. See notes to article 1376, et seq.

Indictment.—Willson's Cr. Forms, 671.

Art. 1403. [925] Clandestine driving cattle across the Rio Grande.—Any person who shall drive any cattle across the Rio Grande into Mexico, at any other point than where a United States custom house is established, or where there is a place of inspection by United States custom house officers, or without first having the same inspected in accordance with law, shall be confined in the penitentiary not less than two nor more than five years. [Id., § 35.]

Indictment.—Willson's Cr. Forms, 675.

Art. 1404. [926] Shipping hides imported from Mexico without inspection.—Any person who shall ship from any port in this state any hides of cattle imported from Mexico, without first having procured a certificate of importation and inspection in accordance with law, shall be fined not less than one nor more than five dollars for each hide so shipped. [Id.]

Indictment.—Willson's Cr. Forms, 676.

Art. 1405. [927] Selling hides without inspection.—Any person who shall sell any hides of cattle, without the same having been inspected, shall be punished as prescribed in the preceding article. [Id., § 36.]

Indictment.—Willson's Cr. Forms, 677.

Art. 1406. [928] Driving cattle out of county to market without road brand.—Any person who shall drive any cattle out of any county, with the intention of driving the same beyond the limits of the state, to a market, without first having road-branded the same in accordance with law, shall be fined not less than twenty nor more than one hundred dollars for each animal so driven. [Id., § 37.]

Indictment.—Willson's Cr. Forms, 678.

See as to road-brand, Rev. St. 1895, art. 5023a; Vernon's Sayles' Civ. St. 1914, art. 7278.

Art. 1407. [929] Driving stock out of county without owner's consent.—Any person who shall drive any cattle or horses out of any county, without the written authority of the owner thereof, duly authenticated as the law requires, and without first having the same duly inspected, shall be punished as prescribed in the preceding article. [Id., § 39.]

When offense is complete.—The offense is complete in either county, the moment the animal is driven across the line of the coterminous counties. *Rogers v. State*, 9 App. 43, distinguishing *Senterfit's case*, 41 Tex. 186.

Venue.—See notes under C. C. P. art. 258.

Indictment.—Willson's Cr. Forms, 679.

The indictment must negative that the cattle driven were the defendant's and that they were driven without the owner's written authority. *Covington v. State*, 6 App. 512; *Long v. State*, Id. 642; *Heard v. State*, 8 App. 466.

Art. 1408. [930] Failing to take bill of sale in purchasing animals.—Any person who shall purchase any animals or hides of cattle without obtaining a bill of sale from the owner or his agent, shall be fined not less than twenty nor more than one hundred dollars for each animal or hide so purchased. [Id., § 39.]

Nature and elements of offense.—The preceding article is construed to require that the bill of sale shall be obtained at the time of the delivery of the cattle. It being in evidence that the cattle were purchased and received by an agent of the defendant for the defendant, it was incumbent upon the state to not only show that the cattle were purchased and received by the agent under the directions of the defendant, but that said agent purchased and received the cattle without taking a bill of sale thereto, by direction of the defendant. *Houston v. State*, 13 App. 595.

In a prosecution for this offense the defendant offered to prove that another person purchased the cattle for him, received them for him, and gave him a bill of sale which he said at the time was the bill of sale for the cattle, and he offered said bill of sale in evidence. This proposed testimony was rejected. Held, error. If defendant did in fact purchase the cattle through an agent, and the cattle were delivered to the agent in the absence of the defendant, these facts would constitute a good defense, unless it further appeared that defendant consented to the receiving of the cattle by his agent, without a bill of sale therefor. *Brockman v. State*, 16 App. 54.

Venue.—See notes under C. C. P. art. 258.

Indictment and information.—Willson's Cr. Forms, 680.

Information held sufficient. *Long v. State*, 6 App. 642.

An indictment for this offense must allege the ownership of the cattle to be in some one. *Houston v. State*, 13 App. 595.

Evidence.—Where the charge was that the defendant purchased cattle on a certain day without taking a bill of sale, and the proof showed such a purchase on three several days, and the conviction was for more than one day's purchase, the judgment was set aside, it being held that the conviction could only be for the purchase made on one of the days. *Long v. State*, 6 App. 642.

The execution by defendant of an attested bill of sale which has not been filed in the case, cannot be proved by secondary evidence without accounting for the non-production of the subscribing witness. *Graves v. State*, 28 App. 354, 13 S. W. 149.

On trial for theft of a mule, a bill of sale of such mule, which a witness testifies he saw defendant write, and that defendant then gave it to him, and which is not attested, is admissible in evidence. *Abrigo v. State*, 29 App. 143, 15 S. W. 408.

Art. 1409. [931] Agent selling without power of attorney.—Any person who shall, as the agent of another, sell any cattle without first having obtained a power of attorney from the owner, duly authenticated, shall be fined not less than fifty nor more than five hundred dollars. [Id., § 40.]

Power of attorney.—See *Turner v. State*, 7 App. 596.

Revocation of agency.—*Massey v. State*, 31 App. 91, 19 S. W. 908.

Indictment.—Willson's Cr. Forms, 681.

Art. 1410. [932] More than one brand or mark.—Any person who shall, in originally branding or marking cattle, use more than one mark or brand, shall be fined not less than twenty-five nor more than one hundred dollars for each animal so branded or marked. [Id., § 41.]

Indictment.—Willson's Cr. Forms, 682.

Records as evidence.—The statute, Rev. St. 1895, arts. 4922, 4923 (*Vernon's Sayles' Civ. St.* 1914, arts. 7152, 7153) contemplating a person's using only one record brand, and Pen. Code, art. 932, making it an offense to use more, where a person records several marks and brands none of these would be evidence of owner-

ship of an animal so branded, but could be used to establish its identity. *Turner v. State*, 45 S. W. 1020, 39 App. 322.

The record of a second brand while the first remains unabandoned is not admissible to prove ownership, the statute providing for the use of only one brand by one person. *Unsell v. State*, 45 S. W. 1022, 39 App. 330.

Art. 1411. [933] Branding or marking outside a pen.—Any person who shall brand or mark any animal, except in a pen, shall be fined not less than ten nor more than fifty dollars for each animal so branded or marked. [Id., § 42.]

Indictment.—Willson's Cr. Forms, 683.

Art. 1412. [934] Clerk improperly recording brand.—Any clerk of the county court who shall record any brand when the person having the same recorded fails to designate the part of the animal upon which the same is to be placed, shall be fined not less than ten nor more than fifty dollars. [Id., § 43.]

See *Hayes v. State*, 30 App. 404, 17 S. W. 940; *Massey v. State*, 31 App. 91, 19 S. W. 908; *Tittle v. State*, 30 App. 597, 17 S. W. 1118; *McKenzie v. State*, 32 App. 568, 25 S. W. 426, 40 Am. St. Rep. 795; *McGrew v. State*, 31 App. 336, 20 S. W. 740.

Record of brand.—Where a recorded brand is relied on to prove ownership, it should identically correspond with that on the animal and should be on the same part of the animal as shown in the record or the discrepancy should be explained by other evidence. *Myers v. State*, 24 App. 341, 6 S. W. 194; *Priesmuth v. State*, 1 App. 480.

Record of brand must designate the part of the animal on which it is placed. *Massey v. State*, 31 App. 91, 19 S. W. 908.

"Left shoulder or side" is insufficient as a designation of the part of the animal on which the brand is to be placed, and such a brand cannot properly be recorded. *Reese v. State*, 43 App. 539, 67 S. W. 326; *Steed v. State*, 43 App. 567, 67 S. W. 330.

— **As evidence.**—The record should designate the part of the animal on which the brand is to be placed. However, the fact that the record designated the brand as being on the hip and the evidence showed that it was on the side of the animal, did not render the record inadmissible in evidence. *Harwell v. State*, 22 App. 251, 2 S. W. 606.

The record which showed that the brand was placed on the hip, thigh and flank, fulfilled the requirements of the statute, though it did not state on which side of the animal it was placed. *Thompson v. State*, 25 App. 161, 7 S. W. 589.

Indictment.—Willson's Cr. Forms, 684.

Art. 1413. [935] Agent of railroad, etc., receiving for shipment uninspected animals.—If any agent of any railroad, steamship, sailing vessel, or shipping company of any kind, shall receive for shipment any horses or cattle, unless such horses or cattle have been duly inspected according to law, he shall be fined not less than twenty-five nor more than one thousand dollars for each animal so unlawfully shipped. [Act April 10, 1883, p. 71.]

Indictment.—Willson's Cr. Forms, 685.

Art. 1414. [936] Counties exempted.—The counties of Anderson, Angelina, Aransas, Archer, Armstrong, Atascosa, Austin, Bailey, Bandera, Bastrop, Baylor, Bee, Bell, Bexar, Bowie, Bosque, Brazoria, Brazos, Brewster, Briscoe, Brown, Burleson, Burnet, Caldwell, Callahan, Calhoun, Cameron, Camp, Carson, Cass, Chambers, Cherokee, Childress, Clay, Cochran, Collin, Collingsworth, Colorado, Comal, Comanche, Cooke, Coryell, Cottle, Crockett, Crosby, Dallam, Delta, Denton, De Witt, Dickens, Donley, Duval, Eastland, Ellis, El Paso, Erath, Falls, Fannin, Fayette, Floyd, Foard, Fort Bend, Franklin, Freestone, Frio, Galveston, Gillespie, Goliad, Gonzales, Gray, Grayson, Gregg, Grimes, Guadalupe, Hall, Hamilton, Hardeman, Hardin, Harris, Harrison, Hartley, Hays, Hemphill, Henderson, Hidalgo, Hill, Hockley, Hood, Hopkins, Houston, Hunt, Irion, Jackson, Jack, Jasper, Jeff Davis, Jefferson, Johnson, Karnes, Kaufman, Kendall, Knox, Kinney, Lamar, Lamb, Lampasas, Lavaca, Leon, Liberty, Limestone, Lipscomb, Live Oak, Llano, Loving, Madison, Marion, Mason, Medina, Maverick, McLennan, Milam, Mills, Mitchell, Montague, Montgomery, Morris, Motley, Nacogdoches, Navarro, Newton, Orange, Palo Pinto, Pan-

ola, Parker; Pecos, Polk, Presidio, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Reeves, Sabine, San Augustine, San Jacinto, San Patricio, Schleicher, Shelby, Smith, Shackelford, Somervell, Starr, Stephens, Tarrant, Terrell, Throckmorton, Titus, Trinity, Tyler, Upshur, Val Verde, Van Zandt, Victoria, Walker, Ward, Washington, Webb, Wharton, Wheeler, Williamson, Wilson, Wise, Winkler and Young are hereby exempted from the provisions of this chapter, and from all laws regulating the inspection of hides and animals. [Act 1893, ch. 107; Act 1895, ch. 43; Act 1897, p. 171; Act 1899, p. 205; Act 1901, p. 269; Act 1903, pp. 111, 186; Act 1905, p. 70; Act 1907, pp. 26, 121, 190, 203; Act 1909, pp. 30, 113, 129, 130; Act 1913, p. 85, ch. 43, § 1.]

Historical.—Art. 1414, revised Pen. Code, was made up from Acts 1893, p. 162, amending Act Mar. 29, 1889, § 1. The revisers overlooked the fact that the act of 1893 had been superseded by various acts passed in the subsequent years 1895, 1897, 1899, 1901, 1903, 1905, 1907, 1909. Most of these acts amended art. 5043, Rev. St. 1895 (art. 7305, Rev. St. 1911). Tracing back the history of the hide and animal inspection law it will be seen that the counties affected by the act are the same, whether the question is viewed from the standpoint of the civil statutes or from that of the criminal statutes. The latest expression of the legislature as to the parts of the state affected by the law is given above in art. 1414, and below in arts. 1414a–1415a.

Art. 1414a. Other counties exempted.—That the counties of Stonewall, Kent, Scurry and Fisher be, and the same are hereby exempt from the provisions and operations of Articles 7256 to 7305 inclusive of Chapter 7, title 124, of the Revised Civil Statutes of 1911 relative to the inspection of hides and animals. [Act 1913, p. 87, ch. 45, § 1.]

See note under art. 1414.

Art. 1414b. Same.—That the counties of Oldham and Potter be and the same are hereby exempt from the provisions and operations of Articles 7256 to 7305, inclusive, of Chapter 7, Title 124, Revised Civil Statutes of 1911, relative to the inspection of hides and animals. [Act 1915, p. 222, ch. 142, § 1.]

See note under art. 1414.

Art. 1415. Counties placed under the law.—That the Governor of Texas shall immediately appoint an inspector of hides and animals for each of the following counties, to wit: the counties of El Paso, Cameron, Hidalgo, Lamb, and Starr each of whom shall hold his office for a term of two years and until the election and qualification of his successor. That said counties of El Paso, Cameron, Lamb, Hidalgo and Starr shall be subject to all of the provisions of Articles 7256 to 7304, inclusive, Revised Civil Statutes of Texas, 1911, except that the inspector shall be elected in each of said counties at the first general election held after appointment herein authorized. [Act 1915, p. 22, ch. 13, § 1.]

Historical.—Art. 1415, revised Pen. Code, was superseded by the later acts of the legislature. See note under art. 1414.

Art. 1415a. Same.—That the Governor of Texas shall immediately appoint an inspector of hides and animals for each of the following counties, to-wit: The counties of Bee, Duval, Live Oak, Maverick and Val Verde, each of whom shall hold his office for a term of two years and until the election and qualification of his successor. All animal and hide inspectors appointed by the Governor shall be entitled to receive for their services the sum of three cents for each animal and hide personally inspected. That said counties of Bee, Duval, Live Oak, Maverick and Val Verde shall be subject to all of the provisions of Articles 7256 to 7304, inclusive, Revised Civil Statutes of Texas, 1911, except that the inspector shall be

elected in each of said counties at the first general election held after the appointment herein authorized. [Act 1915, p. 107, ch. 57, § 1.]

See note under art. 1414.

Historical.—It will be noticed that the counties of Wichita, Wilbarger, Harde- man, Childress, Donley, Armstrong, Oldham, Gray, and Karnes, are exempted from operation of the "inspection" laws by article 1414 and are placed under the operation of the "inspection laws" by article 1415. Also that the counties of Wichita, Wilbarger, Harde- man, Childress, Donley, Gray, and Armstrong are twice exempt under the provisions of article 1414.

CHAPTER SEVENTEEN

EMBEZZLEMENT

Art.	Art.
1416. Defined and punished.	1419. "Money" and "property" defined.
1417. By factor or commission mer- chant.	1420. Fraudulently receiving, etc., em- bezzled property.
1418. By carrier.	

Article 1416. [938] Defined and punished.—If any officer, agent, clerk or attorney at law or in fact, of any incorporated company or institution, or any clerk, agent, attorney at law or in fact, servant or employé of any private person, copartnership or joint stock association, or any consignee or bailee of money or property, shall embezzle, fraudulently misapply or convert to his own use, without the consent of his principal or employer, any money or property of such principal or employer which may have come into his possession or be under his care by virtue of such office, agency or employment, he shall be punished in the same manner as if he had committed a theft of such money or property. [Act May 25, 1876, p. 9.]

See ante, art. 1348 and notes thereunder.

Nature and elements of offense.—Prior to the last amendment of art. 1416, it was held that an attorney at law could not be convicted of this offense for converting to his own use moneys received for his client. *State v. McLane*, 43 Tex. 404. But the amended article includes an attorney at law or in fact. *Griffin v. State*, 4 App. 390.

Partners cannot embezzle the partnership property, but a mere inchoate agreement of partnership cannot furnish immunity to one of the contracting parties, who obtains the money of the other upon such agreement, and then abandons the venture and appropriates the money. *Napoleon v. State*, 3 App. 522.

Where the evidence shows that the property alleged to have been embezzled was an advance payment made to the defendant, a conviction for embezzlement will not be sustained. *Keeller v. State*, 4 App. 527.

Concise-ly defined, embezzlement, which is akin to theft, is the fraudulent appropriation of the personal property of another by one to whom it had been entrusted. *Leonard v. State*, 7 App. 417; *Simco v. State*, 8 App. 406; *Cole v. State*, 16 App. 461.

Conversion of bailment or proceeds by bailee as offense. *Leonard v. State*, 7 App. 417; *Baker v. State*, 6 App. 344; *Epperson v. State*, 22 App. 694, 3 S. W. 789; *Horse and not proceeds of sale. Henderson v. State*, 55 App. 640, 117 S. W. 825; *Huggins v. State*, 42 App. 364, 60 S. W. 52.

It is not necessary to constitute the offense that a demand on defendant for the property should have been made. The fraudulent appropriation is to be inferred from facts. *Leonard v. State*, 7 App. 417.

The doctrine of ultra vires cannot be invoked as a defense. *Leonard v. State*, 7 App. 417.

The breach of trust constitutes the gist of the offense, and unless there be a duty or trust imposed, this offense cannot exist. Four things must be established: (1) Defendant's agency and charged with the duty of receiving the property. (2) The receipt of the property. (3) Its receipt by virtue of his agency. (4) Its embezzlement. The offense may be effected by an authorized sale, if done with a fraudulent intent. But, if by transmutation the property becomes the agent's, it ceases to be the subject of embezzlement by him. *Webb v. State*, 8 App. 310; *Epperson v. State*, 22 App. 694, 3 S. W. 789; *Leonard v. State*, 7 App. 417; *Griffin v. State*, 4 App. 390; *State v. Johnson*, 21 Tex. 775; *Brady v. State*, 21 App. 659, 1 S. W. 462; *Taylor v. State*, 29 App. 466, 16 S. W. 302. See *Bryant v. State*, 57 App. 267, 122 S. W. 543.

Authority conferred on a sewing machine agent to trade the machines for horses and convert the horses into money held to so change the character of the contract of agency that neither the horses nor their proceeds were the property of the principal, so that the law of embezzlement could not apply. *Webb v. State*, 8 App. 310.

The value of the property embezzled must be proved. *Reside v. State*, 10 App.

675; Gerard v. State, Id. 690; Stallings v. State, 29 App. 220, 15 S. W. 716. See, also, Aldrich v. State, 29 App. 394, 16 S. W. 251.

There is no settled mode in which embezzlement must take place. It may occur in any of the numberless ways which may suggest themselves to the particular individual. The mode of embezzlement is simply matter of evidence and not of pleading. Cole v. State, 16 App. 461; Golden v. State, 22 App. 1, 2 S. W. 531.

See facts held to constitute a delivery of goods to bailee. Cohen v. State, 20 App. 224.

Embezzlement by partner selling machine on authority of outgoing partner and appropriating proceeds. Aldrich v. State, 29 App. 394, 16 S. W. 252.

Giving of an indemnity bond held not to absolve from liability. Smith v. State, 34 App. 265, 30 S. W. 236.

A taking of principal's money constitutes embezzlement, where the taking was not open and under claim of right. Smith v. State, 34 App. 265, 30 S. W. 236.

Proof that an express agent took the money without consent of the agent having direct supervision of the office is sufficient. Smith v. State, 34 App. 265, 30 S. W. 236.

Where no fraudulent intent is shown defendant should be acquitted. Eilers v. State, 34 App. 344, 30 S. W. 811.

An attorney collecting money and appropriating it to his own use is guilty, though he intended to replace it out of his own money. Farmer v. State (Cr. App.) 34 S. W. 620.

One who receives a watch and money and a horse to trade for another horse but trades without giving the watch and money and conceals this fact from the owner, may be convicted. O'Morrow v. State, 44 App. 221, 70 S. W. 209.

One to whom another gives money to purchase a business wherein they are to be partners, is not guilty though using the money for other purposes. Manuel v. State, 44 App. 433, 71 S. W. 973.

The "recording and financial secretary" of a lodge cannot be convicted of embezzling funds, if there are two secretaries, one a "permanent secretary" and the other the "recording and financial secretary," and it is the former's duty to receive the money. Loving v. State, 44 App. 373, 71 S. W. 277.

Though a partner cannot embezzle partnership funds, yet where any condition precedent in a contract of partnership remains to be performed before the funds become partnership property, the party appropriating or misapplying the funds may be guilty of embezzlement thereof, though there is an executory contract of partnership. Ray v. State, 48 App. 122, 86 S. W. 761.

Conversion by accused of money deposited with him for safe-keeping. Stephens v. State, 49 App. 489, 93 S. W. 545.

Where a purchaser of land made a part payment on agreement of vendor to satisfy a vendor's lien note, and he failed to do so, but accepted the balance of payments from the purchaser, he was guilty. Cowan v. State, 49 App. 466, 93 S. W. 553.

The word "agent" as used in this article means one in the employ of another for a specific purpose. One known as and called a "messenger" in the employ of an express company is an "agent" within the meaning of the statute. Lamb v. State, 49 App. 442, 93 S. W. 734.

One in the employ of an express company known as, and called a "messenger" is an agent within the meaning of this article. Lamb v. State, 49 App. 442, 93 S. W. 734.

Where one receives goods from another under a contract that he is to take them at cost price to the other as a sale to him, they to divide profits on a resale by him, his appropriation of the property would not be embezzlement. McCrary v. State, 51 App. 496, 103 S. W. 926, 123 Am. St. Rep. 903.

The statute includes cases where money is received by virtue of express terms of the employment or agency, or by virtue of the implied authority fairly resulting from the express terms of the agency. Smith v. State, 53 App. 117, 109 S. W. 120, 121, 17 L. R. A. (N. S.) 531, 15 Ann. Cas. 435.

The essential issue in a trial for embezzlement is whether accused intended to defraud the owner. Henderson v. State, 55 App. 640, 117 S. W. 825.

Where no fiduciary relation of principal and agent existed between prosecuting witness and defendant, the latter was not guilty of embezzlement. Bryant v. State, 57 App. 267, 122 S. W. 543.

Under this article the offense consists of an agent's fraudulent misapplication or conversion to his own use, without the consent of his principal or employer, of money or property of the principal or employer, or which may have come into his possession, or is under his control, by virtue of his office, agency, or employment. Hamer v. State, 60 App. 341, 131 S. W. 813.

Where one advanced money to accused to make improvements on accused's homestead, took a note therefor from accused and his wife, together with a contract providing that the money should be used in the construction of the house in question, and received a lien to secure payment of the note, both upon the house to be improved and upon other property belonging to accused's wife, the transaction was an ordinary contract of borrowing and lending, the money not being placed in accused's hands as agent, and his failure to repay it did not constitute embezzlement. Clark v. State, 61 App. 539, 135 S. W. 575.

The fact that accused intended to repay the amount converted would not be a defense to a prosecution for embezzling the proceeds of a check given to accused to deposit for another, so that it was immaterial whether accused intended to pay back the amount of the check out of the proceeds of certain notes. Nesbitt v. State (Cr. App.) 144 S. W. 944.

A partner cannot be guilty of embezzling the partnership property; the statute defining the offense not mentioning partners among those who may be guilty of the crime, and, aside from statute, a partner being entitled to use the property,

so as to be only civilly liable, if he converts it to his own use. *O'Marrow v. State* (Cr. App.) 147 S. W. 252.

Where a jeweler, with whom a diamond had been placed for sale by a jobber, made a conditional sale of it, and indorsed the contract of sale to the jobber, the latter became the legal owner of the contract and entitled to the diamond when it was returned by the purchaser to the jeweler. *Pope v. State*, 71 App. 261, 158 S. W. 527.

A boarding house keeper, who fraudulently misappropriates money deposited with him for safe-keeping by a boarder, to be returned on demand, is guilty of embezzlement, for there are contractual relations between the parties, as Rev. St. 1911, art. 5663, gives the keeper a lien thereon for the payment of his board bill, and there is a fiduciary relation between the parties because the keeper would not be responsible for the money if it was left in the boarder's room, so that the bailment is for the boarder's benefit (citing 3 Words & Phrases, 2761). *Johnson v. State*, 71 App. 206, 159 S. W. 849.

Where defendant induced prosecutrix to deliver to him certain stock certificates and a note, to be exchanged for shares in another company and returned to her, but he immediately sold the stock so delivered and converted the proceeds, he was properly charged with embezzling the proceeds of the sale and not the stock. *Landrum v. State* (Cr. App.) 166 S. W. 726.

Where defendant induced prosecutrix to deliver to him certain certificates of stock in a life insurance company and a note for \$300, for which he was to procure for her shares in another insurance company and deliver the same to her after the exchange had been made, but he sold her shares and converted the proceeds, he was guilty of embezzlement. *Landrum v. State* (Cr. App.) 166 S. W. 726.

Two of three trustees of a school district determining that a school building should be repaired may lawfully delegate to one of the trustees the duty of carrying out the work, so as to constitute the trustee an "agent" within this article. *Adams v. State* (Cr. App.) 172 S. W. 219.

Trustees of a school district delegated one trustee to look after the repairs of a schoolhouse, and to sign their names to vouchers to be presented to the superintendent for approval before the depository of the school money was authorized to pay it. The trustee made an oath to a voucher, which the superintendent approved, and the depository paid the money, which was converted by the trustee. Held, as there was no law requiring an affidavit to the vouchers, and as any want of authority to sign the vouchers had been ratified by the subsequent action of the other trustees, that the money came into the hands of the trustee rightfully, and hence he was guilty of embezzlement under this article. *Adams v. State* (Cr. App.) 172 S. W. 219.

Inasmuch as the trustees had complete control over the money, though it belonged to the particular school, as was alleged, and could only be paid out by the depository on their order, it was their money, and the accused trustee was their agent under this article. *Adams v. State* (Cr. App.) 172 S. W. 219.

Where such trustee, after getting approval of a voucher, had it discounted at the depository bank, because there was not enough school money to pay the voucher, the money he received was nevertheless school money, the bank thereafter appropriating such money as it came in to pay the voucher, and the trustee was properly convicted of embezzlement under this article. *Adams v. State* (Cr. App.) 172 S. W. 219.

Compared with and distinguished from other offenses.—See notes under articles 1329, 1332, and 1348, ante.

Theft as including offense, see C. C. P. art. 772, and notes thereunder.

Embezzlement is the fraudulent appropriation of the property of another by the person to whom it has been intrusted. It is akin to theft, but is a distinct offense. *Simco v. State*, 8 App. 406; *Golden v. State*, 22 App. 1, 2 S. W. 531; *Leonard v. State*, 7 App. 417; *Griffin v. State*, 4 App. 390, overruling upon this point, *Riley v. State*, 32 Tex. 763.

A conviction under an indictment for theft was not permissible for an offense committed before the present revision. *Simco v. State*, 8 App. 406.

In the case of a bailment, it is only where the property is held by the bailee for the benefit of the bailor, that embezzlement can be committed. Where the possession is for the benefit of the bailee, as in the case of a hiring, the offense cannot be committed. *Reed v. State*, 16 App. 587. But see, ante, art. 1348, which makes a conversion under such circumstances theft.

One who was the agent, employé or clerk of another, having control of the latter's pawnshop, part of the time during the owner's absence, but while under his direction and supervision, and who took property therefrom without the owner's consent, was guilty of theft and not embezzlement. *Zysman v. State*, 42 App. 432, 60 S. W. 669.

Where defendant and his partner were running a gin, and cotton ginned into a bale was left in their custody by one who brought it to the gin, and defendant took charge of it and sold it, he would not be guilty of theft, but of embezzlement, if guilty at all. *Edwards v. State*, 47 App. 65, 79 S. W. 542.

One who under pretense that he is an employé at a lodging house, obtains money from a guest to keep for him over night and who immediately decamps, is guilty of theft and not of embezzlement. *Johnson v. State*, 46 App. 415, 80 S. W. 621.

Because the act may, under article 1348, constitute theft by bailee is no reason why it should not also constitute embezzlement under the general statute. *Wilson v. State*, 47 App. 159, 82 S. W. 651.

When one sends a servant for medicine to one place, on a mare which he furnishes him, and the servant goes to another place and tries to sell the mare, he is guilty of embezzlement, although he may be also guilty of theft under article 1348. *Wilson v. State*, 47 App. 159, 82 S. W. 652.

Disposing of mortgaged property. *Forbish v. State*, 49 App. 486, 93 S. W. 1029.

Where the charge is embezzlement under this article it is error for the court to fail to charge on this crime, and to charge on conversion of property by bailee under article 1348. *Maulding v. State*, 53 App. 220, 103 S. W. 1182.

It is not receiving stolen property but embezzlement, when a clerk consented to burglary of his employer's premises, and part of the property was afterwards found in his possession. *Bowmer v. State*, 55 App. 416, 116 S. W. 798.

The word "bailee" as used in the embezzlement statute, which punishes the fraudulent conversion by a bailee, does not include all bailments, but only those for the sole benefit of the bailor, where there is a fiduciary relation between the parties; hence as there must be a fraudulent taking to constitute the crime of theft denounced by article 1329, the conversion of property by a bailee, where the bailment is for mutual benefit, falls within the purview of article 1348, making such conversion an offense, being neither theft nor embezzlement. *Johnson v. State*, 71 App. 206, 159 S. W. 849.

Where accused, who was authorized to sign the name of the firm for which he worked, drew a check in the firm name and had a draft payable to his brother-in-law issued out of the proceeds, which draft accused used in payment of his own debt, signing the brother-in-law's name to the draft, he was guilty of embezzlement of money, and not of the mere draft. *Pope v. State* (Cr. App.) 170 S. W. 152.

The owner of certain personal property went to a bathing beach, and, before going in, deposited the property with the bathhouse keeper. R. in some way obtained possession of the check, presented it to the keeper, and obtained the property, and the next day part of it was found in accused's possession, concealed in a safety deposit vault. Held, that the evidence showed pure theft on the part of R., and did not raise the issue of embezzlement. *Goldstein v. State* (Cr. App.) 171 S. W. 709.

Felony or misdemeanor.—See *Clark v. State*, 48 App. 527, 89 S. W. 647; *McCrary v. State*, 51 App. 496, 103 S. W. 926, 123 Am. St. Rep. 903; *Stallings v. State*, 29 App. 220, 15 S. W. 716; *Taylor v. State*, 29 App. 466, 16 S. W. 302.

Second-hand clothing has no such market value as will represent an actual value in determining the grade of the offense of embezzlement of such property. Nor can the rule obtaining among dealers in second-hand clothing, "to sell for fifty per cent less than the original cost," furnish anything like a just standard of value. *Cooksie v. State*, 26 App. 72, 9 S. W. 58.

The mode of arriving at the value of articles of that character, which were embezzled, was correctly stated in the following charge: "If you believe, from the evidence, that the defendant is liable, under the charge given you, for the embezzlement of any of the articles described in the indictment, you are instructed that in arriving at the value of such articles, and thereby fixing the punishment of the defendant, you will be governed by what, if anything, you believe from the evidence was the fair and reasonable value of such articles at the time and place they were so embezzled." *Cooksie v. State*, 26 App. 72, 9 S. W. 58.

Embezzlement is a felony or a misdemeanor according to the value of the property embezzled. *Aldrich v. State*, 29 App. 394, 16 S. W. 251.

When defendant was herding horses for his employer and let them get away and he was found twenty miles away with one horse in his possession, but there is no evidence showing intent to dispose of same, appropriation is not shown and conviction for felony cannot be sustained; it is a misdemeanor. *Ximenez v. State* (Cr. App.) 54 S. W. 588, 589.

Prosecutrix delivered to defendant \$2,050 to be invested for her in October, 1902, and on December 2, 1902, following, defendant claimed that he had loaned the money to W., and exhibited a note for the amount covered by a mortgage on real property. It was thereafter discovered that the note was a forgery, and that W. was a fictitious person. It was also shown that on the day defendant received the money he deposited it in the bank, and on the same day drew out \$540, and on October 16th, \$100; on the 18th, \$136; on the 23d, \$65; on the 29th, \$50; on November 6th, \$61; and on the 7th, \$73. On December 17th he executed the fictitious note to conceal the defalcation. The indictment charged the embezzlement as having been committed on December 13, 1902, on which date he withdrew from the bank but \$42.25. Held that, since defendant had authority to draw the money out of the bank all at once or at different times, several withdrawals did not constitute different offenses, but that the act of embezzlement occurred when accused attempted to cover his appropriations, the different withdrawals being mere continuous acts admissible to show criminal intent, and hence the fact that he only withdrew \$42.25 on the date of the alleged embezzlement did not reduce the crime to a misdemeanor. *Hamer v. State*, 60 App. 341, 131 S. W. 833.

In a prosecution for embezzlement, where accused admitted the embezzlement, but testified that he never took more than \$50 at one time, it was error to refuse to instruct that he could only be convicted of a misdemeanor if the jury should find that he never took more than \$50 at one time. *Day v. State*, 71 App. 414, 159 S. W. 1186.

Venue.—See C. C. P. art. 251, and notes thereunder.

Indictment, proof, and variance.—See C. C. P. arts. 451 et seq. and notes thereunder. *Willson's Cr. Forms*, 686-688.

Where the indictment charged embezzlement of \$10,000 in gold coin (describing it), proof that defendant embezzled the whole amount in *solido* is sufficient, without specific proof as to any of the coin described. *Riley v. State*, 32 Tex. 763.

The indictment must aver a fraudulent intent. *Peacock v. State*, 36 Tex. 647. But an allegation that the defendant "did embezzle, fraudulently misapply, and convert to his own use" was held to sufficiently allege a fraudulent intent. Such allegation follows the language of the statute, and *ex vi termini* imports a fraudu-

lent intent. *Bridgers v. State*, 8 App. 145. When the indictment is against an agent, clerk, etc., it must be distinctly averred that the defendant had the care or possession of the money or property by virtue of his agency, clerkship, etc. *State v. Johnson*, 21 Tex. 775; *Gaddy v. State*, 8 App. 127. For an indictment against an agent held good, see *Gibbs v. State*, 41 Tex. 491; *Brown v. State*, 23 App. 214, 4 S. W. 588. Against a clerk, see *Wise v. State*, 41 Tex. 139. Against a bailee. *Leonard v. State*, 7 App. 417. See *Golden v. State*, 22 App. 1, 2 S. W. 531; and *Brown v. State*, 23 App. 214, 4 S. W. 588, approving *Willson's Cr. Forms*. The indictment need not allege an intent to deprive the owner of the property of its value and to appropriate it to the taker's use, as in theft. *Leonard v. State*, 7 App. 417. The indictment must allege the value of the embezzled property. *Reside v. State*, 19 App. 675. The ownership of the property embezzled must be alleged, and may be alleged in a special owner as in theft, and in case a corporation is the owner, it is sufficient to allege ownership in the corporation by name. *Leonard v. State*, 7 App. 417; *Riley v. State*, 32 Tex. 763. Where the indictment, in the same count, charged the embezzlement of a horse, and also a gun and pistol, the two latter of the aggregate value of twenty dollars, the indictment was held bad for duplicity. *Heineman v. State*, 22 App. 44, 2 S. W. 619. A conviction for this offense cannot be had under an indictment for theft. *Huntsman v. State*, 12 App. 619, overruling *Whitworth v. State*, 11 App. 414. See, also, *Simco v. State*, 8 App. 406; *Cody v. State*, 31 App. 183, 20 S. W. 398.

In an indictment against the treasurer of an incorporated company for embezzlement of its money, the only description of the money was as follows: "Five hundred dollars, lawful money of the United States of America, of the value of five hundred dollars, a more particular description of which the grand jury cannot give." The defense excepted to the indictment because it did not allege the names of the persons from whom the defendant received the said five hundred dollars, nor state whether the money was gold or silver coin, national bank or United States treasury notes, or United States paper money authorized by law. Held, that the exceptions were properly overruled, the facts showing that the allegation of the indictment is as definite and specific as practicable.

It is urged in this court that the indictment is insufficient because it does not allege that the money was "current" money. Held, in view of the facts of this case, that such an allegation was not necessary in this indictment. *Malcolmson v. State*, 25 App. 267, 8 S. W. 468.

It was at one time held that an indictment which charged the embezzlement of money, was not sustained by proof of the embezzlement of United States greenbacks, or national bank notes, or both. *Block v. State*, 44 Tex. 620. But such is not now the law. *Griffin v. State*, 4 App. 390.

An indictment held fatally defective in substance. *Griffin v. State*, 4 App. 390. An indictment charging the embezzlement of particular property will not be sustained by proof of the embezzlement of the proceeds of such property. *Baker v. State*, 6 App. 344.

Mode of embezzlement is a matter of evidence and not of pleading. *Cole v. State*, 16 App. 461; *Golden v. State*, 22 App. 1, 2 S. W. 531; *Leonard v. State*, 7 App. 417. See also *Malcolmson v. State*, 25 App. 267, 8 S. W. 468.

The ownership of the property must be proved as alleged, and the nonconsent of the owner or owners, to the appropriation thereof by the defendant. *Cohen v. State*, 20 App. 224; *Leonard v. State*, 7 App. 417; *Livingston v. State*, 16 App. 652.

For essential allegations, see *Jaimes v. State*, 32 App. 473, 24 S. W. 297.

Indictment against a city officer need not allege that the city was incorporated. Nor is it necessary to set out the ordinance creating defendant an officer. *Steiner v. State*, 33 App. 291, 26 S. W. 214. Indictment for theft of a bicycle which alleges possession in defendant by virtue of contract of hiring is sufficient indictment for embezzlement. *Gebhardt v. State* (Cr. App.) 27 S. W. 136. Where W. delivered money to defendant to be carried to K., the indictment should allege the want of consent of both W. and K. *Turner v. State* (Cr. App.) 32 S. W. 767.

An indictment charging the embezzlement of funds belonging to an incorporated company need not allege the charter or act of incorporation. *Smith v. State*, 34 App. 265, 30 S. W. 236. See, also, *Leonard v. State*, 7 App. 417.

The indictment should have alleged by whom defendant was intrusted with the property, the agreement to carry it and what was to have been done with it. *Nassitts v. State*, 36 App. 5, 34 S. W. 957.

The relation of parties being sufficiently stated, an indictment was not defective as failing to allege the property came into accused's possession, or under his care, by virtue of his agency, office, or employment. *Evans v. State*, 40 App. 54, 48 S. W. 194.

An indictment held sufficient. See *Stephens v. State*, 49 App. 489, 93 S. W. 545, following *Goodwyn v. State* (Cr. App.) 64 S. W. 251.

Description of corporation. *Garner v. State*, 51 App. 578, 105 S. W. 187; *Stalling v. State*, 29 App. 220, 15 S. W. 716.

An allegation in an indictment that money charged had "theretofore" come into accused's possession and was in his care as agent was not bad as being too general, nor as being a mere conclusion, nor as showing that the money came into his possession before the agency. *Mortimore v. State*, 60 App. 69, 130 S. W. 1004.

Where an indictment alleged the embezzlement of \$2,050 lawful money of the United States of America, it sufficiently alleged the value of the property embezzled. *Hamer v. State*, 60 App. 341, 131 S. W. 813.

The phrase "current money of the United States," as used in an indictment for embezzlement by tax collector, charging conversion to his own use of such money, includes gold, silver, copper or other coin, bank bills, government notes, or other circulating medium which is current as money; article 1419 post, providing that the term "money," as used in the chapter on embezzlement, shall include, besides

coin, bank bills, government notes, or other circulating medium. *Ferrell v. State* (Cr. App.) 152 S. W. 901.

The variance between an indictment for embezzlement of a described check and the check offered in evidence, which was like the description in the indictment, except that it contained in the upper left-hand corner a monogram of the bank, was immaterial. *Irby v. State* (Cr. App.) 155 S. W. 543.

Evidence.—See C. C. P. arts. 783 et seq., and notes thereunder.

Evidence held to support a conviction. *Irby v. State* (Cr. App.) 155 S. W. 543; *Riley v. State*, 32 Tex. 763; *Leonard v. State*, 7 App. 417; *Cole v. State*, 16 App. 461; *Harris v. State*, 21 App. 478, 2 S. W. 830; *Golden v. State*, 22 App. 1, 2 S. W. 531; *Epperson v. State*, 22 App. 694, 3 S. W. 789; *Brown v. State*, 23 App. 214, 4 S. W. 588; *Garner v. State*, 51 App. 578, 105 S. W. 187. Contra, *Henderson v. State*, 1 App. 432; *Victor v. State*, 15 App. 90; *Livingston v. State*, 16 App. 652; *Strong v. State*, 18 App. 19; *Cohen v. State*, 20 App. 225; *Perry v. State*, 22 App. 19, 2 S. W. 600; *Brady v. State*, 21 App. 659, 1 S. W. 462; *Cooksie v. State*, 26 App. 72, 9 S. W. 58; *Brown v. State*, 28 App. 65, 11 S. W. 1022; *Stallings v. State*, 29 App. 220, 15 S. W. 716; *Aldrich v. State*, 29 App. 394, 16 S. W. 251; *Taylor v. State*, 29 App. 466, 16 S. W. 302; *Price v. State* (Cr. App.) 40 S. W. 596; *Mortimore v. State*, 60 App. 69, 130 S. W. 1004; *Maddox v. State*, 70 App. 47, 156 S. W. 206.

Evidence is admissible to explain a seeming variance, *Leonard v. State*, 7 App. 417.

Evidence is admissible to explain the terms of the bailment, *Leonard v. State*, 7 App. 417.

The fraudulent appropriation is to be inferred from facts. Flight, insolvency, concealment, or evasion, are circumstances to prove guilt. The guilt of the defendant may be proved by any of the modes sanctioned by the general rules of evidence. Proof by positive testimony is not required. *Leonard v. State*, 7 App. 417; *Riley v. State*, 32 Tex. 763.

Where the evidence for the state establishes a prima facie case of guilt, and the defendant relies upon a bona fide disposition of the property, the burden is upon him to prove such defense. *Bridgers v. State*, 8 App. 145.

Where the indictment charged the defendant with the embezzlement of money intrusted to him for payment to the state treasurer, it was held competent for the state to prove by a clerk in the treasurer's office that the books of that office did not show payment of the money by the defendant to the treasurer. But it was further held, that this negative evidence did not suffice to countervail the presumption of innocence, and it was incumbent on the state to produce the best evidence, viz.: the testimony of the treasurer, in proof of the nonpayment of the money to him by defendant. *Strong v. State*, 18 App. 19.

When defendant has received property to be disposed of in a particular way and he has not done so, to relieve himself he must show what he did with it. *Evans v. State*, 40 App. 58, 48 S. W. 194.

When a witness testified that the value of the property was as alleged in the indictment, it was held sufficient proof of value, although the indictment was not read in evidence, but only read as pleading. *Harris v. State*, 21 App. 478, 2 S. W. 830. See *Cooksie v. State*, 26 App. 72, 9 S. W. 58, as to evidence of value.

The venue like any other fact may be proved by circumstantial evidence. *Brown v. State*, 23 App. 214, 4 S. W. 588.

A statement by an agent charged with embezzlement that he had taken the money and lost it at a game of poker is an admission that he used it without the principal's consent, and fraudulent intent is sufficiently established by proof of concealment until the crime was discovered. *Smith v. State*, 34 App. 265, 30 S. W. 236.

Evidence that defendant had put the goods beyond his control and secured money and drinks on them sufficiently shows fraudulent intent. *Harris v. State* (Cr. App.) 34 S. W. 922.

Evidence of want of consent to taking. See *Garner v. State*, 51 App. 578, 105 S. W. 187; *Smith v. State*, 34 App. 265, 30 S. W. 236.

Where prosecutrix's attorney was indicted for embezzlement of money alleged to have been left with him for investment, a receipt reciting that defendant had received from prosecutrix \$60 on "loan account" did not of itself indicate that the relation between the parties was that of debtor and creditor. *Hamer v. State*, 60 App. 341, 131 S. W. 813.

Since, in a prosecution for embezzlement, the intent is incapable of direct proof, great latitude is necessarily allowed in proving the same, and any evidence is admissible which has a tendency, though slight, to establish fraudulent intent on the one hand, or the bona fides of accused on the other. *Hamer v. State*, 60 App. 341, 131 S. W. 813.

In a prosecution for embezzling the proceeds of a check given to accused by the prosecuting witness for deposit to the maker's credit in a bank in which accused owned stock in which one count alleged conversion of a check, and another of its proceeds, evidence was admissible that accused deposited the check to his own credit, and that witness, an official of the bank, had the original deposit slip showing that fact, and that, after depositing the check, accused gave the cashier a check for the amount, which was credited against one of accused's notes. *Nesbitt v. State* (Cr. App.) 144 S. W. 944.

Where the indictment in a prosecution for embezzling a check alleged that accused fraudulently embezzled and converted the check to his own use, evidence was admissible that he received the proceeds of the check as a credit on a note he owed the bank. *Nesbitt v. State* (Cr. App.) 144 S. W. 944.

In a prosecution for embezzling the proceeds of a check given to accused to deposit for another, evidence by prosecuting witness that he had to sell his buggy and team to pay off two notes which he had signed for accused was not admissible,

being calculated to prejudice him with the jury. *Nesbitt v. State* (Cr. App.) 144 S. W. 944.

In a prosecution for embezzling the proceeds of a check given to accused to deposit for another, evidence as to what property accused owned, or the amount of, or his failure to pay, his debts, was not admissible. *Nesbitt v. State* (Cr. App.) 144 S. W. 944.

In a prosecution for embezzling the proceeds of a check given to accused to deposit for another, a letter written by accused after converting the proceeds, stating that he told the owner of the check about using the proceeds not less than a week after he received the check, was admissible as tending to show whether the owner gave him authority to use the check, or whether accused thought he had authority to so use it. *Nesbitt v. State* (Cr. App.) 144 S. W. 944.

A letter written by accused to the owner of a check shortly after its alleged embezzlement, stating that the owner knew that what accused did had been intentionally honest, and that he had meant no wrong and had not desired to beat him out of a cent, was admissible on the question whether accused had authority to use the proceeds of the check for himself. *Nesbitt v. State* (Cr. App.) 144 S. W. 944.

The check given to accused by prosecuting witness and described in the indictment was also admissible in evidence. *Nesbitt v. State* (Cr. App.) 144 S. W. 944.

Evidence, on a prosecution for embezzlement of money obtained on a check, held insufficient to raise the issue of the check being drawn on defendant's own account, but to show that, by arrangement with the person whose property was charged to have been embezzled, it was to be paid out of his money. *Poteet v. State* (Cr. App.) 153 S. W. 863.

In a prosecution for the embezzlement of a diamond, evidence held sufficient to warrant a finding that it was not sold to the jeweler on credit, but that it was entrusted to him for sale. *Pope v. State*, 71 App. 261, 158 S. W. 527.

In a prosecution for theft or embezzlement of a note, evidence that when the owner learned defendant had pledged the note he made no objection and did not appear surprised is admissible to show the owner's consent. *Pye v. State* (Cr. App.) 171 S. W. 741.

— Other offenses.—See notes under C. C. P. art. 783.

Questions for jury.—See C. C. P. art. 786, and notes. See *Henderson v. State*, 55 App. 640, 117 S. W. 825.

The question of fraudulent conversion is a question of fact for the jury, and not a matter of law. *Jaimes v. State*, 32 App. 473, 24 S. W. 237.

Question of partnership. *Butler v. State*, 54 App. 42, 111 S. W. 146.

In a prosecution for theft or embezzlement of a note which was delivered to defendant to enable him to raise money for the owner, the question whether defendant believed he had permission to use the note for his own benefit held, under the evidence, for the jury. *Pye v. State* (Cr. App.) 171 S. W. 741.

Charge of court.—See C. C. P. arts. 735 et seq., and note thereunder. *Epperson v. State*, 22 App. 694, 3 S. W. 789.

If evidence be introduced tending to show consent on the part of the owner, the jury should be instructed to acquit if they found that fact. *Henderson v. State*, 1 App. 432.

The statutory terms, "embezzle, fraudulently misapply, or convert to his own use," are employed in their ordinary signification and need not be explained in the charge. *Bridgers v. State*, 3 App. 145. If the evidence tends to show consent of the owner to the conversion of the property by the defendant, the charge should submit that issue, and direct the jury to acquit in case they entertained a reasonable doubt of the want of the owner's consent. *Henderson v. State*, 1 App. 432. For a correct charge as to the ownership of money, where defendant claimed that the money alleged to have been embezzled by him belonged to his wife, see *Golden v. State*, 22 App. 1, 2 S. W. 531. For a correct charge as to embezzlement by a bailee who sold the property, having authority to sell, see *Epperson v. State*, 22 App. 694, 3 S. W. 789. This offense may be presented within three years after its commission, but not after the lapse of that time. Where, by the evidence, no issue is raised as to limitation, the charge need not instruct in regard thereto. *Cohen v. State*, 20 App. 224.

Charge as to venue. *Cohen v. State*, 20 App. 224.

Correctness of instructions on appropriation by husband of wife's money. *Gold- en v. State*, 22 App. 1, 2 S. W. 531.

In a trial for embezzlement of money by an officer of an incorporated company it was not error to allow the state to prove that the accused, without authority, but with the company's money, bought and charged to the company a pair of horses and a set of harness, and afterward sold the same. Appellant, however, insists that such proof necessitated an instruction to the jury not to convict for a conversion or sale of the horses and harness. But held that, the proof being competent for the purpose of tracing the company's money into the custody of the accused, and there being no purpose or attempt to convict him of a conversion or sale of the horses and harness, it was not incumbent on the trial court to instruct the jury as contended by appellant. *Malcolmson v. State*, 25 App. 267, 8 S. W. 468.

The proof in this case clearly establishing the agency of the accused with respect to the alleged embezzled property, the charge of the trial court upon the subject was correct. The charge of the court referred to reads as follows: "In deciding as to whether or not the defendant was the agent of M., within the meaning of the foregoing charge, you are instructed that if you believe from the evidence that said M. told defendant to get said articles and bring them to him, and also told one Mrs. W. to have R. to get them and bring or send them to him or his wife, and that said R. in compliance with said instructions, did get into her possession said articles and deliver them to the defendant for him to send by express

to said M., or to his wife for him, at Dallas, and that defendant so received into his possession said articles, agreeing with said R. to send them to said M., or to his wife for him, you will find the defendant to have been such agent." *Cooksie v. State*, 26 App. 72, 9 S. W. 58.

Charge held erroneous. *Jaimes v. State*, 32 App. 473, 24 S. W. 297.

A charge held not objectionable for failing to more fully charge on a power of attorney and right thereunder to dispose of funds. *Jackson v. State*, 44 App. 259, 70 S. W. 760.

The court need not define "embezzlement" and "fraudulent misapplication." *Jackson v. State*, 44 App. 259, 70 S. W. 760.

Charge as to loan and loss of money. *Garner v. State*, 51 App. 578, 105 S. W. 187.

A general charge defining the offense without applying the law to the facts, is insufficient. *Goodsoe v. State*, 52 App. 626, 108 S. W. 388.

Charges in case of different counts and offenses. *Manovitch v. State*, 50 App. 260, 96 S. W. 1; *Alford v. State*, 52 App. 621, 108 S. W. 364; *Maulding v. State*, 53 App. 220, 108 S. W. 1182.

In a prosecution for embezzlement of a diamond, where the defense was that it was sold to the defendant on credit and not consigned to him for sale, an instruction that if the jury had a reasonable doubt, or believed that the prosecuting witness agreed to sell goods on credit to the defendant, and that this diamond was sold under the agreement, they must acquit, presented affirmatively the defendant's theory of the case. *Pope v. State*, 71 App. 261, 158 S. W. 527.

Art. 1417. [939] By factor or commission merchant.—If any factor or commission merchant shall embezzle or fraudulently misapply or convert to his own use any money, goods, produce, commodity or other property, which shall have come into his possession or shall be under his care by virtue of his office, agency or employment, he shall be punished in the same manner as if he had committed a theft of such money, goods, produce, commodity or other property. [Act Feb. 12, 1858, p. 182.]

See notes to preceding article.

Indictment.—Willson's Cr. Forms, 689.

See good indictment on motion in arrest. *Gibbs v. State*, 41 Tex. 401. The indictment should aver the character of the consignment and the act of conversion; but if these are averred in general terms, and the defendant fails to except in limine, the judgment will not be arrested for that defect. *Ib.* The indictment need not allege a fraudulent intent, and it may characterize the defendant as "the commission-merchant," instead of "a commission-merchant." The terms "embezzle, fraudulently misapply, or convert," are used in their ordinary signification, and the burden of proving a bona fide disposition of the property is on the defendant. *Bridgers v. State*, 8 App. 145.

The indictment should aver the character of the consignment and the act of conversion. If the indictment follows the language of the statute it sufficiently alleges fraudulent intent. *Bridgers v. State*, 8 App. 145.

Art. 1418. [940] By carrier.—If any carrier, to whom any money, goods or other property, shall have been delivered to be carried by him, or if any other person who shall be intrusted with such property, shall embezzle or fraudulently convert to his own use any such money, goods or property, either in the mass, as the same were delivered, or otherwise, he shall be deemed guilty of theft, and shall be punished as prescribed for that offense according to the value of the money, goods or other property so embezzled or converted. [Id.]

See notes under preceding articles of this chapter, and *Smith v. State*, 34 App. 265, 30 S. W. 236; *Stallings v. State*, 29 App. 220, 15 S. W. 716; *Livingston v. State*, 16 App. 652; *Aldrich v. State*, 29 App. 394, 16 S. W. 251; *Felsenthal v. State*, 30 App. 675, 18 S. W. 644; *Cooksie v. State*, 26 App. 72, 9 S. W. 58.

Nature of offense.—Where money was delivered to the wife of accused, to be carried to a third party, and accused converted it to his own use and failed to pay on demand, he was guilty of theft within the meaning of this article. *De Gaultie v. State*, 31 Tex. 32.

Indictment.—Willson's Cr. Forms, 690.

See *Keeller v. State*, 4 App. 527.

An indictment alleging delivery to defendant a carrier, by W. of money belonging to K. to be carried, and that defendant embezzled it without K.'s consent, should also allege that W. was K.'s agent, and embezzlement was without W.'s consent. *Turner v. State* (Cr. App.) 32 S. W. 767.

Indictment for embezzlement under this article, should allege the agreement to carry the property and by whom defendant was intrusted with the property. *Nasitts v. State*, 36 App. 5, 34 S. W. 957.

Evidence.—In a prosecution under this article in which it appeared that accused, after having induced the prosecuting witness to deposit money then in another bank in a bank in which accused was a stockholder, took a \$60 check from him, and deposited it in his own name, instead of in the name of the prosecuting

witness as agreed, evidence was admissible that prosecuting witness had money on deposit in the other bank to meet the check when it was issued. *Nesbitt v. State* (Cr. App.) 144 S. W. 944.

Art. 1419. [941] "Money" and "property" defined.—The term "money," as used in this chapter, includes, besides gold, silver, copper or other coin, bank bills, government notes or other circulating medium current as money; and the term "property" includes any and every article commonly known and designated as personal property, and all writings of every description that may possess any ascertainable value.

See *Kimbrough v. State*, 28 App. 367, 13 S. W. 218.

Property.—"Money" is property within the meaning of article 251 of the C. of C. P. prescribing the venue of prosecutions for this offense. *Brown v. State*, 23 App. 214, 4 S. W. 588.

"Property," includes any and every article commonly known and designated as personal property, and all writings of every description that may possess any ascertainable value, and this includes money. *Taylor v. State*, 29 App. 466, 16 S. W. 302.

Money.—See *Griffin v. State*, 4 App. 390.

An indictment for embezzling money held not sustained by proof of embezzling United States currency or national bank bills. *Block v. State*, 44 Tex. 620.

In legal acceptance, the word "money" means current metallic coins. *Block v. State*, 44 Tex. 620.

"Money," as used in the statutes pertaining to theft (and kindred crimes), means legal tender coin, or legal tender currency of the United States. *McCline v. State*, 25 App. 247, 7 S. W. 667; *Lewis v. State*, 28 App. 140, 12 S. W. 736; *Taylor v. State*, 29 App. 466, 16 S. W. 302; *Otero v. State*, 30 App. 450, 17 S. W. 1081; *Me- near v. State*, 30 App. 475, 17 S. W. 1082.

"Money," under this article, includes, beside gold, silver, copper or other coin, bank bills, government notes, or other circulating medium, current as money. *Taylor v. State*, supra; *Malcolmson v. State*, 25 App. 267, 8 S. W. 468.

The description "current money of the United States of America" is sufficient. It covers any kind of current money of the United States, and includes, besides gold and silver, copper and other coin, bank bills, government notes and other circulating medium current as money. *Butler v. State*, 46 App. 287, 81 S. W. 744.

In view of this article it was held that the phrase "current money of the United States," as used in an indictment for embezzlement by tax collector, charging conversion to his own use of such money, includes gold, silver, copper or other coin, bank bills, government notes, or other circulating medium which is current as money. *Ferrell v. State* (Cr. App.) 152 S. W. 901.

Art. 1420. [942] Fraudulently receiving, etc., embezzled property.—If any person shall fraudulently receive or conceal any property which has been acquired by another in such manner as that the acquisition comes within the meaning of embezzlement, knowing the same to have been so acquired, he shall be punished in the same manner as the person embezzling the same would be liable to be punished. [Act March 16, 1883, p. 24.]

Nature and elements of offense.—Embezzlement is an offense eo nomine, and this article is not so indefinitely framed, or of such doubtful construction as that it can not be understood, and is not, therefore, inoperative. It uses the words "acquired" and "acquisition" where the words "converted" and "conversion" should have been used, but still the legislative intent is plain, which is to create and punish as an offense the fraudulent receiving or concealing of embezzled property, the same as the fraudulent receiving or concealing of stolen property. *Hodges v. State*, 22 App. 415, 3 S. W. 739. Prior to the enactment of the preceding article it was not an offense to fraudulently receive or conceal embezzled property. *Leal v. State*, 12 App. 279.

Indictment.—Willson's Cr. Forms, 692, approved in *Hodges v. State*, 22 App. 415, 3 S. W. 739.

CHAPTER EIGHTEEN

OF SWINDLING AND THE FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY

Art.	1. SWINDLING	Art.	
1421.	"Swindling" defined.	1428.	Obtaining board or lodging by false or fraudulent representations, trick, etc.
1422.	Certain wrongful acts included.		
1423.	"Money" includes bank bills.	1429.	Conviction can be had under foregoing article, when.
1424.	No benefit need accrue to defendant.		
1425.	If the act constitutes any other offense.	2. FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY	
1426.	Executor, etc., converting estate guilty of swindling.	1430.	Fraudulent disposition of mortgaged property.
1427.	Punishment.		

1. SWINDLING

Article 1421. [943] "Swindling" defined.—"Swindling" is the acquisition of any personal or movable property, money or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the rights of the party justly entitled to the same. [Act Feb. 12, 1858, p. 183.]

Cited, *Wagoner v. State*, 63 App. 180, 140 S. W. 339; *Burkhiser v. Lyons* (Civ. App.) 167 S. W. 244.

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| 1. Nature and elements of offense in general. | 6. Compared with and distinguished from other offenses. |
| 2. Intent. | 7. Venue. |
| 3. False pretense or promise and reliance thereon. | 8. Indictment and information. |
| 4. Acquiring or impairing property or right. | 9. — Proof and variance. |
| 5. Felony or misdemeanor. | 10. Evidence. |
| | 11. — Other offenses. |
| | 12. Charge of court. |

1. Nature and elements of offense in general.—Decisions defining the offense. *Mathews v. State*, 10 App. 279; *May v. State*, 15 App. 430; *Baker v. State*, 14 App. 332.

To constitute this offense there must be: 1, an intent to defraud; 2, an actual fraud committed; 3, false pretenses made by the accused; and 4, the fraud must have been accomplished by means of the false pretenses made use of for the purpose. *Blum v. State*, 20 App. 578, 54 Am. Rep. 530, citing *Buckalew v. State*, 11 App. 352, and other authorities, and generally see *Cline v. State*, 43 Tex. 494; *Robinson v. State*, 33 Tex. 341; *Allen v. State*, 16 App. 150; *Moody v. State*, 24 App. 458, 6 S. W. 321; *May v. State*, 15 App. 430; *Stringer v. State*, 13 App. 520; *Buntain v. State*, 15 App. 515; *Johnson v. State*, 57 App. 347, 123 S. W. 143.

The fact that a man bets on his own ability to work a swindling device, does not prevent the transaction from being a swindle. *Gray and Ross v. State*, 32 App. 598, 25 S. W. 627.

Where one is authorized to buy property for another, and buys and pays for the property by draft on his principal, the fact that the principal fails to pay the draft does not constitute swindling. *Williams v. State*, 34 App. 606, 31 S. W. 649.

The drawing and passing a worthless check held not swindling within the meaning of this article. *Ayers v. State*, 37 App. 1, 38 S. W. 943; *Brown v. State*, 37 App. 104, 38 S. W. 1008, 66 Am. St. Rep. 794.

The offense may consist of acts as well as words. *Brown v. State*, 37 App. 104, 38 S. W. 1008, 66 Am. St. Rep. 794. See, also, *Faulk v. State*, 38 App. 77, 41 S. W. 616; *Speer v. State*, 50 App. 273, 97 S. W. 469.

The instrument declared on read "\$3 Hamilton Texas July 1st 1896 I promise to pay to A C L Hurst quarterly in advance for one year and in the event default is made in the payment of any amount the whole to become due" signed J. E. W. It was alleged to be of the value of \$15, and to be an instrument securing a valuable right; held, the instrument as alleged would not support a charge of swindling. *Hurst v. State*, 39 App. 196, 45 S. W. 573.

Note a device with trick locks, manipulated under a wager, held to be a clear case of swindling. *McFarland v. State*, 45 App. 248, 75 S. W. 788.

Conversion of funds by a guardian. *Walls v. State*, 45 App. 329, 77 S. W. 8.

Swindling an insurance company. *Hunter v. State*, 46 App. 498, 81 S. W. 730.

In a case of swindling it is not necessary that any benefit accrue to the party guilty of the fraud or deceit; or injury to the person intended to be defrauded. *Faxter v. State*, 51 App. 576, 105 S. W. 195; *La Moyne v. State*, 53 App. 221, 111 S. W. 950. See, also, article 1424, and notes.

That the injured party could, after the failure of the security given falsely by the accused, have secured himself by marshaling other properties owned by accused, is no defense. *La Moyne v. State*, 53 App. 221, 111 S. W. 950 (overruling *Gaskins v. State* [Cr. App.] 38 S. W. 470; *Perry v. State*, 39 App. 495, 46 S. W. 816, and *Lively v. State* [Cr. App.] 74 S. W. 321).

The crime of swindling having been committed by defendant making false representations, knowing they were false, on which he obtained a loan of L., was not wiped out by his giving L. property to pay the debt in order to prevent a prosecution. *Robinson v. State*, 63 App. 212, 139 S. W. 978.

Where accused sold animals of a third person to prosecutor representing ownership, and thereby obtained from prosecutor money, a conviction for swindling was authorized. *Melton v. State*, 63 App. 573, 140 S. W. 781.

Where C. paid defendant \$10, on her representation that for a fee of that amount she would obtain for him certain employment, which she never did, intending the title of the \$10 to pass to her, defendant was not guilty of "theft," but, at most, of "swindling." *Arnold v. State* (Cr. App.) 176 S. W. 159.

2. Intent.—An essential element of this offense is the intent with which the defendant acquires the property. *Stringer v. State*, 13 App. 520; *May v. State*, 15 App. 430; *Sims v. State*, 28 App. 447, 13 S. W. 653.

3. False pretense or promise and reliance thereon.—See *Harrison v. State*, 44 App. 243, 70 S. W. 421; *May v. State*, 17 App. 213.

To constitute this offense, some false pretense, etc., as to an existing fact, or a past event, must have been made. Mere false promises, or false professions of intentions, although acted upon, are not sufficient. *Johnson v. State*, 41 Tex. 65;

Mathews v. State, 10 App. 279; Allen v. State, 16 App. 150; Blum v. State, 20 App. 578, 54 Am. Rep. 530. See further, as to false pretense, art. 1332.

The false pretense, etc., to constitute this offense, must be as to some existing fact, or past event. Mere false promises, or false professions of intention, although acted upon, are not sufficient. Mathews v. State, 10 App. 279; Allen v. State, 16 App. 150; Blum v. State, 20 App. 578, 54 Am. Rep. 530; Johnson v. State, 41 Tex. 65. It is not necessary that the pretense, etc., should be in words; there may be a sufficient false pretense, etc., in the acts and conduct of the party, without any verbal representation of a fraudulent nature. Blum v. State, 20 App. 578, 54 Am. Rep. 530. It need not be such an artificial device as would impose upon a man of ordinary prudence and caution, nor need it be such that can not be guarded against by ordinary caution. But if the pretense was absurd or irrational, or if the injured party knew its falsity, or had the means of instantly detecting it, it will not be such a pretense as will constitute this offense. Buckalew v. State, 11 App. 352; Colbert v. State, 1 App. 314; May v. State, 17 App. 213.

An essential element of the offense is, that the party injured, in parting with his property, actually relied upon and was deceived by the false pretenses, etc., of the accused. Buckalew v. State, 11 App. 352; Ervin v. State, *id.* 536.

Swindling may be predicated upon a promissory note, when its execution has been procured by means of false or deceitful pretenses, or fraudulent representations. Baker v. State, 14 App. 332.

No statement of anything to occur in the future is a pretense under this article, though a false pretext may be implied from the acts and conduct of the party without false or fraudulent verbal representations. Blum v. State, 20 App. 578, 54 Am. Rep. 530; Hurst v. State, 39 App. 196, 45 S. W. 573; Brown v. State, 37 App. 104, 38 S. W. 1008, 66 Am. St. Rep. 802; Johnson v. State, 41 Tex. 65; Boscow v. State, 33 App. 390, 26 S. W. 625; Anderson v. State (Cr. App.) 177 S. W. 85.

A false promise to do a certain thing in the future is not swindling; but when accompanied by a false statement as to an existing fact, it may sustain the charge. Boscow v. State, 33 App. 390, 26 S. W. 625.

The indictment must allege and evidence show that the injured party relied on the false statements and was induced to part with his property by means of the false pretenses. Thorpe v. State, 40 App. 347, 50 S. W. 383.

✓ Pretenses must relate to existing facts or past events; mere false promises or professions of intention, though acted on, are insufficient. Martin v. State, 36 Tex. Cr. 125, 35 S. W. 976.

The mere act of drawing a check upon a bank in which the drawer has neither funds nor credit will not alone, or without attending false representations, constitute swindling. Ayers v. State, 37 App. 1, 38 S. W. 792; Brown v. State, 37 App. 104, 38 S. W. 1008, 66 Am. St. Rep. 794.

It is not necessary that the false pretenses should be the sole inducement which moved the prosecutor to part with his property. It is sufficient that they materially contribute to this end and without which he would not have parted with his property. Cowan v. State, 41 App. 617, 56 S. W. 752.

Defendant insured his life, and then pretended that he had been drowned, leaving evidence indicative in some respects of this fact. The beneficiary innocently believing the insured to be dead, brought suit on the policy, (which the insurance company resisted on the ground that the insured was not dead) and recovered judgment which the company was forced through the courts to pay. This was not swindling under the statutes. The pretense or representations may be of acts or conduct as well as by words, still they must be made to some one and must be declared on in the indictment. They must be relied on and the party injured must be induced to part with the ownership of the property on the faith of the representations. A connection must be shown between the alleged false representations and the obtention of the property. The court cannot be deemed the agent of the company to show such connection. The company did not believe the facts relied on to show false representations, but was compelled by the court in the suit to accept them as true and pay the money. The indictment should have been quashed. Hunter v. State, 46 App. 498, 81 S. W. 730.

The offense consists of a wilful false representation as to a substantial and material fact, inducing another to part with his property. La Moyne v. State, 53 App. 221, 111 S. W. 950.

While a false representation that one is the owner of property is one on which a prosecution for swindling may be based, a representation that one will invest in certain property, and failure to do it, is but a breach of promise, not a basis for swindling. Johnson v. State, 57 App. 347, 123 S. W. 143.

A defendant who falsely represented that he was the owner of land free from incumbrance, and purchased personal property on credit, securing the price by a deed of trust on the land, is guilty of "swindling," within this and the following article, though the person swindled had constructive notice by means of the records that the land was incumbered. Brown v. State, 62 App. 592, 138 S. W. 604.

✓ To support a conviction under article 1421, defining swindling as the acquisition of property by false and deceitful means, it must appear that the party injured, in parting with his property, actually relied on and was deceived by the false pretenses used by accused. McDaniel v. State, 63 App. 260, 140 S. W. 232.

* The crime of swindling or obtaining money by false pretenses defined by article 1421, may be committed by the use of false pretenses with reference to real, as well as personal, property. Yoakum v. State (Cr. App.) 150 S. W. 910.

A fraudulent representation that deceased would at some future time convey title to certain land in return for the present delivery of certain notes does not constitute the offense of swindling, since the statute expressly excludes matters of that sort; to constitute the offense the representations must relate to a past matter or existing fact and not a mere promise to do some act in the future. Windham v. State, 71 App. 384, 160 S. W. 72.

4. **Acquiring or impairing property or right.**—The title to money or property must be obtained by the accused, or must pass from the injured party. *Cline v. State*, 43 Tex. 494; *State v. Vickery*, 19 Tex. 326; *May v. State*, 15 App. 430.

The money being placed to accused's credit in a bank instead of being paid to him, there is no merit in contention that he did not receive it in cash. *Medders v. State*, 54 App. 494, 113 S. W. 270.

Securing the signature of a person to a note, whereby he was subsequently required to pay it, is securing from him a "valuable right," within art. 1421, as to swindling. *Johnson v. State*, 57 App. 347, 123 S. W. 143.

A debtor for merchandise, who agreed to give a check on a bank in payment, on the creditor making out an itemized account and attaching it to the check, and who represented that the check would be paid, and who gave a check, to which was attached the account, is not guilty of swindling merely because the check was not paid for want of funds, since the debtor acquired no property or right by means thereof, or impaired the right of the creditor. *Allen v. State*, 58 App. 494, 126 S. W. 571.

Where a person secured the indorsement of his note by another upon false representations that he was solvent, that he owed but a limited amount (naming it), and owned property of a value greatly in excess of such amount, and that a named person would loan him a given amount if the note was indorsed by the person to whom the representations are made, etc., he acquired a valuable right, and his act is "swindling," within the purview of the statute. *Hubbert v. State* (Cr. App.) 147 S. W. 267.

5. **Felony or misdemeanor.**—See *La Moyne v. State*, 53 App. 221, 111 S. W. 950; *Faulk v. State*, 38 App. 77, 41 S. W. 616.

6. **Compared with and distinguished from other offenses.**—See notes under articles 1329 and 1332. ante. See *Mathews v. State*, 33 Tex. 102; *Witherspoon v. State* (Cr. App.) 37 S. W. 433; *Hirshfield v. State*, 11 App. 207; *Underwood v. State*, 49 App. 285, 91 S. W. 572.

When the possession of property is acquired by false pretenses, the true distinction between theft and swindling is this: when by such pretenses the owner is induced to part with the property finally, the offense is swindling; but when possession is obtained in a manner not adequate to pass title to the property, but merely the interim custody, and the property is then appropriated in pursuance of the original fraudulent intent, it is theft. *White v. State*, 11 Tex. 769; *State v. Vickery*, 19 Tex. 326; *Cline v. State*, 43 Tex. 494; *Pitts v. State*, 5 App. 122. Swindling may be committed without destroying or impairing the rights of the party justly entitled to the property, and may be perpetrated upon one who is not even justly entitled to the property. It may be committed with either of two intents: 1. With the intent to appropriate the property. 2. With the intent to destroy or impair the rights of the party justly entitled to the property, or both these intents may enter into the offense. Theft is not constituted unless the two intents exist and accompany the taking of the property. *May v. State*, 15 App. 430.

If the owner was induced to part with his property finally, by means of the false pretenses, the offense is swindling. But when the possession, delivered to him by the owner, was obtained in a manner not to pass title, the owner only intending to part with the possession and custody, and not title, and the acquiring person then and there intending to appropriate it, and did appropriate it, the offense is theft. *State v. Vickery*, 19 Tex. 326; *Cline v. State*, 43 Tex. 494; *Curtis v. State*, 31 App. 39, 19 S. W. 604; *Taylor v. State*, 32 App. 110, 22 S. W. 148; *Bink v. State*, 50 App. 445, 98 S. W. 863.

The indictment must allege that the injured party was induced to part not only with the possession but also with the title of his property, which is essential to show that the act was swindling and not theft. *Cline v. State*, 43 Tex. 494; *Curtis v. State*, 31 App. 39, 19 S. W. 604; *Bink v. State*, 50 App. 445, 98 S. W. 863 (following *Witherspoon v. State* [Cr. App.] 37 S. W. 433. *Hirshfield v. State*, 11 App. 207, and overruling *Sims v. State*, 21 App. 649, 1 S. W. 465).

It has been held that, on proper proof, a conviction can be had for swindling under an indictment for theft. *Davison v. State*, 12 App. 214, but compare *Huntsman v. State*, Id., 619.

A party can be guilty of both forgery and swindling in the same transaction. *Scott v. State*, 40 App. 108, 48 S. W. 523.

The difference in theft by false pretext, and swindling is, that in theft the owner, in parting with the possession, does not intend to part with the ownership of his property; while in swindling, the owner intends to part with both ownership and possession. *Taylor v. State*, 32 App. 110, 22 S. W. 149.

Where one fills in the blank spaces of a printed receipt, the signature of which is not in writing, nor resembles manuscript, but is printed in bold type, he is not guilty of forgery, but of swindling. *Heath v. State*, 49 App. 49, 89 S. W. 1063, 122 Am. St. Rep. 733.

Where a person obtained money from a bank by the unauthorized signing of the name of another to a note, it is forgery and indictable as such, rather than as swindling. *Ashmore v. State* (Cr. App.) 150 S. W. 196.

Where by the fraud practiced the title to money is passed, the offense is "swindling" and not theft, but if mere possession is obtained by false pretenses, and title does not pass, the person acquiring the money is guilty of "theft." *Lewis v. State* (Cr. App.) 171 S. W. 217.

7. **Venue.**—See notes under C. C. P. arts. 245, 253.

8. **Indictment and information.**—Willson's Cr. Forms, 693, 695-697.

See notes to articles 1422, 1423 and 1424, post, and C. C. P. arts. 457, 470.

See *Colbert v. State*, 1 App. 314; *Blum v. State*, 20 App. 578, 54 Am. Rep. 530; *Hunter v. State*, 46 App. 498, 81 S. W. 730; *Doxey v. State*, 47 App. 503, 84 S. W. 1061, 11 Ann. Cas. 830; *Curtis v. State*, 31 App. 39, 19 S. W. 604; *Brown v. State*,

48 App. 433, 88 S. W. 811; *Salter v. State*, 36 App. 501, 38 S. W. 212; *Scott v. State*, 27 App. 264, 11 S. W. 320; *Brown v. State* (Cr. App.) 43 S. W. 986; *Graves v. State*, 31 App. 65, 19 S. W. 895.

Indictment need not charge that offense was committed feloniously or with a felonious intent. *Robinson v. State*, 33 Tex. 341.

The indictment must distinctly aver the ownership of the property acquired by the defendant, and the person from whom the same was acquired by the defendant. *Burd v. State*, 39 Tex. 509. The false or deceitful pretense or device, or fraudulent representation used to accomplish the swindle, must be set forth fully and accurately. The facts of the case should be stated clearly and distinctly, accompanied by such explanations, when necessary, as will place in bold relief the important fact, so that its meaning, relation, and pertinency may be fully comprehended, without a resort to inference. *State v. Baggerly*, 21 Tex. 757; *Washington v. State*, 41 Tex. 583; *Mathena v. State*, 15 App. 473; *Buntain v. State*, Id. 515; *Lutton v. State*, 14 App. 518. And it must appear that the false pretenses, etc., related to existing facts, or past events; mere false promises, or false professions of intention, though acted upon, are not sufficient. *Allen v. State*, 16 App. 150. It must be distinctly alleged that the pretenses, etc., were false, and an omission of such allegation is not cured by an averment that the defendant knew they were false. *State v. Levi*, 41 Tex. 563; *Warrington v. State*, 1 App. 168. It must be alleged that the defendant knew the pretenses, etc., were false when he made them. *State v. Levi*, 41 Tex. 563; *Marander v. State*, 44 Tex. 442; *Hirsch v. State*, 1 App. 393. It must be alleged that the injured party was induced to part with the ownership of the property, acquired by the defendant, by means of the false pretenses, etc., alleged in the indictment. *Hightower v. State*, 23 App. 451, 5 S. W. 343; *Mathena v. State*, 15 App. 473; *Buckalew v. State*, 11 App. 352; *Epperson v. State*, 42 Tex. 79; *White v. State*, 3 App. 605; *Ervin v. State*, 11 App. 536. But it need not be expressly alleged that the injured party relied upon the false pretenses, etc. *Baker v. State*, 14 App. 332. A general description of the property acquired, as in theft, will be sufficient, but if the property be particularly described, it must be proved as described, or the indictment will not be sustained. *Childers v. State*, 16 App. 524. The indictment should fully set out the matter alleged to be false, and the matter thus alleged, being material and descriptive, must be proved as alleged. The alleged false matter, however, may be set out by its substance, or by its tenor. If set out by its tenor, the proof must conform strictly to the allegations; but if by its substance, then it is only necessary to prove the allegation substantially. Thus, when the alleged false representation was, that the defendant had "a large amount of money on deposit in the Dallas National Bank," proof that the representation was that he "had \$5,000 on deposit" in said bank, was held sufficient. It was further held that the allegation that the defendant fraudulently obtained the sum of \$106 was supported by proof that he obtained \$109—the variance being immaterial, it only being necessary to prove that he so obtained money of the value of \$20 or more. This case is distinguished from *Marwinsky v. State*, 9 App. 377, and *Litman v. State*, Id. 461; *Moore v. State*, 20 App. 233. The fact that the indictment alleges facts which constitute theft, will not vitiate it. By the same act the defendant may have committed both theft and swindling, and the state had its election to prosecute him for either offense, but a conviction of one would bar a prosecution for the other. *Sims v. State*, 21 App. 649, 1 S. W. 465. But it has been held, contrary to the doctrine of the last cited case, that where the indictment alleged facts which showed that the defendant had committed the offense of uttering a forged instrument, it was a bad indictment. *Hirshfield v. State*, 11 App. 207. An essential ingredient of swindling is the intent with which the property is acquired. It must be acquired with the intent to appropriate the same to the use of the person acquiring it, and this intent must be alleged in the indictment. *Stringer v. State*, 13 App. 520, overruling upon this point *Tomkins v. State*, 33 Tex. 228. Where the swindling alleged consists in obtaining a person's signature to an instrument in writing, it must be alleged that the instrument, after being signed, was delivered. *Baker v. State*, 14 App. 332. So, when it was alleged that the swindle was accomplished by means of a false draft, it was held that the indictment was bad, because it did not allege that said draft was delivered to or accepted by the injured party. *Lutton v. State*, 14 App. 518. Where the alleged swindle was perpetrated by means of a written instrument, the written instrument should be set out, as in the case of forgery, or good reason should be alleged for not so setting it out. *State v. Baggerly*, 21 Tex. 757; *Baker v. State*, 14 App. 332; *White v. State*, 3 App. 605; *May v. State*, 15 App. 430. Where it was charged that the swindling was by means of a "writing obligatory," which the defendant knew to be valueless, it was held that the indictment must show wherein the said writing was valueless. *State v. Dyer*, 41 Tex. 520. The ownership of the property acquired by the defendant by the swindle must be alleged, and the same rules apply in respect to ownership as are applicable in a prosecution for theft. *May v. State*, 15 App. 430; see ante, art. 1329, and C. C. P. art. 457 and notes. The value of the property acquired must be alleged, as in theft. Ante, art. 1342. See an indictment which was held bad for uncertainty, because it did not clearly appear therefrom whether the pleader intended to charge that the defendant swindled the injured party out of an organ, or out of a chance in a raffle for said organ. If the latter, swindling could not be based upon it, a "chance in a raffle" not being property. *Rosales v. State*, 22 App. 673, 3 S. W. 344. It has been held that a conviction may be had for this offense under an ordinary indictment for theft. Ante, art. 1329.

It is necessary to allege ownership of property obtained. *Washington v. State*, 41 Tex. 583; *Mays v. State*, 28 App. 484, 13 S. W. 787.

Averment as to delivery of watch, in case wherein the gravamen of the offense was its delivery in pledge to secure money borrowed. *Buntain v. State*, 15 App. 515.

Indictment for swindling by false pretense must positively and clearly aver

the commission of the acts of the accused. If a written instrument enters into the offense, as matter of inducement, it should be set out as in forgery. *Dwyer v. State*, 24 App. 132, 5 S. W. 662.

Indictment charged the offense of swindling by means of a promissory note, which, though he knew it to be neither valid nor genuine, the accused represented to be good, valid, and genuine. The indictment sets out the note in *hæc verba*, and upon its face it appears to be a valid obligation. The indictment, however, fails to allege the facts which render the note invalid and worthless. Exception to the indictment and a motion in arrest of judgment, based upon this omission, were overruled. Held, that the exception and the motion in arrest were well taken, and should have prevailed. *Wills v. State*, 24 App. 400, 6 S. W. 316.

Indictment for swindling by means of a false chattel mortgage and fraudulent verbal representations, is not sufficient to charge the offense, unless it sets out the alleged mortgage in *hæc verba*, or unless, stating good reason why the alleged mortgage could not be so set out, it sets it out in substance. *Ferguson v. State*, 25 App. 451, 8 S. W. 479.

A written instrument being the basis of the swindle, the indictment must set out the instrument in full, or show good reason for not doing so. *Scott v. State*, 27 App. 264, 11 S. W. 320; *Ferguson v. State*, 25 App. 451, 8 S. W. 479; *Hardin v. State*, 25 App. 74, 7 S. W. 534.

See indictment for swindling by means of a "trick knife," held sufficient. *Gray and Ross v. State*, 32 App. 598, 25 S. W. 627. An indictment for swindling a bank must state whether such bank is an individual, corporation, copartnership, or joint stock company. *Nasets v. State* (Cr. App.) 32 S. W. 698.

Indictment held insufficient because the alleged representations did not relate to existing facts or past events. *Martin v. State*, 36 App. 125, 35 S. W. 976.

An indictment for swindling alleged that defendant handing to the injured party a check stated to him that "he would have no trouble in getting his money," held, the indictment charged no offense. *Martin v. State*, 36 App. 125, 35 S. W. 976.

An indictment for swindling by an exchange of property must allege an actual delivery of the property. *Cummings v. State*, 36 App. 152, 36 S. W. 266.

An indictment charging that defendant falsely represented that he owned a diamond stud and thereby induced prosecutor to part with \$75; held, insufficient. *Cummings v. State*, 36 App. 152, 36 S. W. 266.

An indictment which alleges that the fraudulent representations were made to C., that C. was the owner of the money, and that he was the owner of the Jones County Bank, sufficiently shows that C. was the party swindled. *Faulk v. State*, 38 App. 77, 41 S. W. 616. Distinguishing *Nasets v. State* (Cr. App.) 32 S. W. 698.

Allegation of exchange of property. *Faulk v. State*, 38 App. 77, 41 S. W. 616.

The transaction constituting the fraudulent pretense must be fully averred. *Hurst v. State*, 39 App. 196, 45 S. W. 573.

An information alleging that defendant represented to a dentist that a person had agreed to secure his note for work and material, and that he knew the representation to be false when made, held sufficient where it was alleged that the dentist was thereby induced to part with his property, though reliance on the representation was not distinctly alleged. *Fairy v. State*, 50 App. 396, 97 S. W. 700.

An indictment for swindling, charging that defendant procured certain clothing from prosecutor's clerk in exchange for a check on a bank, which defendant represented would be paid on presentation from funds which defendant falsely claimed to have on deposit therein, that the check was not good, that defendant had no right to draw it, etc., and that payment was refused, stated an offense. *Glover v. State*, 57 App. 208, 122 S. W. 396.

An indictment for swindling must allege that the person alleged to have been swindled relied on the false representations. *Johnson v. State*, 57 App. 347, 123 S. W. 143.

An affidavit and information for swindling alleged that on June 1, 1909, defendant, with force and arms, and by means of false and fraudulent representations, knowingly and fraudulently made by him to W., had induced W. to part with his lawful money in the sum of \$26 by representing that he, defendant, was the owner of certain goods, and had the right to dispose of the same, when in fact he did not own the goods, so that the representations were false and made solely to swindle W., contrary, etc. Held fatally defective for failure to show connection between the false representations and the obtaining of the property, and for failure to allege that prosecutor intended to part, and did part, with the title to his property, and that he acquired any property; the entire charge being laid inferentially and by way of recital instead of by positive, direct averment. *Robinson v. State*, 60 App. 353, 132 S. W. 354.

An indictment, alleging the obtaining of money from L., by a false statement of defendant that he was the owner of certain property, and by giving a lien thereon to secure payment of the money so obtained, is not subject to motion to quash because of the deed of trust to C. as trustee, set out in the indictment, given to secure the payment, reciting that it was given for and in consideration of a sum paid by C., trustee; it further reciting that it was given to secure the payment of a note due L. *Robinson v. State*, 63 App. 212, 139 S. W. 978.

An indictment for swindling, which alleges that accused represented that he was a member of a solvent construction company of which third persons named were members, and that accused was solvent, that he and the third persons named were not members of the company, which was not solvent, and that, by reason of the false representations, accused obtained a contract to build a railway, and obtained a specified sum under the contract, charges the obtaining of money by the false representations, and is good; and the allegations of the value of the contract may be treated as surplusage. *McDaniel v. State*, 63 App. 260, 140 S. W. 232.

The presentation of a note to a person for his signature and its signing by such person does not make it his note, so that, where an indictment for swindling

alleged that by the defendant presenting a note to another for his signature it became the property of the other, and the defendant obtained it from him by fraudulent representations, and contained no allegation that the defendant obtained the signature, either as an accommodation maker or as surety, under the fraudulent representations alleged, it is insufficient to charge the offense. *Hubbert v. State* (Cr. App.) 147 S. W. 267.

Where an indictment charged that defendant, in order to obtain \$10 from prosecutor, represented that he was the owner of certain real estate in El Paso county, Tex., and by means of false pretenses and fraudulent representations induced prosecutor to exchange such sum for an instrument purporting to be a conveyance of the land described, and by such false pretenses prosecutor was induced to part and did part with the possession of the money to accused, when, in fact, accused did not own the land or have the right to sell the same, or make a valid deed there-to, etc., sufficiently charged the crime of swindling within article 1421. *Yoakum v. State* (Cr. App.) 150 S. W. 910.

An indictment charging swindling must allege the ownership of the property fraudulently acquired by accused and the person from whom it was acquired. *Pilgrim v. State* (Cr. App.) 150 S. W. 1170.

An indictment for obtaining notes by false pretenses, which fails to state whether the pretenses were with reference to a promise to deliver a deed to land or with reference to the land conveyed by the deed delivered, and which fails to show except in an inferential way that the deed delivered did not cover the land to be conveyed, is vague, indefinite, and uncertain. *Windham v. State* (Cr. App.) 160 S. W. 72.

Allegations of the indictment in a prosecution for swindling, that accused represented that he was the agent of an underwriters' association, and falsely represented the amount of the capital, etc., thereof, and that prosecuting witness was induced to pay the agent \$30 for a receipt set out in the indictment, did not sufficiently allege the offense of swindling, and should have alleged that prosecuting witness, by reason of such representations, was induced to take out an application for insurance, and pay \$30 "as a premium on said policy," etc.; it being the policy, and not the receipt, for which he was induced by the false representations to pay out his money. *Tripp v. State* (Cr. App.) 160 S. W. 1191.

9. — **Proof and variance.**—See *Baker v. State*, 14 App. 322; *Mathews v. State*, 33 Tex. 102; *Brown v. State*, 48 App. 433, 88 S. W. 811; *Salter v. State*, 35 App. 501, 38 S. W. 212; *Peckham v. State* (Cr. App.) 28 S. W. 532; *Marwilsky v. State*, 9 App. 377.

Where the indictment alleged that the property acquired was "good, lawful, and current money of the United States of America, being currency bills," it was held that this description, though unnecessarily particular, should have been strictly proved. *Childers v. State*, 16 App. 524. Where the indictment charged that the property acquired was nine dollars, and the proof was that it was six dollars, the variance was held to be fatal. *Marwilsky v. State*, 9 App. 377; *Litman v. State*, Id. 461. But see *Moore v. State*, 20 App. 233, explaining the cases last cited, and holding that where the indictment charged that the defendant obtained \$106, but the proof showed he obtained \$109, there was no variance. It was also held in the same case, that where the indictment alleged the false representation to be that the defendant had "a large amount of money on deposit in the Dallas National Bank," it was not a variance to prove the representation to be that he "had \$5,000 on deposit" in said bank. An indictment which alleged the ownership of the property to be in B. K. & Co., was held to be not supported by proof that B. & K. were the owners. *Mathews v. State*, 33 Tex. 102. The false pretense, etc., must be proved precisely as alleged. *Warrington v. State*, 1 App. 168; *Peckham v. State* (Cr. App.) 28 S. W. 532.

The indictment alleged that defendant procured money from D. B. as agent of J. B. by a false note and mortgage. The mortgage introduced was executed direct to J. B.; held, no variance. *Perry v. State*, 39 App. 495, 46 S. W. 816.

Where the indictment alleged swindling on one contract, and the evidence shows that if there was any swindling it was on a subsequent contract, there is a fatal variance. *Dechard v. State* (Cr. App.) 57 S. W. 814.

Where an indictment for swindling charged that defendant secured a loan from a bank by false representations as to his ownership of property and his having a contract with a person to deliver cattle, failure to prove the pretense of having the contract did not necessitate a verdict for defendant, since the pretense of having a contract to deliver, being of something in futuro, was not a basis for a prosecution, and it was clear from the indictment itself that the false pretenses relied upon were those regarding ownership. *Baxter v. State*, 51 App. 576, 105 S. W. 195.

Where, in a prosecution for swindling by giving prosecutor's clerk a worthless check in payment of goods, the clerk had testified that the check in question, which was on a specified bank, was the check defendant gave witness for the goods, evidence that after witness had sold the goods to defendant, and after defendant stated he wanted to pay for them with a check, witness asked defendant if he had money in the bank, and defendant answered that the check would be honored and that he had money, was not objectionable because the indictment did not charge that defendant had represented to witness that he had on deposit money in the bank on which the check was given. *Glover v. State*, 57 App. 208, 122 S. W. 396.

Where one is charged with acquiring by swindling the possession of property described, the state must prove that the property so acquired is that described. *Lieske v. State*, 60 App. 276, 131 S. W. 1126.

An indictment for swindling, which alleges that accused unlawfully acquired current money of the United States of a specified sum, is not sustained by proof of the unlawful acquisition by accused of a check for that amount. *Lieske v. State*, 60 App. 276, 131 S. W. 1126.

A deed of trust to C., trustee, to secure payment of a note due L., being an exact copy of the mortgage set out in the indictment, is not inadmissible as at variance with the mortgage alleged in the indictment, though the indictment alleged the execution of the mortgage to L. *Robinson v. State*, 63 App. 212, 139 S. W. 973.

A deed of trust to C., trustee, to secure payment of a note due L., is in law a mortgage to L. *Robinson v. State*, 63 App. 212, 139 S. W. 973.

The allegation of an indictment for swindling that defendant obtained money from L. is supported by evidence that defendant received from L. his check on a bank and immediately cashed it at the bank in L.'s presence. *Robinson v. State*, 63 App. 212, 139 S. W. 973.

The variance between an indictment for swindling, based on the sale of an animal, which sets out the check delivered in payment of the animal, and the check as described in the indictment, together with an indorsement on the back thereof by accused, does not render the check inadmissible, where the proof showed that prosecutor gave accused the check, and that thereafter accused indorsed it. *Melton v. State*, 63 App. 573, 140 S. W. 781.

The allegation of title of the property fraudulently acquired by accused charged with swindling must be proved, and a variance between the allegation and proof is fatal. *Pilgrim v. State* (Cr. App.) 150 S. W. 1170.

The value of the property must be proved, as in theft. Ante, art. 1342, note. Evidence that the property was of the value of fifteen dollars will not support a conviction for the felony grade of this offense. *Mathews v. State*, 10 App. 279. Where two persons are jointly indicted for this offense, evidence that one of them, with the knowledge, approbation, concurrence, and direction of the other, made the false pretenses charged, warrants the conviction of both. *Blum v. State*, 20 App. 578, 54 Am. Rep. 530. But to make one defendant amenable for the acts and declarations of his codefendant, proof of complicity between them, in the commission of the offense, must be adduced. *Marwilsky v. State*, 9 App. 377. See a state of case wherein the defendant should have been permitted to show the course of dealing between himself and the alleged injured parties, both before and after the date of the alleged offense, as reflecting upon the intent of the defendant, or throwing light upon the question whether or not the creditor was using the criminal law to collect a debt. *Lutton v. State*, 14 App. 518. Evidence that the defendant delivered the property to the wife of the person whose name was used as a basis of credit, is competent for the defendant. *Bozier v. State*, 5 App. 220. But that the defendant, at the time he acquired the property, intended to repay the same, cannot operate to relieve the act of its criminal character, and evidence of such intent, and the defendant's ability to make the repayment, is not competent. *Buntain v. State*, 15 App. 515; *Moody v. State*, 24 App. 458, 6 S. W. 321.

10. Evidence.—See notes to following article. See, also, C. C. P. arts. 783, et seq. and notes thereunder.

See *Brown v. State*, 37 App. 104, 38 S. W. 1008, 66 Am. St. Rep. 794; *Brown v. State*, 29 Tex. 503; *McFarland v. State*, 45 App. 248, 75 S. W. 788; *Salter v. State*, 36 App. 501, 38 S. W. 212.

Evidence held not to support a conviction. *McDaniel v. State*, 63 App. 260, 140 S. W. 232; *Popinaux v. State*, 12 App. 140; *Childers v. State*, 16 App. 524; *Moore v. State*, 20 App. 233; *Blum v. State*, 20 App. 578, 54 Am. Rep. 530; *Williams v. State*, 34 App. 606, 31 S. W. 649; *Campbell v. State*, 52 App. 208, 106 S. W. 130.

To sustain a conviction, the facts charged must be proved; and if the charge be that the accused passed spurious money, representing it to be good, the spuriousness of the money must be satisfactorily proved. *Brown v. State*, 29 Tex. 503. So, where the property was acquired by means of a representation that the defendant had money on deposit in a bank, it must be satisfactorily proved that he had no such deposit. *Moore v. State*, 17 App. 176. The notarial certificate of the protest of a draft made in another state, is admissible in evidence to prove the matter stated in such certificate, but is not evidence to prove any fact not stated in said certificate. *May v. State*, 15 App. 430; s. c., 17 App. 213.

In a prosecution for swindling it was held error to admit in evidence a certain petition, citation, and judgment, as the same were immaterial and irrelevant to any issue in the case. *Moody v. State*, 24 App. 458, 6 S. W. 321.

On trial for swindling by obtaining money under the false pretense that defendant was associated with one H—— in the practice of medicine, held that H—— could testify as to the falsity of such statement both as to himself and his son who was his partner. *Boscow v. State*, 33 App. 390, 26 S. W. 625.

Evidence of the status of defendant's bank account, held, admissible. *Brown v. State*, 37 App. 104, 38 S. W. 1008, 66 Am. St. Rep. 794.

On trial for swindling by means of a worthless draft by which defendant secured a deposit at a bank upon which he drew checks, such checks are admissible in evidence. *Faulk v. State*, 38 App. 77, 41 S. W. 616.

In a prosecution for swindling by means of a worthless check, evidence of the bookkeeper of the bank on which the check was drawn that the check was presented to the bank for payment, and payment refused, was proper. *Glover v. State*, 57 App. 208, 122 S. W. 396.

In a prosecution for fraudulently inducing the complaining witness to sign a note with accused by falsely representing that accused had a contract to teach school, evidence held insufficient to overcome the legal presumption of innocence, and to sustain a conviction. *Thurman v. State*, 59 App. 285, 128 S. W. 404.

Evidence held insufficient to sustain a conviction of swindling by obtaining money for services as a Spiritualist in finding buried money. *Nurse v. State*, 59 App. 354, 128 S. W. 906.

Evidence held insufficient to authorize a conviction of swindling, claimed to have been perpetrated by defendant having cotton, which he had bought by the

pound, underweighed at the time of purchase. *Schillings v. State*, 60 App. 309, 131 S. W. 1075.

Defendant purchased mules upon credit, giving a deed of trust for the payment of the price upon land to which he claimed to have an unincumbered title. His title in fact was incumbered. Held, that vendors' lien notes on the land were admissible, as well as evidence that such notes had not been paid. *Brown v. State*, 62 App. 592, 138 S. W. 604.

It was not error in such case to permit the state to show that defendant had made no payments upon his land; the court having instructed the jury that if the land was sufficient to pay both debts defendant would not be guilty of any offense. *Brown v. State*, 62 App. 592, 138 S. W. 604.

L., on a prosecution for obtaining money from him on false representations, may testify that, of the sum defendant arranged to borrow from him, he at defendant's request paid part of it to a bank in payment of defendant's debt to it, and the remainder to defendant. *Robinson v. State*, 63 App. 212, 139 S. W. 978.

In a trial for swindling by leading the defrauded persons to believe that accused had discovered minerals in a shaft which accused "salted," the jury were properly permitted to consider similar transactions between accused and the defrauded persons concerning another shaft which he sunk, and in which he falsely represented that minerals had been found, to establish the identity in developing the *res geste* of the particular offense, and as tending to circumstantially show his guilt. *Trimble v. State* (Cr. App.) 145 S. W. 929.

In a trial for swindling by falsely representing that accused had struck mineral in a shaft sunk for the defrauded persons, testimony concerning investigations witnesses had made in the shafts after accused was paid was admissible; the fact that the investigations were made from one to six days after accused gave possession going to the weight rather than the admissibility of the testimony. *Trimble v. State* (Cr. App.) 145 S. W. 929.

Evidence held to sustain a conviction of swindling by leading the defrauded persons to believe that minerals had been discovered in a shaft. *Trimble v. State* (Cr. App.) 145 S. W. 929.

Where, in a prosecution for swindling in executing a deed of trust to secure a loan on property which accused had already conveyed to another, there was parol evidence admitted as to the contents of the note, the deed of trust securing it, and the deed which accused previously made and delivered to the prior grantee of the property, it was no ground for reversal that the record on appeal failed to show the note, deed of trust, and deed, or that such instruments had ever, in fact, been admitted in evidence. *Bedford v. State* (Cr. App.) 170 S. W. 727.

11. — **Other offenses.**—See notes under C. C. P. art. 783.

12. **Charge of court.**—See C. C. P. arts. 735 et seq., and notes thereunder.

See *Sherwood v. State*, 42 Tex. 498; *Moore v. State*, 20 App. 233; *Matthews v. State*, 33 Tex. 102; *Speer v. State*, 50 App. 273, 97 S. W. 469; *La Moyne v. State*, 53 App. 221, 111 S. W. 950; *Faulk v. State*, 38 App. 77, 41 S. W. 811; *Brown v. State*, 48 App. 433, 88 S. W. 811; *Gray and Ross v. State*, 32 App. 598, 25 S. W. 627.

See a case where the trial court properly refused to charge the law relating to circumstantial evidence, and also properly refused to instruct the jury that if the defendant, at the time he acquired the property, intended to repay it, he would not be guilty. *Buntain v. State*, 15 App. 515.

Charge of the court required the jury to believe that the signatures to the document were on it before its utterance, and that the defendant's false representation that they were genuine induced the issuance of the draft thereon—otherwise, to acquit. Held correct. *Scott v. State*, 27 App. 264, 11 S. W. 320. See, also, *Moody v. State*, 24 App. 458, 6 S. W. 321; *Lewis v. State*, 28 App. 140, 12 S. W. 736; *Taylor v. State*, 29 App. 466, 16 S. W. 302; *Otero v. State*, 30 App. 450, 17 S. W. 1081.

Where accused charged with swindling by the sale to prosecutor of an animal belonging to a third person sought to show that he bought the animal from the third person and had made a partial payment therefor, a charge that if accused bought the animal from the third person, and that they agreed on the terms of sale, and that the third person accepted a part payment and delivered possession to accused, relying on his promise to subsequently pay the balance, the title passed to accused, and he could not be convicted, was not objectionable because making it necessary that the third person received the part payment before title could pass to accused. *Melton v. State*, 63 App. 573, 140 S. W. 781.

Where an indictment for swindling charged that accused fraudulently acquired property from eight persons named, and the proof showed that the title and possession of the property fraudulently acquired by accused was in one of the persons only, a charge authorizing a conviction if accused by fraudulent representations made to one only of the persons obtained the property was erroneous. *Pilgrim v. State* (Cr. App.) 150 S. W. 1170.

Where accused was charged with executing a deed of trust on property that he did not own to secure a loan, the deed by which accused had previously conveyed the land to another being admissible on the issue whether accused intended to swindle the lender at the time he executed the deed of trust, the court did not err in refusing to charge that the deed could not be considered as evidence to establish accused's guilt. *Bedford v. State* (Cr. App.) 170 S. W. 727.

Where, in a prosecution for swindling by executing a deed of trust on property which accused did not own to secure a loan, the court charged that, if accused did not receive the consideration from one to whom he had previously sold the land when he made the deed to him, he should be acquitted, such instruction sufficiently covered a request to charge that the jury could not consider such deed as evidence of accused's guilt. *Bedford v. State* (Cr. App.) 170 S. W. 727.

Art. 1422. [944] Certain wrongful acts included.—Within the meaning of the term “swindling” are included the following wrongful acts:

1. The exchange of property upon the false pretense that the party is the owner or has the right to dispose of the property given in exchange.

See notes under the preceding article.

See, also, *Hardin v. State*, 25 App. 74, 7 S. W. 534; *Scott v. State*, 27 App. 264, 11 S. W. 320; *Sims v. State*, 28 App. 447, 13 S. W. 653; *Mays v. State*, 28 App. 484, 13 S. W. 787; *Frank v. State*, 30 App. 381, 17 S. W. 936; *Curtis v. State*, 31 App. 39, 19 S. W. 604; *Graves v. State*, 31 App. 65, 19 S. W. 895.

Indictment.—Willson's Cr. Forms, 693, 695-697.

Indictment should state the name of the person to whom the property was sold or traded. *Presley v. State*, 24 App. 494, 6 S. W. 540, *Smith v. State*, 26 App. 577, 10 S. W. 218.

It is essential under this subdivision, and must be alleged, that some false representation as to existing facts or past events was made by accused. Mere false promise or false profession of intention will not suffice. *Martin v. State*, 36 App. 125, 35 S. W. 976, citing *Allen v. State*, 16 App. 150; *Epperson v. State*, 42 Tex. 79; *Curtis v. State*, 31 App. 39, 19 S. W. 604; *Thorpe v. State*, 40 App. 346, 50 S. W. 383.

Indictment for swindling by exchange or disposition of property must allege an actual sale and delivery by defendant. *Cummings v. State*, 36 App. 152, 36 S. W. 266.

Evidence.—A bill of sale signed by the prosecutor and another was held admissible on trial for procuring an exchange of property by fraud on the prosecutor. *Salter v. State*, 36 App. 501, 38 S. W. 212.

2. The purchase of property upon the faith and credit of some other person upon the false pretense that such other has given the accused the right to use his name in making the acquisition.

Under this subdivision, see *Boscov v. State*, 33 App. 390, 26 S. W. 625; *Curtis v. State*, 31 App. 39, 19 S. W. 604; *Tomkins v. State*, 33 Tex. 228; *Robinson v. State*, Id. 341; *Epperson v. State*, 42 Tex. 79; *Hirshfield v. State*, 11 App. 207; *May v. State*, 15 App. 430; s. c., 17 App. 213; *Richardson v. State*, 2 App. 322; *Bozier v. State*, 5 App. 220; *Boscov v. State*, 33 App. 390, 26 S. W. 625.

3. The obtaining by false pretense the possession of any instrument of writing, certificate, field notes or other paper relating to lands, the property of another, with the intent that thereby the proper owner shall be defeated of a valuable right in such lands.

See *State v. Vickery* 19 Tex. 326.

4. The obtaining by any person of any money or other thing of value with intent to defraud by the giving or drawing of any check, draft or order upon any bank, person, firm or corporation, with which or with whom such person giving or drawing said check, draft or order has not at the time of the giving or drawing of such check, draft or order, or at the time when in the ordinary course of business such check, draft or order would be presented to the drawee for payment, sufficient funds to pay same, and no good reason to believe that such check, draft or order will be paid.

See notes under article 1421, ante.

5. The special enumeration of cases of swindling above set forth shall not be understood to exclude any case which by fair construction of the language, comes within the meaning of the preceding Article. [Act Feb. 12, 1858, p. 183; Act 1913, p. 184, ch. 98, § 1, amending Art. 1422, revised Pen. Code.]

Art. 1423. [945] “Money” includes bank bills.—Within the meaning of “money,” as used in this chapter, are included also bank bills or other circulating medium current as money. [Act Feb. 12, 1858, p. 183.]

See notes to articles 1419, 1421, ante.

See *Block v. State*, 44 Tex. 620; *Lewis v. State*, 28 App. 140, 12 S. W. 736.

“Current money” defined.—“Current money” includes national bank bills as well as U. S. treasury notes. *Baxter v. State*, 51 App. 576, 105 S. W. 195.

Description of money in indictment and proof thereof.—An unnecessary description of the money by the indictment imposes the necessity of proving it as alleged. *Childers v. State*, 16 App. 524. And see *Lewis v. State*, 28 App. 140, 12 S. W. 736; *Block v. State*, 44 Tex. 620.

Under this article an indictment for swindling, alleging current money, includes bank bills, as well as United States treasury notes. *Baxter v. State*, 51 App. 576, 105 S. W. 195.

Under this article, there is no variance between an indictment alleging the obtaining of money by swindling and the evidence that accused received a bank check and cashed it. *King v. State* (Cr. App.) 146 S. W. 543.

Art. 1424. [946] No benefit need accrue to defendant.—It is not necessary, in order to constitute the offense of swindling, that any benefit shall accrue to the person guilty of the fraud or deceit, nor that any injury shall result to the persons intended to be defrauded, if it is sufficiently apparent that there was a wilful design to receive benefit or cause an injury. [Id.]

See notes under article 1421, ante.

Immateriality of benefit or injury.—Immaterial that any benefit accrue to the person guilty of the fraud, or that any injury shall result to the person intended to be defrauded, the intent of accused being shown. *La Moynes v. State*, 53 App. 221, 111 S. W. 950; *Baxter v. State*, 51 App. 576, 105 S. W. 195.

Effect of statute as to indictment.—In view of this article it was held that where defendant by false representations secured a loan from a bank on his note therefor, an indictment against him for swindling need not allege that the note had never been paid. *Baxter v. State*, 51 App. 576, 105 S. W. 195.

Art. 1425. [947] If the act constitutes any other offense.—Where property, money or other articles of value enumerated in the definition of swindling are obtained in such manner as to come within the meaning of theft, or some other offense known to the law, the rules herein prescribed with regard to swindling shall not be understood to take any such case out of the operation of the law which defines any such other offense. [Id.]

See article 1332, ante.

See *Mathews v. State*, 33 Tex. 102.

Necessity of prosecution for other offense.—If the fraud charged constitutes another offense defendant should be prosecuted for it and not for swindling. *Witherspoon v. State* (Cr. App.) 37 S. W. 433.

When the transaction on which the charge of swindling is based constitutes another offense, the prosecution must be for such other offense and not the swindling. *Cline v. State*, 43 Tex. 494; *Bink v. State*, 50 App. 445, 98 S. W. 863 (following *Witherspoon v. State* (Cr. App.) 37 S. W. 433; *Hirshfield v. State*, 11 App. 207, and overruling *Sims v. State*, 21 App. 649, 1 S. W. 465).

Even if the facts constitute swindling, yet if they also constitute theft by fraudulent pretext, the guilty person may by provision of Pen. Code 1911, art. 1425, be prosecuted for the latter offense. *Anderson v. State* (Cr. App.) 177 S. W. 85.

Evidence showing forgery.—The evidence showed that the defendant induced one bank to cash a draft by means of a forged telegram from another bank; held, that he is guilty of uttering a forged instrument and should be prosecuted for that offense and not for swindling. *Witherspoon v. State* (Cr. App.) 37 S. W. 433.

Where the facts show the offense to be both a swindle and a forgery the case is one of forgery and the prosecution must be for that offense. *Abel v. State* (Cr. App.) 97 S. W. 1056.

Art. 1426. [948] Executor, etc., converting estate, guilty of swindling.—If any executor, administrator or guardian, having charge of any estate, real, personal or mixed, shall unlawfully, and with intent to defraud any creditor, heir, legatee, ward or distributee interested in such estate, convert the same, or any part thereof, to his own use, he shall be deemed guilty of the offense of swindling. [Id.]

Explanatory.—The amendment is by inserting the word "creditor."

See notes to article 1421, ante.

Constitutionality.—This article was within the constitutional power of the Legislature to enact, notwithstanding articles 1442 and 1443, though it fails to embrace an essential ingredient of swindling as defined in the said two articles. *Walls v. State*, 45 App. 329, 77 S. W. 8.

Swindling by guardian.—*Moody v. State*, 24 App. 458, 6 S. W. 321.

Indictment.—*Willson's Cr. Forms*, 698.

Art. 1427. [949] Punishment.—Every person guilty of swindling shall be punished in the same manner as is provided for the punishment of theft, according to the amount of the money or the value of the property or instrument of writing so fraudulently acquired. [Id.]

See articles 1340 and 1341.

Determination of grade of offense.—Defendant, by fraudulent representations, induced prosecutor to sell his horse; held, that in determining the grade of the offense the amount paid for the horse should be deducted from the value of the horse. *Gaskins v. State* (Cr. App.) 38 S. W. 470.

Construing this with article 1424 the grade of the offense should be fixed by the value of the property the possession of which is yielded upon the fraudulent representations. *La Moynes v. State*, 53 App. 221, 111 S. W. 953; *Baxter v. State*, 51 App. 576, 105 S. W. 195.

Art. 1428. Obtaining board or lodging by false or fraudulent representations, trick, etc.—Every person who shall obtain board or lodging in any hotel or boarding house by means of any trick or deception or false or fraudulent representations, or statement or pretense, and shall fail or refuse to pay therefor, shall be held to have obtained the same with the intent to cheat and defraud such hotel or boarding house keeper, and shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding one month, or by both such fine and imprisonment. [Act 1899, p. 172.]

Constitutionality.—It seems that this act is an attempt to vest hotel and boarding-house keepers with legislative powers and hence is unconstitutional. For the opinion of the court on a similar act see *Jannin v. State*, 42 App. 631, 51 S. W. 1126, 62 S. W. 419, 96 Am. St. Rep. 821.

Art. 1429. Conviction can be had under foregoing article, when.—It shall be the duty of every hotel and boarding house keeper in the state to post a printed copy of this law in a conspicuous place in each room of his or her hotel or boarding house; and no conviction shall be had under the foregoing article until it shall be made to appear to the satisfaction of the court that the provisions of said article have been substantially complied with by the hotel or boarding house keeper making the complaint. [Id., p. 172.]

See note under preceding article.

2. FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY

Art. 1430. [950] Fraudulent disposition of mortgaged property.—If any person has given, or shall hereafter give, any mortgage, deed of trust or other lien, in writing, upon any personal or movable property or growing crop of farm produce, and shall remove the same, or any part thereof, out of the state, or shall sell or otherwise dispose of the same, with intent to defraud the person having such lien, either originally or by transfer, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [Act March 31, 1885, p. 85.]

See *Cravey v. State*, 26 App. 84, 9 S. W. 62; *Thornton v. State*, 34 App. 469, 31 S. W. 372; *Williams v. State*, 27 App. 258, 11 S. W. 114; *Martin v. State*, 28 App. 364, 13 S. W. 151.

Explanatory.—The amendment inserts "or growing crop of farm produce."

Nature and elements of offense.—The several ways in which this article may be violated: 1, by removing the mortgaged property or any part thereof, out of the state; 2, by selling the mortgaged property; 3, by otherwise disposing of the mortgaged property—the intent being in either case to defraud the mortgagee or lien-holder. The lien must be in force, valid and subsisting. *Robberson v. State*, 3 App. 502.

A removal of the property from one county to another in the state, does not constitute the offense. The term "otherwise dispose of" does not include a removal, or a sale, but does include any other mode of placing the property beyond the reach of the holder of the lien. *Robberson v. State*, 3 App. 502.

Removal of the property is an offense only when the removal is from the State. *Robberson v. State*, 3 App. 502.

Prior to the amendment of the preceding article, it was held that a growing crop of cotton was not movable property, nor was it personal property until ready to be harvested, and hence could not be the basis of this offense. *Hardeman v. State*, 16 App. 1, 49 Am. Rep. 821. But the article as amended expressly includes "growing crops." *Honeycut v. State*, 23 App. 71, 3 S. W. 716.

Fraudulent intent is the gist of the offense and must be alleged and proved. *Glass v. State*, 23 App. 425, 5 S. W. 131; *Robberson v. State*, 3 App. 502; *Satchell v. State*, 1 App. 438.

Liability of minor.—A minor cannot be held criminally responsible for disposition of mortgaged property. His disposition thereof is a disaffirmance of his mortgage contract, and renders it void. *Jones v. State*, 31 App. 252, 20 S. W. 578.

Defenses.—The owner of a horse turned it over to defendant to sell; defendant to have all above a certain sum that he might get for the horse. Defendant traded the horse for a pair of mules and told plaintiff that he had a purchaser for said mules. Thereafter the owner, being dissatisfied with the failure of defendant to sell the mules as he had promised, took a mortgage on the mules securing a note for the amount for which the horse was to be sold. Held, that the execution of the mortgage changed the relation of the parties as to the property from the condition on which defendant originally acquired it, but, if the conduct of the parties after the execution of the mortgage showed that the mortgage was not intended to express the contract existing between the parties, then defendant would have the right to set this up in a prosecution against him for thereafter selling the mortgaged property. *Stewart v. State*, 60 App. 92, 131 S. W. 329.

A chattel mortgage cannot be set aside on an implied agreement or understanding; but there must have been an express contract made subsequently in order to set aside and invalidate the note and mortgage. *Stewart v. State*, 60 App. 92, 131 S. W. 329.

One accused of fraudulently disposing of mortgaged property having admitted that he received possession of the property by agreeing to give a mortgage thereon, and that he did execute and deliver the mortgage should not be permitted to say that, in fact, he did not do so. *Loggins v. State* (Cr. App.) 149 S. W. 170.

Venue.—See notes under C. C. P., art. 258.

Indictment, proof and variance.—Willson's Cr. Forms, 699.

Description of property, see notes under C. C. P., art. 458.

See, also, C. C. P., art. 470, and note.

Variance. See *Honeycut v. State*, 23 App. 71, 3 S. W. 716; *Jones v. State*, 35 App. 565, 34 S. W. 631.

Neither the value of the property, nor its liability to forced sale need be alleged, and the title may be laid in the administrator of a deceased mortgagee. *State v. Maxey*, 41 Tex. 521.

If the instrument is conditional, it must be averred that the condition has happened. *State v. Devereux*, 41 Tex. 383.

It must be alleged that the mortgage, deed of trust, or other lien in writing, was valid, subsisting, and unpaid at the time of the sale, removal, or disposition of the property. *Satchell v. State*, 1 App. 438.

It must be alleged that the mortgage or other lien was in writing, and that the injured party was the holder of the same. *Moye v. State*, 9 App. 88.

The indictment must allege that the property was personal or movable property, or a growing crop of farm produce, at the time of the execution of the mortgage or lien upon it. The sale or other disposition of real property on which the owner had executed a written lien is not an offense. *Hardeman v. State*, 16 App. 1, 49 Am. Rep. 821.

Willson's Cr. Forms, 699, approved in *Glass v. State*, 23 App. 425, 5 S. W. 131.

For allegation as to the mortgage, see, also, *Glass v. State*, 23 App. 425, 5 S. W. 131; *Jones v. State*, 35 App. 565, 34 S. W. 631.

The indictment in this case alleges that the mortgaged property was fraudulently disposed of by the accused to some person to the grand jury unknown. The evidence shows that it was disposed of to one Ike Thomas, and that the grand jury either knew, or by the exertion of reasonable diligence could have ascertained that fact. Held, that the indictment is sufficient, to charge the offense of fraudulently disposing of mortgaged property, but the evidence, disproving an essential allegation in the said indictment, is insufficient to support the conviction. *Presley v. State*, 24 App. 494, 6 S. W. 540. See, also, *Armstrong v. State*, 27 App. 462, 11 S. W. 462.

The indictment in this case described the property to which it related as "a growing crop," and alleged that the mortgage thereon was executed on the fifteenth day of January, 1887, and pledged a crop not then planted. Held, that the indictment was insufficient to charge the offense denounced by this article. To be sufficient to charge an offense under the facts stated, the indictment should have charged that the accused executed a mortgage upon a crop to be planted; that the said crop was afterwards planted by the accused, and that when the same was planted by him, and was growing or grown, the mortgage attached to and became a lien upon the same, and that the accused fraudulently disposed of the same, etc. *Mooney v. State*, 25 App. 31, 7 S. W. 587.

Indictment, to be sufficient to charge the offense of disposing of mortgaged property with intent to defraud, must allege the name of the person to whom the mortgaged property was disposed of, or that the name of such person was unknown to the grand jury. *Smith v. State*, 26 App. 577, 10 S. W. 218; *Alexander v. State*, 27 App. 94, 10 S. W. 764.

It is made a felony to fraudulently dispose of the whole or a part of the mortgaged property, but in each instance there must be a fraudulent disposition. Therefore it follows that each fraudulent disposition is a separate offense, and where the pleader undertakes to allege separate offenses, he must do so in separate counts. He cannot allege two distinct offenses in the same count. *Wood v. State*, 47 App. 543, 84 S. W. 1058.

An indictment for the fraudulent disposition of mortgaged chattels, which alleges that accused delivered to prosecutor a chattel mortgage, which sets out the mortgage, which on its face authorizes the prosecutor as trustee to sell the chattels on default, and which avers that accused fraudulently sold the chattels with intent to defraud the prosecutor, the legal owner of the mortgage, is sufficient without alleging that the prosecutor is the holder of the debt and that he is a trustee for the holder. *Stewart v. State*, 60 App. 92, 131 S. W. 329.

While, in a prosecution for fraudulently disposing of mortgaged property, it is better for the indictment to set out the mortgage or its substance, in order to be sufficient, it must at least allege that the mortgage was given to secure an in-

debtedness, naming the amount, and that the debt was unpaid when the property was disposed of. *McElroy v. State* (Cr. App.) 150 S. W. 797.

Evidence.—See notes under C. C. P., art. 783.

Evidence held sufficient to convict. *Wisdom v. State*, 39 App. 621, 47 S. W. 1118.

Charge of court and questions for jury.—See *Jones v. State*, 35 App. 565, 34 S. W. 631.

Where the evidence raised the issue that in exchanging the mortgaged property, the defendant stipulated that the title to the same should not pass to and vest in the vendee, until he, the defendant, had satisfied the mortgage, the court should have submitted this issue in its charge, and should have directed the jury that such a disposition of the property would not have been with a fraudulent intent. *Glass v. State*, 23 App. 425, 5 S. W. 131.

Where defendant is charged with selling mortgaged property, and there is evidence that he notified purchaser of the mortgage, and the purchaser agreed to pay balance after satisfaction of his debt on the mortgage, this issue should be presented to the jury. *Sweat v. State* (Cr. App.) 59 S. W. 265.

On a trial for fraudulently selling mortgaged chattels the evidence showed that accused was in possession of a horse to sell for the prosecutor, that thereafter he exchanged it for a pair of mules, and in settlement of the transaction he executed to prosecutor a chattel mortgage on the mules for the amount for which the horse was to be sold. The evidence showed that after such execution of the mortgage he treated the property as his own and subsequently mortgaged it to a third person and thereafter sold it. Held, that an instruction that, if accused under a mistaken belief supposed he could sell the chattels, he should be acquitted, though he intended to appropriate the proceeds of the sale to his own use, was sufficiently favorable to accused. *Stewart v. State*, 60 App. 92, 131 S. W. 329.

Where an alleged unlawful sale of mortgaged property occurred July 15, 1909, and an indictment therefor was returned on September 30th following, an instruction that if the mortgage was a valid lien on the property on or about July 15, 1910, and defendant on that day sold the property, he was guilty, was erroneous. *Fox v. State*, 61 App. 341, 135 S. W. 557.

CHAPTER NINETEEN

OF OFFENSES COMMITTED IN ANOTHER COUNTRY OR STATE

Art.	Art.
1431. Bringing stolen property into this state.	1432. Requisites of guilt under preceding article.

Article 1431. [951] Bringing stolen property into this state.—If any person having committed an offense in any foreign country, state or territory, which, if committed in this state, would have been robbery, theft, embezzlement or receiving of stolen goods or property, knowing the same to have been stolen, or fraudulently receiving or concealing property acquired by another by embezzlement, knowing the same to have been so acquired, shall bring into this state any property so acquired or received, he shall be deemed guilty of robbery, theft, embezzlement, or receiving of goods or property stolen or embezzled, as the case may be, knowing the same to have been stolen or embezzled, and shall be punished as if the offense had been committed in this state. And, in cases herein mentioned, the offense may be charged to have been committed in any county into or through which the property may be brought in the same manner as if the act constituting such offense had taken place wholly within this state. [Amend. 1895, p. 116.]

See notes under the following article.

Indictment.—Willson's Cr. Forms, 702.

Art. 1432. [952] Requisites of guilt under preceding article.—To render a person guilty under the preceding article, it must appear that by the law of the foreign country, state or territory from which the property was taken and brought to this state, the act committed would also have been robbery, embezzlement, theft or receiving stolen goods or property, or receiving or concealing goods or property embezzled. [Amend. 1895, p. 116.]

Nature and elements of offense.—The evidence must show that the defendant brought the property into the county of the prosecution, or took possession and control of it after it reached said county. *Carter v. State*, 37 Tex. 362.

The law of the foreign country or state is an element of the offense and an issuable fact to be alleged and proved. *Cummins v. State*, 12 App. 121.

It must be shown that the defendant committed the theft and brought the property into this state, or, at least, that he had possession or control over it after it came into this state. But if the defendant not only aided in the original theft, but furnished the means for bringing the property into this state, and then came to this state himself in pursuance of an agreement with the other thief, and here received his portion of the fruits of the theft, he brought the property into the state within the meaning of the law. *Sutton v. State*, 16 App. 490.

To support a conviction for the theft of property stolen in a foreign country and brought into this state, it devolves upon the prosecution to prove that the act committed was not only theft in this state, but was theft in the foreign country from which the property was taken and brought into this state. *Fernandez v. State*, 25 App. 538, 8 S. W. 667. See, also, *Clark v. State*, 27 App. 405, 11 S. W. 374; *West v. State*, 27 App. 472, 11 S. W. 482.

Constituent elements of bringing stolen property into the state: 1, the acts and intent must constitute theft by the law of the country in which the property was taken; 2, such acts and intent must constitute theft under the law of this state. The thief must bring the stolen property into this state. *McKenzie v. State*, 32 App. 568, 25 S. W. 426, 40 Am. St. Rep. 795. And see, also, *State v. Morales*, 21 Tex. 298; *Carmisales v. State*, 11 App. 474; *Edwards v. State*, 29 App. 452, 16 S. W. 98.

Unless the act constitutes robbery under the laws of the territory where committed, it is no offense to bring the property into this State, though the act constitutes robbery if committed in Texas. *Smith v. State*, 37 App. 346, 39 S. W. 933.

If a person commits an act in another State or Territory, which if committed in this State would be theft and subsequently brings the stolen property into this State he can be prosecuted in this State and punished as if the theft had been committed in this State. *Beard v. State*, 45 App. 522, 78 S. W. 348.

It is not an offense to bring property acquired in another State or jurisdiction, into this State, when it has been acquired by means of swindling. *Bink v. State*, 50 App. 450, 98 S. W. 251.

Swindling is not included among the inhibited crimes enumerated in article 1431, and this State has no extra territorial jurisdiction over such offenses. *Bink v. State*, 50 App. 450, 98 S. W. 249.

To constitute the offense of bringing stolen goods into the state, it was not necessary that defendant himself should ship the goods, as if he was the procuring cause, he would be legally responsible for bringing them into the state. *Zweig v. State* (Cr. App.) 171 S. W. 747.

In a prosecution for bringing stolen goods into the state, the fact that one in charge of the corporation, alleged to be the original owner of the property, had employed a drayman to carry the goods to the depot from which they were stolen did not take them out of his possession. *Zweig v. State* (Cr. App.) 171 S. W. 747.

Accomplice.—See notes under article 79, ante.

Venue.—See notes under C. C. P., art. 258.

Indictment.—Willson's Cr. Forms, 702.

See *Granado v. State*, 37 App. 426, 35 S. W. 1069.

The law of the foreign state or country is an issuable fact, and must be alleged. *Carmisales v. State*, 11 App. 474; *Cummins v. State*, 12 App. 121; *Edwards v. State*, 29 App. 452, 16 S. W. 98.

That the accused was punishable by, or amenable to, the laws of the foreign country or state need not be alleged. *Cummins v. State*, 12 App. 121.

It must be averred that the act was an offense under the laws of the foreign country or state. *State v. Morales*, 21 Tex. 298; *Carmisales v. State*, 11 App. 474.

For a sufficient indictment, see *Cowell v. State*, 16 App. 57.

In an indictment charging theft of a horse in another State or Territory, and the subsequently bringing the stolen property into this State, the indictment must contain the laws of the State or Territory in which the animal was stolen. *Beard v. State*, 45 App. 522, 78 S. W. 349.

An indictment under this article charging theft of a horse in another State where the stolen property is brought into this State need not allege the value of the horse. *Beard v. State*, 45 App. 522, 78 S. W. 348.

Where an indictment for bringing stolen cattle into the state and selling them properly alleged the theft of one head of cattle, and the court's charge followed the indictment, it was not material that the evidence showed the theft of more than one head. *Gorrell v. State* (Cr. App.) 164 S. W. 1012.

An indictment for receiving stolen property knowing that it had been stolen and bringing it into this state need not allege the time and place of the original taking, though it must allege that it was fraudulently received and concealed with knowledge that it had been acquired by theft, and the name of the owner, if known, and the name of the person from whom received. *Zweig v. State* (Cr. App.) 171 S. W. 747.

Under this and the preceding article it was not necessary that an indictment, specifically alleging that the acts of accused under the laws of Missouri constituted the offense of receiving stolen property, allege the facts going to constitute theft by the original taker from whom the property was received. *Zweig v. State* (Cr. App.) 171 S. W. 747.

Under article 1431 an allegation in an indictment for the offense that the property was received "in the county of St. Louis," was not an element of the offense, and would be disregarded as surplusage; and, even if a descriptive averment necessary to be proved, and even if the city of St. Louis, in which it was received, was a municipality separate from the county of St. Louis, proof that the city was always considered as a part of the county was not a variance, but sufficiently sustained the descriptive averment. *Zweig v. State* (Cr. App.) 171 S. W. 747.

Evidence.—See *Carter v. State*, 37 Tex. 362; *Clark v. State*, 27 App. 405, 11 S. W. 374; *Sinclair v. State*, 34 App. 453, 30 S. W. 1070; *Smith v. State*, 37 App. 342, 39 S. W. 933.

Article 2304 of the Revised Statutes (Vernon's Sayles' Civ. St. 1914, art. 3692), provides how laws shall be proved, and is applicable in criminal cases. *Cummins v. State*, 12 App. 121.

For the manner of proving the laws of an Indian nation, see *Cowell v. State*, 16 App. 57.

Evidence held insufficient to convict. *Cowell v. State*, 16 App. 57.

In a case arising under the preceding articles, all the facts and circumstances bearing upon the transaction, whether transpiring in this state or out of it, are admissible in evidence, and may be considered by the jury. *Sutton v. State*, 16 App. 490.

Evidence held sufficient to support conviction. *Sutton v. State*, 16 App. 490.

As sufficient proof that an act committed was not only theft in this state, but theft in the foreign county from which the property was taken and brought into this state, the trial court properly admitted in evidence a reprint of a book purporting to be the "Penal Code of the State of Coahuila, Republic of Mexico, and published by authority of said state;" the rule being that "when the code or the statutes of another state have been published by authority, and purport to have been so published, a reprint of such book is admissible in evidence, without other evidence of its sanction by the government of such state." *Fernandez v. State*, 25 App. 538, 8 S. W. 667.

An unrecorded brand is no evidence of ownership. *McKenzie v. State*, 32 App. 568, 25 S. W. 426, 40 Am. St. Rep. 795.

In a prosecution for bringing stolen cattle into the state from Oklahoma and selling the same to L. for beef, it appearing that L. gave defendant a check for \$50 with knowledge that the cattle had been stolen, evidence of the transaction between defendant and witness, a banker, who cashed the check, concerning what occurred at the time was admissible. *Gorrell v. State* (Cr. App.) 164 S. W. 1012.

In a prosecution for bringing stolen goods into the state, evidence held to show that defendant received the goods from the persons named in the indictment. *Zweig v. State* (Cr. App.) 171 S. W. 747.

Charge of court.—See *Fernandez v. State*, 25 App. 538, 8 S. W. 667.

Charges held correct. *Sutton v. State*, 16 App. 490; *Clark v. State*, 27 App. 405, 11 S. W. 374.

Evidence held sufficient to support an instruction that if the horses were stolen in Mexico and brought into Texas, defendant should be convicted. *Granado v. State*, 37 App. 426, 35 S. W. 1069.

In a prosecution for bringing stolen cattle from Oklahoma into Texas and selling them, the court properly charged the jury as to the law of theft of both Oklahoma and Texas. *Gorrell v. State* (Cr. App.) 164 S. W. 1012.

In a prosecution for bringing stolen goods into the state knowing them to have been stolen, where there was evidence that defendant was at a certain place in the other state with the original taker of the goods and admitted that they had crooked goods, and that the original taker resided in the other state, had the reputation of being a professional thief, and had been convicted of similar thefts, while defendant resided in Texas, the refusal to submit a count charging defendant with theft of the goods and the submission of that adjudging him with receiving stolen goods knowing them to be stolen goods, was proper. *Zweig v. State* (Cr. App.) 171 S. W. 747.

TITLE 18

OF MISCELLANEOUS OFFENSES

Chap.	Chap.
1. Of conspiracy.	16. Railroads, etc.—Prohibiting the issuance of free passes, etc.
2. Of threats.	17. Railroads and other common carriers—Bills of lading, prescribing certain requirements for issuance.
3. Seduction.	18. Railroad employes, limiting the work hours of same.
3a. Hours of labor on public work or in public service.	19. Railroad companies—requiring engineers or conductors to serve first as firemen or brakemen.
3b. Time of service of firemen.	19a. Railroad companies—Air brakes.
3c. Employment of females.	20. Railroad companies—Required to do repair work in Texas, and furnish sufficient motive power.
4. Employment of sailors and crew.	21. Railroad companies—Prohibited establishing name for a station other than name of postoffice.
5. Protection of settlers on school lands.	22. Street railway—Regulating fare in certain cities and towns.
6. Trusts—Conspiracies against trade.	23. Assignor.
7. Theaters, etc.—Prohibiting discrimination between persons desiring to lease same.	24. Duplication of process for witnesses.
8. Corporations—Permitting the attorney general and his representatives to examine books.	25. County finances.
8a. Corporations—Use of assets and funds.	26. Bureau of labor statistics.
9. State revenue agent.	27. Mines and mining.
10. Guaranty and fidelity companies, regulation of.	28. Penitentiaries—Control and treatment of prisoners.
11. Bond investment companies.	29. Reformatory institutions.
12. Prize fighting, roping contests, etc.	
13. Schools.	
14. Railroad commission.	
15. Offenses by railway officials or against railways.	

CHAPTER ONE

OF CONSPIRACY

Art.	Art.
1433. Definition.	1439. To kill, same as murder.
1434. When offense complete.	1440. Conspiracy to commit an offense in another state.
1435. Agreement must be positive.	1441. Conspiracy in another state to commit an offense in this.
1436. Mere threat not sufficient.	
1437. What crimes the subject of.	
1438. Punishments.	

Article 1433. [953] Definition.—A “conspiracy” is an agreement entered into between two or more persons to commit any one of the offenses hereafter named in this chapter. [Act Oct. 26, 1871, p. 15.]

See notes under article 1437 post.

Cited, *Johnson v. State*, 3 App. 590; *Whitford v. State*, 24 App. 489, 6 S. W. 537, 5 Am. St. Rep. 896.

Indictment.—Willson's Cr. Forms, 703, 704.

Art. 1434. [954] When offense complete.—The offense of conspiracy is complete, although the parties conspiring do not proceed to effect the object for which they have so unlawfully combined. [Id.]

See notes under article 1437 post.

Cited, *Johnson v. State*, 3 App. 590; *Whitford v. State*, 24 App. 489, 6 S. W. 537, 5 Am. St. Rep. 896.

Indictment.—Willson's Cr. Forms, 703, 704.

Art. 1435. [955] Agreement must be positive.—Before any conviction can be had for the offense of conspiracy, it must appear that there was a positive agreement to commit one of the offenses hereafter named in this chapter. It will not be sufficient that such agreement was contemplated by the parties charged. [Id.]

See notes under article 1437 post.

Cited, *Johnson v. State*, 3 App. 590; *Whitford v. State*, 24 App. 489, 6 S. W. 537, 5 Am. St. Rep. 896.

Indictment.—Willson's Cr. Forms, 703, 704.

Art. 1436. [956] Mere threat not sufficient.—A threat made by two or more persons acting in concert will not be sufficient to constitute conspiracy. [Id.]

Cited, *Johnson v. State*, 3 App. 590; *Whitford v. State*, 24 App. 489, 6 S. W. 537, 5 Am. St. Rep. 896.

Indictment.—Willson's Cr. Forms, 703, 704.

Art. 1437. [957] What crimes the subject of.—The agreement, to come within the definition of conspiracy, must be to commit one or more of the following offenses, to wit: Murder, robbery, arson, burglary, rape or any other offense of the grade of felony. [Act Feb. 5, 1884, p. 25.]

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| 1. Explanatory. | 12. ——— Robbery. |
| 2. Offense in general. | 13. ——— Theft. |
| 3. ——— Conspiracy to kill. | 14. ——— Swindling. |
| 4. ——— Conspiracy to steal. | 15. ——— Acts and declarations. |
| 5. ——— Conspiracy to commit bur-
glary. | 16. ——— Testimony of wife. |
| 6. Indictment. | 17. Accomplices. |
| 7. Evidence in general. | 18. Questions for jury and charge of
court. |
| 8. ——— Homicide. | 19. ——— Homicide. |
| 9. ——— Rape. | 20. ——— Burglary. |
| 10. ——— Arson. | 21. ——— Theft. |
| 11. ——— Burglary. | 22. Judgment. |

1. **Explanatory.**—The amendment leaves out the words "theft and forgery," adding in their stead, "or any other offense of the grade of felony."

2. **Offense in general.**—See notes under articles 74 and 79 ante, and C. C. P. art. 801.

The offense is complete as soon as the criminal agreement is entered into, and although the conspirators do not proceed to consummate it. *Johnson v. State*, 3 App. 590.

After an agreement to commit burglary, the owner of the house, for purposes of detection, may connive at the entry without relieving the conspirators from liability. (*Speiden v. State*, 3 App. 156, 30 Am. Rep. 126, and *Pigg v. State*, 43 Tex. 108, distinguished.) *Johnson v. State*, 3 App. 590.

Conspiracy defined. *Myers v. State*, 6 App. 1.

The least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all. *Phillips v. State*, 6 App. 364. And the agreement may be entered into, and the offense be completed, although the original purpose of meeting and consultation was lawful. *Lowery v. State*, 30 Tex. 402. The agreement completes the offense. *Johnson v. State*, 3 App. 590.

Conspiracy has been defined as a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. *Loggins v. State*, 12 App. 65.

An "agreement" is a coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing. A conspiracy can not be committed by one person alone, and it can not be committed by two, when there is no concurrence of purpose and mind, or when the concurrence or purpose on the part of one is unreal or feigned. *Woodworth v. State*, 20 App. 375.

As to acts establishing conspiracy, see *Smith v. State*, 21 App. 107, 17 S. W. 552; *Lyons v. State*, 30 App. 642, 18 S. W. 416; *Blain v. State*, 30 App. 702, 18 S. W. 862.

It is not necessary, in order to establish a conspiracy to commit an offense, to prove that the persons charged came together, and actually agreed in terms to have that design and pursue it by common means. If it be proved that they pursued the same objects, often by the same means, one performing one part and another a different part of the same, so as to complete it with a view to the attainment of the same object, the jury will be justified in concluding that they were engaged in a conspiracy to effect that object, and such acting together would make all principal offenders, whether bodily present at the place of the offense or not, and until the full purpose and object of the conspiracy has been consummated. *Smith v. State*, 21 App. 107, 17 S. W. 552.

When two or more persons agree to commit an offense and from the nature of the offense it is reasonably probable that death will result to the victim, and death does result, all the parties connected with the conspiracy would be responsible for the homicide. *Blain v. State*, 30 App. 702, 18 S. W. 862.

Whether co-conspirators proceed severally or collectively, each is responsible for the acts of all as though performed by himself alone. *Blain v. State*, 30 App. 702, 18 S. W. 862.

Proof that the parties actually agreed in terms to a certain design and to pursue it by common means, held not essential to the establishment of the crime of conspiracy. *Smith v. State*, 21 App. 107, 17 S. W. 552.

It takes two or more to form a conspiracy, and they must be named in the indictment. *Dever et al. v. State*, 37 App. 396, 30 S. W. 1071.

A person who persuades others to enter into a conspiracy to commit crime is guilty though he did not intend to help commit the crime. *Dever et al. v. State*, 37 App. 396, 30 S. W. 1071.

When one enters into a conspiracy to commit a crime, even though he withdraws before the crime has been committed, he may be convicted for entering into the conspiracy. *Dill v. State*, 35 App. 240, 33 S. W. 126, 60 Am. St. Rep. 37.

When a conspiracy to commit an unlawful act exists, and in the execution of the conspiracy one of the persons commits a homicide, all persons engaged in the conspiracy are guilty of murder. *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456; *Isaacs v. State*, 36 App. 505, 33 S. W. 40.

Each conspirator is responsible for everything done by his confederate which follows immediately in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. *Henry v. State* (Cr. App.) 54 S. W. 593.

Our statute with reference to conspirators, and who may be engaged in a conspiracy makes no exception in favor of the wife. Husband and wife may conspire together without the intervention of a third person to commit a murder and if either is being tried for the consummated offense the doctrine of conspiracy, so far as the rules are concerned, is applicable under our system. *Smith v. State*, 48 App. 233, 89 S. W. 817.

Where a party is charged as an accomplice, under the statute, with the commission of a felony, the case assumes the nature to some extent of a conspiracy, though the statute makes a distinction between a conspiracy as an offense and an offense committed by a principal instigated by an accomplice; a conspiracy being complete when a positive agreement has been made between the parties to commit a felony, while to be an accomplice the crime must have been actually committed by the principal. *Cooper v. State* (Cr. App.) 154 S. W. 989.

Where a crime committed is not in any way connected with a conspiracy, but is the independent act of one of the conspirators, though done while he was engaged in the common purpose, the others are not legally responsible therefor, but if the crime is in furtherance of the common purpose, and is such an offense as might have been and should have been contemplated would result from the execution of the conspiracy, and it was so executed, then all engaged in the unlawful purpose are equally guilty, though at the time they may have been engaged in some other part of the common purpose. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

3. — **Conspiracy to kill.**—The test of whether accused was principal was whether he and another acted together in pursuance of a common design wherein their minds had agreed. *Kirby v. State*, 23 App. 13, 5 S. W. 165.

The accused, who was on trial for the murder of his jailer, contended that a conspiracy among several of the prisoners extended no further than the escape, and did not contemplate the killing of the jailer, or the infliction of bodily injury upon him beyond his mere detention, and that the killing was the individual and independent act of C. alone, perpetrated without the accused's complicity, and without ability on his part to prevent it. Held, in view of the nature and object of the conspiracy, and of the preparation and use of a deadly weapon as a means to execute the common design, that the homicide was not the independent act of C. alone, but was the act of each and all the conspirators, because it was directly incident to and grew out of the common design of all. *Kirby v. State*, 23 App. 13, 5 S. W. 165, citing *Mercersmith v. State*, 8 App. 211; *Stevenson v. State*, 17 App. 619. And see *Blain v. State*, 30 App. 702, 18 S. W. 862; *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Renner v. State*, 43 App. 347, 65 S. W. 1102.

If defendant and another combine to beat a person, and in the attempt to do so the co-conspirator kill such other person, both would be guilty of murder. *Mitchell v. State*, 36 App. 278, 33 S. W. 367, 36 S. W. 456.

Defendant having helped to set in motion that which resulted in another's death is guilty of murder, he is an accomplice whether he instigated the act himself or his co-conspirators instigated it. *Isaacs v. State*, 36 App. 505, 33 S. W. 40.

Where there is a conspiracy to kill, mere presence at scene of killing, under some circumstances, will be sufficient act of encouragement. *Leslie v. State*, 42 App. 65, 57 S. W. 661.

Where the state claimed a killing was the result of a conspiracy, accused cannot be convicted for the acts of his co-conspirators, unless he conspired to take deceased's life or conspired to do an unlawful act and the killing was the result of an attempt to perpetrate it. *Cline v. State* (Cr. App.) 178 S. W. 520.

4. — **Conspiracy to steal.**—The conspiracy to steal is complete at the time it is entered into, without any reference to subsequent theft, and a conviction of the theft is not a bar to prosecution for the conspiracy. *Bailey v. State*, 42 App. 289, 59 S. W. 901.

5. — **Conspiracy to commit burglary.**—The offense of conspiracy to commit burglary is complete when the agreement to burglariously enter a house is entered into, though the parties abandon the object of the conspiracy. *Johnson v. State*, 3 App. 590.

A conspiracy to commit burglary and the burglary committed in pursuance thereof are different offenses and a conviction of one will not bar a prosecution for the other. *Whitford v. State*, 24 App. 489, 6 S. W. 537, 5 Am. St. Rep. 896.

When one has entered into a conspiracy to commit burglary, notwithstanding he withdraws before the commission of the offense, he may nevertheless be convicted of conspiracy. *Dill v. State*, 35 App. 240, 33 S. W. 126, 60 Am. St. Rep. 37.

The fact that a person, after entering into an agreement with another to commit a burglary, withdraws from the transaction, does not prevent his conviction for the conspiracy. *Dill v. State*, 35 App. 240, 33 S. W. 126, 60 Am. St. Rep. 37.

6. **Indictment.**—Willson's Cr. Forms, 703, 704.

The indictment need not set out the offense with the same particularity for an unexecuted as for an executed conspiracy. See an indictment for conspiracy to commit burglary held sufficient. *Brown v. State*, 2 App. 115; *Mason v. State*, Id. 192.

The parties to a conspiracy to commit crime must be named, and there must be at least two principals. *Dever v. State*, 37 App. 396, 30 S. W. 1071. See, also, *Woodworth v. State*, 20 App. 375.

7. Evidence in general.—See *Cox v. State*, 8 App. 254, 34 Am. Rep. 746; *Loggins v. State*, 12 App. 65; *Pierson v. State*, 18 App. 524; *Kennedy v. State*, 19 App. 618; *Smith v. State*, 21 App. 107, 17 S. W. 552; *Willey v. State*, 22 App. 408, 3 S. W. 570; *Richards v. State*, 53 App. 400, 110 S. W. 432; *Proctor v. State*, 54 App. 254, 112 S. W. 770; *O'Quinn v. State*, 55 App. 18, 115 S. W. 39; *Williams v. State*, 55 App. 65, 115 S. W. 35; *Roma v. State*, 55 App. 344, 116 S. W. 598.

Evidence held sufficient to sustain convictions. *Brown v. State*, 2 App. 115; *Mason v. State*, *Id.* 192.

A conspiracy cannot be proven by confessions of one of the co-conspirators, the existence of the conspiracy must be proven by other evidence. *Sessions v. State*, 37 App. 62, 38 S. W. 623; *Menges v. State*, 25 App. 710, 9 S. W. 49.

Where one of several defendants charged with conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried. *Paul v. State*, 12 App. 346.

The fact of possession by one of several defendants of goods belonging to deceased is admissible. *Conde v. State*, 33 App. 10, 24 S. W. 415; *Clark v. State*, 28 App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Rix v. State*, 33 App. 353, 26 S. W. 505.

When a conspiracy to commit burglary has been shown, any fact or circumstance which would tend to show that defendant's co-conspirator was present is admissible. *Mixon v. State*, 36 App. 66, 35 S. W. 394.

8. — Homicide.—See *Hudson v. State*, 43 App. 420, 66 S. W. 668; *Moore v. State*, 44 App. 526, 72 S. W. 595; *Williams v. State*, 45 App. 240, 75 S. W. 509; *Kipper v. State*, 45 App. 377, 77 S. W. 611; *Chapman v. State*, 45 App. 479, 76 S. W. 477; *Carbough v. State*, 49 App. 452, 93 S. W. 738; *Parnell v. State*, 50 App. 419, 98 S. W. 269; *Banks v. State*, 52 App. 480, 108 S. W. 693; *Richards v. State*, 53 App. 400, 110 S. W. 432; *Proctor v. State*, 54 App. 254, 112 S. W. 770; *Roma v. State*, 55 App. 344, 116 S. W. 598.

Where in a murder case conspiracy was shown, a bill of sale purporting to convey from deceased to defendant's co-conspirator certain goods found in the co-conspirator's possession was properly admitted in evidence. *Post v. State*, 10 App. 598.

Evidence held not to show a conspiracy to murder or to commit any crime of which murder might be the reasonable and natural consequence. *Blain v. State*, 30 App. 702, 18 S. W. 862.

In a prosecution for murder, where there is evidence that a number of people took part in the homicide, and that defendant was among them, exclusion of evidence offered by defendant to show threats and ill feeling against deceased of a person not indicted with the others, if error, is harmless, since the presence of such person and participation in the crime could not benefit defendant. *Harris v. State*, 20 S. W. 916, 31 App. 411.

J.'s threats, made in defendant's absence, after J.'s fight with deceased held admissible against defendant, it being left to the jury to say whether the conspiracy was then formed, in which case only they were to consider them. *Blain v. State*, 33 App. 236, 26 S. W. 63.

In a prosecution for killing decedent pursuant to a conspiracy to organize in Texas a company to invade Mexico, evidence concerning the carrying of arms and ammunition from Texas into Mexico was admissible as showing the formation of an unlawful conspiracy. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

In a prosecution for homicide in the furtherance of a conspiracy to illegally organize in Texas an armed company to invade Mexico, evidence that accused, a member of the company, secured arms when he went to the camp, carried them all the time while he was in the company, and was armed when arrested, was admissible as showing that, while in the United States, the company was prepared to resist all those who might interfere with their purpose, together with the nature of the resistance that would be offered. *Gonzales v. State* (Cr. App.) 171 S. W. 1146.

Where decedent was killed as an incident to a conspiracy to illegally organize an armed force in Texas to invade Mexico, in accordance with a certain political party, and accused testified that he was a subscriber to a newspaper, and that one of the principal things which induced him to join the company was articles in the paper, and that the principles announced in the paper were those of the party to which he belonged and joined the company to carry out, a translated copy of the paper was admissible as showing the purpose for which the conspiracy was organized and for which the defendant joined it. *Gonzales v. State* (Cr. App.) 171 S. W. 1149.

In a prosecution for homicide committed in furtherance of an illegal conspiracy to organize in Texas an armed band to invade Mexico, evidence held to warrant a finding that defendant was a member of the band and engaged in the furtherance of the conspiracy at the time of the killing. *Martinez v. State* (Cr. App.) 171 S. W. 1153.

Where, in a prosecution for homicide, the state did not claim a specific conspiracy to kill deceased, but that he was killed as an incident to a conspiracy to organize in Texas an armed force to invade Mexico, the members of the company not immediately concerned in the killing could only be convicted of homicide on proof that the killing was incidental to a conspiracy to do an unlawful act and was within the scope thereof. *Martinez v. State* (Cr. App.) 171 S. W. 1153.

In a prosecution for homicide alleged to have been committed in the furtherance of a conspiracy to organize in Texas an armed force to invade Mexico, personal property found on one of the conspirators at the camp ground, including a manifesto, battle flag, bugle, guns, bayonets, dynamite, and other munitions of

war, and testimony concerning where and what was found, was admissible to show the conspiracy and its purpose. *Martinez v. State* (Cr. App.) 171 S. W. 1153.

In a prosecution for homicide committed as incidental to an illegal conspiracy to organize in Texas an armed band to invite Mexico, a manifesto in the Mexican language, purported to have been written by a Junta in California, intended to incite Mexicans to rebellion, found in the possession of one of the conspirators, who separated from the others a short time prior to their arrest, but who was first arrested, was admissible against accused to show the illegal character of the conspiracy. *Martinez v. State* (Cr. App.) 171 S. W. 1153.

Where decedent was killed as incidental to a conspiracy to organize in Texas an armed force to invade Mexico in order to prevent a discovery of the conspiracy, which did not terminate until the conspirators' arrest, evidence of all that took place and what each of the conspirators said from the time of their discovery at their rendezvous and until they were arrested was admissible, in a prosecution against each of them for the homicide. *Martinez v. State* (Cr. App.) 171 S. W. 1153.

9. — **Rape.**—See *Williams v. State*, 55 App. 65, 115 S. W. 35.

10. — **Arson.**—On trial for conspiracy to commit arson, a letter written by a third party after the accomplishment of the conspiracy, though it bore the name of one of the conspirators, and was addressed to defendant, but never given to him, was inadmissible against him. *Dawson v. State*, 38 App. 9, 40 S. W. 731.

Where defendant was charged with conspiracy to commit arson, and the theory of the state was that he committed the crime to procure the insurance money, a continuance because of the absence of defendant's wife on account of sickness should be granted, where defendant desired to prove by her that she knew the value of the articles stored in the house, and that they were insured for only half their value. *Dawson v. State*, 38 App. 9, 40 S. W. 731.

11. — **Burglary.**—Where the evidence in a burglary case showed a conspiracy, it was not error to admit evidence of finding of the fruits of the crime in defendant's house in defendant's absence. *Jackson v. State*, 28 App. 370, 13 S. W. 451, 19 Am. St. Rep. 839.

When a conspiracy to commit burglary has been shown, any fact or circumstance tending to show defendant's presence at the time of the commission of the offense is admissible. *Mixon v. State*, 36 App. 66, 35 S. W. 394.

12. — **Robbery.**—See *Nite v. State*, 41 App. 340, 54 S. W. 763.

At the place of the robbery tracks of two persons were found, both with peculiarities; held, evidence of both tracks was admissible against each defendant. *Angle v. State*, 35 App. 427, 34 S. W. 116.

13. — **Theft.**—Collateral evidence in proof of conspiracy to steal cattle held improperly admitted. *Rix v. State*, 33 App. 353, 26 S. W. 505.

14. — **Swindling.**—See *Marwilsky v. State*, 9 App. 377; *Gray v. State*, 32 App. 598, 25 S. W. 627; *Cowan v. State*, 41 App. 617, 56 S. W. 751.

15. — **Acts and declarations.**—See notes under C. C. P. art. 783.

16. — **Testimony of wife.**—See notes under C. C. P. art. 795.

17. **Accomplices.**—See art. 79 et seq. ante, and notes thereunder.

18. **Questions for jury and charge of court.**—Instructions submitting to the jury the question of the existence of a conspiracy held proper. *Loggins v. State*, 12 App. 65.

Where several were jointly indicted for conspiracy, and one had severed and been tried and acquitted, it was held to be error to charge, on the trial of another of the defendants, with reference to a supposed conspiracy between him and the defendant who had been acquitted. The charge should have confined the jury to a conspiracy between the defendant on trial and the defendants not yet tried. *Paul v. State*, 12 App. 346.

The jury should be instructed that the conspiracy could not be established by the acts or declarations of a co-conspirator, made after the consummation of the offense, and in the absence of defendant. *Crook v. State*, 27 App. 198, 11 S. W. 444.

When the time that the conspiracy was entered into is a disputed fact, the trial court should submit that fact to the jury and instruct them not to consider any act or declaration which did not occur during the existence of the conspiracy. *Harris v. State*, 31 App. 411, 20 S. W. 916.

It is the province of the court to determine, in a case involving that question, whether or not a prima facie case of conspiracy has been established; and if, in the opinion of the court, such issue arises from the evidence permitted to be introduced, then it is further the duty of the court to submit the issue of conspiracy, or not, to be determined by the jury, as any other issue in the case. *Luttrell v. State*, 31 App. 493, 21 S. W. 248.

There need be no charge on conspiracy, where the facts tend to show this, if the charge on principals is sufficiently comprehensive. *Augustine v. State*, 41 App. 59, 52 S. W. 79, 96 Am. St. Rep. 765.

19. — **Homicide.**—Where defendant was convicted of murder upon evidence which established a conspiracy between him and his co-defendant to kill the deceased, and the fact that he was present at the homicide, it was not error for the court to refuse to instruct that, if prior to the killing defendants abandoned their design, and deceased was subsequently killed by the co-defendant, and that defendant at the time did no act aiding, encouraging, or abetting the offense, he would not be liable except as accomplice. *Slade v. State*, 29 App. 381, 16 S. W. 253.

On a murder trial, where a conspiracy to kill deceased was sought to be shown, it was proper to charge that, if the jury believed that defendant had entered into a conspiracy to kill the deceased, they could consider as evidence against defendant any acts or declarations of his co-conspirators, or either of them, done or made

to carry out their common purpose during the pendency of such conspiracy, but should disregard such acts and declarations if there was no conspiracy, or if they were not done or made during the pendency thereof to carry out the design. *Luttrell v. State*, 21 S. W. 248, 31 App. 493.

An instruction, in addition, that if a conspiracy was not established the jury were not to consider these acts and declarations as evidence against defendant held proper. *Luttrell v. State*, 31 App. 493, 21 S. W. 248.

Under the evidence in a murder case held that the giving of an instruction relative to conspiracy was not error. *Childs v. State*, 35 App. 573, 34 S. W. 939.

In a prosecution for homicide, evidence held sufficient to justify submission to the jury of the question of a specific conspiracy to take the life of decedent, though the preponderance of the evidence indicated that he was killed as an incident to a conspiracy to commit another offense. *Martinez v. State* (Cr. App.) 171 S. W. 1153.

Where all the testimony showed a conspiracy between defendant and third persons committing a murder, and that the murder was committed in pursuance of the common design, the court could refuse to define a "conspiracy"; but where the testimony did not show conclusively a conspiracy, the court must instruct on the subject, and clearly state what facts must be found to justify a conviction. *Vasquez v. State* (Cr. App.) 171 S. W. 1160.

20. — **Burglary.**—Where the indictment charged the defendants, one H. and one W., with a conspiracy to commit burglary, and the evidence completely exonerated the defendant W., it was held not to be error for the court to instruct the jury, that if the evidence showed a conspiracy between the defendant and H., the offense would be complete, and that the state was not required to prove W. was also a party to the conspiracy. The allegations as to W. were held to be surplusage and not essential to be proved. *Woodworth v. State*, 20 App. 375.

21. — **Theft.**—On a trial for theft of a cow, there was evidence that defendant and others conspired to prove a purchase of the cow after defendant took possession of it, and the court charged that, "when two or more persons conspire together to commit an offense, and each carries out the part agreed to be done by him, and such offense is actually committed, then all parties to such an agreement are equally guilty of such offense; and if * * * defendant fraudulently took the property, * * * and others agreed or conspired, before or after such taking, to prove a purchase or pretended purchase, * * * either before or after such taking, this would be no defense to such fraudulent taking." Held, that such instruction was authorized by the evidence, and was correct. *Kegans v. State*, 27 App. 703, 11 S. W. 644.

22. **Judgment.**—See notes under C. C. P. art. 853.

Art. 1438. [958] Punishment.—Conspiracy to commit murder shall be punished by confinement in the penitentiary not less than two nor more than ten years. Conspiracy to commit any one of the other offenses named in the preceding article shall be punished by confinement in the penitentiary not less than two nor more than five years. [Act Oct. 26, 1871, p. 15.]

See notes under article 1437, ante.

Art. 1439. [959] To kill, same as murder.—A conspiracy to kill a human being shall be deemed a conspiracy to commit murder. [Id., p. 16.]

Art. 1440. [960] Conspiracy to commit an offense in another state.—A conspiracy entered into in this state for the purpose of committing any one of the offenses named in article 1437 in any other of the states or territories of the United States, or in any foreign territory, shall be punished in the same manner as if the conspiracy so entered into was to commit the offense in this state. [Id.]

Indictment.—Willson's Cr. Forms, 705.

Evidence.—See notes under article 1337, ante.

Where a company was illegally organized and equipped in Texas under an agreement to invade Mexico, such organization constituted a felony in Texas as violating articles 1433 to 1441, and decedent having been killed by members of the organization to prevent his informing against it, a flag with the words: "The Liberal Party Mexico. Land and Liberty"—emblazoned thereon and a bugle found at the conspirators' camp, were admissible, in a prosecution against them for the homicide, to show they were engaged in an illegal design. *Serrato v. State* (Cr. App.) 171 S. W. 1133.

— **Acts and declarations.**—See notes under C. C. P. art. 783.

Art. 1441. [961] Conspiracy in another state to commit offense in this.—A conspiracy entered into in another state or territory of the United States to commit any one of the offenses named

in article 1437 in this state, shall be punished in the same manner as if the conspiracy had been entered into in this state.

Jurisdiction and proof.—The courts of Texas have jurisdiction, independent of the Act of 1876, to try a prosecution for conspiracy to fabricate titles to Texas lands, though the fabrication was committed in another state by defendant's co-conspirator. *Ex parte Rogers*, 10 App. 655, 38 Am. Rep. 654.

State can prove that parties formed a conspiracy outside of the State to come to Texas and commit crime. *Moore v. State*, 40 App. 443, 50 S. W. 942.

Indictment.—Willson's Cr. Forms, 703, 706.

Indictment should contain a direct averment that the conspiracy was to be consummated in another State, under this article. *Cowan v. State*, 41 App. 617, 56 S. W. 752.

Forgery in another state.—See art. 950, ante.

CHAPTER TWO OF THREATS

<p>Art. 1442. Threat to take life, etc. 1443. Threat must be seriously made. 1444. Which is a question of fact.</p>	<p>Art. 1445. Certain threats not included. 1446. Sending threatening letter.</p>
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Article 1442. [962] Threats to take life, etc.—If any person shall threaten to take the life of any human being, or to inflict upon any human being any serious bodily injury, he shall be punished by fine of not less than one hundred nor more than two thousand dollars, and, in addition thereto, he may be imprisoned in the county jail not exceeding one year. [Act Feb. 22, 1875, p. 51.]

See notes under 1445 post.

Indictment.—Willson's Cr. Forms, 711, 712, 744.

Art. 1443. [963] Threats must be seriously made.—In order to render a person guilty of the offense provided in the preceding article, it is necessary that the threat be seriously made. [Id.]

Indictment.—Willson's Cr. Forms, 711, 744.

Art. 1444. [964] Which is a question of fact.—It is for the jury to determine, in every case of prosecution under article 1442, whether the threat was seriously made or was merely idle and with no intention of executing the same. [Id.]

Indictment.—Willson's Cr. Forms, 744.

Art. 1445. [965] Certain threats not included.—A threat that a person will do any act merely to protect himself, or to prevent the commission of some unlawful act by another, does not come within the meaning of this chapter. [Id., p. 52.]

See *Woods v. State*, 37 App. 459, 36 S. W. 96.

Nature and elements of offense.—Two things must concur to constitute this offense: 1. A threat to take life, or do serious bodily injury. 2. A serious intention existing at the time of making such threat, to execute it. *Buie v. State*, 1 App. 58; *McFain v. State*, 41 Tex. 385.

That the threat was conditional is immaterial, provided it required something to be done, or left undone, that the party threatening had no right to require. *McFain v. State*, 41 Tex. 385. But a mere rash and inconsiderate expression will not constitute this offense. *March v. State*, 3 App. 107.

If the object of the threat was merely to extort money, it is not sufficient to constitute this offense, unless the defendant intended to execute the threat in case the money was not paid him. *Haynie v. State*, 2 App. 168.

A mere rash and inconsiderate expression provoked by an angry altercation in which the parties were engaged, held not a threat to kill. *March v. State*, 3 App. 107.

The court should instruct the jury, that if defendant had no intention of executing the threat he should be acquitted. *Wilkerson v. State* (Cr. App.) 30 S. W. 807.

One who made an unprovoked assault on prosecutor, and who, when prevented from again striking prosecutor, made an inconsiderate and harsh remark, did not unlawfully and seriously threaten to take the life of a human being, punishable by article 1442. *Bolt v. State* (Cr. App.) 150 S. W. 431.

Arrest of offender.—If serious threats to take life of a peace officer have been made, he can make affidavit and get a warrant for the arrest of the offender. Without such warrant he has no more right to go to the house of the offender and intrude upon his premises than any other citizen. *Allen v. State* (Cr. App.) 66 S. W. 674.

Indictment.—Willson's Cr. Forms, 711, 744.

It is sufficient, in the case of a threat to take life, for the indictment to allege that the defendant "did unlawfully and seriously threaten to take the life of" a person naming the person, without alleging the particulars of the threat. *Tynes v. State*, 17 App. 123; *Buie v. State*, 1 App. 58; *Longley v. State*, 43 Tex. 490; *McFain v. State*, 41 Tex. 385. An indictment which charged that two defendants did, "jointly and severally," seriously threaten, etc., was held good, the words "jointly and severally" being treated as surplusage. *Gay v. State*, 3 App. 168.

Evidence.—It is competent for the state, to prove intention, to give in evidence other threats made by the defendant on another occasion. *Longley v. State*, 43 Tex. 490; *Aycock v. State*, 2 App. 381; *Thrasher v. State*, 3 App. 281. And, also, to prove that the defendant had a grudge against the party threatened. *Aycock v. State*, 2 App. 381.

To be admissible in evidence the threat need not name the threatened party, if the other proved facts show that the injured party was intended. *Hardy v. State*, 31 App. 289, 20 S. W. 561; *Massey v. State*, 31 App. 371, 20 S. W. 758.

See this case for evidence to sustain conviction for making threats to take life under article 1442. *Shelton v. State*, 56 App. 265, 119 S. W. 862.

Charge of court and questions for jury.—Whether the threat was seriously made is a question of fact, and must be submitted to the jury. *Longley v. State*, 43 Tex. 490.

In case of proof of a grudge against the party threatened, it was held not to be error for the court to charge that the jury might consider such grudge, if any existed at the time the threats were made, if any threats were made, in determining whether such threats, if any, were seriously made. *Aycock v. State*, 2 App. 381.

The fact the defendant did not execute the threat, when he could have done so, will not necessitate a charge that the jury might infer that the threat, if made, was not seriously made. *Vincent v. State*, 3 App. 678.

Art. 1446. [966] Sending threatening letter.—If any person shall knowingly send or deliver to another any letter or writing, whether signed or not, threatening to accuse such other person of a criminal offense, with a view of extorting money, property, thing of value, or any advantage whatever from such other person, or threatening to kill or in any manner injure the person of such other, or to burn or otherwise destroy or injure any of his property, real or personal, or to do any other injury to such other person, he shall be punished by fine not less than one hundred nor more than one thousand dollars, and, in addition thereto, may be imprisoned in the county jail not exceeding one year.

Nature and elements of offense.—A conviction in a prosecution for a threat to extort money, held not authorized unless it appeared that defendant intended to execute his threat to kill if the money be not paid. *Haynie v. State*, 2 App. 168.

It is the sending or delivering of a threatening letter knowingly that constitutes this offense, not knowingly threatening. *Castle v. State*, 23 App. 286, 4 S. W. 892.

Venue.—See notes under C. C. P., art. 258.

Indictment and information.—Willson's Cr. Forms, 713, 744.

The indictment must charge that the act of sending or delivering the letter was "knowingly" done. To allege that it was "unlawfully" done will not be sufficient. *Tynes v. State*, 17 App. 123; *Landa v. State*, 26 App. 580, 10 S. W. 218. Nor will it be sufficient to charge that the defendant "knowingly did threaten, etc., by sending, etc." *Castle v. State*, 23 App. 286, 4 S. W. 892.

The indictment should set out the writing verbatim. *Tynes v. State*, 17 App. 123; *Hanson v. State*, 35 App. 593, 34 S. W. 929.

Information held insufficient, because it failed to charge that accused delivered the letter with a view to extort money. *Landa v. State*, 26 App. 580, 10 S. W. 218.

Where information alleged a threat to prosecute before justice court of precinct No. 1, B. county, held, that the allegation must be proved. *Strange v. State*, 33 App. 315, 26 S. W. 406.

An indictment for sending a letter threatening to charge another with some criminal offense, must set out the specific offense intended to be charged against such other person. *Cohen v. State*, 37 App. 118, 33 S. W. 1005.

CHAPTER THREE

SEDUCTION

Art.	Punishment.	Art.	Punishment.
1447.	Punishment.	1450.	Abandonment after seduction and marriage, offense defined.
1448.	"Seduction" how used.	1451.	Married man not liable, if known.
1449.	Marriage obliterates offense.		

Article 1447. [967] Punishment.—If any person, by promise to marry, shall seduce an unmarried female under the age of twenty-five years, and shall have carnal knowledge of such female, he

shall be punished by imprisonment in the penitentiary not less than two nor more than ten years. [Act Feb. 12, 1858, p. 185; amended, Act 1903, p. 221.]

See notes under the two following articles.

Cited, *Thorp v. State*, 59 App. 517, 129 S. W. 607, 29 L. R. A. (N. S.) 421.

Change in statute.—Act of 1903 changed the punishment for seduction, by omitting the fine therefrom. *Ex parte Biela*, 46 App. 487, 81 S. W. 739.

Indictment.—Willson's Cr. Forms, 715.

Art. 1448. [968] "Seduction," how used.—The term "seduction" is used in the sense in which it is commonly understood.

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| 1. Nature and elements of offense in general. | 8. — Sufficiency. |
| 2. Seduction as felony. | 9. — Presumption of chastity. |
| 3. Justification or defense. | 10. — Opinion evidence. |
| 4. Accomplice. | 11. — Testimony of female and corroboration thereof. |
| 5. Indictment. | 12. Charge of court. |
| 6. — Of accessory. | 13. — On weight of evidence. |
| 7. Evidence. | 14. Punishment. |

1. Nature and elements of offense in general.—The term seduction when used in the sense in which it is commonly used does not convey the full meaning of the offense, which was intended to be punished by the Code. *Cole v. State*, 40 Tex. 147.

The promise of marriage is an important element in the definition of the statutory offense and must be shown to have been the sole inducement. *Cole v. State*, 40 Tex. 147.

The promise of marriage is an essential element of this offense, and the concession must have been alone upon that consideration. The jury must not, therefore, be instructed that "seduce" is used in its ordinary sense. *Cole v. State*, 40 Tex. 147.

The object of the statute is to redress a frailty, which has been induced by a promise of marriage. *Kelly v. State*, 33 App. 31, 24 S. W. 295.

Seduction, as used in this chapter, means to "lead away" a female from the path of virtue, to entice or persuade her, by a promise of marriage, to surrender her virtue, and have carnal intercourse with the man making such promise. *Putman v. State*, 29 App. 454, 16 S. W. 97, 25 Am. St. Rep. 738.

It must be shown that the carnal intercourse with the female was accomplished by means of a promise to marry her made at the time of the illicit intercourse. That promise, and the yielding of her virtue by the female in consideration thereof is the gist of the offense. See the opinion in extenso. *Putman v. State*, 29 App. 454, 16 S. W. 97, 25 Am. St. Rep. 738; *Cole v. State*, 40 Tex. 147.

The evidence showed that for four years past the reputation of prosecutrix for chastity was bad; that before defendant's promise of marriage was made, under which she claimed to have been seduced, she was generous and promiscuous in her favors, and specific acts were proved. Held, that it was error to instruct the jury that if defendant and prosecutrix were well acquainted, and defendant, knowing her character in the community, promised to marry prosecutrix, and seduced her by virtue of such promise, he cannot avail himself of her want of chastity as a defense. *Mrous v. State*, 21 S. W. 764, 31 App. 597, 37 Am. St. Rep. 834.

The law is mainly intended to redress frailty when induced by a promise of marriage not when existing before. *Kelly v. State*, 33 App. 31, 24 S. W. 295, following *Mrous v. State*, 31 App. 597, 21 S. W. 764, 37 Am. St. Rep. 834.

If, prior to the alleged seduction, prosecutrix had intercourse with another man, defendant is not guilty. *Luckie v. State*, 33 App. 563, 28 S. W. 533.

A conviction may be had though the promise was not repeated at the time of the act. *Bailey v. State*, 36 App. 540, 38 S. W. 185.

To warrant conviction it must be shown that prosecutrix relied upon promise of marriage. *Barnes v. State*, 37 App. 320, 39 S. W. 684.

If prosecutrix did not rely solely on the absolute promise of marriage, but was moved to favor defendant partly through fear, or partly through lust, or through both, defendant should be acquitted, though a promise of marriage was then made, and was part, though not the sole, inducement. *Nolan v. State*, 48 App. 436, 88 S. W. 242.

An instruction that seduction means an enticement of a woman on the part of a man to surrender her chastity by means of some art, violence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him, as much as if it was expressly stated, was not open to the objection that it made a deception, influence, art, or other promise sufficient to constitute the offense, regardless of the character of the deception or promise, and because under the laws of Texas the offense of seduction consists of a woman surrendering her virtue by reason of a promise of marriage. *Faulkner v. State*, 53 App. 258, 109 S. W. 199.

A woman who has carnal intercourse with a man under a conditional promise of marriage, the condition to happen in the future, predicated on a possible pregnancy, is not seduced. *Simmons v. State*, 114 S. W. 841, 54 App. 619.

If the girl was unchaste prior to appellant having intercourse with her even under promise of marriage still he would not be guilty of seduction under article 1447. If a girl has intercourse with a man under a promise that if she becomes pregnant he will marry her, this is in the nature of a contract in the nature of a bargain and barter than a betrayal of confidence and is not seduction. *Simmons v. State*, 54 App. 619, 114 S. W. 844, 845.

A man having intercourse with a woman pursuant to a contract to marry her

if she becomes pregnant, is not guilty of seduction. *Muhlhouse v. State*, 56 App. 288, 119 S. W. 866.

A woman who had been having intercourse with other men at the time accused had intercourse with her, was not subject to seduction by accused. *Muhlhouse v. State*, 56 App. 288, 119 S. W. 866.

An instruction on a trial for seduction defining "seduce" as to entice a woman to surrender her chastity by deception, and stating that seduction is not complete unless the female was at the time chaste, unmarried, and under 25 years of age, and was persuaded to surrender her chastity by reason of accused's promise to marry her, and that if accused had intercourse with prosecutrix by reason of his promise of marriage, and prosecutrix was then chaste and unmarried and under 25 years of age, he was guilty, but if she yielded by reason of her own passion he must be acquitted, is sufficient. *Hinman v. State*, 59 App. 29, 127 S. W. 221.

A blunt offer of wedlock in the future for sexual favors at the present time presents no case of seduction. *Barclay v. State*, 62 App. 323, 137 S. W. 118.

In view of Rev. St. 1895, art. 2955 (Vernon's Sayles' Civ. St. 1914, art. 4609), providing that any girl over 14 years of age may marry, the offense of seduction, which consists of having carnal knowledge of a female with her consent, obtained under a promise of marriage, may be committed with a girl under 15 years of age at the time, and the fact that, as the girl had not arrived at the age of 15 years, the offender might be guilty of rape, does not affect the state's right to prosecute for seduction. *Murphy v. State* (Cr. App.) 143 S. W. 616.

A charge that in order to constitute the offense of seduction the female must be under the age of 25 years and unmarried, and have yielded her chastity and person under a promise of marriage, is a correct definition of the crime of seduction. *Knight v. State*, 64 App. 541, 144 S. W. 967.

To constitute seduction, there must have been an act of intercourse induced by a promise of marriage. *McLaurin v. State* (Cr. App.) 146 S. W. 557.

An unchaste female cannot be subject of seduction. *Coleman v. State*, 71 App. 20, 158 S. W. 1137.

Where the prosecuting witness agreed to intercourse in return for defendant's promise to marry her, such a transaction of barter of sexual favors for the promise contained none of the legal elements of a seduction. *Gleason v. State* (Cr. App.) 178 S. W. 506.

A charge that by the term "seduction" is meant the leading of an unmarried female away from the path of virtue, and, before a conviction can be had, the jury must be convinced that accused had intercourse with prosecutrix within three years before the filing of the indictment, that the prosecutrix consented solely upon accused's promise of marriage, that she was under 25 years of age, and at that time was virtuous, correctly charges the elements of the offense. *Grimes v. State* (Cr. App.) 178 S. W. 523.

2. **Seduction as felony.**—See notes under article 55, ante.

3. **Justification or defense.**—Character of female, see *Kelly v. State*, 33 App. 31, 24 S. W. 295; *Mrous v. State*, 31 App. 597, 21 S. W. 764, 37 Am. St. Rep. 834. Acts of intercourse with others subsequent to the seduction is no defense thereto. *Anderson v. State*, 45 S. W. 15, 39 App. 83.

One who seduced a woman under a promise of marriage may not escape punishment therefor by proving that the woman before the time appointed for the marriage had intercourse with other men. *Carter v. State*, 59 App. 73, 127 S. W. 215.

The fact that a difference between accused and prosecutrix arose after he had seduced her under a promise of marriage did not bar a prosecution unless he in good faith offered to marry her. *Hinman v. State*, 59 App. 29, 127 S. W. 221.

Where accused seduced prosecutrix by virtue of a promise of marriage, the fact of her subsequent misconduct with others was not a justification or ground of defense. *Walls v. State* (Cr. App.) 153 S. W. 130.

In a prosecution for seduction, evidence of improper conduct of the prosecutrix with others after the date of the seduction is no defense. *Curry v. State*, 72 App. 463, 162 S. W. 851.

That after accused had led her astray, prosecutrix submitted herself to other men, was no defense. *Hart v. State* (Cr. App.) 175 S. W. 436.

4. **Accomplice.**—See notes under article 79 ante.

5. **Indictment.**—The indictment must allege that at the time of the commission of the act the female was unmarried. *Mesa v. State*, 17 App. 395.

An indictment charging that accused had carnal knowledge of prosecutrix under a "prom" of marriage is insufficient to charge seduction. *Latham v. State*, 63 App. 632, 141 S. W. 953.

6. — **Of accessory.**—See notes under article 86 ante.

7. **Evidence.**—Letters from the prosecutrix to a third person stating other acts of illicit intercourse are admissible. *Davis v. State*, 36 App. 548, 38 S. W. 174.

The deposition of a witness in a breach of promise suit cannot be adduced as evidence on trial for seduction, as the state was not a party in the civil suit. *Luckie v. State*, 33 App. 562, 28 S. W. 533.

It is competent to prove that defendant stated that he intended to have carnal intercourse with prosecutrix, but that he did not intend to marry her. *Bailey v. State* (Cr. App.) 30 S. W. 669.

Prosecutrix's character for virtue cannot be attacked by evidence of statements made by third persons in regard thereto. *Parks v. State*, 35 App. 378, 33 S. W. 872.

Any act or statement of the prosecutrix tending to show a want of virtue is admissible, but it must be proven by witnesses who saw the act or heard the statement. Mere reports or rumors of the conduct of the prosecutrix are not admissible, unless the witness is qualified to testify to her general reputation for chastity,

and such reports go to make up her general reputation. *Parks v. State*, 35 App. 278, 33 S. W. 872.

Testimony by the mother of the prosecutrix that she had overheard a conversation between prosecutrix and defendant is admissible. *Snodgrass v. State*, 36 App. 207, 36 S. W. 477.

Prosecutrix testified that no person except defendant had had intercourse with her; held, admissible to prove by other men that they had had intercourse with her. *Davis v. State*, 36 App. 548, 38 S. W. 174.

It is competent to show that, subsequent to the alleged seduction, prosecutrix had had promiscuous intercourse with other men. *Id.*

Evidence that the prosecutrix was called Miss, that she lived with her mother and received the attentions of defendant, is sufficient proof that she was unmarried. *Bailey v. State*, 36 App. 540, 38 S. W. 185.

The testimony of the mother of the prosecutrix that defendant visited her daughter about once a week, that he told her they were engaged and asked her consent to their marriage, is sufficient evidence of promise of marriage. *Id.*

Sexual intercourse may be proven by circumstantial evidence. Evidence that defendant had said that he was going to have intercourse with the prosecutrix, and that they went to a hotel and registered as man and wife, and stayed in the same room, is sufficient evidence of sexual intercourse between the parties. *Id.*

It is not error, on trial of an indictment for seduction committed prior to the taking effect of the act permitting the seduced female to testify, to admit the evidence of such female, since such act does not require less evidence to convict, and hence is not *ex post facto*. *Mrous v. State*, 21 S. W. 764, 31 App. 597, 37 Am. St. Rep. 834.

Though, on indictment for seduction, defendant may not have used due diligence to procure absent witnesses, by whom he claimed, in his motion for a continuance, which was overruled, that he could prove that they had had intercourse with the prosecutrix, and though these witnesses may not have been very credible, a conviction should be reversed, and an opportunity given to procure them, where the circumstances, and the testimony of the prosecutrix herself, tend to show that she was unchaste, and that they had had intercourse with her. *Kelly v. State*, 33 App. 31, 24 S. W. 295.

In a prosecution for seduction, remarks of the court, in overruling an objection by accused to the testimony of a witness as to the reputation of prosecutrix for chastity, on the ground that the witness never heard any one speak of her reputation in that respect, that there is no higher evidence of the good character of a person than that it was never discussed, and that that fact is the best evidence of good character, is ground for reversal. *McCullar v. State*, 36 App. 213, 36 S. W. 585, 61 Am. St. Rep. 847.

The seduced female is presumed to be a willing party to the act, and it is immaterial as to whether or not she adjusted her person so as to facilitate the act. *Barnes v. State*, 37 App. 320, 39 S. W. 684.

It is competent to prove that the act of coition produced no pain, soreness or laceration of the parts of the female. *Id.*

On cross-examination prosecutrix testified that defendant never got her full consent, and that she would not have done it had she not been afraid of him. Held, that questions as to whether she submitted to him because he promised to marry her, because she loved him, and because she was afraid of him were erroneous as leading. *Barnes v. State*, 37 App. 320, 39 S. W. 684.

Evidence of the complexion, and of the color of the hair and eyes, of a child only three or four months old, is not admissible for the purpose of comparison, in order to prove its paternity. *Barnes v. State*, 37 App. 320, 39 S. W. 684.

Where defendant proved an act of intercourse between prosecutrix and another, it is competent for the prosecution to show what was said and done in connection therewith to induce prosecutrix to submit. *Anderson v. State*, 45 S. W. 15, 39 App. 83.

In a prosecution for seduction, evidence that prosecutrix had kissed and been kissed and embraced by other men than defendant is admissible, as tending to show lack of chastity. *Creighton v. State*, 41 App. 101, 51 S. W. 910.

It is admissible to prove that prosecutrix, for a long time before her child was born, lived at a house and associated with three women who had given birth to illegitimate children. This to show her real character. *Caviness v. State*, 42 App. 420, 60 S. W. 555.

In a prosecution for seduction, evidence of acts of prosecutrix subsequent to the alleged commission of the offense, going to show illicit relations and lascivious conduct with others than defendant, is admissible to show that prosecutrix was unchaste prior to the alleged illicit intercourse with defendant. *Nolan v. State*, 48 App. 436, 88 S. W. 242.

While the mere fact that prosecutrix subsequently becomes a prostitute is no justification or defense for defendant, yet, if her conduct be such as to indicate general prostitution on her part, this should be considered as a circumstance by the jury in passing on whether she was probably chaste at the time of her alleged seduction. *Nolan v. State*, 48 App. 436, 88 S. W. 242.

In a prosecution for seduction, letters written to a third person by prosecutrix, showing a vulgar and lascivious mind on her part, were admissible for the purpose of discrediting her, and also to shed light on her chastity at the time of her alleged seduction by defendant. *Nolan v. State*, 48 App. 436, 88 S. W. 242.

In a prosecution for seduction, evidence that prior to the trial prosecutrix, who married subsequent to the alleged seduction, stated, in substance, to defendant's attorneys, that defendant had raped her, was admissible for impeachment, and an attempted limitation of it by the court to contradiction alone was error. *Nolan v. State*, 48 App. 436, 88 S. W. 242.

As under the amendment to the seduction law the offer of marriage must be made to the prosecutrix herself, it was not error in a prosecution for seduction of a minor female to exclude evidence that shortly after his arrest defendant sent to her father, requesting permission to marry her, witness also testifying that the day following defendant stated that he did not intend to marry prosecutrix. *Nolan v. State*, 48 App. 436, 88 S. W. 242.

In a prosecution for seduction, prosecutrix was asked on direct examination whether she believed at the time that defendant and she were to become man and wife the following spring, whether the day of their marriage had been fixed, and whether the time was fixed according to his or her suggestions. Held, that the questions and the evidence elicited thereby were relevant and material. *Faulkner v. State*, 53 App. 258, 109 S. W. 199.

In a prosecution for seduction, testimony of prosecutrix in response to a question whether defendant in his actions toward her appeared "affectionate or loving, kind, and true, as a true lover should," was admissible. *Faulkner v. State*, 53 App. 258, 109 S. W. 199.

Where, in a prosecution for seduction, prosecutrix testified as to the existence of an engagement between her and defendant at the time of the seduction, evidence as to a former engagement between prosecutrix and defendant, which had been broken before the alleged seduction took place, was admissible. *Faulkner v. State*, 53 App. 258, 109 S. W. 199.

Where, on a trial for seduction, the evidence showed that accused was in love with prosecutrix, that her father was opposed to him and objected to his coming to the house to see her, that accused had requested a third person to bring prosecutrix to a town, and that he intended to marry her, statements by accused that he was responsible for prosecutrix's pregnancy, and that he contemplated stealing a girl, were admissible to prove intercourse with prosecutrix and to corroborate the proof of an engagement to marry. *Hinman v. State*, 59 App. 29, 127 S. W. 221.

In a prosecution for seduction, testimony by a physician that his examination had disclosed the prosecutrix's pregnancy is admissible. *Knight v. State*, 64 App. 541, 144 S. W. 967.

In a prosecution for seduction, where the record disclosed that prosecutrix was the only girl to whom accused was paying attention and that her social position was good, evidence of his boasts of his conquests among the best girls in the town was admissible. *Knight v. State*, 64 App. 541, 144 S. W. 967.

In a prosecution for seduction where, after his examining trial, accused sought to have a conversation with prosecutrix in the presence of no one but his relative and friend, and the aunt of the prosecutrix objected to such conversation, saying that she did not think they had any talk coming, that all they needed was a marriage license and a preacher, and the accused remained silent, no conversation being had, evidence of the remarks of the aunt and the failure of accused to reply was admissible as an implied admission. *Knight v. State*, 64 App. 541, 144 S. W. 967.

In a prosecution for seduction, testimony by the mother of the prosecutrix that after the examining trial of accused he called up the prosecutrix and asked to speak to her was admissible, where accused made an engagement with the prosecutrix, when called to the telephone, to have a meeting with her at the residence of a third party, and it appeared that such meeting was had. *Knight v. State*, 64 App. 541, 144 S. W. 967.

The state, on a trial for seduction is not confined to proof of the first act of intercourse, but subsequent acts may be shown. *Walls v. State* (Cr. App.) 153 S. W. 130.

The details of an operation of abortion and the suffering at the time and after are not admissible in evidence in a prosecution for seduction, nor for being an accessory to that crime. *Harrison v. State* (Cr. App.) 153 S. W. 139.

On a trial for seduction, it was immaterial whether accused was present in a physician's office when the money was given to prosecutrix to leave the county and go to a distant city; the payment being done with his knowledge, consent, and acquiescence. *Cole v. State*, 70 App. 459, 156 S. W. 929.

In a prosecution for seduction, evidence that letters were written by the sister of the prosecutrix to a named third person was inadmissible. *Black v. State*, 71 App. 621, 160 S. W. 720.

In a prosecution for seduction under promise of marriage, evidence that prosecutrix's mother had been long dead at the time of the seduction was admissible. *Gillespie v. State* (Cr. App.) 166 S. W. 135.

Where, in a prosecution for seduction under promise of marriage, prosecutrix's reputation for chastity became an issue, evidence that on one occasion, during the time in question, she had a difficulty with a young man in a church and called him "a damn son of a bitch" was admissible. *Gillespie v. State* (Cr. App.) 166 S. W. 135.

On a trial for seduction, letters written by the prosecutrix long after the offense, and of little importance, were not admissible. *Creacy v. State* (Cr. App.) 166 S. W. 162.

In a prosecution for seduction under promise of marriage, both the act of intercourse and the promise of marriage may be established by circumstantial evidence. *De Rossett v. State* (Cr. App.) 168 S. W. 531.

In a prosecution for seduction, the child of prosecuting witness should not have been brought before the jury, identified, and introduced as evidence. *Gleason v. State* (Cr. App.) 178 S. W. 506.

Where the prosecutrix testified that she yielded solely on account of accused's persuasions and entreaties, relying on his protestations of love and marriage, questions as to whether prosecutrix was capable of experiencing and did experience sexual desire do not call for material evidence. *Grimes v. State* (Cr. App.) 178 S. W. 523.

8. — **Sufficiency.**—Evidence held to sustain a conviction. *Wooldridge v. State* (Cr. App.) 146 S. W. 550; *Carter v. State*, 59 App. 73, 127 S. W. 215; *Hinman v. State*, 59 App. 23, 127 S. W. 221; *Barclay v. State*, 62 App. 323, 137 S. W. 118; *Browning v. State*, 64 App. 148, 142 S. W. 1; *Knight v. State*, 64 App. 541, 144 S. W. 967; *Push v. State*, 71 App. 14, 157 S. W. 944; *Blackburn v. State*, 71 App. 625, 160 S. W. 687; *Curry v. State*, 72 App. 463, 162 S. W. 851; *Slaughter v. State* (Cr. App.) 174 S. W. 580. *Contra*, *Murphy v. State* (Cr. App.) 143 S. W. 616.

Defendant, at the time the seduction was alleged to have taken place, paid prosecutrix assiduous attention. A witness testified that defendant admitted his engagement to marry prosecutrix, and of his having intercourse with her, and saw them in the act. Held sufficient corroboration of prosecutrix, who testified that the intercourse was superinduced by promise of marriage, to sustain a conviction of seduction. *Anderson v. State*, 45 S. W. 15, 39 App. 83.

The evidence to support a conviction of seduction must be measured and governed by the rules governing the sufficiency of evidence to justify a conviction of any other crime, and any fact essential to the offense may be established by circumstantial evidence as well as by direct proof. *Nash v. State*, 61 App. 259, 134 S. W. 709.

In a prosecution for seduction, evidence held to authorize the jury to find that an engagement existed between prosecutrix and defendant at the time of the acts complained of. *Barclay v. State*, 62 App. 323, 137 S. W. 118.

In a prosecution for seduction, evidence held insufficient to raise the issue of consent because of lust or fear. *Knight v. State*, 64 App. 541, 144 S. W. 967.

9. — **Presumption of chastity.**—Proof of acts of carnal intercourse with others than defendant after the act charged, is no answer to the presumption that she was chaste before the act charged. *Anderson v. State*, 39 App. 83, 45 S. W. 15.

Want of chastity of a prosecutrix being a complete defense to a prosecution under the statute, evidence of her chastity is admissible in the first instance, for while she is presumed chaste the accused is also presumed innocent. *Knight v. State*, 64 App. 541, 144 S. W. 967.

In a prosecution for seduction, the prosecutrix is presumed chaste. *Knight v. State*, 64 App. 541, 144 S. W. 967.

The prosecutrix is presumed chaste, and if accused relies on the fact of unchastity he has the burden of establishing it. *Curry v. State*, 72 App. 463, 162 S. W. 851.

10. — **Opinion evidence.**—See notes under C. C. P. art. 783.

11. — **Testimony of female and corroboration thereof.**—See C. C. P. art. 789, and notes thereunder.

12. **Charge of court.**—Where, on a trial for seduction, the testimony showed that for four years past the reputation of prosecutrix was bad; that before appellant's promise of marriage was made she was generous and promiscuous in her favors, and specific acts were also proved, held, that a charge to the jury which in effect instructed them, if they believed that defendant and prosecutrix were well acquainted with each other, and defendant, knowing the character of the prosecutrix in the community, promised to marry her, and subsequently seduced her by virtue of said promise, that he could not avail himself of the character of the woman for want of chastity, was erroneous, because if the facts above stated were true, appellant was not guilty of seduction, whatever may have been his civil liability for breach of promise. *Mrous v. State*, 31 App. 597, 21 S. W. 764, 37 Am. St. Rep. 834.

Definition should be given to the jury. *Bailey v. State* (Cr. App.) 30 S. W. 669. The prosecutrix is an accomplice and the court should so instruct the jury. *McCullar v. State*, 36 App. 213, 36 S. W. 585, 61 Am. St. Rep. 847.

It was not error to refuse to charge as to conditional promise of marriage, where the only evidence on the question was that defendant said he would marry prosecutrix when he got out of his trouble, alluding to a criminal matter then pending in the courts against him. *Barnes v. State*, 37 App. 320, 39 S. W. 684.

When there is conflicting evidence as to the guilt of the accused the court should define seduction. *Merrell v. State*, 42 App. 13, 57 S. W. 291.

Where there was evidence that the prosecuting witness was not a chaste woman, it was error, in a trial for seduction, to fail to define the term "seduction" in charging the jury. *Gorzell v. State*, 43 App. 82, 63 S. W. 126.

Where others had an equal opportunity with defendant to have had sexual intercourse with prosecutrix, and there was evidence that she had had intercourse with others, and evidence showing unchaste habits was not denied by her, a conviction could not be sustained. *Gorzell v. State*, 43 App. 82, 63 S. W. 126.

The court was not required to limit the effect of evidence as to an engagement between prosecutrix and defendant, which was broken prior to the seduction. *Faulkner v. State*, 53 App. 258, 109 S. W. 199.

Where the testimony suggested a promise of marriage on condition of prosecutrix becoming pregnant by reason of intercourse, the court, at the request of accused, must charge that if the marriage promise was conditional the offense was not established; and an instruction that if prosecutrix yielded through fear of accused, or for any other reason than by the means of promise of marriage previously made, was insufficient, as leading the jury to believe that the conditional marriage promise was sufficient. *Muhlhouse v. State*, 56 App. 288, 119 S. W. 866.

Where the intercourse is admitted, and defendant testifies that it was with the consent of prosecutrix, that issue should be affirmatively presented. *Lemmons v. State*, 58 App. 269, 125 S. W. 400.

Where the court defined "seduction," and stated that it was to lead an unmarried woman under the age of 25 years from the paths of virtue, to entice her by means of a marriage promise to have intercourse with the man making the

promise, and that the woman must have been of chaste character, the instructions were not open to the objection that the court in its preparatory statement omitted to state the elements of the offense. *Carter v. State*, 59 App. 73, 127 S. W. 215.

Where there was no suggestion in the evidence that the intercourse was the result on prosecutrix's part of anything except the promise of marriage, unless the jury might attribute it to her own lust, and the court charged that if the intercourse was the result of her passion accused should be acquitted, the refusal to charge that, if the intercourse was induced on her part by any other motive than promise to marry, accused must be acquitted, was not erroneous. *Hinman v. State*, 59 App. 29, 127 S. W. 221.

A charge, in a seduction case, that if prosecutrix's conduct for chastity was bad, and that before accused had promised to marry her, if he did do so, and that she was generous and promiscuous in bestowing her favors to other men, then if, under these circumstances, accused had carnal intercourse with her, he would not be guilty of seduction, is erroneous, since, if prosecutrix was not of a chaste character, or if theretofore she had had carnal intercourse with some other man, she was not the subject of seduction. *Vantreese v. State*, 59 App. 281, 128 S. W. 383.

Where two witnesses testified that they had been criminally intimate with prosecutrix on several occasions prior to the intercourse between accused and prosecutrix, the refusal to charge that though prosecutrix yielded to accused under a promise of marriage, yet if before the promise of marriage, she had had criminal intercourse with other persons, accused must be acquitted, was reversible error. *Sharp v. State*, 61 App. 247, 134 S. W. 333.

Where prosecutrix fixed the time of the promise of marriage and accompanying act of intercourse as in April, 1908, and the evidence showed that accused, in the early part of 1909, married another woman, and thereafter wrote letters to prosecutrix as a renewal of the engagement, and subsequently renewed illicit relations with her, a charge that, if accused at any time within three years before the return of the indictment seduced prosecutrix by means of a promise of marriage previously made, he was guilty was erroneous, as authorizing a conviction under either promise of marriage, while the subsequent promise could not form the basis of a conviction. *Humphrey v. State* (Cr. App.) 143 S. W. 641.

Where many circumstances were shown indicating lack of prior chastity on prosecutrix's part, it was error for the court to omit to charge that, if prosecutrix was unchaste at the time the offense was committed, defendant could not be convicted. *Bishop v. State* (Cr. App.) 144 S. W. 278.

An instruction defining the term "seduce" as an inducement of a woman on the part of a man to surrender her chastity by reason of some art, influence, or deception calculated to accomplish that object, and to include the yielding of her person to him as much as if it was expressly stated, is correct. *Bost v. State*, 64 App. 464, 144 S. W. 589.

A charge authorizing a conviction if accused had, at any time within three years next prior to the finding of the indictment, seduced prosecutrix, was correct, though not referring to the date of the seduction as alleged by prosecutrix. *Bost v. State*, 64 App. 464, 144 S. W. 589.

In a prosecution for seduction, held, that the charge of the court sufficiently submitted everything that was properly necessary to be submitted under the evidence and the law. *Bost v. State*, 64 App. 464, 144 S. W. 589.

Where the indictment alleged that the offense occurred in 1910, and the evidence showed the first act of intercourse to have occurred in 1909, a charge that a woman could be seduced but once and that accused could be convicted only for the first act of copulation and that subsequent acts of intercourse can be considered along with other evidence in passing on the guilt or innocence of accused, is not contradictory as authorizing a conviction for any offense committed within three years prior to the filing of the indictment, and in instructing that no conviction could be had for subsequent acts. *Knight v. State*, 64 App. 541, 144 S. W. 967.

An instruction, that seduction is not complete unless the female alleged to have been seduced be at the time a chaste person unmarried and under 25 years of age and was persuaded to surrender her chastity and have carnal intercourse with defendant by reason of his promise to marry her and must have relied upon said promise and must not have surrendered her virtue or yielded to his desires through any other consideration, was proper. *Bush v. State*, 71 App. 14, 157 S. W. 944.

An instruction that if prosecutrix ever had intercourse with a "man" other than accused, the jury should acquit, was not misleading in excluding possible intercourse between prosecutrix and a "boy"; there being no evidence, on the issue of prosecutrix's alleged intercourse with another than defendant, that she had ever been intimate with a "boy." *Bush v. State*, 71 App. 14, 157 S. W. 945.

Where defendant claimed that he had heard of prosecutrix's intimacy with others but did not produce any witness who had told him of any such intimacy, instructions affirmatively requiring the jury to believe beyond a reasonable doubt that prosecutrix had submitted herself to defendant solely by reason of his promise to marry her, and that if she prior to that time had been intimate with any other person, or if defendant had ever been intimate with her prior to his promise of marriage, to find him not guilty, sufficiently submitted the question of the previous chastity of the prosecutrix. *Blackburn v. State*, 71 App. 625, 160 S. W. 687.

An instruction, strictly in accordance with the statute, that, if any person by a promise of marriage shall seduce any unmarried female under the age of 25 years, he is guilty of seduction, and literally quoting article 1448, declaring that the term "seduction" is used in the sense in which it is commonly understood, was sufficient even if it were necessary to define the offense to the jury; it being

the rule that, where the charge taken as a whole substantially defines the offense and whatever words therein are necessary to be defined, that is all that is required. *Blackburn v. State*, 71 App. 625, 160 S. W. 687.

Evidence held to require a finding that the promise of marriage by which prosecutrix was induced to yield her person on the first occasion was not conditioned on her becoming pregnant from the intercourse, so that the court did not err in refusing to submit the question of such alleged conditional promise. *Gillespie v. State* (Cr. App.) 166 S. W. 135.

13. — **On weight of evidence.**—See notes under C. C. P. art. 735.

14. **Punishment.**—1. The Penal Code declares that every offense punishable by death or imprisonment in the penitentiary, either absolutely or alternatively, is a felony. Seduction is punished by imprisonment in the penitentiary or by fine. Rev. St. 1879, art. 3602 (Vernon's Sayles' Civ. St. 1914, art. 6249) provides that any one convicted of a misdemeanor or petty offense may be hired out to liquidate his fine and costs. Held, that one convicted of seduction, and punished by fine, could not be so hired out. *Ward v. White*, 23 S. W. 981, 86 Tex. 170.

One whose punishment, on conviction of seduction, has been fixed at a fine, which he claims to be unable to pay, held not entitled to be released from custody on habeas corpus. *Ex parte Biela*, 81 S. W. 739, 46 App. 487.

On conviction of seduction, a sentence of seven years is not excessive. *Faulkner v. State*, 53 App. 258, 109 S. W. 199.

Art. 1449. [969] Marriage obliterates offense.—If the parties marry each other at any time before the defendant pleads to the indictment before a court of competent jurisdiction, then the prosecution, if begun, shall be suspended, but not dismissed; and, if indictment has been returned, the case shall be continued on the docket of the court from term to term; and, if the defendant, after said marriage in good faith continues to live with the person so seduced for two years after said marriage, the said prosecution shall be dismissed; but, if the defendant within two years after said marriage, without the fault of his said wife, such fault amounting to acts committed by her after said marriage as would entitle him to a divorce, shall abandon her or refuse to live with her, or shall be so cruel to her as to compel her to leave him, or shall be guilty of such outrages or cruelties toward her as to render their living together insupportable, then the prosecution shall be revived, and said marriage shall be no bar to the same, and the female so seduced shall be a competent witness against the defendant; provided, however, that if, after the prosecution is begun, and prior to the time he pleads to the indictment before a court of competent jurisdiction, the defendant, in good faith, offers to marry the female so seduced, and if she refuses to marry him, such refusal shall be a bar to further prosecution; but the benefit of this article shall not apply to the case of a defendant who was in fact married at the time of committing the offense. [Act 1899, ch. 47; Amended, Act, 1903, p. 221.]

Constitutionality.—That portion of this law (Act of 1903) which suspends the indictment, in case the defendant marries the seduced female, for two years in which to live in good faith with his wife and treat her well, is invalid, and contrary to section 10, article 1 of the Bill of Rights. *Waldon v. State*, 50 App. 512, 98 S. W. 848, 14 Ann. Cas. 342.

Marriage or offer to marry.—By the term, "in good faith offer to marry," the statute goes no farther than the marriage vow. It does not include, nor require, the promise to live with, protect, and support. *Wright v. State*, 31 App. 354, 20 S. W. 756, 37 Am. St. Rep. 822. And after prosecution is begun and up to the moment of conviction, such an offer made by defendant is a valid defense. *Id.*

While prosecutrix was on the stand testifying, defendant produced a marriage license, and offered to marry her then and there, stating that, if she accepted, his Honor upon the bench could marry them. The district attorney, contesting the good faith of the offer, was allowed to call a witness who testified that defendant had stated to him that he would not live a day with prosecutrix, that it would break his mother's heart for him to marry her. Defendant was then sworn, and again promised to marry prosecutrix, saying he would live with her and act as a true husband. She refused his offer. Held, that the prosecution should have been dismissed. *Id.*

Where a defendant who is a minor offers to marry the prosecutrix but his mother will not allow him, it is not an offer in good faith within the meaning of the law. *Merrell v. State*, 42 App. 19, 57 S. W. 290.

The provisions of this article do not apply where the marital stage is assumed between the parties prior to the institution of criminal proceedings. *Eledge v. State*, 50 App. 223, 96 S. W. 39, 40.

Where one seduces a woman under promise of marriage a conviction can only be barred by his marrying her or in good faith offering to do so. *Hinman v. State*, 59 App. 29, 127 S. W. 221.

Under this article, providing that, where accused in good faith offers to marry prosecutrix, the prosecution for seduction shall be dismissed, one is not relieved from prosecution for seduction because prosecutrix married a third person, and prevented accused from marrying her after the institution of the prosecution. *Thorp v. State*, 59 App. 517, 129 S. W. 607, 29 L. R. A. (N. S.) 421.

Under this article and article 1447, one on trial for rape of a female under the age of 15 years may not rely on the presumption of a common-law marriage arising from evidence of cohabitation following their engagement to marry at some future time. *Wofford v. State*, 60 App. 624, 132 S. W. 929.

Offer of marriage, in order to constitute a defense to seduction, must be made before accused pleads to the indictment for seduction. *Baskins v. State* (Cr. App.) 171 S. W. 723.

Art. 1450. Abandonment after seduction and marriage, offense defined.—If any person, by promise of marriage, shall seduce an unmarried female under the age of twenty-five years, and shall have carnal knowledge of such female, and if, after prosecution has begun, the parties marry each other, at any time before the defendant pleads to the indictment before a court of competent jurisdiction, and if the defendant within two years after said marriage, without the fault of his said wife, such fault amounting to acts committed by her after said marriage as would entitle him to a divorce under the laws of this state, shall abandon her or refuse to live with her, or shall be so cruel to her as to compel her to leave him, or shall be guilty of such outrages or cruelties towards her as to make their living together insupportable, thereby leaving her or forcing her to leave him and live apart from each other, shall be guilty of the offense of abandonment after seduction and marriage; and any person convicted of said offense shall be confined in the penitentiary for a term not less than two nor more than ten years; and said marriage shall be no bar to the qualifications of said female to testify against the defendant; and the female so seduced and subsequently married and abandoned, as herein provided, shall be a competent witness against said defendant. [Act 1909, p. 97.]

Constitutionality.—This statute is not a violation of Bill of Rights, § 3, requiring that all men shall have equal rights and privileges. *Thacker v. State*, 62 App. 294, 136 S. W. 1095.

Nor does it impose a "cruel or unusual punishment" within Const. art. 1, § 13. *Thacker v. State*, 62 App. 294, 136 S. W. 1095.

Nor does it provide for putting one twice in jeopardy for the same offense within Const. art. 1, § 14. *Thacker v. State*, 62 App. 294, 136 S. W. 1095.

Nor is it an "ex post facto law" within Const. art. 1, § 16. *Thacker v. State*, 62 App. 294, 136 S. W. 1095.

Abandonment and liability therefor in general.—In a prosecution of a husband for abandoning his wife, whom he had married to prevent prosecution for seduction under promise of marriage, defendant cannot be convicted if the female consented to the illicit intercourse not relying solely on a prior unconditional promise of marriage, but on a promise to marry her in case she should become pregnant, or on any other reason or inducement. *Thacker v. State*, 62 App. 294, 136 S. W. 1095.

Temporary absence of the husband from his wife, with her consent, while at work, without an intention to abandon her, does not constitute an abandonment, but proof that he refused to furnish her a home, except with his parents and their family, and that they so abused her, with his knowledge, as to force her to leave, was sufficient to constitute abandonment. *Baskins v. State* (Cr. App.) 171 S. W. 723.

Justification of abandonment.—The statute defining the offense of abandonment after seduction and marriage authorizes the abandonment of the woman by the man only for such acts of intercourse committed after marriage by her as would entitle him to a divorce; the law condones his past offense if he marries and lives with and supports her, and it also requires of him to condone all her acts prior to the marriage, and if, after he had seduced her, she, between that time and the time he married her, again fell, it would not justify him in abandoning her, as, having been guilty of the first wrong, he must bear its consequences. *James v. State* (Cr. App.) 167 S. W. 727.

Seduction before law took effect.—Where a seduction took place in 1907, but the parties married in July, 1909, and the husband abandoned his wife shortly thereafter, it was held that, the marriage and abandonment having taken place after the law took effect, it was immaterial that the seduction was prior thereto. *Thacker v. State*, 62 App. 294, 136 S. W. 1095.

Commencement of prosecution for seduction.—The filing of a complaint for seduction before a justice of the peace, the issuance of a warrant, and accused's ar-

rest thereunder, constituted the commencement of a prosecution against him for seduction within this article. *Baskins v. State* (Cr. App.) 171 S. W. 723.

Indictment and proof thereunder.—Where a statute prescribes different ways by which the offense of abandonment after seduction and marriage can be committed, an indictment should not be quashed on the ground that it charges the offense to have been committed in only one of those ways. *Qualls v. State*, 71 App. 67, 153 S. W. 539.

Where an indictment alleged only an abandonment of the wife by the husband and not the commission of the offense in other ways denounced by the statute, the state must prove that the abandonment occurred in the county of the prosecution, even though other acts which would constitute the offense, had they been alleged, were committed within the county, and the statute gave the jurisdiction of an offense committed partly within and partly without the state to the court of any county where the defendant might be found. *Qualls v. State*, 71 App. 67, 153 S. W. 539.

Evidence.—Where, in a prosecution of a husband for abandoning his wife, whom it was alleged he had seduced before marriage, defendant denied that she left her home prior to her marriage on account of her pregnant condition, it was error to exclude evidence of a witness who carried her part of the distance on that trip that in talking to him prosecutrix stated she was leaving home on account of unpleasantness of her home and home surroundings, and that she could not remain with her father's family under such conditions. *Coleman v. State*, 71 App. 20, 153 S. W. 1137.

Where, in a prosecution for abandonment after seduction and marriage, defendant sought to show that his wife abandoned him in another state, and that he refused to live with her when she came to Texas, because he had been informed by his father that she had returned to Texas to send him to the penitentiary, all of which the wife denied or explained, evidence that defendant did not intend to live with his wife longer than the two years required by law is pertinent. *Qualls v. State* (Cr. App.) 165 S. W. 202.

In a prosecution for abandonment after seduction and marriage, evidence that the prosecutrix had been engaged to other men prior to the time she became engaged to defendant was not germane, where there was no proof offered as to criminal intimacy. *Qualls v. State* (Cr. App.) 165 S. W. 202.

In a prosecution for abandonment after seduction and marriage, evidence that the prosecuting witness had given birth to a child was admissible. *James v. State* (Cr. App.) 167 S. W. 727.

In a prosecution for abandonment after seduction and marriage, where defendant's testimony to show that prosecutrix was not chaste when he was alleged to have had his first intercourse with her was to the effect that she in her own home, in the presence of her visitors, a young lady and a young man, openly and flagrantly engaged in an act of intercourse with defendant's brother, who never told defendant when they were trying to send him to the penitentiary, yet told him immediately after his marriage, was so unreasonable and contrary to all human experience that a conviction would not be disturbed. *James v. State* (Cr. App.) 167 S. W. 727.

Accused having abandoned his wife, whom he married to stop prosecution for seduction, the state could prove by parol that a complaint for seduction was prepared by the district attorney, furnished to the wife's father, delivered to a justice of the peace, and that he issued a warrant thereon under which accused was arrested, as bearing on the pendency of the prosecution for seduction at the time of the marriage, and this regardless of the fact that the justice did not put his file mark on the complaint or docket the case, and decline to have anything further to do with it, and made the warrant returnable before another justice. *Baskins v. State* (Cr. App.) 171 S. W. 723.

In a prosecution for abandonment of a wife and marriage to avoid prosecution for seduction, evidence of the justice before whom the seduction prosecution was instituted that he was justice of precinct No. 7 in M. county, Tex., was admissible. *Baskins v. State* (Cr. App.) 171 S. W. 723.

Where a wife was married to avoid a husband's prosecution for seduction and taken to the home of his parents, evidence as to the treatment she received from her husband's mother and other members of the family in his absence, of which he was informed, and that this was such as to force her to leave, was admissible in a prosecution against him for abandonment to show that she did not leave him voluntarily. *Baskins v. State* (Cr. App.) 171 S. W. 723.

In a prosecution for wife abandonment after marriage to escape prosecution for seduction, the complaint and warrant, or properly certified copies thereof, on which accused was arrested for the seduction constituted the best evidence of the institution of such a prosecution, prior to the marriage, and, such documents not having been shown to have been lost or destroyed, it was error to permit oral proof thereof by the district attorney who drew the complaint and the justice of the peace who filed the same and issued the warrant. *Baskins v. State* (Cr. App.) 171 S. W. 723.

Testimony of wife.—In a prosecution of a husband for abandonment of his wife, whom he married to prevent prosecution for seduction under marriage promise, the prosecuting witness must be corroborated both as to the promise of marriage and as to the illicit intercourse. *Thacker v. State*, 62 App. 294, 136 S. W. 1095.

A wife can testify against her husband in a prosecution against him for abandonment after seduction and marriage, since the statute expressly authorizes such testimony. *Qualls v. State*, 71 App. 67, 153 S. W. 539.

Charge of court.—In a prosecution for abandonment after seduction and marriage, where the defendant contended that he did not abandon his wife but that she abandoned him in another state, and she testified that she was informed while in another state that her husband had abandoned her and that she then stated

she was coming back to send him to the penitentiary, the court should give a charge, on request by the defendant, as to the place of the abandonment. *Qualls v. State*, 71 App. 67, 158 S. W. 539.

Where, in a prosecution of a husband for abandoning his wife, whom he had seduced before marriage, there was evidence that she was unchaste, and that he had been intimate with her many times before the occasion on which she claimed she submitted to his embraces under promise of marriage, the court erred in refusing to charge that if there was no promise of marriage after the first act of intercourse, then prosecutrix would not be chaste, and the jury should acquit. *Coleman v. State*, 71 App. 20, 158 S. W. 1137.

Where, in a prosecution for abandonment of wife, married by defendant after he seduced her, there was evidence that she had not been chaste before accused had known her, and, while she testified that the first act of intercourse with defendant was in September, he testified that he had been intimate with her many times as far back as the prior June, it was error to refuse to charge that to convict accused the jury must find beyond a reasonable doubt, considering the charge on accomplice's testimony, that he promised to marry her, and that she submitted to his embraces while she was chaste, and relying on his unconditional promise to marry her, and even though the jury might believe that defendant had carnal intercourse with her, and he promised to marry her, yet, if at the time of the intercourse she was actuated by lust or any such consideration, or if the promise of marriage by defendant was conditional on prosecutrix's becoming pregnant from such intercourse, or if the jury had a reasonable doubt that she may have been actuated by any such motive, and that the promise of marriage may have been so conditioned, to find defendant not guilty. *Coleman v. State*, 71 App. 20, 158 S. W. 1137.

Where, in a prosecution for a wife abandonment after marriage to avoid prosecution for seduction, accused defended on the ground that the wife had been guilty of acts which would entitle him to a divorce, the court properly submitted such matters in general terms for finding, and refused to select certain facts showing or tending to show acts or outrages or cruelties, or abandonment or not, and tell the jury that they would or would not be sufficient to authorize a conviction or require acquittal, since such charge would be on the weight of the evidence. *Baskins v. State* (Cr. App.) 171 S. W. 723.

Art. 1451. [970] **Married man not liable if known.**—No person who was, at the time of committing the offense, married, and the fact of marriage known to the woman, shall be held liable for the offense defined in this chapter.

CHAPTER THREE A

HOURS OF LABOR ON PUBLIC WORK OR IN PUBLIC SERVICE

<p>Art. 1451a. What constitutes day's work. 1451b. Contracts for work to be made on basis of this law; unlawful to require longer hours; ex-</p>	<p>Art. ception; wages in case of exceeding limit; proviso. 1451c. Penalty for violation. 1451d. Repeal.</p>
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Article 1451a. What constitutes day's work.—Eight hours shall constitute a day's work for all laborers, workmen or mechanics now employed or who may hereafter be employed by or on behalf of the State of Texas, or by or on behalf of any county, municipality, or political subdivision of the State, county or municipality in any one calendar day, where such employment, contract or work is for the purpose of constructing, repairing or improving buildings, bridges, roads, highways, streams, levees, or other work of a similar character, requiring the service of laborers, workmen or mechanics. [Act 1913, p. 127, ch. 68, § 1.]

Art. 1451b. Contracts for work to be made on basis of this law; unlawful to require longer hours; exception; wages in case of exceeding limit; proviso.—All contracts hereafter made by or on behalf of the State of Texas, or by or on behalf of any county, municipality or other legal or political subdivision of the State, with any corporation, persons or association of persons for the performance of any work, shall be deemed and considered as made upon the basis of eight hours constituting a day's work. It shall be unlawful for any corporation, person or association of persons having a contract with the State or any political subdivision thereof, to require or permit any such laborers, workmen, mechanics or

other persons to work more than eight hours per calendar day in doing such work, except in case of emergency, which may arise in times of war, or in cases where it may become necessary to work more than eight hours per calendar day for the protection of property, human life or the necessity of housing inmates of public institutions in case of fire or destruction by the elements. In such emergencies the laborers, workmen, mechanics or other persons so employed and working to exceed eight hours per calendar day shall be paid on the basis of eight hours constituting a day's work; provided that not less than the current rate of per diem wages in the locality where the work is being performed shall be paid to the laborers, workmen, mechanics or other persons so employed by or on behalf of the State of Texas, or for any county, municipality or other legal or political subdivision of the State, county or municipality, and every contract hereafter made for the performance of work for the State of Texas, or for any county, municipality or other legal or political subdivision of the State, county or municipality, must comply with the requirements of this Section; provided, that nothing in this Act shall affect contracts in existence at the time of the taking effect of this Act; provided further, that nothing in this Act shall be construed to affect the present law governing State and county convict labor while serving their sentences as such. [Id., § 2.]

Art. 1451c. Penalty for violation.—Any person, or any officer, agent or employé of any person, corporation or association of persons, or any officer, agent or employé of the State, county, municipality or any legal or political subdivision of the State, county or municipality, who shall fail or refuse to comply with the provisions of this Act or who shall violate any of the provisions of this Act, shall, on conviction thereof, be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1000.00), or by imprisonment not to exceed six months or by both such fine and imprisonment and each and every day of such violation shall constitute a separate offense. [Id., § 3.]

Art. 1451d. Repeal.—All laws or parts of laws in conflict herewith are hereby repealed, and expressly an Act passed at the Regular Session of the Thirty-second Legislature, known as House Bill No. 98, and being the same Act that was attempted to be vetoed by the Governor, but which veto was held ineffective by the Supreme Court because the veto message was filed with the Secretary of State after the expiration of twenty days as held by the Supreme Court in the case of *R. B. Minor, et. al., vs. C. C. McDonald, Secretary of State*. [Id., § 4.]

CHAPTER THREE B

TIME OF SERVICE OF FIREMEN

Art. 1451e. Limitation of days of service.	Art. 1451g. Penalty for violation.
1451f. Designation of time for service.	

Article 1451e. Limitation of days of service.—No member of any paid fire department in any city containing twenty-five thousand inhabitants or more, according to the last United States census, shall be required to be on duty for more than six days in any one week, except in cases of emergency. [Act 1915, 1st S. S., p. 22, ch. 9, § 1.]

Art. 1451f. Designation of time for service.—The city official having supervision of the fire department shall designate the day of

the week upon which each member of such department shall not be required to be on duty. [Id., § 2.]

Art. 1451g. Penalty for violation.—Any city official having charge of the fire department in any city coming under this Act who shall violate any of the provisions hereof shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$10.00 nor more than \$100.00. [Id., § 3.]

CHAPTER THREE C

EMPLOYMENT OF FEMALES

Art.	Art.
1451h. More than nine hours' labor per day in certain employments prohibited, proviso.	1451j. Cotton mills; wages for labor in excess of nine hours.
1451i. Laundries.	1451k. Seats for females.
	1451l. Punishment, provisos.
	1451m. Partial invalidity.

Article 1451h. More than nine hours labor per day in certain employments prohibited, proviso.—No female shall be employed in any factory, mine, mill, workshop, mechanical or mercantile establishment, laundry, hotel, restaurant or rooming house, theater or moving picture show, barber shop, telegraph, telephone or other office, express or transportation company, or any State institution, or any other establishment, institution or enterprise where females are employed, except as hereinafter provided, for more than nine hours in any one calendar day, nor more than fifty-four hours in any one calendar week; provided, however, that in case of extraordinary emergencies, such as great public calamities, or where it becomes necessary for the protection of human life or property, longer hours may be worked, but for such time not less than double time shall be paid such female with the consent of the said female; provided, this Act shall not apply to stenographers and pharmacists. [Act 1915, p. 105, ch. 56, § 1, repealing Act 1913, ch. 175, § 1.]

Art. 1451i. Laundries.—No female shall be employed in any laundry for more than fifty-four hours in one calendar week; the hours of such employment to be so arranged as to permit the employment of such female at any time so that she shall not work more than a maximum of eleven hours during the twenty-four hours' period of one day; provided that if such female is employed for more than nine hours in any one day she shall receive pay at the rate of double her regular pay for such time as she is employed for more than nine hours per day. [Act 1915, p. 105, ch. 56, § 1a, repealing Act 1913, ch. 175, § 1a.]

Art. 1451j. Cotton mills; wages for labor in excess of nine hours.—No female shall be employed in any factory engaged in the manufacture of cotton, woolen or worsted goods or articles of merchandise manufactured out of cotton goods for more than ten hours in any one calendar day, nor for more than sixty hours in any one calendar week.

Provided, that if such female is employed for more than nine hours in any one day she shall receive pay at the rate of double her regular pay for such time as she may be employed for more than nine hours per day. [Act 1915, p. 105, ch. 56, § 1b.]

Art. 1451k. Seats for females.—Every employer owning or operating any factory, mine, mill, workshop, mechanical or mercantile establishment, laundry, hotel, restaurant or rooming house, theater or moving picture show, barber shop, telegraph or telephone or other office, express or transportation company, the superintendent

of any State institution or any other establishment, institution or enterprise where females are employed, as provided by Sections 1, 1a and 1b, [arts. 1451*h*–1451*j*] shall provide and furnish suitable seats, to be used by such employéés when not engaged in the active duties of their employment, and shall give notice to all such female employéés by posting in a conspicuous place, on the premises of such employment in letters not less than one inch in height, that all such female employéés will be permitted to use such seats when not so engaged. [Act 1915, p. 106, ch. 56, § 2, repealing Act 1913, ch. 175, § 2.]

Art. 1451*l*. Punishment; provisos.—Any employer, overseer, superintendent, foreman, or other agent of any such employer who shall permit any female to work in any of the places mentioned in Sections 1, 1a and 1b [arts. 1451*h*–1451*j*] more than the number of hours provided for in this Act during any day of the twenty-four hours, or who shall fail, neglect or refuse to so arrange the work of females employed in the said places mentioned in Sections 1, 1a and 1b so that they shall not work more than the number of hours provided for in Sections 1, 1a and 1b of this Act, during any day of twenty-four hours or the number of hours prescribed by this Act in any one week, or who shall fail, neglect or refuse to provide suitable seats as provided in Section 2 of this Act [art. 1451*k*] shall be deemed guilty of a misdemeanor, and upon conviction in any court of competent jurisdiction shall be fined in any sum not less than fifty (\$50.00) dollars nor more than two hundred (\$200.00) dollars and each day of such violation and each such female employéé required or permitted to work more than the time provided in the various sections of this Act shall constitute a separate offense. “Provided, that the provisions of the law shall not apply to telegraph and telephone companies in rural districts and in cities or towns of less than 3000 inhabitants, as shown by the last Federal census.” Provided that the provisions of this Act shall not apply to mercantile establishments in rural districts and in cities and towns and villages of less than 3000 inhabitants. [Act 1915, p. 106, ch. 56, § 3, repealing Act 1913, ch. 175, § 3.]

Art. 1451*m*. Partial invalidity.—If any section or provision of this Act is for any reason held or declared to be unconstitutional it shall not affect nor impair nor render invalid the rest of this Act, and changing other sections to conform thereto. [Act 1915, p. 106, ch. 56, § 4.]

CHAPTER FOUR

EMPLOYMENT OF SAILORS AND CREW

Article 1452. [971] Restriction on employment of crew of vessel.—No sailor or portion of the crew of any foreign sea-going vessel shall engage in working on the wharves or levees of ports in the state of Texas beyond the end of the vessel’s tackle. Any officer, sailor or member of the crew of a foreign sea-going vessel violating this law shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined in a sum not less than ten dollars nor more than one hundred dollars, or be imprisoned in the county jail for not less than ten nor more than thirty days, or both, in the discretion of the court or jury. [Act March 26, 1885, ch. 54, p. 52.]

FENCES WITHOUT GATES

Laws 1884, ch. 24 making it a misdemeanor to construct a fence more than three miles in length without a gate therein was held unconstitutional in *Dilworth v. State*, 36 App. 189, 36 S. W. 274. See art. 852a and note thereunder.

CHAPTER FIVE

PROTECTION OF SETTLERS ON SCHOOL LANDS

Article 1453. [972] **Punishment for certain threats, etc.**—Any person who, by force, threats or intimidation shall prevent, or attempt to prevent, or shall combine and confederate with others to prevent, or attempt to prevent, any person who has acquired a right thereto in accordance with the laws of the state, from peaceably entering upon and establishing a settlement on any parcel or tract of land belonging to the common school, university, the lunatic, blind, deaf and dumb and orphan asylum lands, subject to purchase and settlement under and in accordance with the laws of this state, shall be deemed guilty of a misdemeanor, and, upon conviction therefor, shall be fined in any sum not less than two hundred nor more than one thousand dollars, and, in addition thereto, shall be imprisoned in the county jail not less than one nor more than six months. [Act March 31, 1885, ch. 89, p. 83.]

CHAPTER SIX

TRUSTS—CONSPIRACIES AGAINST TRADE

Art.		Art.	
1454.	Defining trusts.	1466.	Punishment for violating this law.
1455.	"Monopoly" defined.	1467.	In prosecution for violating this law, what evidence used.
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Article 1454. Defining trusts.—A "trust" is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any, or all of the following purposes:

1. To create, or which may tend to create or carry out, restrictions in trade or commerce or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state.
2. To fix, maintain, increase or reduce the price of merchandise,

produce, or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce, or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound, themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree, in any manner, to keep the price of such article or commodity, or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation, at a fixed or graded figure, or by which they shall, in any manner, affect or maintain the price of any commodity or article, or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation, between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance, or charge for the preparation of any product for market or transportation, whereby its price or such charge might be in any manner affected.

6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within the state of Texas, or any portion thereof. [Arts. 976-988d, Pen. Code, 1895; Act 1895, ch. 83; Act 1899, ch. 146; Act 1903, p. 119.]

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| 1. Validity in general. | 9. Contracts with carriers. |
| 2. Constitutionality. | 10. Contracts for sale of goods. |
| 3. Law in force. | 11. Exclusive franchise. |
| 4. Retroactive operation. | 12. Ordinance regulating billboards. |
| 5. Illegality of contract in general | 13. Reservation in dedicatory deed as to use of streets. |
| 6. Combinations prohibited. | 14. Indictment. |
| 7. Contract to engage in business. | |
| 8. Interstate commerce. | |

See Texas Cent. R. Co. v. Hannay-Frerichs & Co., 104 Tex. 603, 142 S. W. 1163, and notes under following article.

1. **Validity in general.**—The anti-trust acts of May 25, 1899 (Acts 1899, p. 246, c. 146), and March 31, 1903 (Acts 1903, p. 119, c. 94), held not indefinite and uncertain, but valid. *Waters-Pierce Oil Co. v. State*, 48 Civ. App. 162, 106 S. W. 918.

2. **Constitutionality.**—The Supreme Court has held that our former statutes on trusts and conspiracies against trade were constitutional. *Welch v. Windmill Co.*, 89 Tex. 653, 36 S. W. 71, citing *Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919; *Houck v. Association*, 88 Tex. 184, 30 S. W. 869.

It seems that the statute is not violative of the fourteenth amendment. *Texas Brewing Co. v. Anderson* (Civ. App.) 40 S. W. 737.

The law prohibiting combinations in restraint of trade is not obnoxious to the

fourteenth amendment to the United States constitution. *Waters-Pierce Oil Co. v. State*, 19 Civ. App. 1, 44 S. W. 936, affirmed by Supreme Court of the United States, Id., 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657.

This article is not violative of state or national constitution. *Texas Brewing Co. v. Durrum* (Civ. App.) 46 S. W. 880.

The act of 1899 (Acts 1899, p. 246, c. 146) was not rendered unconstitutional by the act of May 27, 1899, to protect workmen in the right of organization, etc. This latter act engrafts no exception upon the anti-trust act of 1899 (Acts 1899, p. 262, c. 153). *Waters-Pierce Oil Co. v. State*, 48 Civ. App. 162, 106 S. W. 926. Affirmed by Supreme Court of the United States, and statute held not unconstitutional, as retroactive, as denying due process of law, or as imposing excessive punishment. Id., 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417.

3. Law in force.—The sections of this and the act of 1899 (Acts 1899, p. 246, c. 146) providing penalties are penal, but cases prosecuted under them for the penalties are not criminal but civil and articles 238, 239, C. C. P., relating to limitation, do not apply in a civil action to recover the penalties. *Waters-Pierce Oil Co. v. State*, 48 Civ. App. 162, 106 S. W. 926.

The proviso in this act as to repeal preserved whatever rights the state had under the act of 1899 (Acts 1899, p. 246, c. 146), including the rights to enforce the penalties prescribed by that act. Id.

The repealing clause of this law repeals that part of the law of 1899 (Acts 1899, p. 246, c. 146) wherein the attorneys for the state are allowed as fees one-fourth of the penalties collected. *State v. Brady*, 102 Tex. 408, 118 S. W. 128-131, reversing (Civ. App.) 114 S. W. 896.

4. Retroactive operation.—This act has no retroactive effect so as to affect contracts previously entered into and executed. *Crump v. Ligon*, 37 Civ. App. 172, 84 S. W. 251.

Where a combination in restraint of trade is formed before the anti-trust law is passed, it can be restrained after the law is enacted and those guilty of carrying out the contract punished. *State v. M., K. & T. Ry. Co.*, 99 Tex. 516, 91 S. W. 215, 5 L. R. A. (N. S.) 783, 13 Ann. Cas. 1072.

5. Illegality of contract in general.—See article 1465, and notes.

The fact that a part of the account between the parties was due, and stated when a contract was made between them which was invalid under this and article 1456, and which stipulates for the payment of the account stated, would not save such part of the contract from being illegal and unenforceable so as to permit recovery of such amount; all items of the illegal contract being invalid. *J. R. Watkins Medical Co. v. Johnson* (Civ. App.) 162 S. W. 394.

6. Combinations prohibited.—Persons may, without malice toward any one, and for the lawful purpose of protecting each other from dishonest or insolvent customers, and otherwise actually assisting each other in the conduct of their business, agree that each, upon the request of the other, would refuse to deal with any person. *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755; *Delz v. Winfree*, 25 S. W. 50, 6 Civ. App. 11.

There must be a "combination"—a union or association of capital, skill or acts. *Gates v. Hooper*, 90 Tex. 563, 39 S. W. 1079. See *Queen Ins. Co. v. State*, 86 Tex. 264, 24 S. W. 397, 22 L. R. A. 483; *Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919; *Welch v. Windmill Co.*, 89 Tex. 653, 36 S. W. 71; *Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27; *Fuqua v. Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241.

Equity will not compel an accounting between partners for profits growing out of an illegal contract to restrict trade, etc. *Wiggins v. Bisso*, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837.

If the combination was made and its object was to restrain trade and create a monopoly, the statute denounces it no matter if the immediate result is to lower prices. The object of the law is to guard the commerce and trade of the state. The getting of a city ordinance enacted by a city council extending the lives of corporations for a long period is a circumstance which may be shown to prove a conspiracy against trade. Although a party may not be alleged to be in the conspiracy, yet when the facts establish a conspiracy and show that he was a party to it, his acts and declarations made to further the common design can be shown. *San Antonio Gas Co. v. State*, 22 Civ. App. 118, 54 S. W. 289.

Where an agreement in violation of the anti-trust law has been made, and one party thereto pursues the course of conduct agreed on, the law presumes that the acts done by him were the result of the agreement and of entering into it, so that the parties thereto are liable as aiders and abettors and are responsible for the acts of each and all within this article. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

A combination in violation of the anti-trust statute is void, irrespective of the common-law distinction between restrictions on trade which are reasonable and those which are unreasonable. *Crandall v. Scott* (Civ. App.) 161 S. W. 925.

A contract to purchase patent medicines from plaintiff at wholesale to be sold at the regular retail prices in a certain part of the county except within cities, which also provided that the buyer would sell no other goods during the term of contract except those procured from plaintiff and would sell them only to customers at their residences in the district prescribed, violated this and article 1456; being an attempt to combine the capital, skill, etc., of the parties to maintain a standard of prices and prevent competition in the territory fixed. *J. R. Watkins Medical Co. v. Johnson* (Civ. App.) 162 S. W. 394.

7. Contract not to engage in business.—A promise by a merchant to the purchaser of his stock to retire from business in the town for one year does not constitute a trust. *Gates v. Hooper*, 90 Tex. 563, 39 S. W. 1079.

An agreement not to engage in a particular business for two years is not in

violation of the trust law, or against trade. *Erwin v. Hayden* (Civ. App.) 43 S. W. 610.

An agreement that if defendant ceased to teach music in plaintiff's school that he would not teach in a certain town is a binding contract and is not in violation of the foregoing article. *Patterson v. Crabb* (Civ. App.) 51 S. W. 870.

A contract of seller, on the sale of merchandise and goods to refrain from such business for twenty years within the county in which the sale is made, is not invalid as an unreasonable restraint of trade. *Tobler v. Austin*, 22 Civ. App. 99, 53 S. W. 706.

An agreement by a doctor not to practice his profession within ten miles of a certain town for ten years is not void, as against public policy, at common law, and is not in conflict with the law to prevent a combination in restraint of trade. *Wolff v. Hirschfeld*, 57 S. W. 572, 23 Civ. App. 670.

An agreement by an owner, on sale of his business and good will, not to re-enter such business within a specified time at a certain place, is not void as in restraint of trade. *Comer v. Burton-Lingo Co.*, 24 Civ. App. 251, 58 S. W. 969.

This law does not apply when one sells his business and good will to a single person or firm on condition that the purchaser will not engage in the same kind of business for a limited time at a specified place. It prohibits any combination having for its purpose the doing of either of the things specified, without regard to the intention of the parties or of the immediate effect of the combination on trade and commerce. *Id.*

A promise by a partner to his copartner, purchasing the business of the firm, not to engage in such business in that town so long as the copartner remains in the business in the town, is not void as in restraint of trade, at common law. *Crump v. Ligon*, 84 S. W. 250, 37 Civ. App. 172.

An agreement by the seller of a cotton gin and gristmill not to re-engage in that business so long as the purchasers operated it was not in violation of this article. *Malakoff Gin Co. v. Riddlesperger* (Civ. App.) 133 S. W. 519.

Plaintiff and two other concerns, who conducted a moving picture business in the town, made an agreement by which the others gave notes to plaintiff in consideration of plaintiff stopping business and agreeing that no showhouse except the two owned by the makers should open in the town before a certain time, and that if a showhouse of a certain standard should open within the time and run for six months, all of the notes maturing after the opening of the house should be void, and that if a showhouse should open and run for less than such period, the notes should be void for the time it was conducted. Held, that the contract was in violation of the Anti-Trust Act and void. *Crandall v. Scott* (Civ. App.) 161 S. W. 925.

8. Interstate commerce.—Where manufacturers in another state sell to dealers in Texas on an order from the latter, and the goods are delivered in Texas on a contract on the part of the sellers not to sell similar goods to any one in a named county for a specified time except the purchasers of the bill it is an interstate transaction and the Texas anti-trust laws do not apply. *Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co.*, 55 Civ. App. 553, 120 S. W. 533.

Where goods sold and contemplated to be sold under a contract in restraint of trade were to be shipped from a sister state to Texas and there mingled with other goods of the buyer in Texas to become a part of the buyer's stock and to be there sold at retail, and the contract was made with the knowledge and purpose and intent of all the parties thereto that that should be done, the parties were liable for a violation of this article, as against the objection that the transaction was interstate commerce. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

A petition, in an action by the state against a foreign corporation for a violation of the anti-trust act of 1903 (Acts 1903, c. 94), which alleged that the foreign corporation was a manufacturer of farming implements and vehicles; that it contracted with a dealer in the state in such articles to give him the exclusive sale of its goods, the latter agreeing not to buy or sell any other makes of like goods; that the foreign corporation had traveling salesmen soliciting business throughout the state; that the contract was signed by one of the salesmen; and that the foreign corporation was a wholesale dealer in farming implements and vehicles—was sufficient as against a general demurrer to show that it was the purpose of the foreign corporation to sell goods under the contract at the residence of the dealer in Texas, and that it was its purpose that the contract should be carried into effect in Texas, so that the transaction was not interstate commerce, but was subject to the state anti-trust laws. *Id.*

The fact that the sale of goods by a citizen of another state to a citizen of Texas under a contract which violated the Anti-Trust Act also constituted interstate commerce would not prevent the Anti-Trust Act from applying to invalidate the contract and prevent a recovery thereon. *J. R. Watkins Medical Co. v. Johnson* (Civ. App.) 162 S. W. 394.

9. Contracts with carriers.—A contract of railroad company to ship 66 per cent. of output of salt of a company at as low rate as any other company held not void as against public policy. *Texas & P. Ry. Co. v. Texas Short Line Ry. Co.*, 35 Civ. App. 387, 80 S. W. 567.

A railroad company has the right to give one person the privilege of soliciting on its trains the transfer business of the passengers on such trains, and to exclude another from engaging in the same business on its trains. By so doing it does not violate the anti-trust law. *Lewis v. W. M. W. & N. W. Ry. Co.*, 36 Civ. App. 48, 81 S. W. 112, 113.

A contract between a railway company and a sleeping car company, whereby the former grants the latter the exclusive right to furnish sleeping cars to be used on the railway company, and on all lines controlled by it, and all roads which it might subsequently acquire or operate, is not in restraint of trade and does not

violate the anti-trust law. *Ft. Worth & D. C. Ry. Co. v. State*, 99 Tex. 34, 87 S. W. 341, 70 L. R. A. 950.

Vernon's Sayles' Civ. St. 1914, art. 6616 authorizes express companies to pursue their business on all the railways controlled by state legislation with equal and reasonable facilities and accommodations and upon equal and reasonable rates, and any combination of the kind denounced by the anti-trust statute, the carrying out of which would limit or narrow such scope, is necessarily one to create or carry out a restriction in the free pursuit of the business. Hence an agreement by a railroad company to give one express company "exclusive privileges" and bound itself not to contract with other express companies to do an express business on its road violates this article. *State v. M., K. & T. Ry. Co.*, 99 Tex. 516, 91 S. W. 215, 5 L. R. A. (N. S.) 783, 13 Ann. Cas. 1072.

An agreement between carriers and associations and citizens of a city binding the carriers to sell excursion tickets at a special low rate for certain occasions held not to contravene the state or federal anti-trust laws. *Lyle v. Galveston, H. & S. A. Ry. Co.*, 100 Tex. 292, 99 S. W. 396, 10 L. R. A. (N. S.) 437.

10. Contracts for sale of goods.—Under this article a petition, which alleges that a manufacturer of farm implements and vehicles entered into a contract with a dealer therein whereby the manufacturer agreed to give the dealer the exclusive sale of its product, and whereby the dealer agreed not to buy or sell any other makes of like goods, and that the manufacturer and dealer carried the contract into execution to the injury of the people, charges a violation. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

An agreement whereby plaintiff was to give defendant the sole and exclusive right to sell certain automobiles and supplies in a fixed territory for a given length of time is not in violation of this article defining a trust as a combination of capital, skill, or acts by two or more persons for specified purposes; there being no combination in this case. *Nickels v. Prewitt Auto Co.* (Civ. App.) 149 S. W. 1094.

A contract for sale of goods by a manufacturer to a retailer, he agreeing to sell none other than its products, and to have no other business, is invalid as creating a trust, defined by Vernon's Sayles' Civ. St. 1914, art. 7796, as a combination of capital, skill, or acts by two or more to prevent competition. *Armstrong v. W. T. Rawleigh Medical Co.* (Civ. App.) 178 S. W. 582.

11. Exclusive franchise.—A city held not to have express or implied power to grant to a waterworks company an exclusive franchise to furnish water to the city for thirty years. *Ennis Waterworks v. City of Ennis* (Civ. App.) 136 S. W. 513.

12. Ordinance regulating billboards.—The anti-trust laws have no application to the questions raised in a proceeding to test the constitutionality of an ordinance regulating the size, location, and construction of billboards. *Ex parte Savage*, 63 App. 285, 141 S. W. 244, Ann. Cas. 1913D, 951.

13. Reservation in dedicating deed as to use of streets.—A reservation in dedicatory deeds of the right in the grantors to the exclusive use of the streets and alleys so dedicated for the maintenance of street railroads, lighting, sewers, gas, telephones, etc., held contrary to public policy, as tending to create a monopoly. *Jones v. Carter*, 45 Civ. App. 450, 101 S. W. 514.

14. Indictment.—Willson's Cr. Forms, 707-710b.

Art. 1455. "Monopoly" defined.—A "monopoly" is a combination or consolidation of two or more corporations when effected in either of the following methods:

1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first section of this chapter.

2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise. [*Id.*; Act 1903, p. 120.]

What are monopolies.—A monopoly is not only an exclusive right granted by the state to a few of something which was before of common right, but embraces a combination, regardless of form, the tendency of which is to prevent competition and control prices to the detriment of the public. *Jones v. Carter*, 45 Civ. App. 450, 101 S. W. 514.

Municipal ordinance regulating the size, location, and construction of billboards held not in conflict with Const. art. 1, § 26, prohibiting monopolies. *Ex parte Savage*, 63 App. 285, 141 S. W. 244, Ann. Cas. 1913D, 951.

Where neither party to a contract giving an exclusive selling agency in specified territory was a corporation, and there being no evidence of a combination or consolidation, the agreement was not in violation of this article. *Nickels v. Prewitt Auto Co.* (Civ. App.) 149 S. W. 1094.

Indictment.—Willson's Cr. Forms, 707, 710, 710a, 710b.

Art. 1456. "Conspiracy in restraint of trade" defined.—Either or any of the following acts shall constitute a conspiracy in restraint of trade:

1. Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.

2. Where any two or more persons, firms, corporations or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons. [Id.]

See notes under articles 1454, ante, and 1471, post.

Constitutionality.—Acts March 30, 1889, and April 30, 1895, prohibiting combinations in restraint of trade, held not a violation of Const. U. S. Amend. 14. *Waters-Pierce Oil Co. v. State*, 19 Civ. App. 1, 44 S. W. 936.

Conspiracy defined.—A "conspiracy," within this article, is a combination between two or more persons to do an unlawful act or to do a lawful thing in an unlawful manner. *State v. Racine Sattley Co. (Civ. App.)* 134 S. W. 400.

Restraint of trade.—Trade as used in the statute is synonymous with traffic—the buying and selling of articles of commerce. The term does not include an occupation or employment. *Queen Ins. Co. v. State*, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483.

Any combination in restraint of trade is unlawful. The prohibition applies to every article of usual and general consumption and of daily use among the people, and this is a matter of common knowledge. *Anheuser-Busch Brewing Ass'n v. Houck (Civ. App.)* 27 S. W. 692; *Houck v. Anheuser-Busch Brewing Ass'n*, 88 Tex. 184, 30 S. W. 869.

A combination which operates to create and carry out restrictions in trade and to prevent competition is within the statute. *Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919; *Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27; *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241.

A contract between A. and B., by which A. agrees not to sell any beer other than that furnished by or with the consent of B. and B. agrees to sell to no other person at two towns at which A. carries on his business, is prohibited by this statute. *Texas Brewing Co. v. Anderson (Civ. App.)* 40 S. W. 737.

A covenant by a grantor not to allow the sale of intoxicating liquors in the same block, held not void as in restraint of trade. *Anderson v. Rowland*, 18 Civ. App. 460, 44 S. W. 911.

An agreement to sell only a certain product made by the buyer in consideration that the seller would sell to no other person in a certain town is in restraint of trade and prohibited. *Texas Brewing Co. v. Durrum (Civ. App.)* 46 S. W. 880.

A contract by which a patentee grants to a licensee the exclusive right to build, weave, and construct wire fences in specified territory, and which binds the licensee to purchase the wire, pickets, and fence machines from the patentee, does not violate the statute against trusts. *Clark v. Cyclone Woven Wire Fence Co.*, 22 Civ. App. 41, 54 S. W. 392.

A contract between a foreign corporation, and a citizen of Texas, which gives the latter the exclusive right to sell goods of the former in Texas and that provides that the purchaser will not buy from anyone, except said corporation, such goods, and that the said goods shall not be used or sold or otherwise disposed of by the purchaser outside of a certain territory is contrary to law and void. *Pasteur Vaccine Co. v. Burkey*, 22 Civ. App. 232, 54 S. W. 804.

Under statute avoiding contracts against trade, a broker may not recover for services in securing an agreement between competitors to maintain prices. *Street v. Houston Ice & Brewing Co. (Civ. App.)* 55 S. W. 516.

An agreement not to sell beer to anyone else than the person to whom the sale was made within a certain designated territory, contributory to his place of business does not violate the anti-trust law. *Vandeweghe v. Am. Brewing Co. (Civ. App.)* 61 S. W. 527.

An agreement of a manufacturer with a dealer not to sell vehicles to any other person within a certain territory violates the anti-trust law and is void. *Troy Buggy Works Co. v. Fife & Miller (Civ. App.)* 74 S. W. 956.

Where the contract was that the retailer would handle the goods of wholesaler exclusively except so far as he might purchase cheaper or inferior class of tin goods and that the wholesaler would not sell to anyone else in retailer's city, so that the latter should have exclusive control of retail business in the city in certain lines, it violated this law and was therefore void. *Simmons & Co. v. Terry (Civ. App.)* 79 S. W. 1103.

A contract of sale and purchase entered into by two parties wherein the seller agrees not to sell the same kind of goods in three specified cities until the purchaser had disposed of the goods bought from the seller is not in violation of the anti-trust law (Acts 1899, p. 246, c. 146), and the notes given by the purchaser for the goods are not uncollectible under that act. *Norton v. W. H. Thomas & Co.*, 99 Tex. 578, 91 S. W. 780; *Id. (Civ. App.)* 93 S. W. 712.

An agreement by a photographer to furnish a grocer trading tickets each entitling the holder to a photo art calendar when presented countersigned by the grocer, and not to sell any other local grocer such tickets does not violate this law. *Forrest Photographic Co. v. Hutchinson Grocery Co.* (Civ. App.) 108 S. W. 768.

A contract wherein it is agreed that a purchaser shall have the exclusive right to sell a certain article in a certain described territory is illegal and void. *Gust Feist Co. v. Albertype Co.* (Civ. App.) 109 S. W. 1140.

A contract whereby the owner of a plantation gives another the exclusive right to sell merchandise on his premises does not violate this law because the right to sell upon the premises of another is not given by law, but by consent of the owner. *Redland Fruit Co. v. Sargent*, 51 Civ. App. 619, 113 S. W. 330.

A manufacturer in another state sold souvenir albums to firm in Galveston and agreed not to sell to any one else in Galveston for the period of one year. This contract did not violate this law. *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S. W. 792.

A contract between the owner of goods and another, whereby such other person was to deal with the goods for one year and then turn them back to the owner, held not void as against public policy. *Holder v. Shelby* (Civ. App.) 118 S. W. 590.

A lease of saloon property binding the lessor not to lease other property in the same street to others for the same business is not invalid under this article. *Wheatley v. Kollaer* (Civ. App.) 133 S. W. 903.

Under this article, restrictions in trade are prohibited without regard to their immediate effect on trade. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

Where an agreement in violation of the anti-trust law of 1903 (Acts 1903, c. 94) has been made, and one party pursues the course of conduct agreed on, the law presumes that the acts done by him were the result of the agreement, so that the parties thereto are liable. *Id.*

Under this article a contract between plaintiff and defendant grain dealers, whereby plaintiff agreed not to buy grain from the growers thereof or from curb-stone brokers or other persons not regularly engaged in the grain business was void as contravening the statute. *Star Mill & E. Co. v. Ft. Worth Grain & E. Co.* (Civ. App.) 146 S. W. 604.

Evidence in an action by one grain dealer against another for breach of a contract to sell and deliver oats to plaintiff held to show that the contract bound plaintiff not to buy grain from the growers or other persons not regularly engaged in the grain business. *Id.*

Where neither party to the contract was engaged in buying or selling automobiles or any other article of merchandise, a contract whereby plaintiff gave defendant the exclusive right to sell certain machines and supplies in a designated locality for a given length of time is not in violation of this article. *Nickels v. Prewitt Auto Co.* (Civ. App.) 149 S. W. 1094.

Acts of defendant, a dealer in eggs, in writing to the express company which employed plaintiff, and whose rules forbade him to engage in such business on his own account, resulting in stopping plaintiff's personal activity in such business, and reducing his profits and in his final discharge, without malice or interference with his customers, held proper competition, and not actionable as an interference with plaintiff's business. *Swift & Co. v. Allen* (Civ. App.) 151 S. W. 645.

A contract giving plaintiff the exclusive right to bottle "Jersey-Creme," a drink, in a certain part of the country, by which the plaintiff agreed to use defendant's copyrighted labels and bottles and to buy the syrup for making such drink from the defendant, was a "conspiracy in restraint of trade" within the article; the bottles and labels being only incidentals, and "Jersey-Creme" being a "commodity" or "article of merchandise," and since it indirectly conferred upon appellee the exclusive right to purchase and resell the syrup. *Jersey-Creme Co. v. McDaniel Bros. Bottling Co.* (Civ. App.) 152 S. W. 1187.

A contract whereby a retail ice dealer agreed to purchase all of his ice from a certain manufacturer and wholesaler so long as the latter could supply his demands, and the wholesaler agreed to sell a certain quantity and as much more as possible to the retailer at a fixed price, unless the market price should go below that, when the market price should prevail, is contrary to subdivision 1 of this article, it not being necessary that the agreement be to refuse both to buy and sell. *Wood v. Texas Ice & Cold Storage Co.* (Civ. App.) 171 S. W. 497.

The fact that the retailer was to receive the benefit of the market price, whatever it might be, does not render the contract lawful, since the intent of the parties and the actual effect of the contract cannot save it if it is illegal under the terms of the act. *Wood v. Texas Ice & Cold Storage Co.* (Civ. App.) 171 S. W. 497.

The fact that one of the parties was a wholesaler and the other a retailer takes the contract out of the statute. *Wood v. Texas Ice & Cold Storage Co.* (Civ. App.) 171 S. W. 497.

Indictment.—Willson's Cr. Forms, 707, 710-710b.

Art. 1457. Trusts, monopolies and conspiracies in restraint of trade prohibited.—Any and all trusts, monopolies and conspiracies in restraint of trade, as herein defined, are hereby prohibited and declared to be illegal. [Id.; Act 1903, p. 121.]

Indictment.—Willson's Cr. Forms, 710-710b.

Art. 1458. Corporations forfeit charter for violation of this law.—Any corporation holding a charter under the laws of the state of Texas, which shall violate any of the provisions of this chapter,

shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine. [Id.]

Explanatory.—At the time the above provision was carried into the revised Penal Code of 1911, it had been amended by Act 1909, p. 281. In view of the decision in *Stevens v. State*, 70 App. 565, 159 S. W. 505, the amendatory act is included in this compilation, and is set out below:

Attorney general to institute quo warranto proceedings.—For a violation of any of the provisions of this chapter, or any anti-trust laws of this state, by any corporation, it shall be the duty of the attorney general, upon his motion and without leave or order of any judge or court, to institute suit or quo warranto proceedings in Travis county, or at the county seat of any county in the state which the attorney general may select, for the forfeiture of its charter rights and franchises, and the dissolution of its corporate existence; and for such purposes, venue is hereby given to each district court in the state of Texas. [Id.; Act 1903, p. 121. Amended Acts 1909, p. 281.]

Validity.—That anti-trust statutes have no application to interstate commerce held not to affect the power of the court to apply them to domestic commerce, so as to forfeit permit of foreign corporation for violation thereof. *Waters-Pierce Oil Co. v. State*, 19 Civ. App. 1, 44 S. W. 936, affirmed by U. S. Supreme Court, Id., 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657.

The (anti-trust) law tested by the decision of the United States (in the Connolly Case) is valid to the extent that it authorizes the state to revoke the license of a foreign corporation or to forfeit the charter of a domestic corporation for acts done which are forbidden by the anti-trust law. *State v. Shippers' Compress & Warehouse Co.*, 95 Tex. 603, 69 S. W. 61.

Forfeiture of charters for violation of law.—The purchase of six cotton compresses by a cotton compress company on one day held not to show that the object of incorporation was to do a lawful act to effect an unlawful purpose,—the restraint of trade. *State v. Shippers' Compress & Warehouse Co.*, 95 Tex. 603, 69 S. W. 58.

— **Evidence.**—Evidence in action for violation of anti-trust law held sufficient to connect corporation therewith. *Waters-Pierce Oil Co. v. State*, 19 Civ. App. 1, 44 S. W. 936.

The charter of a compress company, incorporated for constructing, purchasing, and maintaining cotton compresses in various counties of the state, held not subject to forfeiture, under the evidence, on the ground that its incorporation was procured for creating a monopoly in compressing cotton. *State v. Shippers' Compress & Warehouse Co.* (Civ. App.) 67 S. W. 1049.

Indictment.—Willson's Cr. Forms, 710-710b.

Art. 1459. Duty of attorney general.—For a violation of any of the provisions of this chapter by any corporation mentioned herein, it shall be the duty of the attorney general, upon his own motion, and without leave or order of any judge or court, to institute suit or quo warranto proceedings in Travis county, at Austin, or at the county seat of any county in the state, where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence. [Id.; Act 1903, p. 121.]

Indictment.—Willson's Cr. Forms, 710-710b.

Art. 1460. When corporation of this state has forfeited its charter, no other corporation to which property of defaulting corporation has been transferred shall be incorporated or be permitted to do business in this state.—When a corporation, organized under the laws of this state, shall have been convicted of a violation of any of the provisions of this chapter, and its charter and franchise has been forfeited, as provided in article 1458, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas. [Id.]

Indictment.—Willson's Cr. Forms, 710-710b.

Art. 1461. Foreign corporation violating this law forbidden to do business.—Every foreign corporation violating any of the provisions of this chapter is hereby denied the right, and is prohibited

from doing any business within this state; and it shall be the duty of the attorney general to enforce this provision by injunction or other proceedings in the district court of Travis county, in the name of the state of Texas. [Id.]

In general.—The courts of Texas have the power of interpretation of the statutes of Texas. What they say the statutes of that state mean, we must accept them to mean, whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657.

A corporation is the creature of the law and none of its powers are original. They are precisely what the incorporating act has made them and can only be exerted in the manner in which that act authorizes. In other words, the state prescribed the purposes of a corporation and the means of executing those purposes. Purposes and means are within the state's control. This is true as to domestic corporations. It has even a broader application to foreign corporations. *Id.*

The charter of a corporation confers its powers and the means of executing them, and such powers and means can only be exercised in other states by the permission of the latter. *Id.*

Having no absolute right of recognition in other states, but depending for such recognition and enforcement of its contract upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion. *Id.*

A corporation does not have the rights of its personal members and cannot invoke that provision of section 2, article 4, of the Constitution of the United States which gives to the citizens of each state the privileges and immunities of citizens of the several states. The statute of 1889 therefore was a condition upon the plaintiff in error (the *Waters-Pierce Oil Company*), within the power of the state to impose, and whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it. The statute was not repealed by the statute of 1895. The only substantial addition made by the latter was to exclude from its provisions organizations of laborers for the purpose of maintaining a standard of wages. *Id.*

The act of 1895 is either constitutional or unconstitutional. If it is constitutional the plaintiff in error (the *Waters-Pierce Oil Company*) has no right to complain of it. If unconstitutional it does not affect the act of 1889, and that imposes valid conditions upon the plaintiff in error, and their violation subjected its permit to do business in the state to forfeiture. *Id.*

Foreign corporation held no less responsible for infraction of anti-trust law by its agent because in so doing the agent's acts involved a criminal responsibility. *Waters-Pierce Oil Co. v. State*, 19 Civ. App. 1, 44 S. W. 936, affirmed by U. S. Supreme Court, *Id.*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657.

So much of the anti-trust statutes of 1889 and 1899 as authorize the cancellation and forfeiture of a charter or of permit to do business within the state is constitutional and valid. *National Cotton Oil Co. v. State* (Civ. App.) 72 S. W. 615, affirmed by U. S. Supreme Court, *Id.*, 197 U. S. 115, 25 Sup. Ct. 379, 49 L. Ed. 689.

Art. 1462. Quo warranto proceedings.—The provisions of the Revised Statutes of this state, prescribing the remedy and regulating the proceedings by quo warranto, etc., shall, except in so far as they conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this chapter. [Id.]

See Willson's Cr. Forms, 710-710b.

Art. 1463. Foreign corporations convicted of violating this law, no other corporation to which the defaulting corporation has transferred its business or property shall be permitted to incorporate or do business in this state.—When any foreign corporation has been convicted of a violation of any of the provisions of this chapter, and its right to do business in this state has been forfeited, as provided in article 1461, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas. [Id.]

See Willson's Cr. Forms, 710-710b.

Art. 1464. Penalty may be recovered for violating this law.—Each and every firm, person, corporation or association of persons, who shall in any manner violate any of the provisions of this chapter, shall, for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars.

which may be recovered in the name of the state of Texas in any county where the offense is committed or where either of the offenders reside, or in Travis county; and it shall be the duty of the attorney general, or the district or county attorney under the direction of the attorney general, to prosecute for the recovery of the same; and the fees of the prosecuting attorney for representing the state in proceedings under this chapter shall be over and above the fees allowed him under the general fee bill. [Id.]

Explanatory.—At the time the above provision was inserted in the revised Penal Code it had been amended by Act 1909, p. 281. In view of the decision in *Stevens v. State*, 70 App. 565, 159 S. W. 505, the amendatory act is included in this compilation, and is set out below:

Penalties; venue; fees of attorney general.—Each and every firm, person, corporation or association of persons, who shall in any manner violate the provisions of this chapter, shall, for each and every day that such violation shall be committed or continued, forfeit and pay a sum of not less than fifty nor more than fifteen hundred dollars, which may be recovered in the name of the state of Texas in the district court of any county in the state of Texas, and venue is hereby given to such district courts; provided, that when any such suit shall have been filed in any county and jurisdiction thereof acquired, it shall not be transferred to any other county, except upon change of venue allowed by the court; and it shall be the duty of the attorney general, or the district or county attorney under the direction of the attorney general, to prosecute for the recovery of the same; and the fees of the district or county attorney for representing the state in all anti-trust proceedings, or for the collection of penalties for the violation of the anti-trust laws of this state, shall be ten per cent of the amount collected up to and including the sum of fifty thousand dollars, and five per cent on all sums in excess of the first fifty thousand dollars, to be retained by him when collected; and all such fees which he may collect shall be over and above the fees allowed under the general fee bill; provided, that the provisions of this chapter as to the fees allowed the prosecuting attorney shall not apply to any case in which judgment has heretofore been rendered in any court, nor to any moneys to be hereafter collected upon any such judgment heretofore rendered in any court, whether such judgment or judgments are pending upon appeal or otherwise; and provided, further, that the district or county attorney who joins in the institution or prosecution of any suit for the recovery of penalties for a violation of any of the anti-trust laws of this state, who shall, previous to the collection of such penalties, cease to hold office, he shall be entitled to an equal division with his successor of the fee collected in said cause; and in case of the employment of special counsel by any such district or county attorney, the contract so made shall be binding upon such prosecuting officer making such contract and thereafter retiring from office; provided, further, that in case any suit is compromised before any final judgment in the trial court is had, then the fees herein provided for shall be reduced one-half. [Id., Act 1903, p. 121, § 11. Amended Act 1909, p. 281.]

See Willson's Cr. Forms, 710-710b.

Repeal of law.—The anti-trust law of 1903 (Gen. Laws, p. 119, c. 94) does not repeal the provision of the anti-trust act of 1899 (Acts 1899, p. 246, c. 146), giving the county attorney a fee of 25 per cent. of penalties recovered for violations of the latter law before this law took effect. *State v. Brady* (Civ. App.) 114 S. W. 896, reversed 102 T. 408, 118 S. W. 128.

Ground of action.—Where an action is brought to recover a penalty allowed by the anti-trust statutes of Texas, held, that no right of the state to the penalties could be based on the ground that the contract created a monopoly at common law or was in violation of the anti-trust statutes of the United States. *Ft. Worth & D. C. Ry. Co. v. State* (Civ. App.) 88 S. W. 370.

In an action by the state for the penalty prescribed by this article, the fact that the petition annexes, as an exhibit, the contract relied on, which contains

blanks which could not be filled by parol evidence in a suit between the parties thereto will not render the petition bad; the making of the contract, and not the contract itself, being the foundation of the suit, so that, the contract being merely evidence, it is immaterial that it only supports the petition in part. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

Inquiry as to offense.—While the language of this statute is imperative, it necessarily implies that before the officer acts he must look into the facts and find not only that there is ground to believe that an offense has been committed but that enough evidence to a successful prosecution can be procured. *Lewright v. Bell*, 94 Tex. 556, 63 S. W. 623.

Verdict.—The verdict (\$1,623,900) is not so large, being under the maximum permitted by law, as to render it manifest that the jury were actuated by prejudice or other improper motives. *Waters-Pierce Oil Co. v. State*, 48 Civ. App. 162, 106 S. W. 926.

Art. 1465. Contract in violation of provisions of this law void.—Any contract or agreement in violation of the provisions of this chapter shall be absolutely void and not enforceable either in law or equity. [Id.; Act 1903, p. 122.]

See notes under article 1454, ante.

Validity of contracts.—Contract of insurance held valid, though insured is a member of a trust. *Springfield Fire & Marine Ins. Co. v. Cannon* (Civ. App.) 46 S. W. 375.

Indebtedness for hydrant rentals, under contract with the assignee of the vendee of the city's waterworks, held not void because the franchise granted to the vendee created a monopoly. *City of Tyler v. L. L. Jester & Co.* (Civ. App.) 74 S. W. 359.

Right of action for breach of contract.—Contract by which defendant was to sell no other goods than those of plaintiff held in restraint of trade, so that plaintiff could not recover for goods furnished. *S. S. White Dental Mfg. Co. v. Hertzberg* (Civ. App.) 51 S. W. 355.

Defendant cannot recover on claim in reconvention for damages for breach of a contract which is violative of statute against monopolies. *Pasteur Vaccine Co. v. Burkey*, 23 Civ. App. 232, 54 S. W. 804.

A contract by the president and the teller of a bank to recover control of sufficient stock to secure the election of a satisfactory board of directors and their own re-election as officers, and to share the expense, is illegal, and expenses incurred thereunder by one cannot be recovered of the other. *Withers v. Edmonds*, 26 Civ. App. 189, 62 S. W. 795.

In view of this article the buyer could not maintain an action for damages for breach of a contract to sell grain which included provisions in restraint of trade contrary to the act. *Star Mill & E. Co. v. Ft. Worth Grain & E. Co.* (Civ. App.) 146 S. W. 604.

Judgment.—In an action on a note by a licensee, given in payment of property purchased under the license, where the licensee seeks a rescission on the ground of fraud and tenders property received under the license contract, he cannot complain of a judgment which requires him to return the property so tendered, even though contract is in violation of statute against trusts. *Clark v. Cyclone Woven-Wire Fence Co.*, 22 Civ. App. 41, 54 S. W. 392.

Art. 1466. Punishment for violating this law.—And, in addition to all other penalties and forfeitures herein provided for, every person violating the provisions of this chapter shall be further punished by imprisonment in the penitentiary not less than two nor more than ten years. [Id.; Act 1903, ch. 94, § 13; Act 1907, p. 194.]

See Willson's Cr. Forms, 710b.

Art. 1467. In prosecutions for violating this law, what evidence used.—In prosecutions for the violations of any of the provisions of this chapter, evidence that any person has acted as the agent of a corporation in the transaction of its business in this state shall be received as prima facie proof that his act in the name, behalf or interest of the corporation of which he was acting as the agent, was the act of the corporation. [Id.; Act 1903, p. 122.]

See Willson's Cr. Forms, 710b.

Art. 1468. Persons may be summoned and required to testify when, shall not be subject to indictment or prosecution.—Upon the application of the attorney general or of any of his assistants, or of any district or county attorney, acting under the direction of the attorney general, made to any county judge, or any justice of the peace, in this state, stating that he has reason to believe that a witness, who is to be found in the county in which such county judge or justice of the peace is an officer, knows of a violation of any of

the provisions of this chapter, it shall be the duty of the county judge, or of the justice of the peace, as the case may be, before whom such application is made, to have summoned and to have examined such witness in relation to violations of any of the provisions of this chapter, said witness to be summoned as provided for in criminal cases. The said witness shall be duly sworn; and the county judge, or justice of the peace, as the case may be, shall cause the statements of the witness to be reduced to writing and signed and sworn to before him; such sworn statement shall be delivered to the attorney general, his assistants, or the district or county attorney, upon whose application the witness was summoned. Should the witness summoned as aforesaid fail to appear, or to make statements of the facts within his knowledge, under oath, or to sign the same after it has been reduced to writing, he shall be guilty of contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned in the county jail until he shall make a full statement of all the facts within his knowledge with reference to the matter inquired about. Any person who shall testify before any county judge, or justice of the peace, as provided for in this chapter, or who shall testify as a witness for the state in the course of any statutory proceeding to secure testimony for the enforcement of this law, or in the course of any judicial proceeding to enforce the provisions of this chapter, shall not be subject to indictment or prosecution for any transaction, matter or thing concerning which he shall so give evidence, documentary or otherwise. [Act 1907, p. 221.]

See Willson's Cr. Forms, 710b.

Witnesses.—The provision in this section relating to the securing of testimony does not apply to an examination before a grand jury, or district court. It is confined to examinations before a justice of the peace. *Ex parte Andrews*, 51 App. 79, 160 S. W. 378. (This decision was rendered before the amendment was made.)

Art. 1469. Actions brought under this law have precedence.—All actions authorized and brought under this chapter shall have precedence, on motion of the prosecuting attorney or the attorney general, of all other business, civil and criminal, except criminal cases where the defendants are in jail. [Act 1903, p. 122.]

Art. 1470. Entering into agreement to form trust, monopoly, etc., penalty.—If any person shall enter into an agreement or understanding of any character to form a trust, or to form a monopoly, or to form a conspiracy in restraint of trade, as these offenses are defined in this chapter, or shall form a trust, monopoly or conspiracy in restraint of trade, or shall be a party to the formation of a trust or monopoly or conspiracy in restraint of trade, or shall become a party to a trust or monopoly or conspiracy in restraint of trade, or shall do any act in furtherance of or aid to such trust or monopoly or conspiracy in restraint of trade, he shall be punished by imprisonment in the penitentiary for a period of not less than two years nor more than ten years. [Act 1907, ch. 173, p. 322; Act 1907, p. 457.]

Indictment.—Willson's Cr. Forms, 708, 709, 710b.

Art. 1471. Person, member, agent, employé, etc., operating in violation of this law, penalty.—If any person shall, as a member, agent, employé, officer, director or stockholder of any business, firm, corporation or association of persons, form, in violation of the provisions of this chapter, or shall operate, in violation of the provisions of this chapter, any such business, firm, corporation or association formed in violation of this chapter, or shall make any sale, or purchase, or any other contract, or do business for such business, firm, corporation or association, or shall do any other act which has the

effect of violating or aiding in the violation of any of the provisions of this chapter, or shall, with the intent or purpose of driving out competition or for the purpose of financially injuring competitors, sell within this state at less than cost of manufacture or production, or sell in such a way or give away within this state, products for the purpose of driving out competition or financially injuring competitors engaged in a similar business, or give secret rebates on such purchase for the purpose aforesaid, he shall be punished by confinement in the penitentiary for a period of not less than two years nor more than ten years. [Id.]

Former law.—Article 981 of the old law, substituted by this chapter, which declares the parties who are amenable to, and the penalties for, a violation of the provisions of the law of trusts and conspiracies against trade, created two distinct characters of offenses: 1, as to all persons who may become engaged in the conspiracy or take part therein, or aid or advise in its commission; 2, as to all who shall, as principals, managers, directors, agents, servants or employes, or in any other capacity, knowingly carry out any of the stipulation, purposes, prices, rates or orders thereunder, or in pursuance thereof; that is, two or more persons may enter into the conspiracy originally, or others after the conspiracy is formed may enter into it, or after the conspiracy is formed any person not an original conspirator may knowingly serve as principal, manager, director, agent, servant or employé of the trust or combination in carrying out its purposes—and in each of such condition the party is amenable to, and liable under the law. *Hathaway v. State*, 36 App. 261, 36 S. W. 465. Compare this and the old article.

— **Indictment and proof thereunder.**—Willson's Cr. Forms, 710b.

Under the former statute Penal Code 1895, art. 976, relating to conspiracies against trade, proof that defendant was an agent without proof that he knew of the conspiracy is insufficient. *Hathaway v. State*, 36 App. 261, 36 S. W. 465.

When the indictment does not charge defendant as a principal or that he acted for the trust proof of such facts will not support a conviction. *Hathaway v. State*, 36 App. 261, 36 S. W. 465.

Art. 1472. Persons outside state liable to punishment, when.—If any person shall, outside of this state, do anything which, if done within this state, would constitute the formation of a trust or monopoly or conspiracy in the restraint of trade, as defined in this chapter, and shall cause or permit the trust or monopoly so formed by him to do business within this state, or shall cause or permit such trust, monopoly, or conspiracy in restraint of trade to have any operation or effect within this state, or, if such trust, monopoly or conspiracy in restraint of trade, having been formed outside of said state, any person shall give effect to such trust, monopoly or conspiracy in this state, or he shall do anything to help or aid it doing business in this state, or otherwise violate the anti-trust laws of this state, or if any person shall buy or sell or otherwise make contracts for or aid any business, firm, corporation or association of persons, formed or operated in violation of the provisions of this chapter, or so formed or operated as would be in violation of the laws of this state, if it had been formed within this state, shall be punished by confinement in the penitentiary for a period of not less than two years nor more than ten years. [Id.]

See Willson's Cr. Forms, 710b.

Art. 1473. Persons, etc., who have formed trusts, etc., penalty for.—If any person or employé or employes, or agent or agents, stockholder or stockholders, officer or officers of any person, firm, association of persons, or corporation, now doing business in this state, who have formed a trust, as defined in this chapter, or formed a monopoly, as defined in this chapter, or has formed a conspiracy in restraint of trade, as defined in this chapter, or shall do or perform any act of any character to carry out such trust, monopoly or conspiracy in restraint of trade, such person, employé or employes, agent or agents, stockholder or stockholders, officer or officers, shall be punished by confinement in the penitentiary for not less than two years nor more than ten years. [Id.; Act 1907, p. 458.]

See Willson's Cr. Forms, 710b.

See note under 1471, ante.

Art. 1474. Venue for criminal prosecutions under this law.—Criminal prosecutions under this chapter may be conducted in Travis county, Texas, or in any county in this state wherein a trust, monopoly, or conspiracy in restraint of trade is being carried on; a recovery or prosecution against any person for any violation of this act shall not bar a prosecution of or recovery against any other person or persons for the same offense. [Id.]

Art. 1475. District or county attorney may commence prosecution, shall notify attorney general.—Prosecutions under this chapter may be instituted and prosecuted by any county or district attorney of this state; and, when any such prosecutions have been instituted by any county or district attorney, such officer shall forthwith notify the attorney general of such fact; and it is hereby made the duty of the attorney general, when he shall receive such notice, to join such officer in such prosecution and do all in his power to secure the enforcement of this chapter. [Id.]

Art. 1476. Fee of district and county attorney.—For every conviction obtained under the provisions of this chapter, the state shall pay to the county or district attorney in such prosecution the sum of two hundred and fifty dollars; and, if both the county and district attorney shall serve together in such prosecution, such fee shall be divided between them as follows: One hundred dollars to the county attorney and one hundred and fifty dollars to the district attorney. [Id.]

Art. 1477. Agricultural products and live stock in hands of producer exempt.—The provisions of this law shall not apply to agricultural products or live stock while in the hands of the producer or raiser; and it shall be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor, and personal service, in their respective pursuits and employments. [Act 1899, p. 262.]

Art. 1478. Trade unions, etc., exempt when.—And it shall not be held unlawful for any member or members of such trades union or other organization or association, or any other person, to induce or attempt to induce, by peaceable and lawful means, any person to accept any particular employment, or quit or relinquish any particular employment in which such person may then be engaged, or to enter any pursuit, or refuse to enter any pursuit, or quit or relinquish any pursuit, in which such person may then be engaged; provided, that such member or members shall not have the right to invade or trespass upon the premises of another without the consent of the owner thereof. [Id., p. 262.]

Art. 1479. Preceding article not to apply to combination, etc.—The foregoing article shall not be held to apply to any combination or combinations, association or associations of capital, or capital and persons, natural or artificial, formed for the purpose of limiting the production or consumption of labor's products, or for any other purpose in restraint of trade; provided, that nothing herein contained shall be held to interfere with the terms and conditions of private contract with regard to the time of service, or other stipulations between employers and employes; provided, further, that nothing herein contained shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies. [Id., p. 262.]

CHAPTER SEVEN

THEATERS, ETC.—PROHIBITING DISCRIMINATION BETWEEN PERSONS DESIRING TO LEASE SAME

<p>Art. 1480. "Public houses of amusement" defined and subject to regulations.</p> <p>1481. Owner, lessee, manager of, discriminating against reputable theaters, operas, etc., penalty for.</p>	<p>Art. 1482. Shall keep a list of all bookings of shows for inspection of whom.</p> <p>1483. Leases of houses of public amusement shall contain what, penalty for violation.</p>
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Article 1480. "Public house of amusement" defined and subject to regulations.—All buildings constructed, fitted and equipped for the purpose of theaters, commonly called theaters, opera houses, play-houses, or by whatever name designated, which are and shall hereafter be used for public performances, the production and exhibition of plays, dramas, operas and other shows of whatever nature, to which admission fees are charged, be, and the same are hereby declared to be "public houses of amusement," and the same shall be subject to regulation by the public will as expressed by ordinance, statute, or other law; provided, that owners and lessees shall have the right to assign seats to patrons thereof, and to refuse admission to objectionable characters. [Act 1907, p. 21.]

Art. 1481. Owner, lessee, manager of, discriminating against reputable theaters, operas, etc., penalty for.—Hereafter it shall be unlawful for any owner, or lessee, or any manager, agent, employé or representative of the owner or lessee, who may be in charge and having the care and management of such house or houses of public amusement, to discriminate against reputable theaters, operas, shows or other productions by whatever name known. And any owner or lessee, or any manager, agent, employé, or representative of the owner or lessee, in charge of such house or houses, who shall fail and refuse to rent, lease and let such house or houses of public amusement, for one or more performances, and upon such terms and conditions as shall not be deemed unreasonable, extortionate or prohibitive, to the agent, manager, proprietor or representative, who may in good faith make application therefor, of any reputable theater, opera or show, by whatever name known, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of competent jurisdiction of this state, be fined in any sum not less than one hundred dollars nor more than five hundred dollars, one-half of which fine shall be paid to the complainant, the balance to go to the jury fund of the county in which such prosecution is had; and, in addition, such person or persons so convicted may be committed to the county jail for a period of not more than ten days. Each violation of any of the provisions of this chapter shall be a separate offense. Provided, however, that if, at the time of the application to lease or rent such house or houses of public amusement for said purposes, it shall be shown by the owner, lessee or other person in charge thereof that said house or houses of public amusement has or have been already leased, let or rented to other persons or parties, and that other bookings have in good faith been made for the date or dates so applied for, and that such leasing, renting, and bookings were made in good faith, and not with the intention of evading the provisions of this chapter, then, and in that instance, the penalties provided by this article shall not be imposed. [Id., p. 22.]

Art. 1482. Shall keep a list of all bookings of shows for inspection of whom.—Owners, lessees, managers or other persons in

charge of such house or houses of public amusement shall make and keep, in convenient form, a list of all bookings of shows for such house or houses, with the dates as to time specifically set out therein; and said list of bookings shall be exhibited, upon request, to all persons applying therefor, who, in good faith, desire to lease or rent such house or houses for the purposes indicated in article 1480; and the failure or refusal of such owner, lessee, or other person or persons in charge of such house or houses, to keep and exhibit such list of bookings as aforesaid, shall, upon conviction thereof, be fined in any sum not less than ten nor more than twenty dollars; and each failure or refusal to so exhibit such list of bookings shall be a separate and distinct offense. [Id., p. 22.]

Art. 1483. Leases of houses of public amusement shall contain what, penalty for violation.—All leases and renewals of leases, hereafter taken and made, for a term, upon such houses of public amusement, as defined in article 1480, shall contain a provision therein to the effect that the lessees and his assigns shall, in good faith, comply with the provisions of this law; and the failure or refusal of any such lessee or his assigns to comply with the provisions of this law shall at once terminate such lease, and, upon conviction of the violation of any provision of this law, such lessee or his assigns, in addition to the penalties provided in articles 1481 and 1482, shall forfeit his lease and all rights and privileges under the same. [Id., p. 22.]

CHAPTER EIGHT

CORPORATIONS—PERMITTING THE ATTORNEY GENERAL AND HIS REPRESENTATIVES TO EXAMINE BOOKS

<p>Art. 1484. Corporations doing business in this state, books, accounts, etc., subject to examination by attorney general, etc.</p> <p>1485. When and for what purpose such examination may be made, information used, when.</p> <p>1486. President or officer of corporation</p>	<p>Art. 1487. When charter or permit of corporation forfeited, members or officers of such corporation prohibited from using old corporate name.</p>
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Article 1484. Corporation doing business in this state, books, accounts, etc., subject to examination by attorney general, etc.—Every corporation doing business in this state, by virtue of a permit or charter, granted under the laws of this state, shall permit the attorney general, or any of his assistants or representatives when authorized in writing by the attorney general, to make examination of all the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records of said corporation, as often as he may deem it necessary. The attorney general, or his assistant or assistants, or representative or representatives shall present a request in writing to the president, vice-president, treasurer, secretary, manager, agent or other officer of said corporation, at the time the attorney general or his assistant or assistants, or representative or representatives, desire to examine said books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records belonging to said corporation; and it shall be the duty of the officer or agent of any corporation to whom said request is presented to immediately permit the attorney general, or his authorized assistant or assistants, or representative or representatives to inspect and examine all

the books, records and other documents of said corporation as hereinabove set forth. [Act 1907, p. 34.]

Art. 1485. Where and for what purpose such examination may be made, information used, when.—The attorney general, or any of his assistants, or representatives when authorized in writing by the attorney general, shall have the power and authority to make diligent investigation into the organization, conduct and management of any corporation authorized to do business within this state, and shall have power to inspect and examine all or any books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records of such corporation, and take copies of any or all of such records or documents, herein set forth, as in his judgment may show or tend to show that said corporation has been or is engaged in acts or conduct in violation of its charter rights and privileges, or in violation of any law of this state; provided, that the attorney general, or his assistant or assistants, or representative or representatives, shall not make public or use said copies or any information derived in the course of said examination of said records or documents, as hereinabove set forth, except in the course of some judicial proceedings of which the state is a party, or in a suit by the state to cancel the permit or forfeit the charter of such corporation, or to collect penalties for a violation of the law of this state, or for the information of any of the officers of this state charged with the enforcement of its laws. [Id., p. 35.]

Art. 1486. President or officer of corporation failing or refusing to permit examination, penalty.—If any president, vice president, treasurer, secretary, manager, agent or other officer of any corporation, doing business under permit or charter from this state, shall fail or refuse to permit the attorney general, or any of his assistants or representatives who may be authorized in writing by the attorney general to make such examination, to examine any or all of the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws and other records of said corporation, or shall fail or refuse to permit said attorney general, or his authorized assistant or assistants, or representative or representatives, to take copies of same, he shall be guilty of a misdemeanor, and, upon conviction therefor, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail for not less than thirty nor more than one hundred days; and each day of such failure or refusal to comply with the provisions of this chapter shall constitute a separate offense. [Id., p. 35.]

Art. 1487. When charter or permit of corporation forfeited, members or officers of such corporation prohibited from using old corporate name.—When any charter or permit, heretofore or hereafter granted under the laws of the state of Texas to any corporation to do business in said state, shall have been forfeited, it shall be unlawful for any persons who were members or officers of said defunct corporation at the time of such forfeiture, to do business in Texas under the old corporate name of such corporation, or to use the same or like signs or advertisements which were used by such corporation before such forfeiture; and any such person, so violating this law, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined in any sum not more than one thousand dollars, nor less than two hundred and fifty dollars; provided, this shall not apply where the charter of a corporation has been revived in the manner provided by law, and is at the time in good standing. [Act 1905, p. 335.]

Indictment.—Willson's Cr. Forms, 731.

CHAPTER EIGHT A

CORPORATIONS—USE OF ASSETS AND FUNDS

Art. 1487a.	Funds not to be used except for legitimate corporate business; exceptions.	Art. 1487b.	Political contributions prohibited.
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Article 1487a. Funds not to be used except for legitimate corporate business; exceptions.—No corporation, domestic or foreign, doing business in this state, shall employ or use its stock, means, assets or other property, directly or indirectly, for any purpose whatever other than to accomplish the legitimate business of its creation, or those purposes otherwise permitted by law; provided that nothing in this Section shall be held to inhibit corporations from contributing to any bona fide association, incorporated or unincorporated, organized for and actively engaged for one year prior to such contribution in purely religious, charitable or eleemosynary activities, nor to local commercial clubs or associations or other local civic enterprises or organizations not in any manner nor to any extent, directly or indirectly, engaged in furthering the cause of any political party, or aiding in the election or defeat of any candidate for office, or defraying or aiding in defraying the expenses of any political campaign, or political headquarters, or aiding or assisting the success or defeat of any question to be voted upon by the qualified voters of this state or any subdivision thereof. Provided, that the provisions of this Act shall not in any wise affect any suit now pending in this State on the behalf of the State of Texas for any violation of unlawful contributions by any corporation. [Rev. St. 1879, art. 589; Rev. St. 1895, art. 665; Rev. St. 1911, art. 1164, amended; Act 1915, p. 156, ch. 102, § 1.]

Explanatory.—This article and the following article were brought into being as an amendment of art. 1164, Rev. St. 1911. As a criminal feature is added by the amendment, the new act is placed in this compilation.

Art. 1487b. Political contributions prohibited.—If any officer, agent or employé of such commercial clubs, associations or other civic enterprise or organization, shall use or permit the use of any money contributed to such organizations by said corporations, to further the cause of any political party; or to aid in the election or defeat of any candidate for office; or to pay any part of the expenses of any candidate for office; or to pay any part of the expenses of any political campaign, or political headquarters or to aid in the success or defeat of any political question to be voted on by the qualified voters of the state or any subdivision thereof; such officer, agent or employer, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five nor more than one thousand dollars. [Id.; Act 1915, p. 157, ch. 102, § 2.]

See note under preceding article.

CHAPTER NINE

STATE REVENUE AGENT

Art. 1488.	Appointment of state revenue agent; his duties.	Art. 1490.	Salary of revenue agent; traveling expenses; penalty for making false report.
1489.	Books and records of officers to be submitted to state revenue agent on demand; penalty for		failure to comply with this law.

Article 1488. [989] His duties.—The governor is hereby authorized to appoint a suitable person as revenue agent for the

state, for the purpose of securing a better enforcement of the revenue laws of the state. The agent provided for herein shall be known as the state revenue agent. Said revenue agent shall be subject to the direction of the governor, who may, whenever in his judgment the public service demands it, direct the said revenue agent to investigate books and accounts of the assessing and collecting officers of this state, and all officers and persons disbursing, receiving or having in their possession public funds, and to make such other investigations and perform such other duties in the interest of the public revenue as the governor may direct. Whenever any such investigation is ordered by the governor, the revenue agent shall report to him in writing the results of such investigations, and to point out the particulars, if any, wherein the revenue laws have been violated or their enforcement neglected, together with the names of the parties delinquent therein; whereupon the governor shall institute civil and criminal proceedings through the attorney general in the name of the state against such delinquent parties, who are reported by such agent to be delinquent; and it is further provided, that said revenue agent shall have power at any time to examine and check up all and any disbursements or expenditures of money appropriated for any of the state institutions or for any other purpose, or for improvements made by the state on state property, or money received and disbursed by any board authorized by law to receive and disburse any state money. [Act April 13, 1891, § 1, 22d Leg., p. 87.]

Explanatory.—When the above article was carried into the revised Penal Code it had been superseded by Act 1899, p. 26, amending art. 5058, Rev. St. 1895, which article had been made up from the same act from which art. 1488 above was constructed. The amendatory act is set out below, in view of the decisions in *Berry v. State* (Cr. App.) 156 S. W. 626, and *Stevens v. State*, 70 App. 565, 159 S. W. 505.

Powers and duties of state revenue agent.—The Governor is authorized to appoint a suitable person as Revenue Agent for the State, for the purpose of securing a better enforcement of the revenue laws of the State. The agent provided for herein shall be known as the State Revenue Agent. Said Revenue Agent shall be subject to the directions of the Governor, who may, whenever in his judgment the public service demands it, direct the said Revenue Agent to investigate books and accounts of the assessing and collecting officers of this State, and all officers and persons disbursing, receiving or having in their possession public funds, and to make such other investigations and perform such other duties in the interest of the public revenues as the Governor may direct. Whenever any such investigation is ordered by the Governor, the Revenue Agent shall report to him in writing the results of such investigation, and point out the particulars, if any, wherein the revenue laws have been violated, their enforcement neglected, together with the names of the parties delinquent therein. Whereupon the Governor shall institute civil and criminal proceedings through the Attorney-General in the name of the State against such delinquent parties who are reported by such agent to be delinquent. Said Revenue Agent shall have power at any time to examine and check up all and any disbursements or expenditures of money appropriated for any of the State institutions or for any other purpose or for any improvements made by the State on State property or money received and disbursed by any board authorized by law to receive and disburse any State money. Said Revenue Agent shall also have power and authority, and it is hereby made his duty, to fully investigate any and all State institutions when so directed by the Governor or required by information coming to the knowledge of said agent. He shall investigate the manner of

conducting the same and the policy pursued by those in charge thereof, and the conduct or efficiency of any person employed therein by the State. He shall examine into and report upon the character and manner as well as the amount of expenditures thereof. He shall also investigate and ascertain all sums of money due the State from any source whatever; the ascertainment and collection of which does not devolve upon other officers of this State under existing law. And he shall report all such facts to the Governor, who shall proceed therein as provided by this or any other law of this State. [Acts 1891, p. 87. Amended Acts 1899, p. 26.]

Indictment.—Willson's Cr. Forms, 732a, 732b.

Art. 1489. [990] Books and records of officers to be submitted; penalty.—When said revenue agent, acting under the direction of the governor, calls on any person connected with the public service to inspect his accounts, records or books, said officers or official so called upon shall submit to said agent all books, records and accounts so called for without delay. Any failure or refusal on the part of any officer or official to comply with the provisions of this article shall be an offense, for which, on conviction thereof, he shall be fined not less than one hundred nor more than one thousand dollars, and may be imprisoned in the county jail not more than one year. [Act April 13, 1891, p. 87, § 2.]

Indictment.—Willson's Cr. Forms, 215, 732a, 732b.

Art. 1490. [991] Penalty for making false report.—Said revenue agent shall receive as compensation for his services not exceeding two thousand dollars per annum, together with his actual traveling expenses, which shall be paid on the approval of the same by the governor; provided, that said revenue agent shall not be allowed traveling expenses for any service connected with the examination and investigation of the accounts of any institution in Travis county. If the revenue agent herein provided for shall wilfully make a false or fraudulent report of the financial condition of the books of any officer or official, department or institution, handling, receiving or disbursing any state funds, appropriated or unappropriated, he shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, and imprisoned in the county jail for any period not to exceed twelve months. [Id., § 3.]

Indictment.—Willson's Cr. Forms, 216, 732a, 732b.

CHAPTER TEN

GUARANTY AND FIDELITY COMPANIES— REGULATION OF

Articles 1491–1503. [992–1004] [Superseded.]

Explanatory.—The above articles appeared in the revised Penal Code of 1895 as arts. 993–1004. The revisers of 1895 carried the same provisions, with the exception of art. 1000 of the Penal Code, into the Revised Statutes of 1895, as ch. 16 of Title 21 (Arts. 733–744). This title and chapter of the Civil Statutes was repealed by Act 1897, ch. 165, § 13, which act reconstructed and re-enacted the repealed law without any criminal feature therein, the criminal features in the old act being displaced by provisions imposing penalties recoverable in a civil action. The result is that the subject matter of this chapter of the Penal Code was dead and obsolete law when it was carried into the revision of 1911. In view of the decisions in *Berry v. State* (Cr. App.) 156 S. W. 626, and *Stevens v. State*, 70 App. 565, 159 S. W. 505, the articles of this chapter are omitted from this compilation.

Indictment.—Willson's Cr. Forms, 41, 732c.

See *Brown v. State*, 26 App. 540, 10 S. W. 112; *Smith v. State*, 18 App. 69.

CHAPTER ELEVEN

BOND INVESTMENT COMPANIES

Art. 1504. Doing business in this state, re- quired to do what.	Art. 1506. Officer, agent, etc., of any such company transacting business in violation of this law, penalty.
1505. Failure to comply with this law, charter forfeited.	

Article 1504. Doing business in this state, required to do what.
—Every corporation, company or individual, doing business in this state as a bond investment company, or company to place or sell bonds, certificates or debentures, on the partial payment or installment plan, shall, and the same is hereby required to, deposit with the state treasurer, in cash or securities approved by the state treasurer, the sum of five thousand dollars; and, in addition thereto, they shall be required to deposit semi-annually with the state treasurer in cash or securities to be approved by said officer, ten per cent of all the net premium received, until the sum deposited shall amount to the sum of one hundred thousand dollars. [Act 1897, p. 118.]

Indictment.—Willson's Cr. Forms, 42.

Art. 1505. Failure to comply with this law, charter forfeited.—If any such company, being a domestic corporation, shall fail, for sixty days after the organization of such company, to make with the state treasurer the deposit required by this chapter, it shall be considered to have forfeited its charter; and the attorney general shall, immediately upon receiving information thereof, bring suit in the name of the state, in the district court of Travis county, to have such charter or certificate of incorporation declared forfeited and of no effect; and said court shall declare such charter forfeited, and appoint a receiver for such company, whose duty it shall be, under the order of the court, to distribute to the shareholders the assets of the company. The court shall, out of the assets of the company, make such allowance for compensation for the receiver as shall be equitable and just. [Id., p. 118.]

Indictment.—Willson's Cr. Forms, 42.

Art. 1506. Officer, agent, etc., of any such company transacting business in violation of this law, penalty.—If any officer, agent, or representative of any such company or companies, whether they be foreign or domestic corporations, shall attempt to place or sell shares, or to transact any business whatsoever in the name or on behalf of such company or companies, while they fail or refuse to comply with the provisions of this chapter, said officer, agent or representative shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense, or be imprisoned in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment. [Id., p. 118.]

Indictment.—Willson's Cr. Forms, 42.

CHAPTER TWELVE

PRIZE FIGHTING, ROPING CONTESTS, ETC.

Art. 1507. Pugilistic encounters prohibited; penalty.	Art. 1510. Matching any cock fight, etc., penalty.
1508. "Pugilistic encounter" defined.	1511. Engaging in roping contest, pen- alty.
1509. Exhibition of prize fights by means of moving pictures pro- hibited.	

Article 1507. [1005] Pugilistic encounters prohibited; penalty.—Any person who shall voluntarily engage in a pugilistic encounter between man and man, or a fight between a man and a bull, or any other animal, for money or other thing of value, or for any championship, or upon the result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged, either directly or indirectly, shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary not less than two nor more than five years. [Act of Oct. 3, 1895, S. S.]

Indictment.—Willson's Cr. Forms, 237, 732d, 732e.

Art. 1508. [1005a] "Pugilistic encounter" defined.—By the term, "pugilistic encounter," as used in this act, is meant any voluntary fight or personal encounter by blows by means of the fists or otherwise, whether with or without gloves, between two or more men for money, or for a prize of any character, or for any other thing of value, or for any championship, or upon the result of which any money or anything of value is bet or wagered. [Id.]

Indictment.—Willson's Cr. Forms, 732d, 732e.

Art. 1509. [1005b] Exhibition of prize fights by means of moving pictures prohibited.—It shall be unlawful for any person, association, corporation, or any agent or employé of any person, association, corporation or receiver, partnership or firm, to give or present to the public an exhibition of prize fights or glove contests, or of any obscene, indecent or immoral picture of any character whatsoever, by means of moving picture films, bioscopes, viti-scopes, magic lanterns, or other device or devices in moving picture shows, theaters, or any other place whatsoever.

Any person or persons, association, or any agent or employé of any person, association, corporation or receiver violating any of the provisions of this act shall, upon conviction thereof, be fined in any sum not less than one hundred dollars and not more than one thousand dollars, or be imprisoned in the county jail for not less than ten nor more than sixty days, or both, in the discretion of the court or jury, and each day's violation of any of the provisions of this article shall constitute and be punishable as a separate offense. [Act S. S. 1910, p. 21.]

Former acts.—Act 1889 imposes an occupation tax of \$500 on prize fights. Act March 23, 1891, prohibits prize fighting, and makes it a felony punishable by fine and imprisonment. Held, that the act of 1891 repealed so much of the act of 1889 as permitted an occupation tax to be charged on prize fights, and that a conviction under the act of 1889 for engaging in a prize fight without obtaining a license could not be sustained. *Sullivan v. State*, 32 App. 50, 22 S. W. 44.

Act 1895, prohibiting "prize fighting and pugilism," and "fights between men and animals," does not violate Const. art. 3, § 35, prohibiting any bill from containing more than one subject. *McMeans v. Finley*, 32 S. W. 524, 88 Tex. 515.

Indictment.—Willson's Cr. Forms, 732d, 732e.

Art. 1510. Matching any cock fight, etc., penalty.—Any person who shall match, or be concerned in matching, any cock fight, or who shall match, or be concerned in matching or causing, a fight between any animals or fowls, or who shall keep, or be concerned in keeping, any cock pit or other place for the purpose of matching fights between cocks, or any other animals or fowls, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than ten nor more than one hundred dollars. Each day such cock pit or other place, as aforesaid, shall be kept shall constitute a separate offense. [Act 1907, p. 156.]

Indictment.—Willson's Cr. Forms, 732i.

Art. 1511. Engaging in roping contest, penalty.—Any person who shall engage in a roping contest, with other persons or alone, in which cattle or other animals are roped as a test or trial of the skill

of the person or persons engaged in such roping contest, for money or prize of any character, or for any championship, for anything of value, or upon the result of which any money or anything of value is bet or wagered, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars; and each animal roped, or attempted to be roped, shall constitute a separate offense. [Act 1905, p. 69.]

Indictment.—Willson's Cr. Forms, 730.

CHAPTER THIRTEEN

SCHOOLS

Art.	Art.
1512. Teacher contracting with trustees shall exhibit certificate; penalty for approving, etc.	1513d. Receiving greater price for supplementary text books than that approved by state superintendent.
1513. Persons selling, giving away, etc., prior to examination, questions propounded by superintendent of public instruction, penalty.	1513e. Loitering on school grounds.
1513a. School trustee preventing use of text books adopted.	1513f. Employment of children of school age.
1513b. Trustee or teacher receiving commission or rebate on text books.	1513ff. Attendance requirements and provisions.
1513c. Influencing or attempting to influence adoption of text books.	1513fff. Exemptions.
	1513g. Duties of parent or guardian.

Article 1512. [1006] **Teacher contracting with trustees shall exhibit certificate; penalty for approving, etc.**—Any county or city superintendent or board of trustees who shall approve any teacher's certificate or voucher, until the person has presented a valid certificate, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than twenty-five nor more than one hundred dollars. [Act April 28, 1891, § 9.]

Effect of statute as to validity of certificate and contract.—Under this article and Rev. St. 1911, art. 2780, providing that any teacher, before contracting to teach, shall exhibit a teacher's certificate valid in a city, town, or district, and that any teacher who shall teach in any public school without having a valid certificate shall not receive any compensation for such service, section 122, c. 96, Acts 32d Leg., providing that the county superintendent shall forward the examination papers of applicants for first-grade certificates to the state superintendent to be delivered to the state board of examiners, and that, if such board's report is favorable, the state superintendent shall forward a certificate to the applicant, a first-grade certificate granted by the county superintendent was void, and, where a teacher had no other certificate when he entered into a contract, the contract was void and unenforceable by him, though he subsequently obtained a first-grade certificate from the state superintendent. *Richards v. Richardson* (Civ. App.) 163 S. W. 50.

Indictment.—Willson's Cr. Forms, 732f.

Art. 1513. Persons selling, giving away, etc., prior to examination, questions propounded by superintendent of public instruction.—Any person or persons who shall sell, barter or give away, prior to any forthcoming examination, to applicants for teachers' certificates, or to any other person, the questions prepared by the state superintendent of public instruction, to be used by the county boards of examiners, or summer normal boards of examiners, in the examination of teachers at said forthcoming examination, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not less than twenty-five nor more than two hundred dollars. [Act 1901, p. 272.]

Explanatory.—At the time the above article was placed in the revised Penal Code of 1911, the act from which it was taken had been superseded by Act 1905, ch. 124, § 124a. The superseding act is placed in this compilation, and is set out below, in view of the decision in *Stevens v. State*, 70 App. 565, 159 S. W. 505:

Selling or giving away or accepting or using prior to examination, questions propounded by superintendent of public instruction.—

That any person or persons who shall sell, barter or give away, prior to any forthcoming examination, to applicants for teachers' certificates or to any other person, the questions prepared by the State Superintendent of Public Instruction to be used by the county summer normal or any other boards of examiners in the examination of teachers at said forthcoming examination, or any person or persons who shall accept or otherwise obtain possession of such questions or the answers thereto, prior to any such examination, or any person or persons who shall use the same fraudulently at the time of such examination, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars and not more than five hundred dollars, and in addition thereto shall be imprisoned in the county jail for any number of days not less than twenty and not more than sixty. [Act 1905, p. 296, ch. 124, § 124a.]

Indictment.—Willson's Cr. Forms, 732.

Art. 1513a. School trustee preventing use of text books adopted.—Any school trustee who shall prevent or aid in preventing the use in any public school in this State of the books or any of them as adopted under the provisions of this Act, [Vernon's Sayles' Civ. St. 1914, arts. 2909a-2909o] or any teacher in any public school in this State who shall wilfully fail or refuse to use the said books, shall be guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than five dollars nor more than fifty dollars for each offense, and each day of such wilful failure or refusal by said teacher or wilful prevention of the use of the books by said trustee shall constitute a separate offense. [Act 1903, 1st S. S., p. 23; Act 1905, ch. 124; Act 1907, p. 454; Act 1911, 1st S. S., p. 95, ch. 11, § 23.]

Art. 1513b. Trustee or teacher receiving commission or rebate on text books.—No trustee or teacher shall ever receive any commission or rebate on any books used in the schools with which he is concerned as such trustee or teacher, and if any such trustee or teacher shall receive or accept any such commission or rebate he shall be guilty of a misdemeanor and upon conviction he shall be fined not less than fifty dollars and not more than one hundred dollars. [Act 1911, 1st S. S., p. 96, ch. 11, § 24.]

Art. 1513c. Influencing or attempting to influence adoption of text books.—Any person not the author or publisher or the bona fide permanent and regular employé of such publisher who shall appear before such Text Book Board in behalf of any book submitted to the Text Book Board for adoption, or seek to influence the members thereof, or any author, publisher, bona fide permanent and regular employé of such publisher who seeks to influence the said Text Book Board in the selection or adoption of any text book by appealing to the members of said board separately, or at any other time than when the board is in regular session, or in any way violating Section I of this Act [art. 2909a, Vernon's Sayles' Civ. St. 1914] shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five hundred dollars nor more than one thousand dollars, and shall be confined in the county jail for not less than thirty days and not more than ninety days. [Id., § 24a.]

Art. 1513d. Receiving greater price for supplementary text books than that approved by state superintendent.—When the supplementary books other than those selected by the Text Book Board are used, they shall be furnished at prices fixed by the trustees of the school in which they are used and approved by the State Superintendent of Public Instruction; and, if any teacher or trustee shall

knowingly and directly or indirectly receive from any pupil a greater price therefor than the price fixed, he shall be guilty of a misdemeanor, and on conviction shall be fined not less than fifty dollars nor more than one hundred dollars. [Id., § 25.]

Art. 1513e. Loitering on school grounds.—It shall be unlawful for any person or persons to loiter or loaf upon any public school grounds in this state, during the session of such school, after being warned by the person in charge of such school to leave such grounds; and such person or persons so found shall be guilty of a misdemeanor, and, upon conviction therefor, shall be fined in any sum not less than five and not to exceed twenty-five dollars. [Act 1897, ch. 164, § 11; Act 1903, 1st S. S., ch. 12, § 12; Act 1907, p. 452; Act 29th Leg., ch. 124.]

Explanatory.—This article constituted a part of art. 1514 of the revised penal code. The rest of the article was superseded by ch. 11 of the First Called Session of the 32nd legislature, and appears in this compilation as arts. 1513a–1513d, ante. This article is numbered 1513e for the reason that there were two articles bearing that number in the revised penal code.

Loitering on school grounds.—The term “school grounds,” as used in this article, is sufficiently broad to apply to acts done inside the building on the grounds, as well as on the grounds outside the building. *King v. State* (Cr. App.) 169 S. W. 675.

That an information charging defendant with causing a minor, in violation of article 37, to loiter on school grounds, in violation of article 1514, did not allege the way in which he caused the offense to be committed did not render it defective; it not being necessary that an information allege the evidence. *King v. State* (Cr. App.) 169 S. W. 675.

Where a boy, after being expelled from school and told not to return, enters the school-room and refuses to go home, though commanded to do so by the teacher, this constitutes “loitering,” within article 1514. *King v. State* (Cr. App.) 169 S. W. 675.

Where, in a prosecution for inciting a minor, in violation of article 37, to loiter on school grounds, in violation of article 1514, after he had been expelled, defendant admitted that he knew of such expulsion, the court properly refused to instruct that, even though the minor had been expelled, defendant would not be guilty unless he knew of such fact. *King v. State* (Cr. App.) 169 S. W. 675.

Evidence held to sustain a conviction of instigating a minor, in violation of article 37, to loiter on school grounds, in violation of article 1514. *King v. State* (Cr. App.) 169 S. W. 675.

The title of Acts 29th Leg. c. 124, reading in part “An act to provide for a more efficient system of public free schools,” sufficiently covers section 79, which makes it unlawful for any person to loiter on public school grounds, to comply with Const. art. 3, § 35, requiring that the subject of a statute be expressed in its title. *King v. State* (Cr. App.) 169 S. W. 675.

Indictment.—Willson’s Cr. Forms, 561, 723–725.

Art. 1513f. Employment of children of school age.—No child under fourteen years of age not lawfully excused from attendance upon school shall be employed by any one during the school hours in any occupation during the period which the child is required to be in school, as provided by this Act. Any person, firm or corporation found guilty of employing any child or any person inducing any child to remain out of school who is subject to the provisions of this Act shall be fined not to exceed ten dollars for each offense, and each day that said child is employed after due notice given by any school official that said child can not be legally employed shall constitute a separate offense. [Act 1915, p. 94, ch. 49, § 5.]

Art. 1513ff. Attendance requirements and provisions.—Every child in this State who is eight years and not more than fourteen years old shall be required to attend the public schools in the district of its residence, or in some other district to which it may be transferred, as provided by law, for a period of not less than sixty days for the scholastic year, beginning September 1, 1916, and for a period of not less than eighty days for the scholastic years beginning September 1, 1917, and for the scholastic year 1918–19, and each scholastic year thereafter a minimum attendance of 100 days shall be required. The period of compulsory school attendance at each school shall begin at the opening of the school term unless otherwise authorized by the

district school trustees and notice given by the trustees prior to the beginning of such school term; provided, that no child shall be required to attend school for a longer period than the maximum term of the public school in the district where such child resides. [Id., § 1.]

Art. 1513fff. Exemptions.—The following classes of children are exempt from the requirements of this Act:

(a) Any child in attendance upon a private or parochial school or who is being properly instructed by a private tutor.

(b) Any child whose bodily or mental condition is such as to render attendance inadvisable, and who holds definite certificate of a reputable physician specifying this condition and covering the period of absence.

(c) Any child who is blind, deaf, dumb or feeble-minded, for the instruction of whom no adequate provision has been made by the school district.

(d) Any child living more than two and one-half miles by direct and traveled road from the nearest public school supported for children of the same race and color of such child, and with no free transportation provided.

(e) Any child more than twelve years of age who has satisfactorily completed the work of the fourth grade of a standard elementary school of seven grades, and whose services are needed in support of a parent or other person standing in parental relation to the child, may, on presentation of proper evidence to the County Superintendent of Public Instruction, be exempted from further attendance at school. [Id., § 2.]

Art. 1513g. Duties of parent or guardian.—If any parent or person standing in parental relation to a child within the compulsory school attendance ages who is not properly excused from attendance upon school for some one or more of the exemptions provided in Section 2 of this Act [art. 1513fff] fails to require such child to attend school regularly for such period as is required in Section 1 [art. 1513ff] hereof, it shall be the duty of the attendance officer who has jurisdiction in the territory where said parent or person standing in parental relation resides, to warn such parent or person standing in parental relation, that the provisions of this Act must be immediately complied with, and upon failure of said parent or persons standing in parental relation to immediately comply with the provisions of this Act after such warning has been given, the official discharging the duties of the attendance officer shall forthwith file complaint against such parent or person standing in parental relation to said child, which complaint shall be filed in the County Court, or in the Justice Court in the precinct where such parent or guardian resides, and shall diligently prosecute same to its conclusion. Any parent or other person standing in parental relation upon conviction for failure to comply with the provisions of this Act shall be deemed guilty of a misdemeanor, and shall be fined for the first offense five dollars, and for the second offense ten dollars, and for each subsequent offense twenty-five dollars. Each day that said child remains out of school after said warning has been given or after said child has been ordered in school by the juvenile court, may constitute a separate offense; provided, however, that if any parent or person standing in parental relation to any child within the compulsory school attendance ages shall present proofs that he or she is unable to compel such child to attend school, said person in parental relation shall be exempt from the above penalties as regards the non-attendance of such child, and such child may be proceeded against as an habitual truant and be subject to commitment to the State Juvenile Training School or any other suitable school agreed

upon between the parent or the guardian of said child and the judge of the juvenile court. All fines collected under the provisions of this Act shall be paid into the available school fund of the common school district or of the independent school district in which the person fined resides, as the case may be. [Id., § 9.]

See art. 1207c, C. C. P.

CHAPTER FOURTEEN

RAILROAD COMMISSION

Art.		Art.	
1514.	Right to inspect books and papers, and penalty for refusal.	1522.	Railroad commission may require construction of union passenger depots.
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1516.	Penalty for false billing.	1522d.	Same; railroad commission to prescribe rates and make regulations.
1517.	"Unjust discrimination" defined; penalty for.	1522e.	Same; power of railroad commission to prevent discrimination.
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1520.	District judge to specially charge grand jury.	1522h.	Same; penalty.
1521.	Railroad official making false statement to secure registration of bond.	1522i.	Trains to be regular, and notice to be given.
1521a.	Penalty not otherwise provided.	1522j.	To build sidings, etc., when.
1521b.	Duty to provide suitable freight and passenger depots.	1522k, l.	Commission to enforce compliance.
1521c.	Commission to require compliance.	1522m.	Powers of commission over other subjects.
		1522n.	Same; charging greater rates than those prescribed by commission.
		1522o.	Same; discrimination.

Article 1514. [1007] **Right to inspect books and papers.**—The commissioners, or either of them, or such persons as they employ therefor, shall have the right, at such times as they may deem necessary, to inspect the books and papers of any railroad company, and to examine, under oath, any officer, agent or employé of such railroad, in relation to the business and affairs of the same. If any railroad shall refuse to permit the commissioners, or either of them, or any person authorized thereto, to examine its books and papers, such railroad company shall, for each offense, pay to the state of Texas not less than one hundred and twenty-five dollars nor more than five hundred dollars for each day it shall so fail or refuse; provided, that any person other than one of said commissioners who shall make any such demands shall produce his authority, under the hand and seal of said commission, to make such inspection. [Act 22d Leg., ch. 51, § 55; April 3, 1891, R. R. Com., § 10.]

Art. 1514a. **Penalty for refusal to exhibit books or papers.**—Any officer, agent or employé of any railroad company who shall, upon proper demand, fail or refuse to exhibit to the commissioners, or either of them, or any person authorized to investigate the same, any book or paper of such railroad company, which is in the possession or under the control of such officer, agent or employé, shall be deemed guilty of a misdemeanor, and, upon conviction in any court having jurisdiction thereof, shall be fined for each offense a sum not less than one hundred and twenty-five dollars and not to exceed five hundred dollars. [Id.]

Art. 1515. [1008] **Commissioners may propound questions to be answered.**—1. The said commission shall cause to be prepared

suitable blanks with questions calculated to elicit all information concerning railroads, and as often as it may be necessary, furnish said blanks to each railroad company. Any railroad company receiving from the commission any such blanks shall cause said blanks to be properly filled out so as to answer fully and correctly each question therein propounded; and, in case they are unable to answer any question, they shall give a satisfactory reason for their failure; and the said answers, duly sworn to by the proper officer of said company, shall be returned to said commission at its office in the city of Austin within thirty days from the receipt thereof. [Id., § 12.]

Indictment.—Willson's Cr. Forms, 562.

Art. 1515a. Penalty for refusal to answer and fill out blanks.—2. If any officer or employé of a railroad company shall fail or refuse to fill out and return any blanks, as above required, or fail or refuse to answer any question therein propounded, or give a false answer to any such question, where the fact inquired of is within his knowledge, or shall evade the answer to any such question, such person shall be guilty of a misdemeanor, and shall, on conviction thereof, be fined for each day he shall fail to perform such duty, after the expiration of the time aforesaid, a penalty of five hundred dollars; and the commission shall cause a prosecution therefor in the proper court; and a penalty of like amount shall be recovered from the company when it appears that such person acted in obedience to its direction, permission or request in his failure, evasion or refusal. Said commission shall have the power to prescribe a system of bookkeeping, to be observed by all the railroads subject hereto, under the penalties prescribed in this article. [Id., § 12.]

Art. 1516. [1009] Punishment for false billing, classification, weight, etc.—Any officer or agent of any railroad subject to this law who, by means of false billing, false classification, false weight, or by any other device, shall suffer or permit any person or persons to obtain transportation for property, at less than the regular rates then in force on such railroad, or who, by means of false billing, false classification, false weighing, or by any device whatever, shall charge any person, firm or corporation more for the transportation of property than the regular rates, shall be guilty of a misdemeanor, and, on conviction thereof, fined in a sum of not less than one hundred dollars nor more than one thousand dollars. [Id., § 16.]

Indictment—Willson's Cr. Forms, 560.

Art. 1517. "Unjust discrimination" defined, penalty for.—If any officer, agent, clerk, servant or employé, or any receiver, or his servant, agent or employé of any railroad company in this state shall, directly or indirectly, or by any special rate, rebate, drawback, or other device, for, and on behalf of, such railroad company, knowingly charge, demand, contract for, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered, or to be rendered, by any such railroad company in this state than such railroad company, or its said officers, agents, clerks, servants or employés, or receiver thereof, charges, demands, contracts for, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, or if any officer, agent, clerk, servant or employé, or receiver, or his agents, servants or employés, of any railroad company in this state, who shall, for, and on behalf of, such railroad company, make or give any undue or unreasonable preference or any advantage to any particular person, company, firm, corporation or locality, as to any service rendered, or to be rendered or performed, by such

railroad company, or to subject any particular description of traffic on such railroad company to any undue or unreasonable prejudice, delay or disadvantage in any respect whatever, such officer, clerk, servant or employé, or receiver, his agents, servants or employés of such railroad company, shall be deemed guilty of unjust discrimination within the meaning of this chapter, and, on conviction thereof, shall be punished by confinement in the state penitentiary for not less than two nor more than five years. [Act 1899, p. 203.]

Indictment.—Willson's Cr. Forms, 53, 54.

Art. 1518. Not applicable, when.—Nothing herein shall prevent the carriage, storage or handling, by railroad companies in this state, or by their agents, officers, clerks, servants and employés, of freight free or at reduced rates, or to prevent railroads, their agents and employés and officers, from giving free transportation or freight rates to any railroad officers, agents, employés, attorneys, stockholders or directors, or to any other officer or person, when permitted by chapter 16 of this title, article 1533.

Art. 1519. Persons subpoenaed and compelled to testify as to violations of this law exempt from prosecution; evidence on which conviction may be had.—Any court, officer or tribunal, having jurisdiction of the offense mentioned in this chapter, or any district or county attorney, may subpoena persons and compel their attendance as witnesses to testify as to the violations of this chapter; and any person so summoned and examined shall not be liable to prosecution for any violation of this law about which he may testify; and for any offense by reason of violations of this chapter, a conviction may be had upon the unsupported evidence of an accomplice or participant. [Id., p. 203.]

Art. 1520. District judge to specially charge grand jury.—It shall be the duty of every district judge in this state, in whose court a grand jury shall be impaneled, to charge said grand jury, whenever organized, to thoroughly investigate with reference to violations of this chapter. [Id., p. 203.]

Art. 1521. [1009a] Railroad official making false statement to secure registration of bond.—Each and every railroad director, president, secretary or other official who shall knowingly make any false statement upon which to secure the registration of any bond or other evidence of debt, as required by the law regulating the issuance of stocks and bonds, or who shall, by false statement knowingly made, procure of the railroad commission direction to the secretary of state to register the same, and which shall be, by the secretary of state, registered, or shall, with knowledge of such fraud, negotiate or cause to be negotiated, any such bond or other security issued in violation of said chapter, shall be guilty of a felony, and, upon conviction thereof in any court of competent jurisdiction, shall be punished by confinement at hard labor in the state penitentiary for a term of years not less than two nor more than fifteen, and shall likewise be liable to any creditor of such company for the full amount of damages sustained by such wrongful conduct. Venue in such cases shall be in either of the district courts held in Travis county, or in the county where the principal office of the railway company whose property is sought to be so incumbered or affected is located. [Act 1893, p. 59.]

Art. 1521a. Penalty not otherwise provided.—If any railway company doing business in this state shall hereafter violate any other provision of this chapter, or shall do any other act herein prohibited, or shall fail or refuse to perform any other duty en-

joined upon it for which a penalty has not been provided by law, or shall fail, neglect or refuse to obey any lawful requirement, order, judgment or decree made by the railroad commission of Texas, for every such act of violation it shall pay to the state of Texas a penalty of not more than five thousand dollars. [Id., sec. 18. Amended Acts 1901, p. 265.]

See *Houston & T. C. R. Co. v. Young* (Civ. App.) 137 S. W. 380.

Explanatory.—The above provision was not included in the revised Penal Code, 1911, and is placed in this compilation, in view of the decision in *Berry v. State*, 156 S. W. 626, for the reason that it seems to state a general criminal penalty for violation of the orders of the Railroad Commission. In this respect it seems to give effect to art. 1522, post. That article, as it now stands, and as it stood in the revised Penal Code, seems to be lacking in vital force (there being nothing in the revised Penal Code indicating the penalty spoken of but not defined), unless it can be attached to the above general provision. On the assumption that this view is correct the publishers have added a number of acts similar to that embraced in art. 1522, some of which antedate the revision and were not included therein. The acts added, in this connection, will be found below as arts. 1521b, 1522a-1522f.

Art. 1521b. Duty to provide suitable freight and passenger depots.—It shall be the duty of all railroad companies in this state to provide and maintain adequate, comfortable and clean depots and depot buildings at their several stations for the accommodation of passengers, and to keep said depot buildings well lighted and warmed for the comfort and accommodation of the traveling public; provided, further, that said railroad companies shall keep and maintain separate apartments in such depot buildings for the use of white passengers and negro passengers, and to keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing and delivering of all freights handled by such roads. [Act 1909, 2d S. S., p. 401, ch. 13, § 1.]

Explanatory.—This provision was omitted from the revision of 1911, and is added to this compilation. See note under art. 1521a.

Art. 1521c. Commission to require compliance.—Power is hereby conferred upon the railroad commission of Texas to require compliance by railroad companies with the provisions of this act under such regulations as said commission may deem reasonable, and all railroad companies shall be subject to the penalties prescribed by law for failure to comply with such requirements. [Id., § 2.]

Compelling erection of depot.—The railroad commission has the power to compel a railroad company to erect depot buildings, not only at places designated by itself as stations but at places of starting, when the nearest station from the starting point is about ten miles distant, although just across the state line in another state are station buildings on the line as it extends through the latter state. *Railroad Commission v. Chicago, R. I. & G. Ry. Co.*, 102 Tex. 393, 117 S. W. 795. But the commission cannot exercise power to require a railway company to erect and maintain depots at places selected arbitrarily and in disregard of public necessity. An order of the railroad commission directing the railroad company to establish a station in the state of Texas within a few hundred feet of an established station in Oklahoma, held unreasonable. *Railroad Commission of Texas v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 114 S. W. 192. The commission is entitled to enforce an order for the construction of a passenger and freight station at a particular town located on state line. *Pecos & N. T. Ry. Co. v. Railroad Commission of Texas*, 56 Civ. App. 422, 120 S. W. 1055.

Art. 1522. Railroad commission may require construction of union passenger depots.—Where two or more railroad companies reach the same city or town in this state, it shall be the duty of the railroad commission of Texas to ascertain whether it is practicable and feasible for such railroad companies to use a joint or union passenger depot; and, if the railroad commission finds, upon investigation, that it is practicable for such railroad companies to join in the construction and use of a passenger depot, then it shall give notice to said railroad companies, and, after investigation and public hearing, may require the construction and maintenance of such union passenger depot by the railroad companies entering any

such city or town, provided, that it shall appear to the railroad commission that the construction and maintenance of such joint or union passenger depot are just and reasonable to the railroad companies involved, and demanded by the public interest. The railroad commission may specify the requirements of such union depot as to kind and character; and said railroad commission may apportion the cost of constructing and maintaining the same to each railroad company, in cases where the interested railroad companies can not themselves agree.

Failure upon the part of any railroad company to observe and obey the orders of the railroad commission, issued in compliance with this article, shall subject such railroad company to the fines and penalties prescribed by law for failure to obey the lawful requirements, orders, judgments and decrees made by the railroad commission of Texas. [Act 1909, p. 399.]

See art. 1521a, and note thereunder.

Art. 1522a. Construction of switch tracks and furnishing of facilities.—Any railroad company or receiver thereof upon application of any shipper tendering traffic for transportation, shall construct, maintain and operate upon reasonable terms, a switch connection with any such private sidetrack or spur track which has been or shall hereafter be constructed by any such shipper, to connect with its railroad where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against such shipper. [Act 1915, p. 66, ch. 35, § 1.]

See art. 1521a, and note thereunder.

Art. 1522b. Same; penalty.—If any railroad company or receiver thereof shall fail to install and operate any such switch connection as aforesaid, on application therefor by any shipper, such shipper may make application to the Railroad Commission of Texas, and said commission shall be authorized and empowered to enter such orders as may be necessary governing the construction, maintenance and operation of said switch connection with said private sidetrack or spur track, where such connection is reasonably practicable, and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same. [Id., § 2.]

See art. 1521a, and note thereunder.

Art. 1522c. Same; rates; discrimination.—The Railroad Commission of Texas shall fix just and reasonable rates to be charged by railroad companies or receivers thereof for traffic moved and handled over such private sidetracks or spur tracks extending to private industries, and it shall be the duty of the Railroad Commission to adopt such rates, rules, and regulations as will prevent any discrimination in the operation of such tracks or the handling of such traffic. Whenever any railway company or receiver thereof shall operate any private sidetrack or spur track without charge, the Railroad Commission of Texas shall have power and authority to compel the operation without charge of and private sidetrack or spur track similarly situated. [Id., § 3.]

See art. 1521a, and note.

Art. 1522d. Same; Railroad Commission to prescribe rates and make regulations.—The Railroad Commission of Texas shall prescribe reasonable rates, rules and regulations for the operation of all private sidetracks or spur tracks as may already have been or may hereafter be constructed either by the railroad companies

themselves or by individuals or corporate interests, or jointly by such railroads and individuals or corporations, when such private sidetracks or spur tracks are operated by railroad companies or the receivers thereof; and shall have power and authority to order and compel the operation of said private sidetracks or spur tracks whenever the railway company or receiver thereof is operating other private sidetracks or spur tracks similarly situated, and to prevent discrimination therein. [Id., § 4.]

See art. 1521a, and note.

Art. 1522e. Same; power of Railroad Commission to prevent discrimination.—Whenever any railroad company or receiver thereof shall hereafter construct or maintain or contribute to the construction or maintenance of any private sidetrack or spur track to any private industry, the Railroad Commission shall have power to order such railway company or receiver to construct or maintain or contribute to the construction or maintenance of a sidetrack or spur track to any private industry similarly situated, on the same terms and conditions. [Id., § 5.]

See art. 1521a, and note.

Art. 1522f. Same; penalty.—Failure upon the part of any railroad company or receiver thereof to observe and obey the orders of the Railway Commission issued in compliance with this Act, shall subject such railroad company to the fines and penalties prescribed by law for failure to obey the lawful requirements, orders, judgments and decrees of the Railroad Commission. [Id., § 6.]

Art. 1522g. Maintenance of roadbed and track.—The Railroad Commission of Texas shall have authority and it is hereby made its duty to see that each and every railroad corporation owning or operating a line of railroad in this State shall maintain its roadbed and track in such condition as to enable it to perform all of its duties as a common carrier with reasonable safety to persons and property carried by it and its employes and with reasonable dispatch.

The Railroad Commission of Texas shall be vested with full power to require of any such railroad company to purchase or secure for installation in its roadbed or track all such ties, rails, ballast and other materials and equipment as may, in the judgment of the Railroad Commission of Texas, be necessary for the proper maintenance of such track and roadbed so as to enable such railroad corporation to adequately perform its duties to the public and to transport freight and passengers with safety thereunto and without delay.

The Railroad Commission of Texas is hereby empowered to require any such railroad company to acquire and install in the whole of such track or roadbed, or any portion thereof that may be designated by the Railroad Commission of Texas, such ties, rails, ballast and other materials as may, in the judgment of the Railroad Commission, be adequate and sufficient to place such track or roadbed in safe condition. [Act 1915, p. 201, ch. 129, § 1.]

See art. 1521a, and note thereunder.

Art. 1522h. Same; penalty.—When the Railroad Commission of Texas shall have made any such order as authorized by Section 1 of this Act [art. 1522g], it shall be the duty of any such railroad company or receiver subject thereto, to promptly comply with the terms thereof, and for failure or refusal to do so, such company or receiver shall become liable to the State of Texas, “as in other cases of failure to comply with orders of the Railroad Commission as provided by law.” In addition to such penalties, any court of competent jurisdiction shall have the power to, and it shall be its duty to, issue

writs of mandamus and mandatory injunctions and other proper writs to compel the compliance with such orders. [Id., § 2.]

See art. 1521a, and note thereunder.

Art. 1522i. Trains to be regular, and notice to be given.—Every such corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, with a reasonable time previous thereto, offer or be offered for transportation at the place of starting and at junctions of other roads and at sidings and stopping places established for receiving and discharging way passengers and freights, and shall take, transport and discharge such passengers and property at, from, and to such places, on the due payment of the tolls, freight or fare legally authorized therefor. Failure on the part of railroad companies to comply with the requirements of this article shall be deemed an abuse of their rights and privileges and subject to regulation and correction by the railroad commission. [P. D. 4893. Amended Act 1903, 1st S. S., p. 21, ch. 11, § 1.]

Explanatory.—The above provision was omitted from the revision of 1911, and is included in this compilation. See art. 1521a, and note thereunder.

Right to fix schedules.—See art. 6543, Vernon's Sayles' Civ. St. 1914.

A railroad has the right to adopt reasonable regulations with reference to the time of starting and running its trains for the transportation of passengers, the time to be fixed by public notice, and shall take passengers from and to places named. Where a party insists in traveling on the trains, after the schedule has been published, to a point where he is informed the train will not stop, he cannot recover damages for being carried beyond that point. *Beauchamp v. Railway Co.*, 56 Tex. 239; *Railway Co. v. White*, 4 Willson, Civ. Cas. Ct. App. § 260, 17 S. W. 419.

Rights of and duties towards passengers.—See Carriers, Title 20, Vernon's Sayles' Civ. St. 1914.

That a belated train arrived earlier than had been represented by the defendant's station agent to plaintiff prior to plaintiff's leaving the depot for breakfast held insufficient to raise an inference of negligence from the agent's failure to delay the train, that plaintiff might take passage thereon. *Southern Kansas Ry. Co. of Texas v. Emmett* (Civ. App.) 139 S. W. 44.

Delay in transporting freight.—See notes under art. 6610, Vernon's Sayles' Civ. St. 1914.

This article provides also for the transportation of property at regular times, and it is held that the shipper who is ready to pay freight can recover damages resulting from delay in transporting freight. *Railway Co. v. Schmidt* (Civ. App.) 25 S. W. 452.

Prepayment of freight and other conditions.—Under this article and art. 6554, Vernon's Sayles' Civ. St. 1914, making railroads liable for refusal to so transport, etc., a complaint in an action for wrongful delay in transportation, alleging that the freight charges were "paid or agreed to be paid when the shipment was tendered," did not sufficiently allege a payment. *Dorrance & Co. v. International & G. N. R. Co.*, 103 Tex. 200, 125 S. W. 561.

Under this article and art. 6554, Vernon's Sayles' Civ. St. 1914, providing that on refusal so to transport any property, or to deliver the same at the regularly appointed time, the railroad shall pay to the party aggrieved all damages sustained thereby, with costs of suit, etc. Held, that the words on "the refusal," etc., "so to take," etc., refer to this article and mean in case of the refusal to take under the conditions prescribed in this article. *Id.*

This article does not contemplate a prepayment of the freight, and hence there was a payment when, on the making out of the bill of lading, a draft was given the railroad for the freight, and was forwarded with the bill of lading and paid on presentation. *Id.*

Where a carrier did not require prepayment of freight charges as authorized by this article, it waived such prepayment, so that failure to prepay was not a defense to an action under art. 6554, Vernon's Sayles' Civ. St. 1914, imposing a penalty for delay in transportation. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.*, 104 Tex. 603, 142 S. W. 1163.

Liability for freight charges.—In the absence of an agreement to the contrary, a consignor is generally responsible for the freight charges. *Keeling & Field v. Walter Connally & Co.* (Civ. App.) 157 S. W. 232.

Actions for failure to transport.—See notes under art. 6554, Vernon's Sayles' Civ. St. 1914.

Art. 1522j. To build sidings, etc., when.—All railroads in Texas shall be required to build sidings and spur tracks sufficient to handle

the business tendered such railroads, when ordered to do so by the railroad commission, as hereinafter provided. [Act 1903, p. 93, ch. 68, § 1.]

Explanatory.—The above provision was omitted from the revision of 1911, and is included in this compilation. See art. 1521a, and note thereunder.

When and where switches, etc., can be required.—This law confers power upon the railroad commission to require the construction of sidings and spur tracks for public uses only, and free from discrimination in favor of any particular individual. The commission exceeds its authority when it undertakes to compel a railroad company to construct a side track for the preferential use of a lumber company. *Railroad Commission v. St. L. S. W. Ry. Co.*, 35 Civ. App. 52, 80 S. W. 102, 103, 104.

The language "the business tendered such railroads" refers to freight and passengers which come to the railroad from the public for transportation as a public highway. It was not intended to require railroad companies to construct "switches and spur tracks" away from their lines to accommodate individual interests. *Ry. Com. v. St. L. S. W. Ry. Co.*, 98 Tex. 67, 80 S. W. 1141.

Validity of special contract.—A contract between a railroad company and a mill owner for the construction of a side track and switch, in consideration of the latter releasing the company from liability, held to show on its face a sufficient consideration, so as to prevent determination of the issue by the court ex parte. *Missouri, K. & T. Ry. Co. of Texas v. Carter*, 95 Tex. 461, 68 S. W. 159.

A contract between a railroad company and a mill owner for the construction of a side track and switch, in consideration of the latter releasing the company from liability, held not void as against public policy. *Id.*

A contract by a railroad section foreman to procure a switch track at a specified place in consideration for a conveyance of land held not to be void as against public policy. *Wright v. Riley (Civ. App.)* 118 S. W. 1134.

Use of spur track.—Where a lumber company and a railroad construct a spur track from the former's premises to the latter's line, the former has no right to authorize a use of the spur by another railroad. *Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co.*, 28 Civ. App. 551, 67 S. W. 525.

Art. 1522k, l. Commission to enforce compliance.—Power is conferred on the railroad commission of Texas to require compliance by railroad companies with the provisions of Section 1 of this Act [art. 1522j,] under such regulations as said commission may deem reasonable; and all railroad companies shall be subject to the penalties prescribed by law for failure to comply with the requirements of the railroad commission as provided herein. [Act 1903, p. 93, ch. 68, § 2.]

See notes under preceding article.

Art. 1522m. Powers of commission over other subjects.—Power and authority are hereby conferred upon the Railroad Commission of Texas over all public wharves, docks and piers and all elevators, warehouses, sheds, tracks and other property used in connection therewith in the State of Texas, and over all suburban, belt and terminal railroads in said State, and over all persons, associations and corporations, private or municipal, owning or operating any such railroad, wharf, dock, pier, elevator, warehouse, shed, track, or other property, and it is hereby made the duty of the said Railroad Commission to fix and adopt all necessary rates, charges and regulations, to govern and regulate said persons, associations and corporations, and to correct abuses and prevent unjust discriminations in the rates, charges and tolls of said persons, associations and corporations, and to fix divisions of rates, charges and regulations between same and railroads and all other common carriers, under the control of the Railroad Commission where a division is proper, and to correct and prevent any and all other abuses in the conduct of their business. [Act 1911, p. 157, ch. 86, § 1.]

Art. 1522n. Same; charging greater rates than those prescribed by commission.—If any person, association or corporation subject to the provisions of this Act, shall demand or receive a greater compensation for any service rendered or to be rendered than that fixed and established by the said Railroad Commission then, and in every

such case, such person, association or corporation shall be deemed guilty of extortion and shall forfeit and pay to the State of Texas, a sum not to exceed five hundred dollars for each offense; provided, that if it shall appear that such violation was not wilful, said person, association or corporation shall have ten days to refund such overcharges or damages, in which case the penalty shall not be incurred, and the said Commission shall have authority and it shall be its duty to sue for and recover the same in the same manner as may be prescribed by law for like suits against railroad companies. [Id., § 2.]

Art. 1522o. Same; discrimination.—If any person, association or corporation subject to the provisions of this Act shall by any special rate, rebate, drawback or other device, or in any manner directly or indirectly charge, demand, collect or receive from any other person, association or corporation a greater or less compensation for any service rendered, or to be rendered, by it than it charges, demands, collects or receives from any other person, association or corporation for doing a like and contemporaneous service, or if any such person, association or corporation shall make or give any undue or unreasonable preference or advantage to any other person, association or corporation, or to any locality, or shall subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage, then and in any such case the person, association or corporation thus offending shall forfeit and pay to the State of Texas a sum not to exceed five hundred dollars (\$500.00) for each and every offense. [Id., § 3.]

CHAPTER FIFTEEN

OFFENSES BY RAILWAY OFFICIALS OR AGAINST
RAILWAYS

Art.	Art.
1523-1. Separate coaches for whites and negroes.	1527. Redemption and sale of unused tickets.
1523-2. "Negro" defined.	1528. Demand to be made in ten days.
1523-3. "Compartment" defined.	1529. Refusal to redeem; penalty.
1523-4. Penalty.	1530. Law to be printed on tickets.
1523-5. Riding in inhibited coach.	1531. Unlawful boarding of trains.
1523-6. Not applicable, to whom.	1531a. Train dispatchers; duties.
1523-7. Law to be posted.	1531b. Derailing devices on repair tracks, exceptions.
1523-8. Not applicable to excursion trains.	1531c. Same; punishment.
1523-9. Duty of conductors.	1531d. Train bulletins at stations.
1523-10. Disposition of fines.	1531e. Obstruction of highway crossings.
1524. Engineer failing to sound bell, etc.	1531f. Same; punishment.
1525. Ticket agents to have certificate of authority.	1531g. Section foreman shall make report of animals killed; evidence.
1526. Agent must exhibit authority on demand.	1531h. Same; punishment.

Article 1523. [1010] 1. Railroad to provide separate coaches for white and negro passengers.—Every railway company, street car company and interurban railway company, lessee, manager, or receiver thereof, doing business in this state, as a common carrier of passengers for hire, shall provide separate coaches or compartments, as hereinafter provided, for the accommodation of white and negro passengers, which separate coaches or compartments shall be equal in all points of comfort and convenience. [Act 22d Leg., ch. 41, § 1, pp. 44 and 165; amended Act 1907, p. 58.]

2. "Negro" defined.—The term "negro" used herein includes every person of African descent as defined by the statutes of this state. [Id. § 2; amended Act 1907, p. 58.]

3. "Compartment" defined, etc.; lettering on coach.—Each compartment of a railroad coach, divided by good and substantial wooden partitions, with a door therein, shall be deemed a separate coach within the meaning of this law, and each separate coach shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart; and each compartment of the street car or interurban car divided by board or marker placed in a conspicuous place, bearing appropriate words in plain letters, indicating the race for which it is set apart, shall be sufficient as a separate compartment within the meaning of this law. [Id., § 3; amended, Act 1907 p. 58.]

4. Penalty for failure to provide, etc.—Any railway company, street car company or interurban railroad company, lessee, manager or receiver thereof, which shall fail to provide its cars bearing passengers with separate coaches or compartments, as above provided for, shall be liable for each and every failure to a penalty not less than one hundred nor more than one thousand dollars, to be recovered by suit in the name of the state in any court of competent jurisdiction; and each trip run with such train or street car or interurban car without such separate coach or compartment shall be deemed a separate offense. [Id., § 4; amended Act 1907, p. 59.]

5. Passenger riding in coach not for his race; penalty.—If any passenger upon a train or street car or interurban car, provided with separate coaches or compartments, as above provided, shall ride in any coach or compartment, not designated for his race, after having been forbidden to do so by the conductor in charge of the train, he shall be guilty of a misdemeanor, and, upon conviction,

shall be fined not less than five nor more than twenty-five dollars. [Id., § 5; amended Act 1907, p. 59.]

See Willson's Cr. Forms, 557.

6. Does not apply, wherein.—The provisions of this law shall not be so construed as to prohibit nurses from traveling in any coach or compartment with their employer, or employes, upon the train of cars in the discharge of their duty, nor shall it be construed to apply to such freight trains as carry passengers in cabooses; provided, that nothing herein contained shall be construed to prevent railroad companies in this state from hauling sleeping cars, dining or cafe cars or chair cars attached to their trains, to be used exclusively by either white or negro passengers, separately, but not jointly. [Amended by Act 22d Leg., ch. 103, § 4; amended, Act 1907, p. 59.]

7. Law to be posted, where.—Every railroad company carrying passengers in this state shall keep this law posted in a conspicuous place in each passenger depot and in each passenger coach provided in this law. [Act 22d Leg., ch. 41, § 7; amended Act 1907, p. 59.]

8. Does not apply to excursion trains.—The provisions of this law shall not apply to any excursion train, or street car, or interurban car, as such, for the benefit of either race. [Id., § 8; amended Act 1907, p. 59.]

9. Duty of conductors.—Conductors of passenger trains, street cars or interurban lines, provided with separate coaches, shall have the authority to refuse any passenger admittance to any coach or compartment, in which they are not entitled to ride under the provisions of this law; and the conductor in charge of the train or street car or interurban car shall have authority, and it shall be his duty, to remove from a coach or street car, or interurban car any passenger not entitled to ride therein, under the provisions of this law, and, upon his refusal to do so knowingly, shall be guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than five or more than twenty-five dollars. [Id., § 9; amended Act 1907, p. 59.]

Willson's Cr. Forms, 559.

Entering negro coach in performance of official duty.—A white peace officer may enter a negro coach in performance of his duty. Missouri, K. & T. Ry. Co. of Texas v. Brown (Civ. App.) 158 S. W. 259.

10. Fines collected to go to school fund.—All fines collected under the provisions of this law shall go to the available common school fund of the county in which conviction is had. Prosecutions under the provisions of this law may be instituted in any court of competent jurisdiction in any county through, or into which, said railroad may be run or have an office. [Id., § 10; amended Act 1907, p. 59.]

Indictment.—Willson's Cr. Forms, 557, 559, 732g, 732h.

Art. 1524. [1010a] Locomotive engineer failing to sound bell and whistle; penalty.—A bell of at least thirty pounds weight and a steam whistle shall be placed on each locomotive engine, and the whistle shall be blown and the bell rung at the distance of at least eighty rods from the place where the railroad shall cross any public road or street; and such bell shall be kept ringing until it shall have crossed such public road, or stopped; and each locomotive engine approaching a place where two lines of railway cross each other, shall, before reaching such railway crossing, be brought to a full stop; and any engineer having charge of such engine, and neglecting to comply with any of the provisions of this article, shall be fined in any sum not less than five nor more than one hundred dollars for such neglect; and the corporation operating such railway shall be liable for all damages which shall be sustained by any

person by reason of any such neglect; provided, however, that the full stop at such crossings may be discontinued when the railroads crossing each other shall put into full operation at such crossing an interlocking switch and signal apparatus, and shall keep a flagman in attendance at such crossing. [Act 1893, p. 87.]

Crossing signals.—Under Acts 1883, (page 28,) an instruction which makes a ringing or whistling at 80 rods' distance, without continuance of the ringing, a compliance with the law, is properly refused. *Galveston, H. & S. A. Ry. Co. v. Duelm* (Civ. App.) 23 S. W. 596.

Rev. St. 1879, art. 4232, as amended by Act March 21, 1883 (Vernon's Sayles' Civ. St. 1914, art. 6564), does not require both the whistle to be blown and the bell rung; and it is sufficient if the whistle is blown at a distance of at least 80 rods before the crossing is reached, without continuing the blowing until the crossing is passed. *Missouri, K. & T. Ry. Co. v. Kirschoffer* (Civ. App.) 24 S. W. 577.

Indictment.—Willson's Cr. Forms, 563, 732g, 732h.

Art. 1525. [1010b] Ticket agents to be provided with certificate of authority.—It shall be the duty of all railroad companies doing business in this state, or the receiver of any such railroad company, through their duly authorized officers, to provide each agent who may be authorized to sell tickets or other evidences entitling the holder to travel upon any such railroad, with a certificate, setting forth the authority of such agent to make such sale. Such certificate shall be duly attested by the corporate seal of such railroad company, or the signature of the receiver, if any there be, of such railroad company, or by the signature of the officer whose name is signed upon the tickets or coupons which such agent may be authorized to sell. [Act of 1893, p. 97.]

Indictment.—Willson's Cr. Forms, 732g, 732h.

SCALPING RAILROAD TICKETS.

Laws 1893, p. 97 making it an offense for any person other than a railroad agent to sell tickets, but requiring that the ticket shall contain a notice that it is unlawful for one not a railroad agent to sell same was held unconstitutional in *Jannin v. State*, 42 App. 631, 51 S. W. 1126, 62 S. W. 419, 96 Am. St. Rep. 821, and was omitted from the revised Penal Code.

Art. 1526. [1010e] Agents must exhibit authority on demand.—It shall be the duty of every agent who shall be authorized to sell tickets, or parts of tickets, or other evidences of the holder's right to travel over any railroad within this state, upon demand, to exhibit to any person desiring to purchase a ticket, or to any officer of the law who may request it, the certificate of his authority to sell, and to keep said certificate posted in a conspicuous place in his office for the information of travelers. [Id.]

Explanatory.—The revisers of 1911 ascribed the above provision to the act of 1893. The subject-matter of this article was carried into Rev. St. 1895, as art. 4560c, and such article was amended by Act 1903, p. 162, but no change was made in its language.

Indictment.—Willson's Cr. Forms, 732h.

Art. 1527. [1010f] Railway companies to redeem unused tickets.—It shall be the duty of all railroad companies in this state, or the receiver or trustee of any such railroad company, to provide for the redemption, from the holder thereof, of the whole, or any parts or coupons of any ticket or tickets which they, or any of their duly authorized agents, may have sold, if for any reason the holder has not used, and does not desire to use the same, upon the following terms: If neither the ticket, nor any part thereof, has been used by the holder, he shall be entitled to receive the full amount he paid therefor; and, where the ticket has been used in part, the holder thereof shall be entitled to receive the remainder of the price paid for the whole ticket, after deducting therefrom the tariff rate between the points for which the portion of said ticket was actually used. [Id.]

Invalidity of omitted part of original statute.—That part of the act which leaves it optional with the railroad company to stamp on the ticket the provision that the act shall not apply to a person holding a ticket upon which is not printed that

it is a penal offense for him to sell the ticket, is in violation of law, null and void. *Jannin v. State*, 42 App. 631, 51 S. W. 1128, 62 S. W. 419, 96 Am. St. Rep. 821.

Necessity of immediate redemption on presentation.—Under this and the two following articles, the railway company may provide its own processes of disbursement; and where a company required tickets for redemption to be forwarded to the auditor of the company, who would send a cash slip to the ticket agent whereupon the money would be paid to the holder of the ticket, the refusal of an agent to immediately pay the redeemable value of a ticket upon presentation did not subject the company to the prescribed penalty, the words "when presented," being equivalent to "in case it is presented," or "on condition that it be presented." *Texas & P. Ry. Co. v. Beaird* (Civ. App.) 169 S. W. 1050.

Indictment.—Willson's Cr. Forms, 732h.

Art. 1528. Demand must be made within ten days.—Provided, however, such tickets, or parts thereof, shall be presented for redemption to the railroad company from which it has been purchased, or the receiver of such railroad company, or to any of the duly authorized ticket agents of such railroad company, or receiver thereof, or in case of a through ticket, to any of the authorized agents of any connecting line, within a time not exceeding ten days after the right to use said ticket has expired by limitation of time as stipulated therein. [Id.]

See notes under the preceding article.

Indictment.—Willson's Cr. Forms, 732h.

Art. 1529. Refusal to redeem; penalty.—Any railroad company, or receiver, or trustee of such railroad company, over or on which said ticket may be used, which shall refuse or fail to redeem the whole, or any part or coupon of any ticket or tickets, when presented, shall forfeit to the holder thereof a sum not less than one hundred dollars nor more than five hundred dollars, recoverable in any court of competent jurisdiction. [Id.]

See notes under article 1527, ante.

Indictment.—Willson's Cr. Forms, 732h.

Art. 1530. [1010g] Law to be printed on tickets.—It shall be the duty of the railway company to print conspicuously across the face of every ticket, sold by its duly authorized agents in this state, a notice to the holder thereof that this ticket, or any unused part thereof, is redeemable by the company or its receiver at any ticket office of the company, when presented for redemption. [Id., p. 98.]

Art. 1531. [1010h] Unlawful boarding of train.—Any person who shall board any passenger, freight or other railway train, whether moving or standing, for any purpose, and without, in good faith, intending to become a passenger thereon, and with no lawful business thereon, and with intent to obtain a free ride on such train, however short the distance, without the consent of the person or persons in charge thereof, shall be guilty of a misdemeanor, and shall be punished by fine of not less than five dollars nor more than one hundred dollars. [Act 1895, p. 178.]

Offender as trespasser.—A person standing on a railroad platform waiting for a chance to steal a ride on a train, being there for the purpose of defrauding the railroad company, in violation of this article, was a "trespasser." *Grubb v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 153 S. W. 694.

Ejection and arrest without warrant.—A violation of this article would not justify the arrest of the offender without a warrant, so that, in an action against a railroad company for unlawful expulsion and wrongful arrest, an instruction that plaintiff's expulsion would be lawful if he was attempting to violate the statute when ejected was properly refused. *Freeman v. Costley* (Civ. App.) 124 S. W. 458.

Indictment.—Willson's Cr. Forms, 558.

An indictment against defendant for unlawfully boarding a railway train, as prohibited by this article, without the consent of the person in charge thereof, failing to state the name of such person, or that his name could not be ascertained with reasonable diligence by the grand jury, was insufficient. *Daugherty v. State*, 41 App. 661, 56 S. W. 629.

Under this article, an indictment charging that defendant unlawfully boarded a passenger and freight train on a certain railroad was not objectionable for failure to sufficiently charge that "defendant boarded a railway train." *Daugherty v. State*, 41 App. 661, 56 S. W. 629.

Art. 1531a. Train dispatchers; duties.—Every such railroad corporation operating trains in this State shall employ a competent train dispatcher whose duty it shall be to keep informed of the movement of all trains upon the lines of such railroad corporation. Said train dispatcher shall also keep all agents at stations having telegraph offices in or near them, informed of the movement of all passenger trains one hour prior to the time such passenger train or trains are due, according to the published schedule at such stations. And in the event any such passenger train is delayed for more than one hour, than the published schedule, then it shall be the duty of such train dispatcher to inform such local agents how late said train is and the last telegraph station passed. If such train dispatcher shall fail or refuse to furnish the information concerning the movement of trains to agents as herein required, then such dispatcher shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than fifty nor more than two hundred dollars for each offense. [Act 1903, 1 S. S., p. 21; Act 1913, p. 318, ch. 148, § 2, amending Art. 6553, Rev. St. 1911.]

See notes under art. 6553, Vernon's Sayles' Civ. St. 1914.

Explanatory.—Act 1903, 1 S. S., p. 21, of which Act 1913, ch. 148, § 2, is amendatory, was omitted from the revised Pen. Code of 1911, and is included in this compilation in view of the decision in *Berry v. State*, 156 S. W. 626.

Art. 1531b. Derailing devices on repair tracks; exception.—It shall be unlawful for any person, firm, corporation or receiver operating any railroad, machine shop or other concern engaged in repairing or manufacturing cars within this State to use any tracks not equipped with derailing devices upon which to repair or manufacture cars; such derailing devices to be provided with private locks, to be kept locked at all times when tracks are in use: provided, that nothing in this Act shall be construed as prohibiting temporary repairs to cars on tracks other than where cars are regularly repaired or manufactured. [Act 1913, p. 334, ch. 158, § 1.]

Art. 1531c. Same; punishment.—Any person, firm, corporation or receiver, operating any railroad, machine shop or other concern engaged in the repairing or manufacture of cars in this State, who shall violate the provisions of Section on [1] of this Act [art. 1531b], shall be deemed guilty of a misdemeanor, and upon conviction in any court of competent jurisdiction, shall be fined in a sum not less than fifty (\$50.00) dollars nor more than two hundred (\$200.00) dollars and each day such violation shall exist shall constitute a separate offense. [Id., § 2.]

Art. 1531d. Train bulletins at stations.—It shall be also the duty of every such railroad agent at stations having telegraph communication with the train dispatcher of the railroad, to ascertain one hour before the schedule time of the arrival of passenger trains, if such train is on time, and if on time, to bulletin that fact on a board provided by the company and placed in some conspicuous place at the passenger station. And if the train is late, he shall bulletin how late, and the last telegraph station passed by such train. If later than one hour, said agent shall thereafter ascertain the latest news from such train dispatcher, or some other reliable source, every hour, and bulletin such information and the time of the probable arrival of such train. If any such agent shall fail or refuse to perform the duties required of him by this Article, he shall be deemed guilty of a misdemeanor, for each time he fails or refuses to perform the duties required of him by this Article, and upon conviction shall be punished by a fine of not less than fifty nor more than one

hundred dollars for each offense. [Act 1903, p. 162, ch. 107, § 1; Rev. St. 1911, art. 6639 amended; Act 1913, p. 350, ch. 166, § 2.]

Explanatory.—Act 1903, ch. 107, § 1, consists of an amendment of art. 4560c. Rev. St. 1895. It was omitted from the revised Penal Code of 1911, and is included, in its amended form, in this compilation, in view of the decision in *Berry v. State* (Cr. App.) 156 S. W. 626.

Art. 1531e. Obstruction of highway crossings.—It shall hereafter be unlawful for any railway company or any officer, agent, servant, receiver or receivers of any railway corporation to wilfully obstruct for more than five minutes at any one time any street, railway crossing or public highway in this State by permitting their trains to stand on or across such crossing or crossings. [Act 1915, p. 109, ch. 60, § 1.]

Art. 1531f. Same; punishment.—Any person, firm or corporation, or the officers, agents, servants, receiver or receivers of any corporation violating any of the provisions of this Act, shall, upon conviction thereof, be fined in any sum not less than five nor more than one hundred dollars. [Id., § 2.]

Art. 1531g. Section foremen shall make report of animals killed; evidence.—Whenever any animal is killed or found dead upon the roadbed or right of way of any railroad company in this State, the section foreman of the railroad where said animal is killed or found dead, shall take and make a description of such animal, stating its kind, the marks and brands, color, and apparent age, and any other description that may serve to identify said animal, which description must be taken and made before said animal is buried or otherwise disposed of, and shall transmit same to the County Clerk of the county in which said animal is found or killed, within ten days from the date of finding or killing, which description shall be by said County Clerk filed and kept of records in his office without exacting any fees from section foreman for filing same. A certified copy of said report so filed may be introduced in evidence in any case wherein the killing, death, or value of said animal is in question. [Act 1915, p. 126, ch. 73, § 1.]

Art. 1531h. Same; punishment.—Any person violating any of the provisions of Section 1 of this Act [art. 1531g] shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than five dollars nor more than twenty-five dollars. [Id., § 2.]

CHAPTER SIXTEEN

RAILROADS, ETC.—PROHIBITING ISSUANCE OF FREE PASSES, ETC.

Art.	Art.
1532. Free pass, frank, privilege or free haul or carrying of person or property free of charge, penalty for.	1536. Companies, their lessees and receivers shall report annually the name and residence of each person to whom free transportation was given.
1533. Provisions of preceding article not to be held to prohibit what.	1537. Person other than those exempt using free pass, free ticket, etc., penalty.
1533a. Transportation of public health exhibit.	1538. Director, officer, agent, receiver, etc., wilfully violating this law or permitting its violation, penalty.
1534. Person offering to use, permit, pass, frank, etc., issued to any other person or applying for same, knowing he is not entitled thereto, penalty.	1539. Person may be compelled to testify, exempt from prosecution.
1535. Discrimination by any means or device, penalty.	

Article 1532. Free pass, frank, privilege or free haul or carrying of persons or property free of charge, penalty for.—If any steam or electric railway company, street railway company, interurban rail-

way company, or other chartered transportation company, express company, sleeping car company, telegraph or telephone company, or person or association of persons operating the same, or the receivers or lessees thereof, or any officer, agent or employé of any such company in this state, shall knowingly haul or carry any person or property free of charge, or give or grant to any person, firm, association of persons, or corporation, a free pass, frank, a privilege or a substitute for pay, or a subterfuge which is used, or which is given to be used instead of the regular fare or rate for transportation, or any authority or permit whatsoever, to travel or to pass or convey or transport any person or property free, or sell any transportation for anything except money, or for any greater or less rate than is charged to all persons under the same conditions, over any railway or other transportation line, or part of line, in this state, or shall knowingly permit any person to transmit any message free in this state, or shall give any frank or right or privilege to transmit messages free in this state, or property free of charge or for greater or less fare or rate than is charged other persons in this state, for similar service, except such persons as are hereinafter exempted under the provisions of this chapter, shall be guilty of a misdemeanor, and, upon conviction in any action brought on this account, and for that purpose, shall pay to the state of Texas the sum of five thousand dollars for each and every act which violates the provisions of this article; and any person, president, director, officer, employé or agent of any such corporation or association of persons, who shall sell any transportation for anything except money, or knowingly give, grant, issue, or cause to be issued, a free pass, a frank, a privilege or any substitute for or in lieu thereof, for the transportation of any person, article or thing, or the sending or transmitting any messages over wire or other means of transmitting messages in this state, except to such persons as are hereinafter exempted from the provisions of this chapter, shall be deemed guilty of a felony under the laws of this state, and, upon conviction for such act, shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, and may, in addition thereto, in the discretion of the jury, be imprisoned in the penitentiary for a term of not less than six months nor more than two years. [Act 1907, p. 93.]

Free transportation of witnesses for railroad.—Where, in an action for injuries to a servant of defendant railroad company, certain of its witnesses testified that they had been furnished free transportation over defendant's road to the place of trial, and admitted that they were not employés nor within any of the exceptions prescribed by Gen. Laws 1907, p. 93, c. 42, prohibiting the issuance of free passes, and declaring that all persons, except those mentioned in section 2, obtaining a free pass or using free tickets, shall be guilty of misdemeanor, it was not error to permit plaintiff's counsel, in argument, to state that such of defendant's witnesses as so testified violated the law in accepting transportation paid by defendant. *Gulf, C. & S. F. Ry. Co. v. Adams* (Civ. App.) 121 S. W. 876.

Art. 1533. Provisions of preceding article not to prohibit what.—That the provisions of Section 1 of this Act [art. 1532] shall not be held to prohibit any steam or electric interurban railway, telegraph company or chartered transportation company or sleeping car company or the receivers or lessees thereof or persons operating the same, or the officers, agents or employés thereof from granting free or exchanging free passes, franks, privileges, substitute for pay or other thing herein prohibited to the following persons: The actual bona fide employés of any such companies and the members of their families. The term employés shall be construed to embrace the following persons only: All persons actually employed and engaged in the service of any such companies, including its officers, bona fide ticket, passenger and freight agents, physicians, surgeons and general attorneys and attorneys who appear in courts to try

cases and who receive a reasonable annual salary; furloughed, pensioned and superannuated employés, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier, and ex-employés traveling for the purpose of entering the service of any such common carrier. And the term families as used in this paragraph shall include the families of the persons named in this provision; also the families of persons killed while in the service of any such common carrier; also persons actually employed on sleeping cars, express cars, also officers and employés of telegraph and telephone companies, newsboys employed on trains, railway mail service employés and their families, postoffice inspectors, chairmen and bona fide members of grievance committees of employés, bona fide custom and immigration inspectors employed by the Government, the State Health Officer and one assistant, and Federal health officers, county health officers, the State Railroad Commissioners, State Superintendent of Public Buildings and Grounds, the State Game, Fish and Oyster Commissioner and his two chief deputies; also Government representatives accompanying from the Texas fish hatcheries shipments of fish for free distribution in the waters of this State; the Dairy and Food Commissioner and two chief deputies; also when live stock, poultry, fruit, melons or other perishable produce is shipped, the necessary caretakers while en route and return; also trip passes to the indigent poor when application therefor is made by any religious or charitable organization; Sisters of Charity, or members of any religious society of like character; delegates to the different farmers' institutes and farmers' congresses and farmers' unions; also all delegates to the State and district firemen's conventions from volunteer fire companies, and Confederate veterans who are or have been or who hereafter may be admitted to the Confederate Home; managers of Young Men's Christian Associations or other eleemosynary institutions while engaged in charitable work; also the officers or employés of industrial fairs during the continuance of any said fair and six months prior thereto; provided, that no more than four officers or employés of any one fair or fair associations shall receive passage in any one year; also persons injured in wrecks upon the road of any such company immediately after such injury, and the physicians and nurses attending such persons at the time thereof; also persons and property carried in cases of general epidemic, pestilence or other calamitous visitations at the time thereof or immediately thereafter; also the United States marshals and not more than two deputies of each such marshal; State rangers; constables; the members of the State militia in uniform and when called into service for the State; sheriffs and not more than two deputies to each constable or sheriff; chiefs of police or city marshals, whether elective or appointive. Any bona fide policeman or fireman in the service of any city or town in Texas may have the right to ride upon free transportation furnished by any steam railroad company, any street railway company, any interurban railway company, or other lines of public transportation, when such policeman or fireman is in the discharge of his public duty; but this provision shall not be construed so as to apply to men holding commissions as special policemen or firemen. Any other bona fide peace officer shall enjoy the same privilege, when their duties are to execute criminal processes; provided, that if any such railroad or transportation company shall grant to any sheriff a free pass over its lines of railroad, then it shall issue like free transportation to each and every sheriff in this State who may make to it written

application therefor; and provided further, that said sheriffs and other peace officers above mentioned using such free passes or transportation shall deduct the money value of the same, at the legal rate per mile, from any mileage accounts against the State and litigants earned by them in executing process when such pass was used or could have been used; also members of the Live Stock Sanitary Commission or their inspectors, of Texas, not exceeding twenty-five (25) in number for any one year; any person who has by many years of actual labor aided, assisted and been instrumental in securing the passage of statutes by the Congress of the United States requiring the equipment of railroad trains with adequate safety appliances for the protection of the persons and lives of the employes and passengers; provided, that such person was not at such time a public officer, National, State or local, nor employed directly or indirectly by any railroad company; provided, that nothing in this Act shall prevent any such companies, the receivers or lessees thereof and their families or the officers, agents or employes from granting to ministers of religion reduced rates of one-half (1-2) the regular fare, nor shall anything in this Act prevent any such companies, their receivers or lessees from transporting free of charge any article being sent to any orphan home or other charitable institution; provided, further, that nothing in this Act shall be construed to prohibit any such companies, their receivers or lessees or officers, agents or servants from making special rates for special occasions or under special conditions, but no such rate shall ever be made without first obtaining authority from the Railroad Commission of Texas; and provided further, that no persons who hold any public office in this State shall at any time during their term of office be entitled to any such pass or transportation, privilege or franks or substitute for fare or charges over any railway or other company mentioned in Section one (1) of this Act, except employes operating trains when in the actual discharge of their duties as such and the officers hereinbefore exempted; provided, further, that nothing in this Act shall prohibit any street railway company from transporting, free of charge, police officers and firemen in any city where said company is authorized so to do by any ordinance or authority from the city council of any such city; provided, however, that no person or persons, beneficiaries of free transportation herein permitted, shall ride on a free pass or enjoy free transportation to or from any political convention or on any political errand; that nothing in this Act shall prohibit any express company from hauling or carrying free of charge the packages and property of its actual and bona fide officers, attorneys, agents and employes who are actually in the employment of any such company, its receivers or lessees, at the time such free transportation or the right thereto was given; and provided, further, that nothing in this Act shall be construed to prohibit any telegraph or telephone company from carrying and transmitting free of charge the messages of its bona fide officers, attorneys, agents and employes and their families who are actually in the employment of such company, its receivers or lessees at the time when such free transportation or the right thereto was given; provided, the actual bona fide officers and employes upon annual salaries of railway and telephone companies, and telegraph companies are hereby permitted to exchange franks, privileges and free transportation over their respective lines of railway and telegraph or telephone; and provided, further, that nothing in this Act shall be construed to prevent the right of contract between railway companies and publishers, editors or proprietors of newspapers or magazines from making an exchange of mileage for advertising space in such news-

papers or magazines; and provided, further, that the contract between the railway companies and publishers, editors or proprietors of such newspapers shall be upon the same basis of charge as is charged the public generally for a like service, and that the said exchange shall be on a basis of value received in all cases, and providing that such contract shall be in writing and shall not be operative until approved by the Railroad Commission of this State and filed in the office of the Commission as a part of the records thereof, subject at all reasonable times to public inspection; and that nothing herein contained shall be construed to prevent railway, express, railway news and other companies, persons and corporations performing service for or in connection with the operation of railways, from issuing to or exchanging with each other, franks, passage and free transportation of persons and property to each other and to their respective company's officers and employes for the use of the respective facilities; provided, that nothing herein contained shall be construed to prohibit actual bona fide employes from riding on a pass if he at the same time holds the position of school trustee or notary public. [Act 1907, p. 94, § 2, amended; Act 1911, p. 151, ch. 83, § 1.]

See note under the preceding article.

Art. 1533a. Transportation of public health exhibit.—It shall be lawful for any railroad company to furnish free of charge a car or cars for the display of the public health exhibit and to furnish free transportation to the persons actually engaged in the work in connection with the display of the public health exhibit. [Act 1913, 1st S. S., p. 191, ch. 45, § 2.]

Art. 1534. Persons offering to use permit, pass, franks, etc., issued to any other person, or applying for same, knowing he is not entitled thereto, penalty.—If any persons shall present, or offer to use, in his own behalf, any permit or frank whatsoever, to travel, pass or to convey any person or property or message which has been issued to any other person, or shall, knowing that he is not entitled under the provisions of this chapter, apply to any railway, express, telegraph or telephone company, officer, agent, lessee or receiver thereof, for any free pass, frank, privilege or a substitute for pay given or to be used instead of the regular fare or rate for transportation, or for any other consideration, except money, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by confinement in the county jail for not less than thirty days and not more than twelve months, and by a fine of not less than one hundred dollars and not more than one thousand dollars. [Act 1907, p. 95.]

Art. 1535. Discrimination by any means or device, penalty.—No company, subject to the provisions of this chapter, shall, directly or indirectly, by any special rate, rebate, draw-back, or other device or exchange, demand, charge or collect or receive from any person, firm, association of persons or corporation a greater or less or different compensation for any service rendered, or to be rendered, in the transportation of passengers, property or messages, than it charges, demands, collects or receives from any other person, firm, association of persons or corporation for doing for him, them or it, a like service, if the transportation or transmission is a like kind of traffic or service under substantially similar circumstances and conditions; and any such company violating these provisions shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the state of Texas a penalty of five thousand dollars. [Id., p. 96.]

Art. 1536. Companies, their lessees and receivers shall report annually the name and residence of each person to whom free transportation was given.—Each and all companies subject to the provisions of this chapter, their receivers and lessees, shall report annually on such dates as may be fixed by the railroad commission of this state, the name and residence of each and every person to whom free transportation, or right thereto, was given to travel, or to have his property or messages transported or transmitted over its transportation, express, sleeping car or railway or telegraph or telephone line; and any company violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the state of Texas a penalty of one thousand dollars. [Id., p. 96.]

Art. 1537. Persons other than those exempt using free pass, free ticket, etc., penalty.—Any person, other than the persons excepted in this chapter, who uses any such free ticket, free pass or free transportation, frank or privilege over any railway or other transportation line or sleeping or express car, telegraph or telephone line, mentioned in this chapter, for any distance under the control and operation of either of said companies, subject to the provisions of this chapter, or under their authority, or shall knowingly and wilfully, by any means or device whatsoever, obtain, use or enjoy from any such company, a less fare or rate than is charged, demanded, collected or received by any such company from any other person, firm, association of persons or corporations for doing for him, them or it, a like service, if the transportation or service is of a like kind of traffic or service under substantially similar circumstances and conditions, such person or such officer or agent who acts for such corporation or company thus favored, shall be guilty of a misdemeanor, and, on conviction, for each offense, shall be fined not less than one hundred dollars and not more than one thousand dollars. [Id., p. 96.]

See note under article 1532, ante.

Effect of statute as to alleged misconduct of a conductor in demanding fare.—In an action against a carrier for alleged misconduct of its conductor with reference to a demand on the plaintiff's wife for fare for her child, the evidence showed that the conductor told plaintiff's wife that he could not carry the child without payment of fare, and that he would have to expel the child unless the fare was paid, and that under the statute it was an offense for him to permit the child to ride without payment of fare. There was evidence that the wife entered the train not expecting to pay fare for the child. Held in view of this article that it was error to refuse an instruction that the conductor was entitled to make such statement to plaintiff, and that, if such conversation was had the jury could not find for plaintiff unless the conductor's manner was rough, and as a result therefrom the wife suffered the injury alleged. *Trinity & B. V. Ry. Co. v. Carpenter* (Civ. App.) 132 S. W. 837.

Art. 1538. Director, officer, agent, receiver, etc., wilfully violating this law or permitting its violation, penalty.—Any director, officer, agent or any receiver, trustee, lessee or person acting for, or employed by, any company subject to the provisions of this chapter, who alone, or with any other corporation, company, persons or party, shall wilfully do, or cause to be done, or shall wilfully suffer, or permit to be done, any act, matter or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter or thing in this act required to be done, or shall cause or wilfully suffer or permit any act, matter or thing so directed, required by this chapter to be done, not to be done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be subject to a fine of not less than one hundred dollars nor more than one thousand dollars; and, if the offense for

which any person shall be convicted under this section shall be unlawful discrimination in rates, fares or charges for the transportation of passengers or property, or the transmission of messages, such person may, in addition to the fines hereinbefore provided for, at the discretion of the jury, be imprisoned in the penitentiary for a term not less than six months nor more than two years. [Id., p. 96.]

Art. 1539. Person may be compelled to testify, exempt from prosecution.—In any investigation, suit or prosecution which may be had, or instituted, under the provisions of this chapter, the court or tribunal in which the investigation, suit or prosecution is pending may compel all persons to attend and give testimony, and to produce such papers, books and documents as may be desired by the state; and no person shall be exempt from giving testimony therein; provided, however, that no criminal action or proceeding shall be brought or prosecuted against such witness on account of any testimony so given or furnished by him. [Id., p. 97.]

CHAPTER SEVENTEEN

RAILROADS AND OTHER COMMON CARRIERS—BILLS OF LADING, PRESCRIBING CERTAIN REQUIREMENTS FOR ISSUANCE

Art.	Art.
1540. All common carriers to issue bills of lading.	officer or agent to issue bill of lading.
1541. What intrastate bills of lading shall, and interstate bills of lading may, contain.	1546. Penalty for issuing wrongful, fraudulent or unauthorized bill of lading.
1542. "Straight" and "order" bills of lading; latter not issuable in duplicate, etc.	1547. Penalty for forgery of name of agent, etc., to bill of lading, or uttering such forgery.
1543. Railroad commission shall prescribe forms, etc., of bills of lading and regulate issuance thereof.	1548. Penalty for duplication, etc., of order bill of lading.
1544. Authority of agents of common carriers under this law to be posted.	1549. Penalty for transfer of bill of lading issued in violation of this law.
1545. Penalty for failure or refusal of	1550. Penalty for fraudulently procuring issuance of false bill of lading.

Article 1540. All common carriers to issue bills of lading.—It shall be the duty of all railroad companies, steamship companies and other common carriers, or receivers thereof, except express companies and pipe line companies, upon the receipt of freight for transportation, to issue bills of lading therefor, and to authenticate, validate or certify such bills of lading, when the same shall be demanded by the shipper, in accordance with the provisions of this chapter. [Act 1910, S. S., p. 138.]

See notes under art. 710, Vernon's Sayles' Civ. St. 1914.

Art. 1541. What intrastate bills of lading shall, and interstate bills of lading may, contain.—Each bill of lading issued by a common carrier, to which the provisions of this chapter apply, for an intrastate shipment, shall contain, and each bill of lading issued by such carrier for interstate or foreign shipment may contain, within the written or printed terms, in addition to the other requirements of this chapter, the following:

- (a) The date of its issuance;
- (b) The name of the person from whom the goods have been received;
- (c) The place where the goods have been received;
- (d) The place to which the goods are to be transported;
- (e) A statement of whether the goods will be delivered to a specific person or to the order of a specific person;

(f) A description of the goods, or the packages containing them, which may, however, be in terms such as may be approved by the railroad commission;

(g) The signature of the carrier, or the duly authorized agent of the carrier; said bill of lading shall be so signed with pen and ink, and the person signing the same shall attach his signature below all written, printed or stamped matter contained in said bill of lading, except the words, "Authorized agent of. . . ." (stating the name of his principal), which shall appear below his signature;

(h) The carrier may insert in a bill of lading issued by him any other terms and conditions; provided, such terms and conditions shall not be contrary to law or public policy or the orders promulgated by the railroad commission; and provided, further, that no language shall be inserted in any bill of lading having the effect of limiting or avoiding any of the provisions of this chapter;

(i) Provided, that when any form of bill of lading has been approved by the interstate commerce commission, and has been adopted by any carrier and made a part of its tariff, then such bill of lading, as to interstate and foreign shipments, shall be a sufficient compliance with the provisions of this article. [Id., p. 139.]

Art. 1542. "Straight" and "order" bills of lading defined; latter not issuable in duplicate, etc.—A bill of lading in which it is stated that the goods are consigned or destined to a specific person is a "straight" bill of lading; and a bill of lading in which it is stated that the goods are consigned to the order of any person named in such bill of lading is an "order" bill of lading. Order bills of lading shall not be issued in sets or in duplicate, but copies thereof may be issued; provided, such copy has written or printed across the face thereof: "Copy—not negotiable." [Id.]

Art. 1543. Railroad commission shall prescribe forms, etc., of bills of lading, and regulate issuance thereof.—It shall be the duty of the railroad commission of Texas to adopt and prescribe forms, terms and conditions for the authentication, certification and validation of all bills of lading issued by common carriers referred to in article . . . , and to regulate the method and manner of their issuance, and to take all such steps as it may deem necessary to carry into effect the provisions of this chapter. [Id.]

See Const. art. 10, § 2.

Art. 1544. Authority of agents of common carriers under this law to be posted.—It shall be the duty of the carriers affected by this chapter to keep posted for public inspection in some conspicuous place in the station or place where freight is received an instrument of writing, authorizing the agent of such carrier, or person authorized to act for such carrier, selected for such purpose, to execute, sign and issue bills of lading; and the agent, or person so authorized to act for said carrier, so selected, shall attach his signature to such instrument in the same manner that he signs bills of lading. [Id.]

Art. 1545. Penalty for failure or refusal of officer or agent to issue bill of lading.—Any officer, agent or servant of any carrier, railroad or transportation company, or receiver thereof, affected by this chapter, who shall fail or refuse to issue a bill of lading in accordance with this chapter and the regulations and orders of the railroad commission, when the same is rightfully demanded, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. [Id., p. 141.]

Art. 1546. Penalty for issuing wrongful, fraudulent or unauthorized bill of lading.—Any officer, agent or servant of a carrier, railroad or other transportation company, or receiver thereof, affected by this chapter, who shall wrongfully issue a bill of lading, with the intent to defraud any person, or who shall, with intent to defraud, knowingly misdescribe any goods, articles or other property, or the quantity or amount thereof, described in any bill of lading, or who shall knowingly issue a bill of lading without authority so to do, with the intent to defraud any person, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the state penitentiary for a term of not less than two years and not exceeding ten years. [Id.]

Art. 1547. Penalty for forgery of name of agent, etc., to bill of lading, or uttering such forgery.—Any person who shall forge the name of any agent of a railroad company, or other common carrier, to a bill of lading, with the intent to defraud, or who shall forge the name of any person to any certificate attached to a bill of lading issued by such carrier, with the intent to defraud, or who shall knowingly utter, or attempt to utter, any such forged instrument, with intent to defraud, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the state penitentiary for a term of not less than five years and not exceeding fifteen years. [Id.]

Art. 1548. Penalty for duplication, etc., of order bill of lading.—Any officer, agent or servant of a common carrier, who knowingly issues, or aids in issuing, or knowingly permits to be issued in parts or sets, or in duplicate, an order bill of lading, shall be guilty of a felony, and, upon conviction, shall be punished for such offense by a fine not exceeding five thousand dollars, and by confinement in the state penitentiary for a term not exceeding five years. [Id.]

Art. 1549. Penalty for transfer of bill of lading issued in violation of this law.—Any person who knowingly, and with the intent to defraud, negotiates or transfers a bill of lading, issued in violation of the provisions of this chapter, or who knowingly, and with the intent to defraud, negotiates or transfers a bill of lading which contains any statement of fact that is untrue, and which statement relates to a material matter, shall be deemed guilty of a felony, and, upon conviction of such offense, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment in the state penitentiary for a term not exceeding ten years. [Id.]

Art. 1550. Penalty for fraudulently procuring issuance of bill of lading.—Any person who shall knowingly and fraudulently procure, and cause the agent of any common carrier to make and set forth in any bill of lading issued by him on behalf of such carrier, any statements or representations which are false and which materially misrepresent the number, amount or quantity of the goods, chattels or other articles therein described, or who shall procure, or cause any agent of a common carrier to issue to him, a bill of lading, with the intent to defraud, shall be deemed guilty of a felony, and shall be punished by confinement in the penitentiary not less than two years nor more than five years. [Id.]

CHAPTER EIGHTEEN

RAILROAD EMPLOYÉS—LIMITING THE WORK HOURS
OF SAME

Art.
1551-1554. [Repealed.]

Art.
1555. Railroad telegraph or telephone operator not to work more than eight hours in twenty-four consecutive hours, penalty.

Articles 1551-1554. [Act 1903, ch. 31; Act 1907, pp. 113, 114; Act 1907, S. S. ch. 5.] Repealed. See note below.

Explanatory.—The act of 1907, ch. 51, pp. 113, 114, with the amendatory act (Act 1907, S. S. ch. 5), when carried into the revised Penal Code of 1911, as articles 1551 to 1554, inclusive, had been expressly repealed by Act 1909, ch. 101, § 3. This repeal was evidently overlooked by the revisers, and in view of the decisions in *Berry v. State* (Cr. App.) 156 S. W. 626; *Stevens v. State*, 70 App. 565, 159 S. W. 505; *Robertson v. State*, 70 App. 307, 159 S. W. 713; *Williams v. State*, 71 App. 6, 159 S. W. 732, the articles named are omitted from this compilation. The act of 1909 re-enacted the former provisions but substituted a penalty recoverable in a civil action in place of the former criminal penalty. The new act will be found in *Vernon's Sayles' Civ. St.* 1914, as articles 6584 and 6585.

Art. 1555. Railroad telegraph or telephone operator not to work more than eight hours in twenty-four consecutive hours, penalty.—It shall be unlawful for any railroad telegraph or telephone operator to work more than eight hours in twenty-four consecutive hours at such occupation; and any such operator, violating this article, shall pay a fine in any sum not less than twenty-five dollars nor more than one hundred dollars; provided, that, in case of an emergency, any operator may remain on duty for an additional two hours. [Act 1907, p. 223.]

Constitutionality.—This act is unconstitutional, in that it purports to apply to both interstate and intrastate commerce, and is in conflict with Act Cong. March 4, 1907, c. 2939, § 2, 34 Stat. 1416 [U. S. Comp. St. 1913, § 8678], and, hence, violative of the commerce clause of the federal constitution. *State v. Texas & N. O. R. Co.* (Civ. App.) 124 S. W. 984.

CHAPTER NINETEEN

RAILROAD COMPANIES—REQUIRING ENGINEERS OR
CONDUCTORS TO SERVE FIRST AS FIREMEN
OR BRAKEMEN

Art.
1556. Person running a locomotive engine upon any railroad, qualification of.
1557. Person engaged as conductor on railroad, qualification of.

Art.
1558. Penalty for violating two preceding articles.
1559. Shall not apply, when.
1560. Not to apply to railroads less than twenty-five miles in length, or lessee or receiver thereof.

Article 1556. Person running a locomotive engine upon any railroad, qualification of.—If any person shall run or operate any locomotive engine upon any railroad in the state of Texas, without having served three years prior thereto as a fireman or engineer on a locomotive engine, he shall be deemed guilty of a misdemeanor, and he shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars; and each day he so engages shall constitute a separate offense. [Act 1909, p. 92.]

Constitutionality.—This chapter is not unconstitutional because article 1560, post, provides that the law shall not apply to railroads less than 25 miles long. *Smith v. State* (Cr. App.) 146 S. W. 900. Nor is it unconstitutional as an unlawful interference with interstate commerce. *Smith v. State* (Cr. App.) 146 S. W. 900. Reversed by Supreme Court of the United States. (1914) *Id.*, 233 U. S. 630, 34 Sup. Ct. 681, 58 L. Ed. 1129, and the statute is held unconstitutional, as infringing the right of contract.

Art. 1557. Person engaged as conductor on railroad, qualification of.—If any person shall act, or engage to act, as a conductor

on a railroad train in this state, without having for two years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars; and each day he so engages shall constitute a separate offense. [Id., p. 92.]

Constitutionality.—See note under the preceding article.

This article is not unconstitutional as an unreasonable interference with employment contracts or the right to pursue a vocation. *Smith v. State* (Cr. App.) 146 S. W. 900. Reversed by Supreme Court of the United States. (1914) Id., 233 U. S. 630, 34 Sup. Ct. 681, 58 L. Ed. 1129, and the statute is held unconstitutional, as infringing the right of contract.

Application to conductor serving required time in another state.—One who had acted as freight conductor for a number of years in another state could not be convicted under this article, the statute not requiring one to have worked as a conductor, etc., for two years within this state. *Byrne v. State*, 60 App. 518, 132 S. W. 473.

Art. 1558. Penalty for violating two preceding articles.—If any person shall knowingly engage, promote, require, persuade, prevail upon or cause any person to do any act in violation of the provisions of the two preceding articles, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars; and each day he so engages shall constitute a separate offense. [Id., p. 92.]

Art. 1559. Shall not apply, when.—Nothing in this law shall be construed as applying to the running or operating of engines, in taking said engines to or from trains at division terminals by engine hostlers, or of the shifting of cars or making up trains, or doing any work appurtenant thereto at engine houses, tram or freight yards by switchman or yardman, or in the case of the disability of an engineer or a conductor while out on the road between division terminals. In case of emergency, where such companies can not obtain the employés, mentioned in this law, who have the qualifications prescribed by the provisions thereof, then such companies may employ temporary firemen, engineers and conductors who have not the qualifications prescribed by this law; but no such employment shall continue longer than such companies can supply their respective places with men who have the qualifications prescribed by this law; and provided, further, that nothing herein contained shall relieve any of such companies from the negligence of any of its employés. [Id., p. 92.]

Art. 1560. Not to apply to railroads less than twenty-five miles in length, or lessee or receiver thereof.—The provisions of this law shall not apply to any railroad company within this state or the receiver, lessee thereof, whose line of railway is less than twenty-five miles in length. [Id., p. 93.]

See notes under article 1556, ante.

CHAPTER NINETEEN A

RAILROAD COMPANIES—AIR BRAKES

Art. 1560a. Inspection required; not applicable to tram roads.	Art. 1560b. When not applicable. 1560c. Penalty for violation.
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Article 1560a. Inspection required; not applicable to tram roads.—It shall be unlawful for any person, corporation or receiver to operate or cause to be operated any train, on any line of railroad in this State, without first having the air brakes and air brake attachments inspected and tested before leaving the division terminals for such trains, by a competent inspector, who shall have

had at least three years' experience as a car inspector or car repairer. Provided that this Act shall not apply to tram roads engaged in hauling logs to any saw mill. [Act 1911, p. 106, ch. 63, § 1.]

Art. 1560b. When not applicable.—The provisions of this Act shall not apply in case of emergency where such companies cannot obtain the employes mentioned in this Act who have the qualifications prescribed by the provisions thereof; then such companies may employ temporary inspectors. Provided, the provisions of this Act do not apply to railroads under forty miles in length. [Id., § 2.]

Art. 1560c. Penalty for violation.—Any person, corporation or receiver violating any of the provisions of this Act shall be fined not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100.00), and each operation of any such train without such inspection first having been made, as provided herein, shall constitute a separate offense. [Id., § 3.]

CHAPTER TWENTY

RAILROAD COMPANIES REQUIRED TO DO REPAIR WORK IN TEXAS AND FURNISH SUFFICIENT MOTIVE POWER

<p>Art. 1561. Having shops in this state, required to repair, renovate or rebuild in Texas.</p> <p>1562. Prohibited from sending cars, coaches, etc., out of Texas to be repaired.</p> <p>1563. Not to apply to strikes, etc.</p>	<p>Art. 1564. Penalty for violating this law.</p> <p>1565. Should equip and furnish sufficient motive power, etc., to handle passenger and freight traffic.</p> <p>1566. Penalty for violating preceding article.</p>
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Article 1561. Having shops in this state, required to repair, renovate or rebuild in Texas.—All railroad corporations operating in the state of Texas, and having their repair shops within the state, shall, and are hereby required to repair, renovate or rebuild, in the state of Texas, any and all defective or broken cars, coaches, locomotives or other equipment, owned or leased by said corporations in the state of Texas, when such rolling stock is within the state of Texas; provided, that such railway shall have, or be under obligation to have, proper facilities in the state, to do such work; and provided, this chapter shall not be so construed as to require any railway corporation to violate the safety appliance law of the congress of the United States; and provided, further, that no railway shall be required to haul such disabled equipment a greater distance for repairs at a point within the state of Texas than would be necessary to reach their repair shops in another state; and provided, further, that no such railway company shall haul, or be permitted to haul, for purposes of repair, any disabled equipment by or past any shop owned or operated by any such company, where said disabled equipment can be repaired, in order to reach some other repair shop at a greater distance, for purposes of repairing said disabled equipment; provided, that the provisions of this chapter shall not apply to companies having less than sixty continuous miles of railroad in operation in this state. [Act 1909, p. 73.]

Art. 1562. Prohibited from sending cars, coaches, etc., out of Texas to be repaired.—All railroad corporations operating in the state of Texas, and having their repair shops within the state, shall be prohibited from sending or removing any of their cars, coaches, locomotives or other equipment out of the state of Texas to be re-

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paired, renovated or rebuilt, when the same is in a defective or broken condition, and within the state. [Id., p. 73.]

Art. 1563. Not to apply to strikes, etc.—The provisions of this chapter shall not apply in cases of strikes, fires, or other unforeseen casualties and emergencies. [Id., p. 73.]

Art. 1564. Penalty for violating this law.—Any railway corporation, lessee, receiver, superintendent, or agent, who shall violate any of the provisions of this chapter, shall, after conviction by any court of competent jurisdiction, be liable to a fine of not less than one hundred dollars nor more than five hundred dollars. [Id., p. 73.]

Art. 1565. Shall equip and furnish sufficient motive power, etc., to handle passenger and freight traffic.—It is hereby declared to be the duty of every railroad company, incorporated under the laws of the state of Texas and doing business in this state, under limitations and regulations prescribed by the railroad commission of Texas, to equip and provide sufficient motive power and rolling stock to handle all passenger and freight traffic expeditiously and without delay. [Act 1907, p. 298.]

For notes on civil features of statute, see Vernon's Sayles' Civ. St. 1914, art. 6685.

Art. 1566. Penalty for violating preceding article.—Any railroad company or common carrier failing to comply with the provisions of this chapter or to obey the orders of the railroad commission, made in pursuance of the provisions hereof, shall be deemed guilty of an abuse of their rights and privileges, and, upon conviction, shall be subject to a fine of one hundred dollars for a violation or failure to comply with any order that may be issued by the railroad commission as is provided said commission may do by article 1553; and each day that such railroad company or common carrier neglects, fails or refuses to comply with such orders shall constitute a separate offense. [Id., p. 298.]

CHAPTER TWENTY-ONE

RAILROAD COMPANIES PROHIBITED ESTABLISHING NAME FOR A STATION OTHER THAN NAME OF POSTOFFICE

Art.		Art.	
1567.	Station or depot in city or town to bear name of postoffice.	1568.	Not to apply, when.
		1569.	Penalty for violation.

Article 1567. Station or depot in city or town to bear name of postoffice.—It shall hereafter be unlawful for any corporation or receiver, operating any line of railroad, in whole or part, in this state, or any officer, agent or representative of such corporation or receiver, to retain, maintain or establish a name for any railway station or depot, in any incorporated or unincorporated town or city within this state, other than the name of the town or city, which have, and bears, the name of its postoffice so given by the United States government. [Act 1909, p. 89.]

Art. 1568. Not to apply, when.—The provisions of article 1552 shall not apply to two or more incorporated or unincorporated towns or cities in this state which now are situated within five miles of each other, and which each have therein established postoffice named and designated by the United States government. Provided, that this chapter shall not apply to those cases where the postoffice name of the city, town, village or settlement is so similar in sound or otherwise to that of some other station upon such railroad, as

that confusion in train orders and directions may arise therefrom; and provided, further, that where the name of such place is changed by the postal department of the federal government, such railway shall not be required to again change the name of its station; and provided, further, that all railways having stations affected hereby shall have ninety days from and after this chapter becomes effective to comply therewith. [Id., p. 89.]

Art. 1569. Penalty for violation.—Any officer, agent, or representative of any corporation, or receiver operating any line of railroad, in whole or in part, within this state, who shall violate the provisions of this chapter, shall be deemed guilty of a misdemeanor, and, upon a conviction therefor, shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars for such offense, or by confinement in the county jail for not less than thirty nor more than ninety days, or by both such fine and imprisonment. Provided, that the venue of all suits originating under the provisions of this chapter shall be in the county where the station, about which the suit occurs, is located. [Id., p. 89.]

CHAPTER TWENTY-TWO

STREET RAILWAY—REGULATING FARES IN CERTAIN CITIES AND TOWNS

<p>Art. 1570. Required to carry children of the age of twelve years or less for one-half fare; not to apply when.</p> <p>1571. Provide for sale of children in lots of twenty, etc.</p> <p>1572. Children under the age of five years transported free, when.</p>	<p>Art. 1573. Providing for transfers.</p> <p>1574. Officer of any corporation violating this law, penalty.</p> <p>1575. Person misrepresenting age or grade to secure reduced fare, penalty.</p>
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Article 1570. Required to carry children of the age of twelve years or less for half fare; not to apply when.—All persons or corporations, owning or operating street railways in or upon the public streets of any town or city in this state of not less than forty thousand inhabitants are required to carry children of the age of twelve years or less at, and for one-half, the charge or fare regularly collected by such person or corporation for the transportation of adult persons; provided, that this chapter shall not apply to street cars carrying children or students to and from schools, colleges, or other institutions of learning, situated at a distance of one mile or more beyond the limits of the incorporated city or town from which said cars run. [Act 1903, p. 182.]

Regulation of rates.—The legislature has the power to regulate the rates of fare of a street railway company in the absence of any provision in its charter relinquishing that right, provided the rates are not so unreasonable as to practically destroy the value of the property of the corporation. *San Antonio Traction Co. v. Altgelt* (Civ. App.) 81 S. W. 108.

Art. 1571. Provide for sale of tickets in lots of twenty, etc.—All such persons or corporations, owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the lines or lines owned or operated by such person or corporation, at, and for, one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic, public or private school, of grades not higher than the grades of the public high schools of this state, situated within, or adjacent to, the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate

of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used except during the months of the year when such schools are in actual session; and such students shall be transported at half fare only upon the presentation of such tickets. [Id., p. 182.]

Constitutionality.—See *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. Ed. 491.

Art. 1572. Children under the age of five years transported free, when.—All such persons or corporations are required to transport children of the age of five years or less, when attended by a passenger of above said age, free of charge. [Id., p. 182.]

Art. 1573. Providing for transfers.—All such persons or corporations are required to accord to all passengers referred to in articles 1561, 1562 and 1563 the same rights as to the use of transfers issued by their own or other lines as are, or may be, accorded to passengers paying full fare. [Id., p. 182.]

Art. 1574. Officer of any corporation violating this law, penalty.—Any officer of any corporation or other person who shall knowingly violate any of the provisions of this chapter shall, upon conviction, be adjudged guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars. [Id., p. 182.]

Art. 1575. Person misrepresenting age or grade to secure reduced fare, penalty.—Any person who shall misrepresent the age or the grade of any person for the purpose of securing the reduced fare herein provided for shall, upon conviction, be adjudged guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars. [Id., p. 182.]

CHAPTER TWENTY-THREE

ASSIGNOR

Article 1576. [1011] Secreting or concealing property from assignee.—If any assignor shall secrete or conceal from his assignee any portion of the property belonging to his estate, other than that which is exempt from execution, or shall, previous to, and in contemplation of, the assignment, transfer any property, with the intent or design to defraud his creditors, such assignor shall be adjudged guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment and labor in the penitentiary for not less than two nor more than five years. [Act March 24, 1879, § 11.]

Indictment.—Willson's Cr. Forms, 700, 701.

CHAPTER TWENTY-FOUR

DUPLICATION OF PROCESS FOR WITNESSES

Article 1577. [1012] Duplication of process for witnesses; penalty.—It shall be unlawful for the clerk of any district court, after a witness in a felony case has been served with a subpoena or an attachment, to issue any other or further process for said witness, except upon the order of the presiding judge, made upon application to him for that purpose. When a witness has been served with process by one party, it shall inure to the benefit of the opposite party, in case he should need said witness; and, as far as

practicable, the clerk shall include in one process the names of all witnesses for the state and defendant; and such process shall show that the witnesses are summoned for the state and defendant. Any district clerk who shall violate the provisions of this law shall be deemed guilty of a misdemeanor, and punished by a fine of not less than ten nor more than one hundred dollars. [Act 21st Leg., March 30, 1889, ch. 121, p. 145.]

See art. 114, ante, and note thereunder.

Application to misdemeanors.—This article, inhibiting clerks from issuing further process where the witness has been served with process by one party, except upon order of the judge, etc., applies only in felony cases, and has no application to misdemeanors. *Searcy v. State*, 40 App. 460, 50 S. W. 699, 51 S. W. 1119, 53 S. W. 344.

Notice of intention to use witness.—The non-issuing party should make known his intention to use the witness. *Byrd v. State*, 39 App. 609, 47 S. W. 721.

Practice as to process.—In conforming to this article, the better practice is, where both parties desire the witness, to have the process issued for either, show that fact on its face. *Mixon v. State*, 36 App. 66, 35 S. W. 394.

In view of this article, forbidding the issuance of more than one subpoena for a witness and giving defendant the benefit of the action of the state in "serving" process on a witness, that defendant failed to look up a witness, for the absence of whom a continuance was asked, because the state had "issued" a subpoena, would not excuse lack of diligence. *Stacy v. State (Cr. App.)* 177 S. W. 114.

Indictment.—*Willson's Cr. Forms*, 168, 169.

CHAPTER TWENTY-FIVE

COUNTY FINANCES *

Art.		Art.	
1578.	State or county officer refusing information.	1583.	Selecting depository of funds of city.
1579.	Clerk failing to keep finance ledger.	1584.	Check and warrants on city depository, how drawn; penalty for violation.
1580.	Treasurer failing to make report.	1584a.	Approval of treasurer's report; order; counting cash; affidavit; registration and publication; penalty for violation.
1581.	Selecting depository of funds of county.		
1582.	Members of commissioners' court failing or refusing to vote; penalty.		

Article 1578. [1013] State or county officer refusing information.—If any state or county officer shall fail or refuse to give any data, statistics and information required of him by law, such state or county officer shall be guilty of a misdemeanor, and, upon conviction, be fined in a sum not less than twenty-five nor more than one hundred dollars. [Act 21st Leg., April 2, 1889, p. 23.]

Art. 1579. [1013a] Clerk failing to keep finance ledger.—If the clerk of the county court of any county in this state, or county auditor in counties having an auditor, shall wilfully fail, neglect, or refuse to keep, or cause to be kept, the finance ledger, provided for by law, or shall wilfully fail, neglect, or refuse to make, or cause to be made, the quarterly statement as provided for by law, the clerk or auditor so failing, neglecting or refusing shall be fined in any sum not less than fifty nor more than two hundred dollars; provided, that such failure, neglect, or refusal, for each quarter, shall constitute a separate offense. [Act 1893, p. 161.]

Art. 1580. [1013b] Treasurer failing to make report.—Any county or city treasurer, or treasurer of the school board of each city or town having exclusive control of its schools, failing to make and transmit the report required by law, and certified copy, or either, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than fifty dollars nor more than five hundred dollars. [Act 1893, p. 188.]

Explanatory.—The report contemplated by this article was to be made to the commissioners' court at its first regular term after Aug. 31 in each year (art.

* See, also, Title 4, chs. 3 and 5; Title 8, ch. 6, arts. 388-420.

3936, Rev. St. 1895). This requirement was repealed by Act 1905, ch. 124, § 170. The act of 1905 requires the report to be made to the State Superintendent of Public Instruction on or before Oct. 1st in each year (Vernon's Sayles' Civ. St. 1914, art. 2773), but the act imposes no penalty for a failure to report. In view of this situation, this article may be superseded, though it did not appear in the chapters of the civil statutes which were expressly repealed. See *Berry v. State*, 156 S. W. 626; *Stevens v. State*, 159 S. W. 505. The repealing clause in the act of 1905 reads as follows: "All provisions of chapters 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, of Title lxxxvi, of the Revised Statutes of the State of Texas and all amendments thereto not herein specifically re-enacted are hereby repealed and all laws and parts of laws in conflict herewith are hereby repealed." See, also, art. 403, ante.

Art. 1581. Selecting depository of funds for county.—The commissioners' court of each county in this state are authorized, at the February term thereof every two years, to receive proposals from any banking incorporation, association or individual banker in such county, as may desire to be selected as the depository of the funds of such county. Notice that such bids will be received shall be published by, and over the name of the county judge, once each week for at least twenty days before commencement of such term, in some newspaper published in said county; and, if no newspaper be published therein, then, in any newspaper published in the nearest county; and, in addition thereto, notice shall be published by posting same at the courthouse door of said county. [Act 1905, ch. 164, § 20; Act 1907, p. 208, § 20.]

Art. 1582. Member of commissioners' court failing or refusing to vote; penalty.—Any member of the commissioners' court of any county who shall fail or refuse to vote for a compliance with the requirements of this section [preceding article] shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment in the county jail for less than one nor more than six months, or by both such fine and imprisonment; and such failure or refusal shall be deemed ground for removal from office. [Id.]

Art. 1583. Selecting depository of funds of city.—The city council of every city in the state of Texas, incorporated under the general laws thereof, or incorporated under special charter, at its regular meeting in July of each year, is authorized to receive sealed proposals, for the custody of the city funds, from any banking corporation, association or individual banker, doing business within the city, that may desire to be selected as the depository of the funds of the city. The school funds, from whatsoever source derived, of incorporated cities, is part of the city funds, and is subject to the provisions of this chapter. Notice that such bids will be received shall be published by the city secretary, not less than one nor more than four weeks before such meeting, in some newspaper published in the city. Any banking corporation, association or individual banker, doing business in the city, desiring to bid, shall deliver to the city secretary on or before the day of such meeting designated by said published notice, a sealed proposal, stating the rate per cent upon daily balances that said banking corporation, association or individual banker offers to pay to the city for the privilege of being made the depository of the funds of the city for the year next following the date of such meeting; or, in the event that said election shall be made for a less term than one year, as hereinafter provided, then, for the time between the date of bid and the next regular time for the selection of a depository as aforesaid. All such proposals shall be securely kept by the secretary, and shall not be opened until the meeting of the council for the purpose of passing upon same; nor shall any other proposals be received after they shall have been opened. It shall be a misde-

meanor for the city secretary or other person to open any of said proposals, or to disclose, directly or indirectly, the amount of any such bid to any person or persons before the selection of such depository, and, upon conviction, he shall be fined in a sum of not less than ten nor more than one hundred dollars. [Act 1905, ch. 123, § 1; Act 1905, ch. 164, § 34; Act 1907, p. 132.]

Cited, *Capps v. Citizens' Nat. Bank* (Civ. App.) 134 S. W. 808; *Manhattan Life Ins. Co. v. Cohen* (Civ. App.) 133 S. W. 51.

Art. 1584. Check and warrants on city depository, how drawn, penalty for violation.—No check shall be drawn upon the city depository by the treasurer, except upon a warrant signed by the mayor and attested by the secretary. No warrant shall be drawn by the mayor and secretary upon any of the special funds, created for the purpose of paying the bonded indebtedness of said city in the hands of the city treasurer, or in the depository, for any purpose whatsoever, other than to pay the principal or interest of said special fund, or for the purpose of investing said special fund according to law. No city treasurer shall pay off, or issue a check, to pay any money out of any special fund created for the purpose of paying any bonded indebtedness of said city other than for the purpose to pay interest due on said bonds, the principal of said bonds, or for the purpose of making an investment of said fund according to law. Any mayor who shall draw a warrant against a special fund, as above defined, for any other purpose than above specified, or any city treasurer who shall pay, or issue a check to pay, a warrant drawn on the special fund of any city, other than for the legal purpose of paying interest due on said bonds, the principal of said bonds, or for investing said sinking fund according to law, shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary for any term not less than one year nor more than five years. [Act 1905, ch. 123, § 6; Act 1905, p. 397.]

Art. 1584a. Approval of treasurer's report; order; counting cash; affidavit; registration and publication; penalty for violation.—When the commissioners' court has compared and examined the quarterly report of the treasurer, and found the same correct, it shall cause an order to be entered upon the minutes of the court, stating the approval thereof, which order shall recite separately, the amount received and paid out of each fund by the treasurer since the preceding treasurer's quarterly report, and the balance of such fund, if any, remaining in the treasurer's hands, and the court shall cause the proper credit to be made in the accounts of the treasurer, in accordance with said order, and said court shall actually inspect and count all the actual cash and assets in the hands of the treasurer belonging to the county at the time of the examination of his said report; and prior to the adjournment of each regular term of the court, the county judge and each of the commissioners shall make affidavit in writing that the requirements of this article have been in all things fully complied with by them at said term of said court, and that the cash and other assets mentioned in said county treasurer's quarterly report made by said treasurer to said court, and held by him for the county, have been fully inspected and counted by them, giving the amount of said money and other assets in his hands; which affidavits of the members shall be filed with the county clerk of the county, and by him recorded in the minutes of the said county commissioners' court of the term at which the same were filed; and the same shall be published in some newspaper published in the county, if there be a newspaper published in the county, for one time, to be paid for at the same rate as other legal notices.

And any county judge, county commissioner, or county clerk in this State, who shall negligently or intentionally fail or refuse to comply with the requirements of this Article, shall be deemed guilty of a misdemeanor, and upon conviction thereof in a court of competent jurisdiction shall be fined in any sum not less than twenty-five nor more than five hundred dollars. [Act 1897, p. 28, ch. 30, § 1.]

Explanatory.—The above provision was omitted from the revised Penal Code, and in view of the decision in *Berry v. State* (Cr. App.) 156 S. W. 626, it is included in this compilation. The civil part of the above article was carried into Rev. St. 1911 as arts. 1448-1450. The criminal feature was added by Act 1897, ch. 30, p. 27, by way of amendment of art. 867, Rev. St. 1895.

School fund embraced.—The county school fund was embraced in this article requiring the county funds to be counted by the commissioners' court. *Poole v. Burnet County*, 97 Tex. 77, 76 S. W. 426.

CHAPTER TWENTY-SIX

BUREAU OF LABOR STATISTICS

Art.		Art.	
1585.	Commissioner of labor statistics, duty of.	1589.	Commissioner may enter factory, mill, store, etc., when.
1586.	Power to issue subpoena, etc., penalty for person failing to attend or testify.	1590.	Shall give written notice to district or county attorney, when.
1587.	Owner, manager, etc., of factory, mill, etc., duty of.	1591.	Owner, manager or person in control of factory, mill, etc., refusing to allow officer of bureau of labor statistics to enter; penalty.
1588.	Name of, shall not be disclosed by commissioner.		

Article 1585. Commissioner of labor statistics, duty of.—The commissioner of labor statistics shall collect, assort, systematize and present in biennial reports to the governor, statistical details relating to all departments of labor in Texas, and especially as affecting or bearing upon the commercial, social, educational and sanitary conditions of the employes and their families, the means of escape from dangers incident to their employment, the protection of life and health in factories and other places of employment, the labor of children and of women and the number of hours of labor exacted of them, and, in general, all matters and things which affect or tend to affect the prosperity of the mechanical, manufacturing and productive industries of this state, and of the persons employed therein. Said commissioner shall also, as fully as may be done, collect reliable reports and information from each county, showing the amount and condition of the mechanical, mining and manufacturing interests therein, and all sites offering natural or acquired advantages for the location and operation of any of the different branches of industry; and he shall, by correspondence with interested parties in other parts of the United States, or in foreign countries, impart to them such information as may tend to induce the location of manufacturing and producing plants within the state, together with such information as may tend to increase the employment of labor and the products of such employment in Texas. [Act 1909, p. 59.]

Art. 1586. Power to issue subpoena, etc., penalty for person failing to attend or testify.—The commissioner of the bureau of labor statistics shall have power to issue subpoenas, administer oaths and take testimony in all matters related to the duties herein required of the said bureau, but such testimony must be taken in the vicinity of the residence or office of the person testifying. Any person duly subpoenaed under the provisions of this chapter who shall wilfully neglect or fail to attend or testify, at the time and place mentioned in the subpoena, shall be deemed guilty of a misde-

meanor, and, upon conviction thereof before any court of competent jurisdiction, shall be punished by a fine of not to exceed fifty dollars, or by imprisonment in the county jail for not to exceed thirty days. Provided, however, that no witness shall be compelled to go outside of the county in which he resides in order to testify. [Id., p. 60.]

Art. 1587. Owner, manager, etc., of factory, mill, etc., duty of.—It shall be the duty of every owner, manager and superintendent of every factory, mill, workshop, mine, store, business house, public or private work, or any other establishment or place, where five or more persons are employed at work, to make to the bureau of labor statistics, upon blanks to be furnished by such bureau, such reports and returns as said bureau may require for the purpose of securing such labor statistics as are contemplated by this chapter; and such reports and returns shall be made within not to exceed sixty days from the receipt of the blanks furnished by the commissioner or by the bureau; and the same shall be verified under oath. Any owner, manager, superintendent or other person in charge or control of any factory, mill, workshop, mine, store, business house, public or private work, or other establishment or place, where five or more persons are employed at work, who shall neglect or refuse to make such reports and returns as are required by the provisions of this chapter, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not to exceed one hundred dollars, or by imprisonment in the county jail for not to exceed thirty days. [Id., p. 60.]

Art. 1588. Name of same shall not be disclosed by commissioner.—In the reports made by the commissioner of labor statistics to the governor, the names of individuals, firms or corporations, supplying information under the provisions of this chapter, shall not be disclosed; nor shall the name of any such individual, firm or corporation be communicated to any person or persons, except such as are employed in the bureau of labor statistics; and any officer or employé of such bureau violating any of the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not to exceed five hundred dollars, or by imprisonment in the county jail for not more than ninety days. [Id., p. 60.]

Art. 1589. Commissioner may enter mill, factory, store, etc., when.—Upon the written complaint of two or more persons, or upon his failure otherwise to obtain information, in accordance with the provisions of this chapter, the commissioner of labor statistics shall have the power to enter any factory, mill, workshop, mine, store, business house, public or private work, or other establishment, or place where five or more persons are employed at work, when the same is open and in operation, for the purpose of gathering facts and statistics, such as are contemplated by this chapter, and for the purpose of examining into the methods of protecting employés from danger, and the sanitary conditions in and around such building or place, of all of which, the said commissioner shall make and return into the bureau of labor statistics a true and detailed record in writing. [Id., p. 61.]

Art. 1590. Shall give written notice to district or county attorney, when.—If the commissioner of labor statistics shall learn of any violation of the law with respect to the employment of children, or fire escapes, or the safety of employés, or the preservation of health, or in any other way affecting the employés, he shall at once give written notice of the facts to the county or district attorney of

the county in which the law has been violated, or of some other county, if any there be, having jurisdiction of the offense; and the county or district attorney to whom such notice has been given shall immediately institute the proper proceedings against the guilty person. [Id., p. 61.]

Art. 1591. Owner, manager or person in control of factory, mill, etc., refusing to allow officer of bureau of labor statistics to enter; penalty.—Any owner, manager, superintendent or other person in charge or control of any factory, mill, workshop, mine, store, business house, public or private work, or other establishment or place, where five or more persons are employed at work, who shall refuse to allow any officer or employé of the said bureau of labor statistics to enter the same, or to remain therein for such time as is reasonably necessary, or who shall hinder any such officer or employé, or in any way prevent or deter him from collecting information, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not to exceed one hundred dollars, or imprisonment in the county jail for not to exceed sixty days. [Id., p. 61.]

CHAPTER TWENTY-SEVEN

MINES AND MINING

Art.	Art.
1592. Owner, lessee, agent, etc., operating mine, duty of.	1605. Kind of oil to be used in mine.
1593. Time for completing escapement shaft.	1606. Any person violating any of the provisions hereof, penalty.
1594. Shafts, cages and passways constructed, how.	1606a. Electric wires to be insulated; trolley wires, how placed.
1595. Current of fresh air shall be maintained throughout mine.	1606b. Penalty for violation.
1596. Appearance of fire damp, notice to be given.	1606c. Duties of state mining inspector.
1597. Cages on which men are riding, how constructed, speed of.	1606d. Map of underground workings to be filed.
1598. Powder in mine, how carried.	1606e. Same; penalty for violation.
1599. Cut-throughs, how made.	1606f. Feeding animals in mine; storing feed.
1600. Safety lamps to be kept when necessary.	1606g. Permitting animal to remain over ten hours unlawful.
1601. Shaft, safety lamp, etc., shall not be injured.	1606h. Not applicable to certain mines; open light in stable prohibited; unflamable stock food.
1602. Rules printed in English shall be posted.	1606i. Penalty for violation.
1603. Adequate and accurate scales shall be provided.	1606j. Duties of state mining inspector.
1604. Employés shall have right to employ check weighman.	1606k. Providing wash houses; mode of construction and equipment.
	1606l. Same; penalty for violation; wilfully destroying property.

Article 1592. Owner, lessee, agent, etc., operating mine, duty of.—It shall be unlawful for the owner, agent, lessee, receiver or operator of any mine in this state to employ any person or persons in said mine for the purpose of working therein, unless there are in connection with every seam or stratum of coal or ore worked in such mine not less than two openings or outlets, separated by a stratum of not less than one hundred and fifty feet at surface and not less than thirty feet at any place, at which openings or outlets, safe and distinct means of ingress and egress, shall, at all times, be available for the persons employed in such mine. The escapement shafts or slopes shall be fitted with safe and available appliances, by which the employés of the mine may readily escape in case of accident. In slopes used as haulage roads, where the dip or incline is ten degrees or more, there must be provided a separate traveling way, which shall be maintained in a safe condition for travel, and kept free from dangerous gases. [Act 1903, p. 103.]

Art. 1593. Time for completing escapement shaft.—The time which shall be allowed for completing such escapement shaft or opening as is required by the terms of this chapter, shall be: For mines already opened, one year for sinking any shaft or slope two hundred feet or less in depth, and one additional year, or pro rata portion thereof, for every additional two hundred feet or fraction thereof; but, for mines which shall be opened after the taking effect of this chapter, the time allowed shall be two years for all shafts or slopes more than two hundred feet in depth, and one year for all shafts two hundred feet in depth or less; and the time shall be reckoned in all cases from the date on which coal or ore is first hoisted from the original shaft or slope, for sale or use. [Id., p. 103.]

Art. 1594. Shafts, cages and passways, constructed, how.—Any shaft in process of sinking, and any opening projected for the purpose of mining coal of all kinds, shall be subjected to the provisions of this chapter.

At the bottom of every shaft and every caging place therein, a safe, commodious passageway must be cut around said landing place, to serve as a traveling way by which employes shall pass from one side of the shaft to the other, without passing under or near the cage.

The upper and lower landings at the top of each shaft, and the openings of each intermediate seam from or to the shaft, shall be clear and free from loose materials, and shall be securely fenced with automatic or other gates or bars, so as to prevent either men or materials from falling into the shaft.

Every hoisting shaft must be equipped with substantial cages fitted to guide rails running from the top to the bottom. Said cages must be safely constructed, they must be furnished with suitable boiler iron covers to protect persons riding thereon from falling objects, and they must be equipped with safety catches. Every cage on which people are carried must be fitted with iron bars, rings, or chains in proper place and in sufficient number to furnish a secure handhold for every person permitted to ride thereon. At the top landing, cage supports, where necessary, must be carefully set and adjusted so as to work properly, and securely hold the cages when at rest.

In all cases where the human voice cannot be distinctly heard, there shall be provided a metal tube or telephone from the top to the bottom of the shaft or slope through which conversation may be held between persons at the bottom and top of such shaft or slope, and that there shall also be maintained an efficient system of signaling to and from the top of the shaft or slope and each seam or opening.

Every underground place on which persons travel, worked by self-acting engines, windlasses or machinery of any description, shall be provided with practical means of signaling between the stopping places and the ends of the plane, and shall further be provided, at intervals of not more than sixty feet, with sufficient man-holes for places of refuge.

Every mine shall be supplied with props and timbers of suitable length and size; and, if from any cause the timbers are not supplied when required, the miners shall vacate any and all such working places until supplied with timber needed.

All openings, worked out or abandoned portions of every operated mine likely to accumulate explosive gases or dangerous conditions shall be securely gobbled and blocked off from the operated portions thereof, so as to protect every person working in such mines from

all danger that may be caused or produced by such worked out portions of such mines. [Act 1907, p. 331.]

Art. 1595. Current of fresh air shall be maintained throughout mine.—(a) Throughout every mine there shall be maintained currents of fresh air sufficient for the health and safety of all men and animals employed therein; and such ventilation shall be produced by a fan or some other artificial means; provided, a furnace shall not be used for ventilating any mine in which explosive gases are generated.

(b) The quantity of air required to be kept in circulation and passing a given point shall be not less than one hundred cubic feet per minute for each person, and not less than three hundred cubic feet per minute for each animal in the mine, measured at the foot of the downcast; and this quantity may be increased at the discretion of the inspector, whenever, in his judgment, unusual conditions make a stronger current necessary. Said current shall be forced into every working place throughout the mine, so that all parts of the same shall be reasonably free from standing powder smoke and deleterious air of any kind.

(c) The measurement of the current of air shall be taken with an anemometer at the foot of the downcast, at the foot of the upcast, and at the working face of each division or split of the air current.

(d) The main current of air shall be split or subdivided as to provide a separate current of reasonably pure air to every one hundred men at work; and the inspector shall have authority to order separate currents for smaller groups of men, if in his judgment special conditions make it necessary.

(e) The air current for ventilating the stable shall not pass into the intake air current for ventilating the working parts of the mine.

(f) Whenever the inspector shall find men working without sufficient air, he shall at once give the mine manager or operator notice and a reasonable time in which to restore the current, and, upon his or their refusal or neglect to act promptly, the inspector may order the endangered men out of the mine. [Id., p. 332.]

Art. 1596. Appearance of fire damp, notice to be given.—Immediate notice must be conveyed by the miner or mine owner to the inspector, upon the appearance of any large body of fire damp in any mine, whether accompanied by any explosion or not, and upon the concurrence of any serious fire within the mine or on the surface. [Id., p. 333.]

Art. 1597. Cages on which men are riding, how constructed, speed of.—Cages on which men are riding shall not be lifted or lowered at a rate greater than six hundred feet per minute, except with the written consent of the inspector. No person shall carry any tools or material with him on a cage in motion, except for use in making repairs; and no one shall ride on a cage while the other cage contains a loaded car. No cage, having an unstable or self-dumping platform, shall be used for the carriage of men or materials, unless the same is provided with some convenient device, by which said platform can be securely locked, and unless it is so locked whenever men or material are being conveyed thereon. [Id., p. 333.]

Art. 1598. Powder in mine, how carried.—No miner or other person shall carry powder into the mine, except in the original keg or in a regulation powder can, securely fastened, and the can in otherwise air tight condition. [Id., p. 333.]

Art. 1599. Cut-throughs, how made.—It shall be the duty of the mine foreman to see that proper cut-throughs are made in all the

pillars at such distances as in the judgment of the mine inspector may be deemed requisite, not more than twenty yards nor less than ten yards apart, for the purpose of ventilation; and the ventilation shall be conducted through said cut-throughs into the rooms and entries by means of check doors made of canvas or other material, placed on the entries or in other suitable places; and he shall not permit any room to be opened in advance of the ventilating current. Should the mine inspector discover any room, entry, airway or other working place being driven in advance of the air current contrary to the requirements of this article, he shall order the workmen in such places to cease work at once until the law is complied with. [Id., p. 333.]

Art. 1600. Safety lamps to be kept when necessary.—At any mine where the inspector shall find fire damp is being generated so as to require the use of a safety lamp in any part thereof, the operator of such mine, upon receiving notice from the inspector that one or more such lamps are necessary for the safety of the men in the mines, shall at once procure and keep for use such number of safety lamps as may be necessary. [Id., p. 334.]

Art. 1601. Shaft, safety lamp, etc., shall not be injured.—It shall be unlawful for any miner, workman or other person, knowingly or carelessly, to injure any shaft, safety lamp, instrument, air-course or brattice, or to obstruct or throw open an air-way, or to carry any open lamp or lighted pipe or fire in any form into a place worked by the light of safety lamps, or within three feet of any open powder, or to handle or disturb any part of the hoisting machinery, or to enter any part of the mine against caution, or to do any wilful act whereby the lives or health of persons working in mines, or the security of the mine machinery thereof, is endangered. [Id., p. 334.]

Art. 1602. Rules printed in English shall be posted.—It shall be the duty of every operator to post on the engine house and at the pit top of his mine, in such manner that the employes of the mine can read them, rules not inconsistent with this chapter, plainly printed in the English language, which shall govern all persons working in the mine. And the posting of such notice, as provided, shall charge all employes of such mine with legal notice of the contents thereof. [Id., p. 334.]

Art. 1603. Adequate and accurate scales shall be provided.—The owner or operator of every mine shall provide adequate and accurate scales for weighing coal; and it shall be the duty of the mine inspector to examine such scales, and, if same are not found to be accurate, he shall notify the owner to repair same; and, if such owner fails or refuses to repair same within a reasonable time, said inspector shall institute proceedings under the law against the proper parties. [Id., p. 334.]

Art. 1604. Employes shall have right to employ check weighman.—The employes in any mine in this state shall have the right to employ a check weighman at their own option and their own expense. [Id., p. 334.]

Art. 1605. Kind of oil to be used in mine.—No miner or other person employed in a mine shall use any kind of oil other than a good quality of lard oil for lighting purposes, except when repairing downcast or upcast shafts. [Id., p. 334.]

Art. 1606. Any person violating any of the provisions hereof, penalty.—Any person who shall wilfully violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding five hundred

dollars, or imprisonment in the county jail for a period not exceeding six months. [Id., p. 334.]

Art. 1606a. Electric wires to be insulated; trolley wires, how placed.—From and after September 1, 1911, in all mines in this State where electricity is or hereafter shall be used as a part of the system, power or means of mining and procuring the coal or other mineral from any of said mines, that the owners or operators of every such mine shall cause all wires conducting electricity in and about said mine to be carefully and thoroughly insulated or protected in a safe manner, so that the person or animals coming in contact therewith shall not be injured thereby; all wires as aforesaid shall either be thoroughly insulated or placed where persons employed in and about the mines can not come in contact therewith, or shall be covered, protected or shielded in a safe manner, so as to prevent any injuries or accidents therefrom to those in or about the mines; provided, however, it shall not be necessary to insulate or cover trolley wires, but they shall all be hung and kept not less than five feet and six inches above the rail, and shall be securely fastened, and not permitted to sag less than said height. Where there is sufficient height in existing entries to permit this, but where sufficient height is not available in existing entries, then the trolley wires shall be placed to one side of the entry, six inches outside the rail; and in all such cases the trolley wire shall be placed on the side of the entry opposite from the working rooms, except where there are rooms on both sides of the entry, in which event, the trolley wires may be placed over the opening of said rooms, said trolley wires to be safely shielded; provided, where it is impracticable in existing entries to place trolley wires six inches outside of the rail, or five feet, six inches high, and where separate travel way is not provided, then the trolley wire shall be safely shielded; and it is further provided that this Act shall not apply to entries that are not used as travel ways for workmen or work animals; provided, however, that this Section shall not apply to mines in operation in this State on January 1, 1902, and prior thereto, and which have developed until there is at least two thousand (2000) feet distance from the shaft to the face of the coal being operated, except as to extensions of trolley wires made and to be made after January 1, 1910, in such mines. [Act 1911, p. 196, ch. 97, § 1.]

Art. 1606b. Penalty for violation.—Any person who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding five hundred (\$500.00) dollars, or imprisonment in the county jail for a period not exceeding six months. [Id., § 2.]

Art. 1606c. Duties of state mining inspector.—It shall be the duty of the State Mining Inspector to see that the provisions of this Act are complied with, and shall report all violations hereof to the State Mining Board and to the district or county attorney of the county where the offense is committed. [Id., § 3.]

Art. 1606d. Map of underground workings to be filed.—It shall be the duty of every operator of a coal mine in the State of Texas to make a map of the underground workings of every mine in his charge, under operation on the first day of January, 1912, or that may be opened thereafter; said map shall be drawn on a scale of one inch to one hundred feet, and shall indicate the surface land lines as well as the rooms, entries or openings underground. It shall be brought up to date at least once each month, covering operations for the preceding month. The original of said map shall be on file at the office of the operator at or near said mine. Said

map shall be extended or brought up to date at any time requested by the State Mine Inspector, at least every three months, if, for any reason, a mine should be closed, then a final map shall be made and filed; provided, however, that maps existing on the date of the passage of this Act may be continued on the same scale as begun, if not smaller than one-half inch to one hundred feet. [Id., § 4.]

Art. 1606e. Same; penalty for violation.—The penalty for non-compliance with Section 4 [art. 1606d] hereof shall be by a fine of not less than twenty-five (\$25.00) dollars nor more than fifty (\$50.00) dollars for each offense. [Id., § 5.]

Art. 1606f. Feeding animals in mine; storing feed.—It shall be unlawful for any person, association of persons, corporation or receiver, owning, operating or managing any mine in this State, to feed or permit to be fed any work animal in said mines, or to store or keep any feed for such animals in said mines. [Act 1911, p. 205, ch. 102, § 1.]

Art. 1606g. Permitting animal to remain over ten hours unlawful.—It shall be unlawful for any person, association of persons, corporation or receiver, owning, operating or managing any mine in this State, to permit any work animal to remain in any mine longer than ten consecutive hours. [Id., § 2.]

Art. 1606h. Not applicable to certain mines; open light in stable prohibited; inflammable stock food.—It is further provided that Sections 1 and 2 [arts. 1606f, 1606g] shall not apply to mines complying with the following provisions:

All stables in mines in which work animals are kept shall be equipped with fire proof doors at each opening, with a door frame of concrete, stone or brick, laid in mortar, and such stable door shall be kept closed during working hours of mines.

All feed, hay, grass, cane, etc., except corn, corp chops, bran and shelled oats, shall not be taken down the hoisting shaft until after the regular day shift is out of the mine.

It is further provided that no open light shall be taken into any underground stable by any person.

It is further provided that not over twenty-four (24) hours' supply of hay, grass or cane, or any other kind of inflammable stock food, except corn, corn chops, bran and shelled oats, shall be taken down in any one day. [Id., § 2a.]

Art. 1606i. Penalty for violation.—In addition to the penalties provided in Section 3 of this Act [art. 5946h, Vernon's Sayles' Civ. St. 1914], every person violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment in the county jail for not less than one month nor more than one year. [Id., § 4.]

Art. 1606j. Duties of state mining inspector.—It shall be the duty of the State Mining Inspector to see that the provisions of this Act are complied with, and he shall report all violations thereof to the State Mining Board and to the district or county attorney of the county where the offense is committed. [Id., § 5.]

Art. 1606k. Providing wash houses; mode of construction and equipment.—It shall be the duty of the operator, owner, lessees or superintendent of any coal mine in this State employing ten or more men to provide a suitable building convenient to the principal entrance of such mine, for the use of persons employed in and about said mine, for the purpose of washing themselves and changing their clothing when entering or leaving the mine. Such building shall be provided with proper light and heat, with a supply of

hot and cold water and shower baths, and with properly constructed individual lockers for the use of such employes. The employes shall furnish their own towels, soap and locks for their lockers, and shall exercise control over and be responsible for all property by them left in such house. The baths and lockers for negroes shall be separate from those for whites, but may be in the same building. [Act 1915, p. 100, ch. 51, § 1.]

Art. 1606. Same; penalty for violation; wilfully destroying property.—Any operator, owner, lessee or superintendent of any coal mine violating the provisions of this Act shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment in the county jail for not more than sixty days or by both such fine and imprisonment, in the discretion of the court or jury. It is further provided that every two weeks of such violation shall constitute a separate offense. Any person wilfully injuring or destroying any property mentioned herein shall be punished as provided by law. [Id., § 3.]

Explanatory.—Sec. 4, Act 1915, ch. 51, provides that the act shall take effect Sept. 1, 1916.

CHAPTER TWENTY-EIGHT

PENITENTIARIES—CONTROL AND TREATMENT OF PRISONERS

Art.	Art.
1607. Prison commission created.	1613. Same.
1607a. Constitution and tenure of commission.	1614. Prison physician failing to make, or making false report.
1608. Commission charged with direction of state prison system and care, etc., of prisoners.	1615. Conversion of prison property declared to be theft, and punishable as such.
1609. Commission to classify prisoners into three grades.	1616. Felony for officers, etc., to acquire financial interest in contracts on behalf of prison, or to peculate in any prison transaction; penalty.
1610. Penalty for excessive whipping of refractory prisoners.	1617. Officer, etc., inflicting unauthorized punishment on any prisoner; penalty.
1611. Penalty for misapplication of money of prisoners by officers, etc., of prison.	
1612. Duties of officers, etc., on decease of prisoner, and penalty for failure to perform.	

Article 1607. Prison commission created.—The management and control of the prison system of the state of Texas shall be vested in a board, to be known as the board of prison commissioners, and, for the purposes of this chapter, shall be referred to as the prison commission. Said board of prison commissioners shall be composed of three men, to be appointed by the governor, with the advice and consent of the senate, whose term of office shall be two years from date of appointment, except those first appointed under this chapter, who shall hold their offices, respectively, for eight, sixteen and twenty-four months from the date of their appointment and qualification. [Act 1910, S. S., p. 143.]

See art. 1607a, post. For other provisions relating to the powers and duties of the board of prison commissioners, see Vernon's Sayles' Civ. St. 1914, arts. 6086-6095j, 6172-6256.

Art. 1607a. Constitution and tenure of commission.—The Board of Prison Commissioners charged by law with the control and management of the State prisons, shall be composed of three members appointed by the Governor, by and with the consent of the Senate, and whose terms of office shall be six years, or until their successors are appointed and qualified; provided that the terms of office of the Board of Prison Commissioners first appointed after the adoption of this amendment shall begin on January 20th of

the year following the adoption of this amendment, and shall hold office as follows: One shall serve two years, one four years, and one six years. Their terms to be decided by lot after they shall have qualified, and one Prison Commissioner shall be appointed every two years thereafter. In case of a vacancy in said office the Governor of this State shall fill said vacancy by appointment for the unexpired term thereof. [Const. art. 16, § 58, adopted Nov. 5, 1912.]

Art. 1608. Commission charged with direction of state prison system and care, etc., of prisoners.—The prison commission shall be vested with the exclusive management and control of the prison system of this state, and shall be held responsible for the proper care, treatment, feeding, clothing and management of the prisoners confined therein, and at all times for the faithful enforcement of the spirit, intent and purpose of the laws and rules governing said system; provided, that the prison commission shall be held responsible for maltreatment of prisoners, and, if permitted, it shall be grounds for removal from office. [Act 1910, S. S., p. 145.]

Art. 1609. Commission to classify prisoners into three classes and each class into three grades.—The prison commission shall provide for the classification of all prisoners, separating them into the following classes: In the first class shall be included young men, first offenders, those appearing to be corrigible, or less vicious than others, and likely to observe the laws, and to maintain themselves by honest industry after their discharge. In the second class shall be included those appearing to be less corrigible, or more vicious, but content to work and reasonably obedient to prison discipline as not to seriously interfere with the productiveness of their labor, or with the labor or conduct of those with whom they may be employed. In the third class shall be included those appearing to be incorrigible or so insubordinate or so vicious in their nature as to seriously interfere with the labor and moral development of those with whom they must come in contact.

The prison commission shall make rules and regulations for the promotion and reduction of the prisoners from one class to another, and shall transfer them from one class to another from time to time, as they may seem to merit promotion or reduction.

The prisoners in each of the classes hereinbefore named, shall be kept in, or upon different or separate prisons or farms. Any prisoner, upon entering the prison system, shall be assigned to one of its institutions according to his class, as hereinbefore provided, and shall be entered in said institution in a neutral grade, which shall be known as grade No. 2, and in which he shall be furnished with a suitable uniform designated for that grade. The prison commission shall adopt rules for a higher grade which shall be known as grade No. 1, as a reward for obedience to prison discipline and good conduct, and shall provide a suitable uniform for this grade; and they shall provide for a lower grade as a punishment for misconduct and violation of prison discipline, which grade shall be known as No. 3, and in which the prisoner shall be clothed in stripes. The uniforms for grades Nos. 1 and 2 shall not be stripes. The prison commission shall provide rules for promotion of prisoners from any grade to another for good conduct and obedience to prison discipline, and for demotion of prisoners for misconduct and violation of prison discipline. The prison commission shall provide specifically for the extension or denial of privileges for the various grades herein provided. [Id., p. 151.]

Art. 1610. Penalty for excessive whipping of refractory prisoners.—The prison commission may adopt such modes of punishment

as may be necessary, such punishment being always humane, and placing prisoners in stocks, shall be prohibited. Whipping with not exceeding twenty lashes on the bare rump and thighs may be resorted to with prisoners of the third class, who can not be made to observe the rules by milder methods of punishment. The strap to be used must be of leather, not over two and one-half inches wide, and twenty-four inches long, attached to a wooden handle; no convict shall be whipped until same has been authorized by at least two members of the prison commission upon their written order; and such order so issued shall be executed only in the presence of a prison physician; and a sworn report shall be made by the officer executing such order to the penitentiary commission, who shall keep a record of all such reports in a well bound book to be kept for that purpose, which shall be at all times open to public inspection; and such report, so to be made by such officer executing the order of the prison commission, shall state the name of the convict whipped, the number of strokes administered, the size of the strap used, the time and place thereof, in whose presence same was done, and the cause thereof. It shall further be the duty of the prison commission to make a semi-annual report of the whipping of convicts to the district judge of the county where such whipping occurred, who shall report same to the grand jury, which is hereby authorized to make investigation thereof, if they deem same advisable. The utmost care must be used by the officer executing the order of the commission not to break the skin of the prisoner whipped; and any person guilty of whipping a prisoner more lashes, or other than as provided herein, or striking a prisoner, except in self-defense, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars nor more than two hundred and fifty dollars, and imprisoned in the county jail not less than thirty days nor more than six months. White and negro prisoners shall not be worked together when it can be avoided, and shall be kept separate when not at work. [Id., p. 152.]

Art. 1611. Penalty for misapplication of money of prisoners by officers, etc., of prison.—Prisoners, when received into the penitentiary, shall be carefully searched. If money be found on the person of the prisoner, or received by him at any time, it shall be taken in charge by the prison commission and placed to the prisoner's credit, and expended for the prisoner's benefit on his written order, and under such restrictions as may be prescribed by law or the rules. Any officer or employé, having charge of a prisoner's money, who misappropriates the same or any part thereof, shall be deemed guilty of a felony, and, upon conviction thereof, shall be confined in the penitentiary for a term of not more than five years. [Id., p. 156.]

Art. 1612. Duties of officers, etc., on decease of prisoner, and penalty for failure to perform.—If any prisoner shall die while in prison, the officer in charge of the prisoner at the time of his death shall immediately report the same to the prison commission, and, if he knows the address or place of residence of any relative within the third degree, either by consanguinity or affinity, shall also notify by wire said relative of the death of such prisoner, and, if the relative of such prisoner claim the body or will take charge of same, then the body of such prisoner shall be turned over to such relative; and the expense of shipping the body to where it is to be buried, provided it is within this state, shall be paid by the prison commission out of any available penitentiary funds on hand, upon the request of such relative. If the residence and address of the

relative of such prisoner is unknown, such prisoner shall be decently buried in citizen's clothes, and the grave marked by a stone with the name of said prisoner, date of death and age, if known, inscribed thereon. If the body of such prisoner is not claimed by the relatives, the prison commission shall at once notify the county judge of the county from which the prisoner was sentenced, of his death, the date and cause of death and place of burial. The prison commission shall cause to be made and kept a record of the deaths of prisoners, and certified copies of same, made by the custodian thereof, shall be admissible in evidence under the rules of law applying to official records. Any officer or employé of the prison system of whom any duties are required by this article, who shall fail to discharge such duties, shall be guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars. [Id.]

Art. 1613. Same.—The prison commission, or other person in charge of prisoners, upon the death of any prisoner under their care and control, shall at once notify the nearest justice of the peace of the county in which said prisoner died, of the death of said prisoner; and it shall be the duty of such justice of the peace, when so notified of the death of such prisoner, to go in person and make a personal examination of the body of such prisoner, and inquire into the cause of the death of such prisoner; and said justice of the peace shall reduce to writing the evidence taken during such inquest, and shall furnish a copy of the same to the prison commission, and a copy of the same to the district judge of the county in which said prisoner died; and the copy so furnished to said district judge shall be turned over by the district judge to the succeeding grand jury; and the said judge shall charge the grand jury, if there should be any suspicion of wrong-doing shown by the inquest papers, to thoroughly investigate the cause of such death.

Any officer or employé of the prison system, having charge of any prisoner at the time of the death of such prisoner, who shall fail to immediately notify a justice of the peace of the death of such prisoner, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by confinement in the county jail not less than sixty days nor more than one year; provided, that the justice of the peace making such examination shall be paid a fee as is now provided by law for holding inquests, said fee to be on sworn account therefor, approved by the prison commission. [Id.]

Art. 1614. Prison physician failing to make report, or making false report.—The prison commission shall provide for competent medical attention for all prisoners, and shall establish rules whereby all physicians shall be required to keep a record of all cases of sickness, accident or injury which they treat. The physicians so employed shall be reputable practicing physicians of not less than two years of experience in practice. Each physician employed in the prison system shall, at the end of each month, file with the prison commission a report in writing, subscribed and sworn to by him, which report shall state the names, race and sex of each prisoner treated or examined by him during said month, the malady or disease with which each was afflicted, and, if any shall be suffering with wounds or injuries inflicted by accident or some individual, he shall state the nature and extent of said injuries, by whom and by what means inflicted, or how the same occurred, and all such other information concerning said matters, and the condition of each prisoner treated or examined by him during said months,

as he may possess; provided, further, that for a failure to make such a report or any false statement knowingly made by any such physician in any such reports, he shall be prosecuted for the offense of perjury or false swearing, as provided by law. [Id., p. 157.]

Art. 1615. Conversion of prison property declared to be theft and punishable as such.—Any officer or employé of the prison system, who shall fraudulently convert to his own use and benefit any food, clothing, or other property, belonging to or under control of the prison system, shall be guilty of theft, and, upon conviction, be punished as prescribed by law. [Id., p. 158.]

See art. 372, ante.

Art. 1616. Felony for officer, etc., to acquire financial interest in contracts on behalf of prison, or to speculate in any prison transaction; penalty.—Any officer, agent or employé, in any capacity connected with the prison system of this state, who shall be financially interested, either directly or indirectly, in any contract for the furnishing of supplies or property to the prison system, of the purchase of supplies or property for the prison system, or who shall be financially interested in any contract to which said prison system is a party, or who shall knowingly and fraudulently sell or dispose of any property belonging to said prison system below its reasonable market value, or who shall be financially interested in any other transaction connected with the prison system, shall be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the state penitentiary for a term of not less than two years nor more than five years; and each transaction shall constitute a separate offense. [Id.]

See art. 372, ante.

Art. 1617. Officer, etc., inflicting unauthorized punishment on any prisoner; penalty.—Any sergeant, guard or other officer or employé of the prison system of this state who shall inflict any punishment upon a prisoner, not authorized by the rules of the prison system, shall be guilty of an assault, and, upon conviction thereof, shall be punished as prescribed by law; and it shall be the duty of the prison commission to make complaint before the proper officer of any county in which such assault was committed upon such prisoner. Provided, that in all cases where any person is charged by complaint or indictment with an offense against a prisoner, prisoners and ex-prisoners shall be permitted to testify. [Id.]

CHAPTER TWENTY-NINE
REFORMATORY INSTITUTIONS

Article 1617a. Corporal punishment of inmates of Girls' Training School.—Corporal punishment in any form shall not be inflicted upon the inmates of said institution except as a last resort to maintain discipline, and then only in the presence of the Superintendent, and a resident nurse; and at no time shall any inmate be struck more than twenty times, and that only with such instrument and in such manner as will inflict reasonable and moderate punishment, considering the age, size and strength of the culprit and the strength of the person administering such punishment, and at no time shall any weapon or instrument of torture be used, or any instrument which by its make, coupled with the manner of its use would be calculated to inflict bodily injury. Any one violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than \$25.00 nor more than \$100.00 or sentenced to not less than thirty days, nor more than ninety days in jail, or by both such fine and imprisonment. [Act 1913, 1st S. S., p. 11, ch. 6, § 15.]

Explanatory.—The above provision is added, by way of amendment, to Rev. St. 1911, as art. 5234a (Vernon's Sayles' Civ. St. 1914, art. 5234a). As it contains a criminal feature it is inserted in this compilation.

TITLE 19

REPETITION OF OFFENSES

Art.	Art.
1618. Second and subsequent convictions for misdemeanor.	1620. Third conviction for felony, how punished.
1619. Subsequent conviction for felony.	1621. Second conviction for capital offense, how punished.

Article 1618. [1014] Second and subsequent convictions for misdemeanor.—If it be shown on the trial of a misdemeanor that the defendant has been once before convicted of the same offense, he shall, on a second conviction, receive double the punishment prescribed for such offense in ordinary cases; and upon a third, or any subsequent conviction for the same offense, the punishment shall be increased, so as not to exceed four times the penalty in ordinary cases. [P. C. 818.]

Validity of statute in general.—This article is not invalid for uncertainty, in that it is not stated whether it is the maximum or the minimum penalty which is to be doubled. *Gould v. State* (Cr. App.) 146 S. W. 172.

Constitutionality.—This article is constitutional. It does not place defendant twice in jeopardy for the same offense. *Kinney v. State*, 45 App. 500, 78 S. W. 226, 79 S. W. 570.

Construction of statute in general.—Prior cases for offenses of like character cannot be used to enhance the punishment of a subsequent offense of like character. *Kinney v. State*, 45 App. 500, 78 S. W. 226, 79 S. W. 570.

This article is to be construed as a reform provision of our Code. That is, if after the conviction for the first offense the defendant does not reform but persists in crime and commits another offense of like character, he can be tried and his former conviction used to enforce his punishment and so on as he commits such subsequent offense up to four.

Prior cases cannot be used to enhance the punishment in any given case more than once. They cannot be made to do double duty. The statute allows these offenses to enter into a subsequent offense for the enhancement of the punishment in as many as four cases. There is no statutory authority that prior offenses can be used more than in the four cases on the contingencies mentioned. *Kinney v. State*, 47 App. 496, 84 S. W. 590.

Under the statute, the punishment for a third or any subsequent conviction for the same offense shall not be less than four times the minimum, nor more than four times the maximum, penalty for the first offense. *Gould v. State* (Cr. App.) 146 S. W. 172.

"Same offense" defined.—The words "same offense" as used in this article do not mean the identical offense, but an offense of like character. See *Kinney v. State*, 45 App. 500, 78 S. W. 226, 79 S. W. 570. *Muckenfuss v. State*, 55 App. 216, 117 S. W. 853.

Indictment and Information.—Willson's Cr. Forms, 741.

The increased punishments provided by this and following articles can not be inflicted unless the indictment alleges the previous conviction, and that the offense with which the defendant is then charged was committed since said previous conviction. "Murder" and "an assault with intent to murder" are not offenses of the same nature. *Long v. State*, 36 Tex. 6.

When the punishment assessed was not greater than that which might have been imposed for first offense, defendant cannot complain that indictment charged that he had been convicted of the "same offense" in three former cases. "Same offense" does not mean "same transaction" but an offense of same character. *Kinney v. State* (Cr. App.) 78 S. W. 225.

It is not sufficient to allege in the language of the statute that appellant had been previously convicted of the "same offense," but it must aver that he had been previously convicted of an offense of like character to that for which he is being tried. *Kinney v. State*, 45 App. 500, 78 S. W. 226, 79 S. W. 571.

Where an information sets up previous convictions in order to charge the defendant with a cumulative punishment, it is necessary to allege that the defendant has been convicted of previous offenses of a like character, but it is not necessary to allege those convictions with the same particularity as if the defendant were charged originally, but the allegation with regard to the previous crimes must show that they have succeeded one another; and hence the second paragraph of an information for violating the local option law, which charged that the defendant on a day named had been convicted of "the same offense" in three previous cases, and that each was for "the same offense" as the one hereinbefore charged, was defective in failing to allege that they were offenses "of like character," and that they were successive offenses; the allegation in the latter regard being of three convictions on the same day. *Neece v. State*, 62 App. 373, 137 S. W. 919.

Where an information charged a violation of the local option law in the first paragraph, and the second paragraph defectively charged former convictions to

impose a cumulative penalty on the accused, and a conviction was had, the case should only be reversed and remanded, as a valid trial may be had on the offense sufficiently charged in the first paragraph. *Neece v. State*, 62 App. 378, 137 S. W. 919.

Under this article an information, alleging that accused had been convicted of the "same offense," setting out two instances thereof did not properly charge the character of offense; the words "same offense" not meaning the identical offense, but one of like character. *Collins v. State* (Cr. App.) 171 S. W. 729.

Evidence.—In the trial of one for keeping a theater open in violation of the Sunday law, charged not to be his first offense, evidence held sufficient to support a finding that the prior convictions charged in the information were for offenses of the same identical character and kind as that for which he was on trial. *Gould v. State* (Cr. App.) 146 S. W. 172.

In the trial of one for a violation of the Sunday law alleged not to be his first offense, the records of the corporation court of a city, showing that he had been tried for a similar offense, and, upon a plea of guilty, had been fined, were admissible in evidence to show his liability to the enhanced punishment prescribed by article 1014, for second and subsequent similar offenses, regardless of the validity of the judgment entry therein shown. *Gould v. State* (Cr. App.) 146 S. W. 172.

Where a judgment of the defendant's prior conviction of a similar offense had never been used to enhance his punishment in any case, it was admissible in evidence in his trial for keeping a theater open in violation of the Sunday law to show his liability to the enhanced punishment prescribed by this article for second and subsequent similar offenses. *Gould v. State* (Cr. App.) 146 S. W. 172.

Under this and the following articles where an information for adultery and fornication charged a former conviction for fornication, such former judgment of conviction on a plea of guilty was admissible; but, it not appearing whether accused pleaded guilty to adultery or fornication, the information should have been introduced to identify the offense of which he was convicted. *Koger v. State* (Cr. App.) 165 S. W. 577.

Where, on a trial for fornication, a former judgment of conviction on a plea of guilty, for fornication with the same person, was introduced as a basis for increased punishment, the county attorney could not properly argue that the plea of guilty might be considered in determining accused's guilt. *Koger v. State* (Cr. App.) 165 S. W. 577.

Where the information did not properly allege previous convictions so as to warrant the additional punishment authorized by this article the admission of the records of prior convictions was error. *Collins v. State* (Cr. App.) 171 S. W. 729.

Such error was not cured by withdrawing the incompetent evidence from the jury, and, in view of a punishment of \$200 and 10 days' imprisonment and the statutory penalty of not less than \$50 nor more than \$500, and imprisonment not to exceed six months, was prejudicial. *Collins v. State* (Cr. App.) 171 S. W. 729.

Charge of court.—Where, for the purpose of increasing the penalty which might be imposed, former convictions of defendant of other violations of the same law were alleged, charging that proofs of such convictions could not be considered in passing on his guilt or innocence of the offense for which he was being tried, but only in fixing the penalty was not error. *Gould v. State* (Cr. App.) 147 S. W. 247.

Art. 1619. [1015] Subsequent conviction for felony.—If it be shown, on the trial of a felony less than capital, that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases. [P. C. 819.]

See notes under article 1618, ante.

Offenses of same nature.—Murder and assault to murder are not offenses of the same nature within this article. *Long v. State*, 36 Tex. 6.

Indictment.—Willson's Cr. Forms, 742.

Art. 1620. [1016] Third conviction for felony; how punished.—Any person who shall have been three times convicted of a felony less than capital, shall, on such third conviction, be imprisoned to hard labor for life in the penitentiary. [P. C. 820.]

See notes under articles 1618 and 1619, ante.

Art. 1621. [1017] Second conviction for capital offense; how punished.—A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment, shall not receive, on such second conviction, a less punishment than imprisonment for life in the penitentiary. [P. C. 821.]

See notes under articles 1618 and 1619, ante.

Indictment.—Willson's Cr. Forms, 743.

List of Acts, Passed Subsequent to the Revision of 1895, Omitted from the
Revised Penal Code of 1911, and Included in This Compilation in
Accordance with the Explanation Given in the
Preface in the Front of This Book

Date of Law.	Chap.	Sec.	Article in this Compilation.	Subject of Act.
1895	43	1	1414	Hide and Animal Inspection.
	47	18	852, note	Grazing Stock on Leased Public Land.
	102	1	831a	Age Limitation of Workers on Public Roads.
1897	30	1	1584a	County Finances.
	77	15	826, note	Willful Obstruction of Public Ditch or Diversion of Water.
	98	1 (Amending art. 529m, Penal Code 1895).	901	Protection of Fish, Birds and Game.
	98	1 (Amending art. 529s, Penal Code 1895).	916	Protection of Fish, Birds and Game.
1897 (S. S.)	5		1414	Hide and Animal Inspection.
			852, note	Grazing Stock on Leased Public Land.
			110-110g, 113a-113d, 115a-115c	Fees of Officers—Accounting for.
1899	15	10	110-110c	Fees of Officers—Accounting for.
	23	1	1488	State Revenue Agent.
	102	1-6	1255a-1256	Act to Promote Agriculture and Stock Raising and to Prohibit Hunting with Firearms or Dogs upon Enclosed or Posted Lands of Another.
1901	104	2	860a	General Land Office—Public Lands—Depredation—Recovery of Damages for.
	119		1414	Hide and Animal Inspection.
	21	1	111	Fees of Clerks of District Court for which they are Required to Account under Penalty.
1901 (1st S. S.)	106	1	1414	Hide and Animal Inspection.
	125	5	852, note	Grazing Stock on Leased Public Land.
1901 (1st S. S.)	12	9	104a	Erection of Sea Walls by Cities and Counties.
1903	68	1	1522j	Railway Companies Required to Build Sidings and Spur Tracks.
	68	2	1522k	Railroad Commission Empowered to Require Railway Companies to Construct Sidings and Spur Tracks.
	84		1414	Hide and Animal Inspection.
1903 (S. S.)	107	1 (part)	1525, 1526	Railroad Agents Required to Exhibit Certificate of Authority to Sell Ticket.
	107	1 (part)	1531d	Bulletin of Railroad Trains.
	120		1414	Hide and Animal Inspection.
	144	1-3	167	Mineral Survey.
	11	1 (Amending art. 4494, Rev. St. 1895).	1522i	Duties and Liabilities of Railways as to Trains and Accommodations.
1905	11	1	1531a	Duty of Railroad Companies to Employ Train Dispatchers.
	50	1	1414	Hide and Animal Inspection.
	106	1	668q	Railway Orders and Associations.
	124	89	317b, 418	Scholastic Census.
	124	124a	1513	Teachers Certificates in Cities.

Date of Law.	Chap.	Sec.	Article in this Compilation.	Subject of Act.
1905	125	1	678	Certificate of Membership, Policy or Other Contract of Insurance Issued by Mutual Assessment Accident Insurance Companies.
	131	6	420f	Assessment and Collection of Taxes in Certain Cases.
	149	1	403	County Treasurers Required to Furnish Detailed Statement to Commissioners Court upon Demand.
1905 (1st S. S.)	10	67	532, note	Receiving Deposits and Incurring Debts by Bank while Insolvent.
	11		220, note	Elections—Manner of Holding and Making Returns.
1907	16		1414	Hide and Animal Inspection.
	29		115a	Disposition of Fees Collected.
	55		1414	Hide and Animal Inspection.
	94		1414	Hide and Animal Inspection.
1909	105		1414	Hide and Animal Inspection.
	14		1414	Hide and Animal Inspection.
	60		1414	Hide and Animal Inspection.
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	101	3	1551, note	Repeal of Laws 1907, c. 51, Limiting Hours of Service of Certain Railroad Employés. Repeal of Laws 1907 (S. S.) c. 5, amending Laws 1907, c. 51.
	102	1-3	664b-664d	Fire Insurance Companies not Organized under Laws of State to File Bond with Commissioner of Insurance and Banking.
1909 (1st S. S.)	11		1458, 1464	Amendment of Anti-Trust Law.
	26	7	695e	Penalty for Knowingly Harboring or Concealing Leper.
1909 (2nd S. S.)	13	1, 2	1521b, 1521c	Railroad Companies Required to Provide Suitable Passenger and Freight Depots.

Act Passed Prior to the Revision of the Penal Code in 1895, and Omitted from That Code, but Revived by Inclusion in the Revised Civil Statutes

Date of Act.	Civil Statutes.	Art. in This Compilation.	Subject of Act.
1879, S. S. p. 5	Arts. 7658, 7659 Rev. St. 1911	108a, 108b	Payment of moneys into treasury by tax collectors and other officers.

Act Included in Revised Penal Code of 1895, and Omitted from Revised Penal Code of 1911

Pen. Code 1895.	Art. in This Compilation.
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