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Code of Criminal Procedure

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SUPPLEMENT

TO THE

CODE OF CRIMINAL PROCEDURE

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TO THE

CODE OF CRIMINAL PROCEDURE

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The provision of the bill of rights requiring that the accused shall have a fair trial by an impartial jury, means that the jury must be not partial, not favoring one party more than another, unprejudiced, disinterested, equitable, and just, and that the merits of the case shall not be prejudged. Duncan v. State (Cr. App.) 184 S. W. 195.

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Art. 9. [9] No person shall be twice put in jeopardy for the same offense.

1. **In general.**—A complaint charging defendant with being a vagrant in that he "did habitually loiter in and around houses of prostitution," if good, covered only the time between the date of his last conviction and the filing of the complaint. King v. State (Cr. App.) 181 S. W. 736.

Under the Constitution and laws of the state, a person cannot be twice tried and convicted for the same overt act, and the plea of autrefois acquit is available if the transaction is the same and two indictments must be sustained by the same proof. Barnes v. State (Cr. App.) 185 S. W. 2.

4. **Insufficient indictment, information or complaint.**—Where an information in a former complaint charged an impossible date, a conviction could not be had under it, so that an acquittal thereunder was not available as a plea of former acquittal. Spicer v. State (Cr. App.) 179 S. W. 712.

8. **Judgment void, set aside, or reversed.**—Where accused had previously been tried upon two counts, the first charging forgery and the second passing a forged instrument, and was convicted under the second count, thereby acquitting him on the first, he could not again be tried on a count for the forgery, although he was granted a new trial on the ground that one of the jurors was a minor. Martin v. State (Cr. App.) 189 S. W. 262.

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local option law by making a sale of liquor, an offense denounced by art. 597, can be convicted of engaging in the business of selling intoxicating liquor in prohibition territory, an offense denounced by article 589. Barnes v. State (Cr. App.) 185 S. W. 2.

In prosecution for violation of prohibition liquor law in making a single sale of intoxicating liquor, plea of conviction for unlawfully engaging in business of selling intoxicating liquor in prohibition territory held not good as plea of former jeopardy. Medlock v. State (Cr. App.) 186 S. W. 323.

Unlawfully engaging in the business of selling intoxicating liquors is a crime distinct from that of a single unlawful sale, and a conviction for one is no bar to a conviction of the other. Hill v. State (Cr. App.) 186 S. W. 769.

53. —— **Unlawful practice of medicine.**—An information charging that the defendant practiced medicine unlawfully between two certain dates by attending a certain person, is not bad on account of former jeopardy, where the former charge was that he attended a different person at different dates, the offenses under the statute being distinct. Young v. State (Cr. App.) 181 S. W. 472.

54. **Waiver of defense.**—Neither consent of counsel of accused to discharge of jury after jeopardy attaches, nor failure of accused to protest, will bar a plea of former jeopardy on subsequent trial. Hipple v. State (Cr. App.) 191 S. W. 1150.

Art. 10. [10] Trial by jury shall remain inviolate.

Disqualification of juror.—Under Const. art. 1, §§ 10, 15, and art. 22, post, held that member of law and order league, obligated to assist in prosecution and conviction for violation of local option laws, was disqualified as a juror in trial for selling intoxicating liquor in prohibition territory, so as to require reversal of a conviction. Counts v. State (Cr. App.) 181 S. W. 723.

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Art. 22. [22] Defendant may waive any right, except, etc.

Cited, Hipple v. State (Cr. App.) 191 S. W. 1150.

2. **Indictment or information.**—Where a certified copy of the indictment was read to the jury in the presence of, and with the knowledge of, defendant and her counsel, without objection until in a motion for a new trial, the reading of the original indictment was waived, as expressly authorized by this article. Orner v. State (Cr. App.) 183 S. W. 1172.

4. **Right to trial by jury.**—Under Const. art. 1, §§ 10, 15, and this article, held that member of law and order league, obligated to assist in prosecution and conviction for violation of local option laws, was disqualified as a juror in trial for selling intoxicating liquor in prohibition territory, so as to require reversal of a conviction. Counts v. State (Cr. App.) 181 S. W. 723.

The provision that the defendant cannot waive a jury in a felony case means that he cannot waive trial by a jury of men who have expressed no opinion as to his guilt. Duncan v. State (Cr. App.) 184 S. W. 195.

5. **Objections to jurors or jury.**—Under this article and art. 657, defendant, charged with a capital crime, held to have waived special venire by announcing ready for trial after the district attorney and the court had agreed that capital punishment should not be inflicted. Smith v. State (Cr. App.) 180 S. W. 278.

Where juror whose name was erased from the jury list by defendant's attorney, served on jury by mistake without discovery, it appearing that juror was qualified, held that, in the absence of a showing that he entertained prejudice, the objection after verdict and on appeal comes too late. Macias v. State (Cr. App.) 189 S. W. 953.

7. **Evidence.**—Introduction of evidence, provided for by art. 566, on a plea of guilty, may, under this article be waived. Flores v. State (Cr. App.) 190 S. W. 496; Diaz v. State (Cr. App.) 190 S. W. 498.

Art. 25. [25] Construction of this Code.

Cited, Lee v. State (Cr. App.) 193 S. W. 313.

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Art. 26. [26] When rules of common law shall govern.

Cited, Hipple v. State (Cr. App.) 191 S. W. 1150.

CHAPTER TWO

THE GENERAL DUTIES OF OFFICERS CHARGED WITH THE ENFORCEMENT OF THE CRIMINAL LAWS

2. District and County Attorneys

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Took effect 90 days after March 21, 1917, date of adjournment.

Art. 34. [34] Shall hear complaints, and what the same shall contain.

Offense committed after filing of complaint.—One cannot be convicted of an offense shown by the evidence to have been committed after the filing of the complaint. McWilliams v. State (Cr. App.) 188 S. W. 999.

Signature to complaint.—Where affidavit charging gambling was not signed by affiant when sworn to, as required by this article, but court permitted it to be signed, with notice to defendant, complaint being regular in all forms and properly sworn to, it was not necessary to file new information, and under this article, though affidavit charging gambling was not signed when sworn to, with notice to defendant, under direction and authority of court, complaint could be signed by affiant. Boren v. State (Cr. App.) 192 S. W. 1063.

Art. 35. [35] Duty when complaint has been made.

Filing.—A nunc pro tunc placing by the clerk of file mark on complaint and information, as of the date they were filed with him, may be permitted by the court. Milstead v. State (Cr. App.) 182 S. W. 305.

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4. Peace Officers

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Cited, Tippett v. State (Cr. App.) 189 S. W. 485.

Art. 45. [45] May summon aid when resisted.

Cited, Myers v. Colquitt (Civ. App.) 173 S. W. 993.

5. Sheriffs

Art. 49. [49] Keeper of jail.

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Art. 50. [50] Shall place in jail every person committed by lawful authority.

Cited, Myers v. Colquitt (Civ. App.) 173 S. W. 993.

Art. 52. [52] May appoint a jailer, who shall be responsible.

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CHAPTER THREE

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TITLE 2

OF THE JURISDICTION OF COURTS IN CRIMINAL ACTIONS

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WHAT COURTS HAVE CRIMINAL JURISDICTION

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CHAPTER TWO

OF THE COURT OF CRIMINAL APPEALS [AND THE SUPREME COURT]

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The Constitution expressly places in the Court of Criminal Appeals, and not in the Supreme Court, the final jurisdiction in all criminal cases. Ex parte Mode (Cr. App.) 180 S. W. 708.

If the district court acts beyond its jurisdiction by issuing an injunction restraining enforcement of a criminal provision, the Court of Criminal Appeals has power to declare the order a nullity. State v. Clark (Cr. App.) 187 S. W. 760; State v. Nabers (Cr. App.) 187 S. W. 783, 784.

Stare decisis.—A decision of the Court of Criminal Appeals adjudging constitutional arts. 6319a–6319n, civil statutes, relating to pool halls, will be followed by a Court of Civil Appeals. Watson v. Cochran (Civ. App.) 171 S. W. 1067.

The decisions of the Court of Criminal Appeals on matters of criminal law are binding upon the Court of Civil Appeals. State v. Country Club (Civ. App.) 173 S. W. 570.

County court should not entertain writ of habeas corpus raising only questions passed on by the Court of Criminal Appeals on appeal from conviction. Ex parte McCallan (Cr. App.) 175 S. W. 1067.

A judgment of the Court of Criminal Appeals that a prohibitory pool hall law is valid is of such public interest as to be conclusive upon all persons. State v. Clark (Cr. App.) 187 S. W. 760; State v. Nabers (Cr. App.) 187 S. W. 783, 784.

Art. 69. [69] Power to issue writs.

5. **Habeas corpus—Delinquent children.**—Proceedings for the commitment of one charged as a juvenile delinquent, under art. 1203, are criminal in nature, so that the Court of Criminal Appeals had jurisdiction of an application by the alleged delinquent for habeas corpus. Ex parte McDowell, 76 Cr. R. 1, 172 S. W. 213.

6. —— **Contempt proceedings.**—Court of Criminal Appeals held to have no jurisdiction of application for habeas corpus by person committed to jail, for violation of temporary injunction, though the act sought to be enjoined was a crime, especially in view of art. 1529, Civil Statutes, authorizing the issuance of writs of habeas corpus by the Supreme Court or any justice thereof in such a case. Ex parte Zuccaro, 72 Cr. R. 214, 162 S. W. 844.

Under Const. art. 5, §§ 3, 5, as amended in 1891, and art. 1529, Civil Statutes, taking away the jurisdiction of the Court of Criminal Appeals in civil matters, and giving the Supreme Court jurisdiction upon habeas corpus, held that an application for a writ to discharge relator on final hearing, in an action to enjoin a theater or show on Sunday, was in a "civil suit," and would be refused. Ex parte Mussett, 72 Cr. R. 487, 162 S. W. 846.

9. **Prohibition.**—It is only where the court has no jurisdiction or is exceeding its jurisdiction that writ of prohibition will lie, and where defendant did not either in the corporation court or in the county court on appeal contend that the statute under which he was prosecuted had been repealed, he was not entitled to prohibition against the county court. State v. Travis County Court, 76 Cr. R. 147, 174 S. W. 365.

Under Const. art. 5, § 5, stating the powers of the Court of Criminal Appeals, that court may issue writs of prohibition to enforce its jurisdiction and prevent restraint of prosecutions by the civil courts, and if a petition alleges no ground of injunction within arts. 4643–4693, Civil Statutes, the district court is without jurisdiction to issue the writ; and, the remedy by appeal from the order granting injunction being inadequate, defendant may apply for writ of prohibition to the Court of Criminal Appeals if the law involved is penal, and a judgment of the Court of Criminal Appeals that a prohibitory pool hall law is valid is of such public interest as to be conclusive upon all persons, and when district courts seek to enjoin prosecutions thereunder, it is the duty of the appellate court to issue a writ of prohibition. State v. Clark (Cr. App.) 187 S. W. 760; State v. Nabers (Cr. App.) 187 S. W. 783, 784.

10. **Certiorari.**—Where the transcript on appeal from a judgment forfeiting a bail bond did not contain a copy of the order transferring the proceeding to the court which forfeited the bond, that error may be supplied by certiorari. General Bonding & Casualty Ins. Co. v. State, 73 Cr. R. 649, 165 S. W. 615.

Art. 70. [70] Power to ascertain facts.

Habeas corpus.—In determining, in habeas corpus in the Court of Criminal Appeals, the power to fine for contempt, the court may go behind the judgment and ascertain the facts. Ex parte Coffee, 72 Cr. R. 209, 161 S. W. 975.

Art. 72. [72] When judge is disqualified.

De facto judge.—All acts of a de facto judge of the Court of Criminal Appeals as such are valid as to the public and third persons and parties to appeals. Marta v. State (Cr. App.) 193 S. W. 323.

Art. 85. Supreme Court or any one of the justices may issue writ.

Habeas corpus.—A court of equity could not enjoin a grand jury from returning an indictment, if the grand jury saw proper to do so, and the Supreme Court could not release on habeas corpus if they did do so, because their authority to issue a writ is limited by the Constitution, and to restraint in a civil cause. Rev. St. art. 1529. State v. Clark (Cr. App.) 187 S. W. 760; State v. Nabers (Cr. App.) 187 S. W. 783, 784.

Art. 87. [86] Article 86 construed.

Amount of fine.—Under the statutes, one convicted in the recorder's court of violating an ordinance, and on appeal to the county court again convicted, and fined $20, cannot appeal to the Court of Criminal Appeals. Holman v. State, 73 Cr. R. 576, 166 S. W. 506.

Under this article, if the punishment imposed in the county court on appeal be a fine not exceeding $100, its judgment was final, and further appeal will not lie. Smith v. State (Cr. App.) 182 S. W. 310.

On appeal from a corporation court to county court, the county court's judgment is final under this article, where the fine assessed is not over $100, and an appeal therefrom must be dismissed. Grigsby v. State (Cr. App.) 183 S. W. 143.

Where the fine imposed by the county court on a trial de novo, on appeal from a corporation court, was $100, further appeal will not lie. Foard v. State (Cr. App.) 185 S. W. 570.

Under this article and art. 86, where there is trial de novo in county court on appeal from corporation court of city, and punishment is fixed at fine of less than $100, Court of Criminal Appeals is without jurisdiction on appeal. Colf v. State (Cr. App.) 193 S. W. 148.

CHAPTER THREE

OF THE DISTRICT COURTS

Article 93. Special terms of district court may be held.

Validity of indictment at special term.—By this article and art. 94, and art. 1678, Civil Statutes, special terms of district court and election of special judges are provided for, and an indictment, found at a special term presided over by a special judge, held valid. De Arman v. State (Cr. App.) 189 S. W. 145.

Art. 94. How and when special terms may be convened.

See Chant v. State, 73 Cr. R. 345, 166 S. W. 513.

Special term.—See De Arman v. State (Cr. App.) 189 S. W. 145; note under art. 93. Under this article and art. 1720, Civil Statutes, a judge had authority to call a special term for the trial of cases. Vasquez v. State, 76 Cr. R. 37, 172 S. W. 225.

CHAPTER THREE A

CRIMINAL DISTRICT COURTS

DALLAS COUNTY

Article 97dd. Sheriff, clerk and county attorney to serve, etc.

Note.—By Act March 29, 1917, ch. 121, post, art. 97*lll*, the office of Criminal District Attorney for Dallas county is created, with power to exercise exclusive control over criminal matters in such county.

Art. 97ff. Criminal District Court No. 2 of Dallas County; concurrent jurisdiction, etc.

Note.—Act March 22, 1915, ch. 86, in its title purports to amend this section, but the enacting part makes no reference to the matter of amendment. The amendatory act is set forth in Vernon's Code Criminal Procedure 1916 as art. 97*ll*.

Transfer of causes.—Where a criminal cause was transferred from the criminal district court of Dallas county to the criminal district court No. 2, in accordance with this article, the fact that the transcript did not contain a copy of the order will not deprive court No. 2 of jurisdiction, and where a bail bond was executed to guarantee the appearance of accused in the criminal district court of Dallas county, the transfer of the prosecution carried with it the bond, and did not discharge the surety. General Bonding & Casualty Ins. Co. v. State, 73 Cr. R. 649, 165 S. W. 615.

Art. 97ggg. Criminal judicial district created.—There is hereby created and established a Criminal Judicial District of Dallas County, Texas, to be composed of the County of Dallas, Texas, alone, and the Criminal District Court of Dallas county, and the Criminal District Court No. 2 of Dallas county, Texas, shall have and exercise all the Criminal Jurisdiction of such courts, of and for said Criminal District of Dallas county, Texas, that are now conferred by law on said Criminal District Courts. [Act March 29, 1917, ch. 121, § 1.]

Note.—Sections 2 to 10, inclusive, relates to the Criminal District Attorney of Dallas County, and is set forth post as art. 97*lll*. Sec. 11 repeals all laws in conflict. Became a law March 29, 1917.

Art. 97h. Sheriff, county attorney, and clerk of Dallas county to act, etc.; fees.

Note.—By Act March 29, 1917, ch. 121, post, art. 97*lll*, the office of Criminal District Attorney of Dallas County is created with exclusive powers over criminal matters in such county.

Art. 97i. Apportionment.

See art. 97ggg, ante.

Art. 97*ll*. Judges of criminal district courts may sit in either court.

Note.—Act March 22, 1915, ch. 86, in its title purports to amend chapter 19, section 2, of Act Sept. 14, 1911 (set forth in Vernon's Code Criminal Procedure 1916, art. 97ff), but the enacting part makes no mention of the matter of amendment.

Art. 97*lll*. Criminal District Attorney; duties; salary; fees; accounting; assistants; oath; powers; report of expenses; election.—There shall be elected by the qualified electors of the Criminal Judicial District of Dallas county, Texas, an attorney for said district, who shall be styled the "Criminal District Attorney of Dallas county," and who shall hold his office for a period of two years and until his successor is elected and qualified. The said Criminal District Attorney shall possess all the qualifications and take the oath and give the bond required by the Constitution and laws of this State, of other district attorneys. [Id., § 2.]

It shall be the duty of said Criminal District Attorney or his assistants, as hereinafter provided to be in attendance upon each term of the "Criminal Court of Dallas County" and the "Criminal District Court No. 2 of Dallas County" and to represent the state in all matters pending before said courts. And he shall have exclusive control of all criminal cases wherever pending, or in whatever court in Dallas County that now has jurisdiction of criminal cases, as well as any or all courts that may hereafter be created and given jurisdiction in criminal cases, and he shall have the fees therefor fixed by law. He shall also have control of any and all cases heard on habeas corpus before any civil district court of Dallas County, as well as before the Criminal Court of said county. The Criminal District Attorney of Dallas County shall have

and exercise in addition to the specific powers given and the duties imposed upon him by this Act, all such powers, dutes and privileges within said Criminal District of Dallas County as are by law now conferred, or which may hereafter be conferred upon district and county attorneys in the various counties and judicial districts of this state.

It is further provided that he and his assistants shall have the exclusive right and it shall be their sole duty to perform the duties provided for in this Act, except in cases of absence from the county of the Criminal District Attorney and his assistants, or their inability or refusal to act; and no other person shall have the power to perform the duties provided for in this Act, or to represent the state in any criminal case in Dallas County, except in case of the absence from Dallas County, or the inability or refusal to act of the Criminal District Attorney and his assistants. [Id., § 3.]

The said Criminal District Attorney of Dallas County shall be commissioned by the Governor and shall receive a salary of $500.00 per annum, to be paid by the state, and in addition thereto shall receive the following fees in felony cases, to be paid by the state; for each conviction of felonious homicide, where the defendant does not appeal or dies, or escapes after appeal and before final judgment of the Court of Criminal Appeals, or where, upon appeal, the judgment is affirmed, the sum of forty dollars. For all other convictions in felony cases, where the defendant does not appeal, or dies, or escapes, after appeal, and before final judgment of the Court of Criminal Appeals, or where, upon appeal, the judgment is affirmed, the sum of thirty dollars; provided, that in all convictions of felony, in which punishment is fixed by the verdict and judgment by confinement in the House of Correction and Reformatory, his fee shall be fifteen dollars. For representing the state in each case of habeas corpus where the defendant is charged with felony, the sum of twenty dollars. For representing the state in examining trials, in felony cases, where indictment is returned, in each case, the sum of five dollars. The Criminal District Attorney shall also receive such fees for other services rendered by him as is now, or may hereafter be authorized by law to be paid to other district and county attorneys in this state for such services. [Id., § 4.]

The Criminal District Attorney of Dallas County shall retain out of the fees earned and collected by him the sum of three thousand five hundred dollars per annum and in addition thereto one fourth of the gross excess of all such fees in excess of three thousand five hundred dollars per annum to an amount not in excess of two thousand dollars. The three fourth remaining to be applied first to the payment of the salaries of the Assistant District Attorneys and extra assistant District Attorneys and stenographer as hereinafter provided for. The remainder to be paid into the treasury of Dallas County; provided that in arriving at the amount collected by him he shall include the fees arising from all classes of criminal cases whether felony or misdemeanor arising in any of the courts in Dallas County now existing, or which may hereafter be created including habeas corpus hearing and fines and forfeitures; provided that after the 30th day of November and before the first day of January following of each year, he shall make a full and complete report and accounting to the county judge of Dallas County of all of such fees so collected by him; provided that in addition to the above he shall receive ten per cent for the collection of delinquent fees as is now provided by law relating to the collection of delinquent fees by county and district attorneys. Such fees however, to be included in the reports herein provided for and to be taken into consid-

eration in arriving at the total maximum compensation provided in this Act. [Id., § 5.]

The Criminal District Attorney of Dallas County may appoint two assistants criminal district attorneys who shall each receive a salary of not to exceed eighteen hundred dollars per annum payable monthly, and four additional assistant district attorneys who shall each receive a salary of not to exceed fifteen hundred dollars a year payable monthly. He may appoint a stenographer who shall receive a salary of not more than twelve hundred dollars per annum payable monthly.

In addition to the assistant criminal district attorneys and stenographer above provided for, said Criminal District Attorney of Dallas County may, with the approval of the county judge and commissioners court of Dallas county, appoint as many additional extra assistant district attorneys as may be necessary to properly administer the affairs of the office of Criminal District Attorney and enforce the law, upon the Criminal District Attorney making application under oath addressed to the county judge of Dallas county, setting out the need therefor; provided, the county judge, with the approval of the commissioners court, may discontinue the services of any one or more of said extra assistant criminal district attorneys so appointed, the salary of said extra assistant criminal district attorney to be fixed by the commissioners court of Dallas county. [Id., § 6.]

The assistant criminal district attorneys and the extra assistant criminal district attorneys above provided for, when so appointed, shall take oath of office and be authorized to represent the state before said criminal district court, and in all other courts of Dallas county, in which the criminal district attorney of Dallas county is authorized by this Act to represent the state, such authority to be exercised under the direction of said criminal district attorney, and which said assistants shall be subject to removal at the will of the said criminal district attorney. Each of said assistant criminal district attorneys shall be authorized to administer oaths, file information, examine witnesses before the grand jury and generally perform any duty devolving upon the criminal district attorney of Dallas county, and to exercise any power conferred by law upon the said criminal district attorney when by him so authorized. The criminal district attorney of Dallas county shall be paid the same fees for services rendered by his assistants as he would be entitled to receive if the services shall have been rendered by himself. [Id., § 7.]

The criminal district attorney of Dallas county is authorized, with the consent of the county judge and county commissioners of Dallas county, to appoint not to exceed two assistants in addition to his regular assistant criminal district attorneys, provided for in this Act, 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 criminal district attorney, and who shall receive as their compensation one hundred dollars per month each, to be paid in monthly installments out of the county funds of Dallas county, Texas, by warrants drawn on such county fund; and provided further, that the criminal district attorney of Dallas county shall be allowed a sum of money by order of said commissioners court of Dallas county, as in the judgment of the commissioners court may be deemed necessary, to the proper administration of the duties of such office not to exceed, however, the amount of fifty dollars per month. Such amount as may be thus necessarily incurred shall be paid by the commissioners court upon affidavit made by the criminal

district attorney of Dallas county, showing the necessity for such expenditure and for what the same was incurred. The commissioners court may also require any other evidence as in their opinion may be necessary to show the necessity for such expenditure, but they shall be the sole judge as to the necessity for such expenditure and their judgment allowing same shall be final. [Id., § 8.]

The criminal district attorney shall at the close of each month of the tenure of such office make, as a part of the report required by this Act, an itemized and sworn statement of the actual and necessary expenses incurred by him in the conduct of his said office, such as stamps, stationery, books, telephone, traveling expenses and other necessary expenses. If such expenses 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 appears that any item of such expenses was not incurred by such officer or that such item was not necessary thereto, such item may be by the said auditor rejected, in which case the correction of such item may be adjudicated in any court of competent jurisdiction. The amount of such expense shall be deducted by the criminal district attorney of Dallas county in making such a report from the amount if any due by him to the county under the provisions of this Act. [Id., § 9.]

The criminal district attorney of Dallas county, as provided for in this Act, shall be elected by the qualified electors of the criminal judicial district of Dallas county at the next general election, and it is provided and directed that the present county attorney of Dallas county, Texas shall continue in office and assume the duties and be known as the criminal district attorney of Dallas county, Texas, and proceed to organize and arrange the affairs of the office of criminal district attorney of Dallas county, and appoint assistants as provided for in this Act and receive the fees provided for in this Act for such office until the next general election and until the criminal district attorney of Dallas county shall be elected and qualified. [Id., § 10.]

See art. 97ggg, ante, and note thereunder.

Harris County

Art. 97u. Criminal district attorney of Harris county; assistants and stenographer; salaries; oath; removal; powers of assistants; fees. —The Criminal District Attorney of Harris County shall appoint two assistant criminal district attorneys, who shall each receive a salary of eighteen hundred dollars per annum, payable monthly. He shall also appoint a stenographer, who shall receive a salary of not more than twelve hundred dollars per annum, payable monthly. In addition to the assistant criminal district attorneys and stenographer, above provided for, the county judge of Harris County may, with the approval of the commissioners' court, appoint as many additional assistants as may be necessary to properly administer the affairs of the office of Criminal District Attorney and enforce the law, upon the Criminal District Attorney making application under oath, addressed to the County Judge of Harris County, setting out the need therefor, provided, the county judge, with the approval of the commissioners' court may discontinue the service of any one or more of the assistant criminal district attorneys provided for in this Act, when in his judgment and of the judgment of the commissioners' court, they are not necessary; provided that the additional assistants appointed by the county judge as herein provided for shall receive not more than $1,800.00 per year, payable monthly. The salaries of all assistants shall be paid by Harris County;

provided that if the above salaries be insufficient and inadequate for the proper investigation of crime in Harris County and the efficient performance of the duties of said office, then the Criminal District Attorney may contract for and pay such additional compensation as is necessary for the proper and efficient discharge of his duties, out of the excess fees collected by him which would otherwise go to the county, a detailed itemized statement, under oath, of which he shall include in his annual report to the County Judge of Harris County, to be approved by the county auditor, but in no event shall the county be liable for such extra compensation. Provided further that before said Criminal District Attorney shall pay such extra compensation he shall secure the written approval of a majority of the District Judges of Harris County. The assistant criminal district attorneys above provided for, when so appointed, shall take the oath of office and be authorized to represent the State before said Criminal District Court, and in all other courts in Harris County in which the Criminal District Attorney of Harris County, is authorized by this Act to represent the State, such authority to be exercised under the direction of the said Criminal District Attorney, and which assistants shall be subject to removal at the will of the said Criminal District Attorney. Each of said assistant criminal district attorneys shall be authorized to file informations, examine witnesses before the grand jury and generally to perform any duty devolving upon the Criminal District Attorney of Harris County, and to exercise any power conferred by law upon the said Criminal District Attorney when by him so authorized. The Criminal District Attorney of Harris County shall be paid the same fees for services rendered by his assistants as he would be entitled to receive if the services should have been rendered by himself. Provided, further, that the $2,500 in fees and the one-fourth of the excess fees heretofore provided for shall in no event exceed the total sum of $6,000 per year as compensation to said District Attorney, and any amount in excess thereof shall be turned in to the County Treasurer. [Act Feb. 23, 1917, ch. 42, § 1.]

Explanatory.—The act amends sec. 22, ch. 67, Acts Reg. Sess. 32nd Leg. as amended by ch. 14, Acts 34th Leg. Gen. Sess., so as to read as above. Sec. 2 repeals all laws in conflict. Became a law Feb. 23, 1917.

NUECES, KLEBERG, WILLACY, AND CAMERON COUNTIES

Art. 97½. Court created; jurisdiction; appeals.—That there is hereby created and established for the Counties of Nueces, Kleberg, Willacy and Cameron a Criminal District Court, which shall have and exercise all of the criminal jurisdiction now vested in and exercised by the district court of the 28th Judicial District of Texas and said Criminal District Court shall try and determine all causes for divorce between husband and wife and adjudicate property rights in connection therewith in said counties, and try and determine all causes for the collection of delinquent taxes and the enforcement of liens for the collection of same. All appeals from the judgments of said court shall be to the Court of Criminal Appeals, except appeals in divorce cases and suits for the collection of delinquent taxes, which shall be to the Court of Civil Appeals, under the same rules and regulations as now or may hereafter be provided by law for the appeals in criminal cases from district courts. [Act Feb. 26, 1916 [1917], ch. 46, § 1.]

Sec. 11 repeals all laws in conflict. Took effect 90 days after March 21, 1917, date of adjournment.

Art. 97½a. Jurisdiction of regular districts courts diminished.—From and after the time when this Act shall take effect, the district court of the 28th Judicial District composed of the Counties of Nueces, Kleberg, Willacy and Cameron shall cease to have and exercise any criminal jurisdiction in either of said counties and shall cease to have and exercise any jurisdiction of divorce cases in either of said counties, and shall cease to have and exercise any jurisdiction of suits for the collection of any delinquent taxes or the enforcement of liens for same; provided, however, that if there shall be any criminal case on trial in the 28th Judicial District Court, when this Act shall go into effect, such district court shall retain jurisdiction of such case until such trial shall be concluded and until appeal therein shall be perfected if an appeal shall be made therein; and provided further that nothing in this Act shall affect the jurisdiction of the 28th District Court to pronounce sentence in any criminal case tried in such court before this Act takes effect, or which shall be on trial when this Act goes into effect. [Id., § 2.]

Art. 97½b. Election of judge; qualifications; powers and duties; exchange, disqualification, etc.—The judge of said Criminal District Court for the Counties of Nueces, Kleberg, Willacy and Cameron shall be elected by the qualified voters of said counties for a term of four years, and shall hold his office until his successor shall have been duly elected and qualified. He shall possess the same qualifications as are required of the judge of the district court, and shall receive the same salary as is now or may hereafter be paid to district judges, to be paid in like manner. He shall have and exercise all the powers and duties now or hereafter to be vested in or exercised by district judges in criminal cases. The judge of said court may exchange with any district judge, as provided by law in cases of district judges: and in case of disqualification or absence of the judge, a special judge may be selected, elected or appointed as provided by law in cases of district judges; provided that the Governor, by and with the consent of the Senate, shall, immediately upon this Act taking effect, appoint a judge of said court, who shall hold the office until the next general election after the passage of this Act and until his successor shall have been elected and qualified. [Id., § 3.]

Art. 97½c. Sheriff and clerk; district attorney; fees and salaries.—The sheriff and clerk of the district court of Nueces County, as now provided by law, shall be the sheriff and clerk, respectively, of said Criminal District Court of Nueces County; and the sheriff and clerk of the district court of Kleberg County, as now provided by law, shall be the sheriff and clerk, respectively, of the Criminal District Court of Kleberg County, as now provided by law, shall be the sheriff and clerk, respectively of the Criminal District Court of Kleberg County, and the sheriff and clerk of the district court of Willacy County, as now provided by law, shall be the sheriff and clerk, respectively, of the Criminal District Court of Willacy County; and the sheriff and clerk of the district court of Cameron County, as now provided by law, shall be the sheriff and clerk, respectively, of said Criminal District Court in Cameron County; and the district attorney of the 28th Judicial District elected and now acting for said district, shall be district attorney for said Criminal District Court in the Counties of Nueces, Kleberg, Willacy and Cameron, and shall hold his office until the time for which he has been elected district attorney for the 28th Judicial District of Texas shall expire, and until his successor is duly elected and qualified; and

there shall be elected for two years, beginning with the next general election after this Act takes effect, a district attorney for said Criminal District Court, whose powers and duties shall be the same as other district attorneys; and said clerk, sheriff and district attorney shall, respectively, receive such fees and salaries as are now or may hereafter be prescribed by law for such officers in the district courts of the State of Texas, to be paid in the same manner. [Id., § 4.]

Art. 97½d. Seal.—Said Criminal District Court shall have a seal in like design as the seal now prescribed by law for district courts, except for Nueces County, the words "Criminal District Court of Nueces County, Texas," shall be engraved around the margin thereof; and for Kleberg County, the words "Criminal District Court of Kleberg County, Texas," shall be engraved around the margin thereof; and for Willacy County the words "Criminal District Court of Willacy County, Texas," shall be engraved around the margin thereof; and for Cameron County the words "Criminal District Court of Cameron County, Texas," shall be engraved around the margin thereof. [Id., § 5.]

Art. 97½e. Terms of court.—That the terms of the said Criminal District Court shall be held in said Twenty-eighth Judicial District each year as follows:

In the County of Willacy on the first Monday in January of each year and may continue in session two weeks; and on the last Monday in July of each year and may continue in session two weeks.

In the County of Cameron on the second Monday after the first Monday in January of each year and may continue in session seven weeks; and on the fifth Monday after the last Monday in July of each year and may continue in session seven weeks.

In the County of Kleberg on the ninth Monday after the first Monday in January of each year and may continue in session three weeks; and on the second Monday after the last Monday in July and may continue in session three weeks.

In the County of Nueces on the twelfth Monday after the first Monday in January of each year and may continue in session eleven weeks; and on the twelfth Monday after the last Monday in July and may continue in session nine weeks. [Act Feb. 26, 1916 [1917] ch. 46, § 6; Act March 15, 1917, ch. 82, § 1.]

Explanatory.—The act amends section 6 of Act to reorganize the 28th judicial district and to create a criminal district court for Nueces, Kleberg, Willacy, and Cameron Counties, approved Feb. 26, 1917. Took effect March 15, 1917.

Art. 97½f. Procedure.—The trials and proceedings in said criminal district shall be conducted in criminal cases according to the laws governing pleadings, practice and proceedings in criminal cases in the district courts. [Act Feb. 26, 1916 [1917] ch. 46, § 7.]

Art. 97½g. Grand and petit juries.—A grand jury shall be drawn and selected for each term of said court held in Nueces, Kleberg, Willacy and Cameron Counties in the manner now provided by law, and all grand and petit jurors for criminal cases drawn and selected for the 28th Judicial District Court under existing laws at the time this Act takes effect, shall be as valid as if no change had been made, and the persons constituting such juries shall be required to appear and serve at the next ensuing term of this court as fixed by this Act, and their acts shall be as valid as if they had served as jurors in the court for which they were originally drawn, and all laws regulating the selection, summoning and impaneling of grand and petit jurors in the district court shall

govern said criminal district court, and jury commissioners shall be appointed for drawing juries for said court as is now or may hereafter be required by law in district courts, and under like rules and regulations. [Id., § 8.]

Art. 97½h. Transfer of causes.—Immediately upon the taking effect of this Act, the criminal cases and tax suits and divorce cases now pending in the 28th Judicial District Court in the respective Counties of Nueces, Kleberg, Willacy and Cameron, together with all records and papers relating thereto, shall be transferred to said Criminal District Court in each respective county, except as otherwise provided in Section 2 hereof. [Id., § 9.]

Art. 97½i. Process in divorce and tax suits; in criminal cases; bonds and recognizances.—All process and writs heretofore issued or served in divorce cases and suits for the collection of delinquent taxes pending in the 28th Judicial District Court in either Nueces, Kleberg, Willacy or Cameron Counties, returnable to the 28th Judicial District Court, and all process and writs in criminal cases pending in said courts heretofore issued or served, returnable to said 28th Judicial District Court, shall be considered returnable to the Criminal District Court herein created, at the time as hereinafter prescribed, and all such process and writs are hereby legalized and validated as if the same had been made returnable to said Criminal District Court of Nueces, Kleberg, Willacy and Cameron Counties, hereby created, and at the time herein prescribed, and all bail bonds, bonds and recognizances in criminal cases pending in said 28th Judicial District Courts, when this Act takes effect, binding any person or persons to appear in said court in either of the counties named in this Act, shall have the effect to require such person or persons to appear at the first term of said Criminal District Court held respectively in Nueces, Kleberg, Willacy and Cameron Counties, where said bail bond, bond or recognizances has been given and taken in the 28th Judicial District Court, after the taking effect of the Act, and there to remain in said court in said respective county from day to day and from term to term until fully discharged, under the same penalties as provided by law in such cases, and to the same effect as if the case or matter was still pending in the district court in which said bail bond, bond or recognizance was originally given and taken, and all caid bail bonds, bonds and recognizances shall have the same validity and be as valid and binding as if this Act had not been passed, and at the first term of said Criminal District Court held in the counties where said bail bond, bond, or recognizance has been given and taken in the district court of the 28th Judicial District in said counties, respectively. [Id., § 10.]

TARRANT COUNTY

Art. 97½ii. Court created; jurisdiction.—That there is hereby created and established at the city of Ft. Worth a Criminal District Court to be known as "Criminal District Court of Tarrant County," which Court shall have and exercise, from and after the taking effect of this Act, original and exclusive jurisdiction over all criminal cases of the grade of felony in the county of Tarrant of which district courts, under the Constitution and laws of this State, have original and exclusive jurisdiction, and shall have and exercise such concurrent jurisdiction with the county court of Tarrant county over misdemeanor cases as is hereinafter provided by this Act. [Act March 15, 1917, ch. 77, § 1.]

Sec. 18 repeals all laws in conflict. Took effect 90 days after March 21, 1917, date of adjournment.

Art. 97½j. Jurisdiction; transfer of causes.—From and after the time this Act shall take effect, the county court of Tarrant county and the Criminal District Court of Tarrant county created by this Act, shall have and exercise concurrent jurisdiction with each other in all misdemeanor cases of which the county court of Tarrant county may now, or may hereafter have exclusive jurisdiction; and of such misdemeanor cases as shall be filed in said county court on appeal from justices' or recorders' courts; and either the judge of said Criminal District Court, or the judge of said county court of Tarrant county, may upon motion of the county attorney of Tarrant county, or other officer representing the State in said courts, in his discretion transfer any cause or causes that may at any time be pending in his court to the other court by an order or orders entered upon the minutes of his court; and where such transfer or transfers, are made, the clerk of the court making such transfer shall certify to the clerk of the court to which such transfer is made a statement of the cause or causes so transferred giving the style and number of the same to the clerk of the court to which such transfer is made and shall accompany such statement with all the papers in said cause or causes so transferred and upon receipt of such statement and the papers in such cause or causes so transferred, the clerk of the court to which such transfer is made shall enter such cause or causes upon the docket of the court to which such transfer or transfers are made, and when so entered upon the docket, the judge of the court to which such transfer or transfers are made shall dispose of said cause or causes in the same manner as if such cases were originally instituted in said court. [Id., § 2.]

Art. 97½jj. Jurisdiction over bail bonds, etc.—Said court shall have jurisdiction over all bail bonds and recognizances taken in proceedings had before said court, or that may be returned to said court from other courts, and may enter forfeitures thereof and final judgments, and enforce the collection of the same by proper process in the same manner as is provided by law in district courts. [Id., § 3.]

Art. 97½k. Seal of court.—The said Criminal District Court of Tarrant county shall have a seal similar to the seal of the district court with the words "Criminal District Court of Tarrant county" engraved thereon, an impression of which seal shall be attached to all writs and other processes, except subpœnas, issuing from said court, and shall be used in the authentication of the official acts of the clerk of said court. [Id., § 4.]

Art. 97½kk. Procedure.—The practice in said court shall be conducted according to the laws governing the practice in the district court, and the rules of pleading and evidence in the district court shall govern insofar as the same may be applicable. [Id., § 5.]

Art. 97½*l*. Jury laws to apply.—All laws regulating the selection, summoning and impaneling of grand and petit jurors in the district court shall govern and apply in the Criminal District Court in so far as the same may be applicable. [Id., § 6.]

Art. 97½*ll*. Rules of criminal procedure.—All rules of criminal procedure governing the district and county courts shall apply to and govern said Criminal District Court. [Id., § 7.]

Art. 97½m. Juries in misdemeanor cases.—Said Criminal District Court of Tarrant County shall try all misdemeanor cases coming before

it with six jurors instead of twelve jurors, unless a jury be waived by the defendant. [Id., § 8.]

Art. 97½mm. Terms of court; grand jury.—Said Court shall hold four terms each year for the trial of causes and the disposition of business coming before it, one term beginning the first Monday of April, one term beginning the first Monday of July, one term beginning the first Monday of October, one term beginning the first Monday of January. Each term shall continue until the term ends by operation of law or the business is disposed of. The grand jury shall be impanelled in said court for each term thereof, unless otherwise directed by the judge of said Court. [Id., § 9.]

Art. 97½n. Continuance of term.—Whenever the Criminal District Court of Tarrant county shall be engaged in the trial of any cause when the time for expiration of the terms of said court as fixed by law shall arrive, the judge presiding shall have the power, and may, if he deems it expedient, continue the term of said court until the conclusion of such pending trial; in such case, the extension of such term shall be shown on the minutes of the court before they are signed. [Id., § 10.]

Art. 97½nn. Officers.—The sheriff, county attorney, and the clerk of the district court of Tarrant county shall be the sheriff, county attorney and clerk, respectively, of said Criminal District Court under the same rules and regulations as are now, or may hereafter be prescribed by law for the government of sheriffs, county attorneys, and clerks of the district courts of this State; and said sheriff, county attorney and clerk shall respectively receive such fees as are now, or may hereafter be prescribed for such officers in the district courts of the State, to be paid in the same manner, provided that the clerk of the court herein created, shall receive as compensation for his services the sum of $125.00 (one hundred and twenty-five dollars) per month, to be paid as all the salaries of other clerks of criminal district courts in this State. [Id., § 11.]

Art. 97½o. Same powers as district court; rules.—In all such matters over which said Criminal District Court has jurisdiction, it shall have the same power within said district as is conferred by law upon the district court, and shall be governed by the same rules in the exercise of said power. [Id., § 12.]

Art. 97½oo. Appeal and error.—Appeals and writs of error may be prosecuted from said Criminal District Court to the court of criminal appeals in criminal cases and to the courts of civil appeals in the same manner and form as from district courts in like cases. [Id., § 13.]

Art. 97½p. Jurisdiction of district court.—From and after the taking effect of this Act, the district courts of Tarrant county as now constituted, shall be, and they are hereby deprived and divested of all jurisdiction in all criminal cases, and of all jurisdiction given the Criminal District Court of Tarrant county by this Act, and all criminal causes pending in said district courts at the time of the taking effect of this Act and all matters pertaining to criminal cases pending therein over which the court herein created is given jurisdiction, shall be, by the judges of the other district courts ordered transferred to and entered upon the docket of said Criminal District Court, and when so entered upon the docket, the judge of said Criminal District Court shall try and dispose of same in the same manner as if such cases were originally instituted therein. Provided that the other district courts of Tarrant

county shall have jurisdiction concurrently with this court to empanel grand juries and to receive their bills of indictment and make proper transfer of same to the Criminal District Court. [Id., § 14.]

Art. 97½pp. Judge; election; term; qualifications; salary; powers; appointment.—The judge of said Criminal Court of Tarrant county shall be elected by the qualified voters of Tarrant county for a term of four years, and shall hold his office until his successor shall have been elected and qualified. He shall possess the same qualifications as are required of the judge of a district court, and shall receive the same salary as is now, or may hereafter be paid, to the district judges to be paid in like manner. He shall have and exercise all the powers and duties now or hereafter to be vested in and exercised by district judges of this State in criminal cases. Provided, that the Governor, by and with the consent of the Senate, if in session, shall appoint a judge of said court who shall hold the office until the next general election after the passage of this Act, and until his successor shall have been elected and qualified. [Id., § 15.]

Art. 97½q. Exchange of judges; disqualification or absence.—The judge of said criminal district court may exchange districts with or hold court for any district judge, as provided by law in cases of district judges, and in case of disqualification or absence of a judge, a special judge may be selected. [Id., § 16.]

Art. 97½qq. Validation of process heretofore issued.—All orders heretofore made and all process heretofore issued in any criminal cause so transferred are hereby validated and made of full force and effect in the Criminal District Court of Tarrant county. [Id., § 17.]

CHAPTER FOUR

OF COUNTY COURTS

Article 101. [94] Appellate jurisdiction.

Cited, Jarvis v. Taylor County (Civ. App.) 163 S. W. 334.

Ordinance violations.—Under acts 26th Leg. c. 33, §§ 2, 16, and this article, a county court has jurisdiction of an appeal from a conviction in the corporation court of violation of city ordinances. Hickman v. State (Cr. App.) 183 S. W. 1180.

LIST OF SPECIAL ACTS AFFECTING THE CRIMINAL JURISDICTION OF THE REGULAR COUNTY COURTS EXISTING UNDER THE CONSTITUTION

This list appeared at this position in Vernon's Code of Criminal Procedure, 1916 edition. As the list has been supplemented in the appendix at the end of the civil statutes, ante, page 1667 of this supplement, reference is made thereto instead of again setting out the matter here.

CHAPTER FIVE

OF JUSTICES' AND OTHER INFERIOR COURTS

Article 106. [96] Original concurrent jurisdiction.

1. Original concurrent jurisdiction.—Under Const. art. 5, §§ 16, 22, this article, and arts. 903–922, Civil Statutes, establishing recorder's courts, an appeal does not lie from the recorder's court in a case arising under an ordinance to the county court, but only in such cases as the recorder's court had concurrent jurisdiction with a justice of the peace. Jarvis v. Taylor County (Civ. App.) 163 S. W. 334.

TITLE 3

OF THE PREVENTION AND SUPPRESSION OF OFFENSES, AND THE WRIT OF HABEAS CORPUS

CHAPTER EIGHT

OF THE SUPPRESSION OF OFFENSES AGAINST PERSONAL LIBERTY

Article 160. [150] Writ of habeas corpus.

1. Nature and scope of remedy in general.—A lunacy proceeding is civil, and not quasi criminal, and a person convicted therein is not entitled to habeas corpus to determine the constitutionality of the statute under which the proceedings were instituted. Ex parte Singleton, 72 Cr. R. 122, 161 S. W. 123.

One properly charged with pursuing an occupation without license in violation of Pen. Code 1911, art. 130, and this section, may not on habeas corpus show a receipt for the tax. Ex parte Jennings, 76 Cr. R. 116, 172 S. W. 1143.

In habeas corpus for discharge of applicant arrested on process in an action charging violation of Pure Food Law, where bail was granted, sheriff need not prove applicant's guilt, but was required only to show he was not illegally held by showing that he was charged by complaint and information of an offense within the jurisdiction of court, and that he was held by sheriff under process from that court. Ex parte Drane (Cr. App.) 191 S. W. 1156.

3. Substitution for other remedy.—Where mayor or other officer refuses to approve sufficient bond of person appealing from mayor's court, mandamus, and not habeas corpus, held to be the proper remedy. Ex parte Hunt, 72 Cr. R. 124, 161 S. W. 457.

8. Want or excess of jurisdiction.—In view of this article and art. 63, where applicant was charged by complaint with violation of Pure Food Law, and subsequently affidavit and information were filed in another court charging same offense and pending case was dismissed, held, that fact that prosecution should have been in court where first filed would not entitle applicant to discharge on habeas corpus when arrested on process by court in which case was subsequently filed. Ex parte Drane (Cr. App.) 191 S. W. 1156.

10. Invalidity or insufficiency of indictment, information, or complaint.—An information charging a violation of Pure Food Law, held not void because of defects in form so as to authorize its attack by habeas corpus proceedings. Ex parte Drane (Cr. App.) 191 S. W. 1156.

16. Review of examining trial.—An application for discharge from an order binding accused over to await action of grand jury, held properly refused under the showing. Ex parte Castorena (Cr. App.) 182 S. W. 1119.

17. Commitment for contempt.—One guilty of contempt and fined in excess of the amount prescribed by art. 1708, Civil Statutes, will not be released until he has paid the amount that could be lawfully imposed. Ex parte Ellerd, 71 Cr. R. 285, 158 S. W. 1145, Ann. Cas. 1916D, 361.

1. Definition and Object of the Writ

Art. 161. [151] What a writ of habeas corpus is, etc.

Cited, State v. Clark (Cr. App.) 187 S. W. 760.

Art. 164. [154] Provisions relating to, how construed.

Cited, State v. Clark (Cr. App.) 187 S. W. 760.

2. By Whom and When Granted

Art. 182. [172] By restraint, is meant, etc.

Cited, State v. Clark (Cr. App.) 187 S. W. 760.

Art. 184. [174] Person committed in default of bail is entitled to the writ, when.

Burden of proof.—The burden of proof, in habeas corpus, for a reduction of bail and a discharge from custody, is upon the state, which must show probable cause for holding the arrested party. Ex parte Villareal (Cr. App.) 187 S. W. 214.

3. Service and Return of the Writ and Proceedings Thereon

Art. 204. [194] Action of court upon examination.

Remanding to sheriff's custody.—The judgment in lunacy proceedings against relator in habeas corpus being void for lack of jury trial, she will be remanded to custody of the sheriff, into which she was taken by proper process, to await jury trial. White v. White (Civ. App.) 183 S. W. 369.

Amount of bond.—Where the state's evidence would make a case of murder in first degree, bond should not be nominal, though evidence for defendant would show lower grade of offense, or justifiable homicide, and the bond should be fixed at $7,500. Ex parte Lovell (Cr. App.) 189 S. W. 486, 487.

Art. 205. [195] If the commitment be informal or void, etc.

Postponement of hearing.—Where one accused of violating United States laws was arrested in Texas and liberated on bail bond furnished United States commissioner issuing the warrant, the fact that the commissioner postponed the hearing without the support of an affidavit as to the existence and contents of absent testimony as required by this article will not excuse accused's failure to appear at the postponed hearing or release his bond, for section 293 authorizes the committing magistrate to postpone for a reasonable time the examination. De Orozco v. United States, 151 C. C. A. 70, 237 Fed. 1008.

Unauthorized term of court.—On habeas corpus to obtain relator's discharge, where it appeared that he was convicted at a term of the county court not authorized by law, he was entitled to a discharge from the custody of the county road superintendent, but would be held by the sheriff under the indictment. Ex parte Collins (Cr. App.) 185 S. W. 580.

Art. 206. [196] If there be probable cause to believe an offense has been committed.

Probable cause.—Where there is probable cause for believing an offense has been committed, the district court on habeas corpus may hold the party for an investigation by the grand jury. Ex parte Villareal (Cr. App.) 187 S. W. 214.

TITLE 4

THE TIME AND PLACE OF COMMENCING AND PROSECUTING CRIMINAL ACTIONS

CHAPTER ONE

THE TIME WITHIN WHICH CRIMINAL ACTIONS MAY BE COMMENCED

Article 229. [219] Misdemeanors, two years.

Prohibition law violation.—In prosecution for violating the prohibition law, there could be a conviction only for an offense committed within two years prior to the filing of the indictment. Sloan v. State (Cr. App.) 179 S. W. 111.

CHAPTER TWO

OF THE COUNTY WITHIN WHICH OFFENSES MAY BE PROSECUTED

Article 245. [235] Property stolen in one county and carried to another, offender prosecuted where.

Charge.—Where the original taking was not fraudulent, a charge that where property is stolen in one county the taker may be prosecuted in any county into which he has carried the property, was not appropriate. Miller v. State (Cr. App.) 191 S. W. 1163.

Art. 251. [240] Offense of embezzlement prosecuted where.

Jurisdiction.—Under this article, where a bill of lading of a shipment of horses, consigned to a firm of which he was a member, was delivered to defendant in Coleman county, there was a delivery, and he came into possession of the stock sufficiently to give Coleman county jurisdiction. McDaniel v. State (Cr. App.) 186 S. W. 320.

Art. 257. [245] Proof of jurisdiction sufficient to sustain allegation of venue, when.

Record on appeal.—Affidavits of trial judge, the stenographer, and the county attorney held to show sufficiently that, when the statement of facts on appeal from a conviction of violating the local option law was signed, approved, and filed, it showed that venue had been proven. Panel v. State (Cr. App.) 181 S. W. 461.

TITLE 5

OF ARREST, COMMITMENT AND BAIL

CHAPTER ONE

OF ARREST WITHOUT WARRANT

Article 259. [247] Arrest without warrant, when.

Cited, Myers v. Colquitt (Civ. App.) 173 S. W. 993; Houston Chronicle Pub. Co. v. Bowen (Civ. App.) 182 S. W. 61.

Constitutionality.—Statutes, authorizing arrests without warrant by peace officers and authorizing municipal corporations to establish rules authorizing such arrests, are not invalid by reason of Const. art. 1, § 9, prohibiting unreasonable seizures. Crippen v. State (Cr. App.) 189 S. W. 496.

Act justifying arrest.—In view of this article, held, that illegal act, if any, of prosecuting witness in running stock in an inclosure afforded no defense to his arrest by defendant, not an officer and having no process. Gilbert v. State (Cr. App.) 181 S. W. 200.

Art. 260. [248] Same subject.

Constitutionality.—Statutes, authorizing arrests without warrant by peace officers and authorizing municipal corporations to establish rules authorizing such arrests, are not invalid by reason of Const. art. 1, § 9, prohibiting unreasonable seizures. Crippen v. State (Cr. App.) 189 S. W. 496.

Civil liability.—Where plaintiff was arrested by an officer employed by a private person to keep the peace at a show, the fact that the person making the arrest was an officer did not show that he acted in his official capacity, nor was the fact of his employment sufficient to show that he acted as defendant's servant, but act of officer in dragging plaintiff out of a seat and causing him to be arrested, after defendant had instructed the officer to settle a dispute over possession of the seat, held not in the officer's official capacity, but performed in defendant's business, for which defendant was liable. Rucker v. Barker (Civ. App.) 151 S. W. 871.

A corporation is responsible for an unlawful arrest made by a watchman or detective employed by it, although he has been appointed a special police officer at the request of his employer, and where a peace officer was hired as a detective to watch in a store and to arrest shoplifters, the proprietors may be liable for his acts in arresting persons suspected of theft, whether the arrest was known to them or not, and though the arrest was in fact made on the street. Perkins Bros. Co. v. Anderson (Civ. App.) 155 S. W. 556.

Where a detective of a railroad company procured arrest of plaintiff, an employé, on a charge of larceny, the railroad company was liable for all damages resulting; the arrest being unlawful, because without a warrant, and the detective acting within the scope of his authority. Missouri, K. & T. Ry. Co. of Texas v. Thompson (Civ. App.) 183 S. W. 8.

Where merchant's clerk pointed out plaintiff as one who stole a locket from the store to policeman who directed him to catch plaintiff, and plaintiff was caught and arrested without warrant, regardless of whether the arrest was lawful, the merchant was not liable. Meyer v. Monnig Dry Goods Co. (Civ. App.) 189 S. W. 80.

Art. 261. [249] Municipal authorities may authorize arrest without warrant, when.

Constitutionality.—See Crippen v. State (Cr. App.) 189 S. W. 496; note under art. 259.

Art. 262. [250] May arrest without warrant when felony has been committed.

Constitutionality.—See Crippen v. State (Cr. App.) 189 S. W. 496; note under art. 259.

Application.—This article held applicable to facts specified. Bader v. State (Cr. App.) 183 S. W. 146.

CHAPTER TWO

OF ARREST UNDER WARRANT

Article 269. [257] Requisites of complaint.

13. Amendment and correction.—Under this article and arts. 598, 599, it was not error to refuse to quash an information based upon an unsigned complaint, where complaint was signed at trial before the prosecuting attorney announced himself ready. Adams v. State (Cr. App.) 192 S. W. 1067.

Art. 289. [277] In case of felony, may break door.

Cited, Kelley v. State (Cr. App.) 190 S. W. 169.

Art. 290. [278] Authority to arrest must be made known.

Cited, Kelley v. State (Cr. App.) 190 S. W. 169.

CHAPTER THREE

OF THE COMMITMENT OR DISCHARGE OF THE ACCUSED

Article 293. [281] When examination postponed for reasonable time; custody and disposition of the accused during that time.

Bail bond.—Under this article one charged with violation of federal laws, and arrested in Texas on a warrant issued upon a sworn complaint by the United States commissioner, was liberated by the commissioner upon the execution of a bail bond conditioned that accused should appear before the commissioner at his office, and remain from day to day and from time to time to answer the charge. Held, that the condition was a substantial compliance with the Texas law, which governs, and so forfeiture of the bail bond cannot be defeated. De Orozco v. United States, 151 C. C. A. 70, 237 Fed. 1008.

Art. 294. [282] Defendant shall be informed of his right to make statement, etc.

Informing defendant as to use of statement.—Under this article and art. 295, voluntary statement permitted to defendant on his examining trial need not show on its face that he was warned, as that may be orally shown. Rios v. State (Cr. App.) 183 S. W. 151.

In prosecution for assault with intent to murder, held, that it was error to admit testimony, over defendant's objection, of statement made by him to district attorney at time of examining trial before justice of peace; he not having been informed at proper time, under this article, of his right to make statement. Fleming v. State (Cr. App.) 194 S. W. 159.

Art. 295. [283] Voluntary statement of accused.

See Rios v. State (Cr. App.) 183 S. W. 151; note under art. 294.
Cited, Fleming v. State (Cr. App.) 194 S. W. 159.

Art. 296. [284] Witness may be placed under rule.

Cited, Bishop v. State (Cr. App.) 194 S. W. 389 (in dissenting opinion).

Art. 303. [291] Witness need not be tendered fees, etc.

Cited, Whitcomb v. State (Cr. App.) 190 S. W. 484.

Art. 308. [296] When committed, discharged, or admitted to bail.

Cited, Whitcomb v. State (Cr. App.) 190 S. W. 484.

CHAPTER FOUR

OF BAIL

1. General Rules Applicable to all Cases of Bail

Article 315. [303] Definition of "bail."

Cited, Bennett v. State (Cr. App.) 194 S. W. 145.

Art. 316. [304] Definition of "recognizance."

Cited, Laird v. State (Cr. App.) 184 S. W. 810.

Entering of record.—An appeal bond not entered of record, but merely filed, will not answer the purposes of the recognizance required to perfect an appeal. Bennett v. State (Cr. App.) 194 S. W. 145.

Art. 317. [305] Definition of "bail bond."

Cited, Laird v. State (Cr. App.) 184 S. W. 810; Bennett v. State (Cr. App.) 194 S. W. 145.

2. Recognizance and Bail Bond

Art. 320. [308] Requisites of a recognizance.

Cited, Laird v. State (Cr. App.) 184 S. W. 810; Bennett v. State (Cr. App.) 194 S. W. 145.

Art. 321. [309] Requisites of a bail bond.

Cited, Laird v. State (Cr. App.) 184 S. W. 810.

Art. 329. [317] Rules for fixing amount of bail.

Reduction of bail.—Judgment fixing bail at amount claimed to be in excess of defendant's ability to give bail held not to be set aside, in the absence of any attempt and failure to give bail in the amount fixed. Ex parte Neyland (Cr. App.) 179 S. W. 715.

Bail in the sum of $1,000 from one accused of murder and robbery, held not to be reduced pending action of grand jury, though offense was made out by accomplice testimony. Ex parte Castorena (Cr. App.) 182 S. W. 1119.

3. Surrender of the Principal by his Bail

Art. 337. [325] Sheriff, etc., not authorized to take bail in felony case when court is in session.

Cited, Laird v. State (Cr. App.) 184 S. W. 810.

Art. 338. [326] May take bail in felony cases, when.

Cited, Laird v. State (Cr. App.) 184 S. W. 810.

4. Bail before the Examining Court

Art. 350. [338] Accused may waive an examination; proceedings in such case.

Waiving introduction of evidence.—Where defendant, charged by complaint on information and belief with robbery and theft and bringing the stolen property into Texas, waived examination and gave bond, he could not complain of being held under reasonable bond for appearance before the grand jury, having waived the introduction of evidence by the state. Ex parte Villareal (Cr. App.) 187 S. W. 214.

TITLE 6

SEARCH WARRANTS

CHAPTER TWO

WHEN AND HOW A SEARCH WARRANT MAY BE ISSUED

Article 364. [352] Warrant to arrest may issue with the search warrant in certain cases.

Cited, Meyer v. Monnig Dry Goods Co. (Civ. App.) 189 S. W. 80.

TITLE 7

OF THE PROCEEDINGS SUBSEQUENT TO COMMITMENT OR BAIL, AND PRIOR TO THE TRIAL

CHAPTER ONE

THE ORGANIZATION OF THE GRAND JURY

Article 389. [377] Shall select grand jurors.

Summoning jurors for succeeding terms.—Under Const. art. 16, § 19, arts. 5122, 5123, Civil Statutes, and this article, the judge of a district in which there were six terms a year had no power to direct jury commissioners appointed for the November, 1911, term to select grand juries for the succeeding January, March, and May, 1912, terms, and a grand jury so selected was illegal. Whiten v. State (Cr. App.) 151 S. W. 1182.

Art. 390. [378] Qualifications of grand jurors.

Civil officers.—Civil officers are not disqualified to serve as grand jurors. Counts v. State (Cr. App.) 181 S. W. 723.

CHAPTER TWO

OF THE DUTIES, PRIVILEGES AND POWERS OF THE GRAND JURY

Article 444. [432] Indictment shall be prepared by attorney and signed, etc., by foreman.

Indorsement of names of witnesses.—The indorsement of names of witnesses upon the back of an indictment for murder after its return into court was not an alteration invalidating it. Galvan v. State (Cr. App.) 179 S. W. 875.

CHAPTER THREE

OF INDICTMENTS AND INFORMATIONS

Article 448. [436] Misdemeanors presented by indictment, or, etc.

Pure food law violation.—Under Const. art. 1, § 10, White's Ann. Code Cr. Proc. art. 436, and this article, an indictment held not necessary to charge a violation of Pure Food Law, but prosecution by information was sufficient to justify retention of accused. Ex parte Drane (Cr. App.) 191 S. W. 1156.

Art. 451. [439] Requisites of an indictment.

Cited, Gray v. State (Cr. App.) 178 S. W. 337.

4. **Name of accused.**—That an indictment for knowingly permitting his house to be used for purposes of prostitution did not put defendant's name after the words "upon their oaths in said court present that, * * *" or that it did not allege particularly where the premises were located in the county, held not grounds for quashing. Lawson v. State (Cr. App.) 179 S. W. 1186.

11. **Time and limitations—Proof.**—In prosecution for permitting liquor to be drunk in disorderly house, state held not bound by date alleged, but entitled to prove any date within the period of limitation. Bennett v. State (Cr. App.) 181 S. W. 197.

12. **Statement of offense.**—An indictment for aiding and abetting the cashier of a bank in violating Pen. Code, art. 523, held open to motion to quash, on the ground that its language and allegations are confused, indefinite, and unintelligible. Ferguson v. State (Cr. App.) 189 S. W. 271.

The ground, under art. 576, for motion to quash indictment, that it does not set forth the offense "in plain and intelligible words," as required by subd. 7, of this article, held embraced in the motion. Id.

Art. 452. [440] What should be stated in an indictment, etc.

Information for slander.—An information for slander, stating what the accused said "in substance and effect" and using the third person, held not defective as not setting forth substantially the language used, in view of Pen. Code, art. 10, this article and arts. 453, 460, and 25, relating to sufficiency of indictments generally. Martin v. State (Cr. App.) 179 S. W. 121.

Proof.—An allegation of the means by which an assault was committed, though unnecessary, must be proved substantially as alleged. Arbetter v. State (Cr. App.) 186 S. W. 769.

Art. 453. [441] The certainty required.

Cited, Gray v. State (Cr. App.) 178 S. W. 337; Winterman v. State (Cr. App.) 179 S. W. 704.

1. **Certainty in general.**—See Martin v. State (Cr. App.) 179 S. W. 121; note under art. 452.

Under this article and arts. 460, 474, relating to sufficiency of indictments, indictment under art. 7355, civil statutes, imposing license tax on itinerant sellers of medicines, and, by subdivision 2, exempting salesmen for merchants "engaged in the sale" of medicines, etc., alleging that defendant was not selling for merchants "selling medicines," etc., held to sufficiently negative proviso. Collins v. State (Cr. App.) 182 S. W. 327.

Art. 454. [442] Particular intent; intent to defraud.

Cited, Townser v. State (Cr. App.) 182 S. W. 1104.

Art. 455. [443] Allegation of venue, etc.

Sufficiency of allegation.—Information presented by county attorney of Wise county in county court of that county, charging that defendant "then and there" unlawfully carried a pistol, held to sufficiently allege venue. Moreno v. State (Cr. App.) 180 S. W. 124.

An indictment for forgery of a deed which failed to allege the location of the land, but included a copy of the forged deed describing the land as in J. county and alleging the forgery in that county, sufficiently showed jurisdiction of the offense in that county. Weber v. State (Cr. App.) 180 S. W. 1082.

Art. 456. [444] Allegation of name.

Cited, Gunter v. State (Cr. App.) 191 S. W. 541.

4. **When known by different names.**—There is no fatal variance between an indictment charging sale to "Chandoin" and proof that his name was spelled "Chaudoin," he being generally known and called by the former name. Graham v. State (Cr. App.) 182 S. W. 453.

In an indictment for larceny, if the injured party was generally known by the name alleged, his true name was immaterial. Lunsford v. State (Cr. App.) 190 S. W. 157.

5. **When name is unknown.**—Where an indictment alleged that the forged name was somebody to the grand jury unknown, it was necessary on trial thereof, where the diligence of the grand jury to ascertain the name of the party was put in issue, to show that the grand jurors used due diligence in order to ascertain the name. Martin v. State (Cr. App.) 189 S. W. 262.

5½. **Correction of name.**—Where accused declared name in indictment to be wrong and gave right name, erasure and substitution in indictment held proper under this article and article 559, declaring name stated sufficient unless objected to, article 560, providing for correction of indictment as to name, and article 561, allowing cause to proceed under name stated where accused refuses to give real name. Carter v. State (Cr. App.) 181 S. W. 473.

9. **Corporation.**—An indictment for larceny by embezzlement, alleging that the accused was agent for a life insurance company lawfully doing business in the state, was equivalent to alleging that it was a corporation; the act regulating insurance companies being a general law of which the courts must take judicial notice. Meredith v. State (Cr. App.) 184 S. W. 204.

That the information alleged defendant was agent of a corporation, and the proofs showed that company was a partnership, does not present reversible error in a prosecution under Pen. Code 1911, art. 735. Cogdell v. State (Cr. App.) 193 S. W. 675.

13. **Homicide.**—That the indictment charged killing of E. B. H., while the evidence showed that deceased's name was E. J. H., and notwithstanding there was an E. B. H. shown to be alive, was no ground for directing an acquittal, where the defendant was not misled. Hassell v. State (Cr. App.) 188 S. W. 991.

Art. 457. [445] Allegation of ownership.

Cited, White v. State (Cr. App.) 181 S. W. 192.

In general.—Under a statute (Pen. Code, art. 870), prohibiting catching fish by nets or seines without the consent of the owner of the lake, etc., and this article, an information and complaint, charging seining without the owner's consent, but not giving his name, is insufficient. Partridge v. State (Cr. App.) 193 S. W. 146.

Art. 458. [446] Description of property.

Money.—Under this article and art. 468, an indictment for robbery, describing the property as $11 in money of the United States, of the value of $11, sufficiently described the property. Noe v. State (Cr. App.) 182 S. W. 1122.

Art. 460. [448] Certainty; what sufficient.

Cited, Winterman v. State (Cr. App.) 179 S. W. 704.

11½. **Slander.**—An information for slander, stating what the accused said "in substance and effect" and using the third person, held not defective as not setting forth substantially the language used, in view of Pen. Code, art. 10, this article and arts. 452, 453, and 25, relating to sufficiency of indictments generally. Martin v. State (Cr. App.) 179 S. W. 121.

12. **Unlawful practice or sale of medicine.**—Under this article and arts. 453 and 474, relating to sufficiency of indictments, indictment under art. 7355, Civil Statutes, imposing license tax on itinerant sellers of medicines, and, by subdivision 2, exempting salesmen for merchants "engaged in the sale" of medicines, etc., alleging that defendant was not selling for merchants "selling medicines," etc., held to sufficiently negative proviso. Collins v. State (Cr. App.) 182 S. W. 327.

Art. 461. [449] Special and general terms in statute.

Cited, Gray v. State (Cr. App.) 178 S. W. 337.

Art. 464. [452] Selling intoxicating liquor; sufficient allegations as to.

Sale without license.—In view of arts. 7435 and 7446, Civil Statutes, this article and arts. 453 and 460, and Pen. Code, art. 614, an information charging sale of intoxicants without a license, following article 611, held sufficient, while not averring the particular place in the county or that accused was licensed to sell elsewhere. Winterman v. State (Cr. App.) 179 S. W. 704.

Art. 467. [455] Misapplication of public money; sufficient charge of.

Cited, Adams v. State (Cr. App.) 192 S. W. 1067.

Art. 468. [456] Description of money, etc., in theft, etc.

See Noe v. State (Cr. App.) 182 S. W. 1122; note under art. 458.

Art. 474. [462] Statutory words need not be strictly followed.

Cited, Gray v. State (Cr. App.) 178 S. W. 337; Young v. State (Cr. App.) 181 S. W. 472.

Following language of statute in general.—An indictment for arson following Pen. Code, art. 1200 et seq., held sufficient. Tinker v. State (Cr. App.) 179 S. W. 572.

In view of arts. 7435 and 7446, civil statutes, arts. 453, 460, 464, and Pen. Code, art. 614, an information charging sale of intoxicants without a license, following article 611, held sufficient, while not averring the particular place in the county or that accused was licensed to sell elsewhere. Winterman v. State (Cr. App.) 179 S. W. 704.

Complaint and information charging defendant with practicing medicine without complying with the law held sufficient and following the law. Gay v. State (Cr. App.) 184 S. W. 200.

Indictment under statute prohibiting the catching of fish, except by hook and line, alleging in terms of statute that defendant caught fish in nets prohibited thereby, held sufficient. Carroll v. State (Cr. App.) 184 S. W. 508.

Negativing exceptions or exemptions.—Under this article and arts. 453 and 460, relating to sufficiency of indictments, indictment under art. 7355, civil statutes, imposing license tax on itinerant sellers of medicines, and, by subdivision 2, exempting salesmen for merchants "engaged in the sale" of medicines, etc., alleging that defendant was not selling for merchants "selling medicines," etc., held to sufficiently negative proviso. Collins v. State (Cr. App.) 182 S. W. 327.

Indictment under Pen. Code, art. 748, prohibiting prescribing narcotic drugs to habitual users thereof, need not negative that the drugs the physician was charged with having prescribed were given as a cure for the drug habit. Fyke v. State (Cr. App.) 184 S. W. 197.

When a statute prescribes an offense and also therein contains an exception or proviso which is made a constituent or necessary part of the offense, such exception or proviso must be negatived by proper allegation in the indictment to make a good pleading. Lowery v. State (Cr. App.) 185 S. W. 7.

Art. 475. [463] Matters of judicial notice, etc., need not be stated.

See notes under art. 783.

Cited, Meredith v. State (Cr. App.) 184 S. W. 204; Cleveland v. State (Cr. App.) 190 S. W. 177.

Art. 476. [464] Defects of form do not affect trial, etc.

2. **Effect in general.**—Overruling of motion containing exception to indictment on ground that it had been altered after return into court held proper. Galvan v. State (Cr. App.) 179 S. W. 875.

3. **Spelling, handwriting and grammar.**—An indictment alleging sale of liquors after an election "therefore duly made and published" was good; the word "therefore" being a clerical error for "theretofore." Dupree v. State (Cr. App.), 190 S. W. 181.

5. **Typographical error.**—An indictment for forgery of a deed, which employed the words "with intent to injure and defraud and defraud," was not therefore unintelligible. Weber v. State (Cr. App.) 180 S. W. 1082.

7. **Omissions.**—Under Acts 29th Leg. c. 108, as amended by Acts 30th Leg. c. 131, relating to pure feedstuff, and providing a penalty for its violation, an information naming cotton seed cake described therein as "concentrated feeding stuff," omitting the word "commercial," held sufficient. Guild v. State (Cr. App.) 187 S. W. 215.

8. **Surplusage or redundancy.**—Information for alluring, procuring, and soliciting a female to be at certain place to have unlawful intercourse with men held sufficient, where surplusage, if any, might be stricken out, leaving language sufficient to charge the offense, and language detailing method of offense without which information would have charged offense did not affect its validity. Johnson v. State (Cr. App.) 181 S. W. 455.

Unnecessary words and allegations in an indictment, not essential to charge the offense, are treated as surplusage and may be entirely disregarded as part of the indictment. Mooneyham v. State (Cr. App.) 181 S. W. 456.

An indictment alleging sale of liquors after an election "therefore duly made and published," was good; the word "therefore" being surplusage. Dupree v. State (Cr. App.) 190 S. W. 181.

The year, in an indictment charging advancing money to another to pay his poll tax for 1916, cannot be treated as surplusage. Nave v. State (Cr. App.) 193 S. W. 668.

10. **Duplicity.**—That an indictment is duplicitous on its face is a defect of substance, ground for quashing which can be raised at any time. Ferguson v. State (Cr. App.) 189 S. W. 271.

Art. 478. [466] Requisites of an information.

Requisite 6.—An information filed on April 7th, charging offense of unlawfully carrying a pistol on April 1st, held to sufficiently charge that the offense was committed before information filed. Moreno v. State (Cr. App.) 180 S. W. 124.

Art. 479. [467] Shall not be presented until oath has been made, etc.

Cited, Boren v. State (Cr. App.) 192 S. W. 1063.

4. **Variance between complaint and information.**—A complaint charging an assault with "knucks, commonly known as brass knucks," and an information charging the assault with "knucks," do not show a fatal variance. Chisom v. State (Cr. App.) 179 S. W. 103.

6. **Authority to take complaint.**—Under art. 347, civil statutes, providing for the appointment of assistant county attorneys, an affidavit taken by one named as "assistant county attorney" cannot be quashed on the ground that he was a deputy and not an assistant. Pierson v. State (Cr. App.) 180 S. W. 1080.

Art. 481. [469] Indictment, etc., may contain several counts.

Cited, Longoria v. State (Cr. App.) 188 S. W. 988.

1. **Charging offense in different counts in general.**—Where an indictment was in two counts, and one of them was good, there was no error in denying a motion to quash, where the conviction was general. Hyroop v. State (Cr. App.) 179 S. W. 878.

An indictment for aiding and abetting the cashier of a state bank in violation of Pen. Code, art. 523, held to be in one count only. Ferguson v. State (Cr. App.) 189 S. W. 271.

11. **Disorderly house.**—In an indictment for keeping, aiding and abetting keeping of a house for prostitutes, two counts on same transaction held proper; it being permissible to charge offense, in different counts, in any of ways denounced by statute. Wyatt v. State (Cr. App.) 190 S. W. 753.

15. **Theft.**—Indictment charging in two counts theft from two persons and theft from one of such persons held good, and not to charge a felony, though aggregate value of property, as stated in both counts, was $55. Whitfield v. State (Cr. App.) 179 S. W. 558.

In prosecution for theft as bailee and embezzlement, court properly overruled defendant's motion to quash indictment for ambiguity, in that first two counts charged theft as bailee and embezzlement of property of one person, and second two counts theft as bailee and embezzlement of the property of another person. Williams v. State (Cr. App.) 188 S. W. 430.

17. **Duplicity.**—Pen. Code, art. 523, declaring guilty of an offense an officer of a state bank who embezzles, abstracts, or willfully misapplies its funds, held to prescribe three offenses, and not merely one which can be committed in three ways, as regards necessity for separate counts. Ferguson v. State (Cr. App.) 189 S. W. 271.

Under Code Cr. Proc. 1911, art. 481, where several ways are set forth in statute by which offense may be committed, embraced in same definition, and made punishable in same manner, they are not distinct offenses, and may be charged conjunctively in same count. Wilson v. State (Cr. App.) 189 S. W. 1071.

Where several ways of committing an offense are set forth in statute, in same general definition, and are punished in the same manner and not repugnant to each other, they are different phases of the same offense, and may be charged conjunctively in the same count. Armendariz v. State (Cr. App.) 194 S. W. 826.

18. —— **Waiver.**—That an indictment is duplicitous on its face is a defect of substance, ground for quashing which can be raised at any time. Ferguson v. State (Cr. App.) 189 S. W. 271.

19. —— **Misdemeanors in general.**—Information under Pen. Code, art. 634, for vagrancy in that defendant unlawfully sold intoxicating liquors held not defective because also alleging his commission of other distinct acts declared by the statute to constitute vagrancy. Mooneyham v. State (Cr. App.) 181 S. W. 456.

Under Tick Eradication Law, § 7, held, that a complaint charging violation of law properly charged defendant conjunctively with violating statute in both ways prescribed. Munsey v. State (Cr. App.) 194 S. W. 953.

33. **Election.**—Where an indictment contained two counts, one charging embezzlement of a check and the other embezzlement of the money represented by the check,

both counts being based on the same transaction, the court properly refused to require the prosecution to elect on which count to ask for a conviction, and did not err in submitting both counts to the jury. Messner v. State (Cr. App.) 182 S. W. 329.

Where an election is authorized, it is the duty of the state, or the court for the state, to make it, and refusal of election, when required by accused in a proper case, is cause for reversal, but an election cannot be required by accused in a special charge or exceptions to testimony. Kelley v. State (Cr. App.) 185 S. W. 874.

Where several counts in indictment charge different phases of same transaction under same statute no election between counts can be required where misdemeanors only are charged. Wilson v. State (Cr. App.) 189 S. W. 1071.

Where in a prosecution for slander, evidence of alleged slanderous statements on several occasions is introduced, it is error to refuse to compel the state to elect upon which occasion it will rely. Owens v. State (Cr. App.) 190 S. W. 487.

34. —— **What constitutes.**—Submission to the jury by the court of only the first count of an indictment charging burglary was tantamount to an election by the state. Rowlett v. State (Cr. App.) 180 S. W. 1078.

In prosecution for theft as bailee and embezzlement, where court in charge submitted only counts of indictment charging crimes as against property of W., there was an election sufficient to meet defendant's motion to require election. Williams v. State (Cr. App.) 188 S. W. 430.

35. —— **Misdemeanor cases in general.**—Where complaint and information for selling liquor were in two different counts, each alleging the commission of the offense on the same day, and in the first the unlawful selling was alleged to one party, and in the second count to another party, the state was not bound to elect on which count conviction was sought. Lieberman v. State (Cr. App.) 189 S. W. 157.

37. —— **Carrying pistol.**—The indictment charging carrying a pistol on or about a certain date, and the state not having been requested to elect, evidence sufficient as to an earlier date, if not as to the day named, will support a conviction. Dolezal v. State (Cr. App.) 191 S. W. 1158.

38. —— **Disorderly house.**—In prosecution for keeping certain house where prostitutes were permitted to reside, the court erred in giving blanket charge authorizing conviction for running any one of three houses with which evidence connected defendant. Guthrie v. State (Cr. App.) 189 S. W. 256.

Where indictment for keeping a house for prostitutes contained two counts based on same transaction, state held not required to elect. Wyatt v. State (Cr. App.) 190 S. W. 153.

40. —— **Assault to murder, maiming, disturbing the peace, and robbery.**—Under an indictment for and proof of an assault with firearms with murderous intent, in a drug store holdup, the state cannot be required to elect as between assault to murder and disturbing the peace. Kelley v. State (Cr. App.) 185 S. W. 874.

42. —— **Rape.**—In prosecution for rape, action of court, in not requiring state to elect which one of several acts proved it would rely on until close of state's case, held proper. Carter v. State (Cr. App.) 181 S. W. 473.

Where birth of a child to prosecutrix was proved as of such date that the act originally relied on could not have caused the pregnancy, while the state should be permitted to prove the two acts, the force of the later should be limited, or the state should be required to elect upon which act it would rely. Hollingsworth v. State (Cr. App.) 189 S. W. 488.

48. —— **Theft.**—In prosecution for theft as bailee and embezzlement, court committed no reversible error in refusing to require state to elect between counts alleging theft as bailee and embezzlement of property of one person and other counts charging theft as bailee and embezzlement of property of another, where only the former counts were submitted. Williams v. State (Cr. App.) 188 S. W. 430.

Where accused was charged with cattle theft, and with receiving stolen property, it was not error to refuse to require the state to elect on which charge it would prosecute, nor to submit both charges to the jury. Longoria v. State (Cr. App.) 188 S. W. 987.

51. **Charge of court submitting counts.**—Where, in prosecution for rape, the state was compelled to elect one of several acts proved, held proper to charge jury that other acts might be considered solely in determining whether accused did the elected act. Carter v. State (Cr. App.) 181 S. W. 473.

Art. 482. [470] When indictment or information has been lost, mislaid, etc.

10. **Suggestion of loss and proceedings thereon in general.**—Where copies of the indictment, etc., certified on a change of venue from F. county to M. county were lost, the jurisdiction of the M. county district court attached, and it might take proceedings to substitute the lost papers. Bennett v. State (Cr. App.) 179 S. W. 713.

15. **Notice.**—In view of this article, lost papers can be substituted without notice served upon the accused, and, in any event, his appearance and answer to a motion to substitute without such service amounted to a waiver of notice. Bennett v. State (Cr. App.) 179 S. W. 713.

24. **Effect of substitution.**—The fact that a substituted copy was not the indictment of a grand jury was no ground why accused could not be tried upon such copy. Bennett v. State (Cr. App.) 179 S. W. 713.

CHAPTER FOUR

OF PROCEEDINGS PRELIMINARY TO TRIAL

1. Of Enforcing the Attendance of Defendant and of Forfeiture of Bail

Article 488. [476] Bail forfeited, when.

Judgment.—Under this article and art. 489, it is not necessary to forfeiture of bail bond that judgment be entered against the sureties, but the state may enter judgment against defendant alone. Bell v. State (Cr. App.) 186 S. W. 328.

Art. 489. [477] Manner of taking a forfeiture.

8. Taking against sureties or principal only.—See Bell v. State (Cr. App.) 186 S. W. 328; note under art. 488.

Art. 490. [478] Citation to sureties.

Necessity of citation for or notice to principal.—Under this article, defendant, who had not appeared for trial as required by his bail bond, is not entitled to notice of proceedings to forfeit. Bell v. State (Cr. App.) 186 S. W. 328.

Art. 497. [485] Cases shall be placed upon civil docket.

Cited, Rudy v. State (Cr. App.) 191 S. W. 698.

Art. 499. [487] Proceedings shall not be set aside for defect of form, etc.

Cited, Mendlovitz v. State (Cr. App.) 189 S. W. 262.

Art. 500. [488] Causes which will exonerate from liability on forfeiture.

Cited, Bell v. State (Cr. App.) 186 S. W. 328.

Cause 2. Death of principal.—Rev. St. § 1014 (U. S. Comp. St. 1916, § 1674), declares that for any crime or offense against the United States the offender may, agreeably to the mode of process against offenders in such state, be arrested and imprisoned or bailed, for trial before such court of the United States as by law has cognizance of the offense. Accused was arrested in Texas for an offense against the United States and liberated on bail. Held that, as the Texas law governed, his death after forfeiture of bond, but before final judgment, was no defense. De Orozco v. United States, 151 C. C. A. 70, 237 Fed. 1008.

Cause 3. Sickness, etc., of principal.—Under this article, defendant on appeal to county court appearing before final judgment to answer accusation and testifying without contradiction as to sickness at time set for trial, held, it was error to render final judgment against him and his sureties on his appeal bond. Adams v. State (Cr. App.) 193 S. W. 1067.

Final forfeiture of bail bond held erroneous under this article, on evidence of sickness at time of forfeiture and subsequent appearance. Thodberg v. State (Cr. App.) 194 S. W. 1108.

Art. 501. [489] Judgment final, when.

16. Setting aside judgment.—Where state by demurring to defendant's motion for new trial after a judgment forfeiting his bail bond admitted averment that indictment had been quashed before judgment on bond, held, that judgment should be set aside. Bell v. State (Cr. App.) 186 S. W. 328.

3. Of Witnesses and the Manner of Enforcing Their Attendance

Art. 536. [524] When an attachment may be issued.

Defendant's request.—Defendant, who on discovering that his witnesses were absent orally asked for an attachment for them, stating that on an attachment he could secure part in two or three hours, and the others in five or six hours, was not entitled to an attachment. Scott v. State (Cr. App.) 185 S. W. 994.

4. Service of a Copy of the Indictment

Art. 551. [540] Copy of indictment delivered to defendant in case of felony.

Accused not in custody.—One arrested after return of indictment held, under this article, entitled to service of copy, and so, under article 579, to two days after service in which to file written pleadings. Martin v. State (Cr. App.) 188 S. W. 1000.

5. Of Arraignment and of Proceedings When No Arraignment is Necessary

Art. 557. [546] No arraignment until two days after service of copy, etc.

Postponement of trial.—Under this article, held it could not be said it was error to refuse postponement to enable additional counsel, brought into the case, to prepare for trial. Bader v. State (Cr. App.) 183 S. W. 146.

Waiver.—Defendant's failure to insist on a ruling on his plea of former acquittal and his motion to postpone and his announcement of immediate readiness for trial held a waiver of his right to the two days allowed to prepare for trial. Spicer v. State (Cr. App.) 179 S. W. 712.

Art. 559. [548] Name as stated in indictment.

Amendment of indictment, etc.—Where accused declared name in indictment to be wrong and gave right name, erasure and substitution in indictment held proper under art. 456, providing for alias indictment, this article and article 560, providing for correction of indictment as to name, and article 561, allowing cause to proceed under name stated where accused refuses to give real name. Carter v. State (Cr. App.) 181 S. W. 473.

Art. 560. [549] If defendant suggests different name.

Amendment of indictment, etc.—See Carter v. State (Cr. App.) 181 S. W. 473; note under art. 559.

Under this article, the trial court, on defendant's suggestion that his true name was Jeorge Rios, and not Jeorge Reyes, as shown by the indictment, properly refused to

abate the indictment, and properly ordered notation on its minutes and correction of indictment by insertion of name suggested. Rios v. State (Cr. App.) 183 S. W. 151.

Art. 561. [550] If defendant refuses to give his real name.

See Carter v. State (Cr. App.) 181 S. W. 473; note under art. 559.

Art. 565. [554] Plea of guilty not received, unless, etc.

Cited, Kelley v. State (Cr. App.) 190 S. W. 173.

Art. 566. [555] Jury shall be impaneled, when.

Evidence.—Under this article, and a charge that the jury could not convict defendant notwithstanding his plea of guilty unless satisfied beyond a reasonable doubt, the state could introduce all evidence it possessed of his guilt, and where accused admitted the robbery charged, and offered no evidence, evidence that he was the person who committed the robbery, and the method of accomplishment, was admissible to assist the jury in assessing punishment. Kelley v. State (Cr. App.) 185 S. W. 570.

Waiver.—Introduction of evidence, provided for by this article, on a plea of guilty, may, under article 22, be waived, and cannot be withdrawn after verdict. Flores v. State (Cr. App.) 190 S. W. 496; Diaz v. State (Cr. App.) 190 S. W. 498.

6. Of the Pleadings in Criminal Actions

Art. 570. [559] Motion to set aside indictment, etc., for what causes only.

2. Grounds of motion in general.—That an indictment charges the same offense charged in another indictment under which accused had been convicted is not ground for quashing the indictment. Park v. State (Cr. App.) 179 S. W. 1152.

8. Defects in indictment or information in general.—That an indictment for knowingly permitting his house to be used for purposes of prostitution did not put defendant's name after the words "upon their oaths in said court present that, * * *" or that it did not allege particularly where the premises were located in the county, held not grounds for quashing. Lawson v. State (Cr. App.) 179 S. W. 1186.

Art. 572. [561] Only special pleas for defendant.

4. Time for plea.—Former jeopardy must be pleaded before trial and cannot be raised for the first time on motion for a new trial. Hill v. State (Cr. App.) 186 S. W. 769.

Art. 575. [564] Exceptions to the substance of an indictment.

Motion.—The ground for motion, under this article, to quash indictment, that it does not appear from its face that an offense against the law was committed by defendant held embraced in the motion. Ferguson v. State (Cr. App.) 189 S. W. 271.

Evidence.—An indictment cannot be shown to be defective by evidence, but is tested as a pleading under the law applicable. Tinker v. State (Cr. App.) 179 S. W. 572.

Art. 576. [565] Exceptions to the form of an indictment.

Motion.—The ground, under this article, for motion to quash indictment, that it does not set forth the offense "in plain and intelligible words," as required by article 451, subd. 7, held embraced in the motion. Ferguson v. State (Cr. App.) 189 S. W. 271.

Art. 579. [568] When defendant is entitled to service of copy of indictment, etc.

Service of copy of indictment.—One arrested after return of indictment held, under art. 551, entitled to service of copy, and so, under this article, to two days after service in which to file written pleadings. Martin v. State (Cr. App.) 188 S. W. 1000.

Art. 581a. Change of venue to enable defendant, in certain felony cases, to enter plea of guilty during vacation; process.

—When in any county in this State which is located in a judicial district composed of more than one county, a party is charged with felony and the maximum punishment therefor shall not exceed fifteen years confinement in the penitentiary and the district court of said county is not in session, such party may, if he desires to enter a plea of guilty, make application to the district judge of such judicial district for a change of venue to the county in which said court is in session, and said district judge may, in term time or vacation, enter an order changing the venue of and transferring

said cause to the county in which court is then in session, and the defendant may enter his plea of guilty to said charge in said district court of the county to which such venue has been changed, as under the law regarding such pleas as laid down in the Code of Criminal Procedure of the State of Texas, and such court shall have the authority to issue all processes and require the attendance of witnesses, as fully and as completely as if said cause had originated in such court. [Act March 30, 1917, ch. 142, § 1.]

Took effect 90 days after March 21, 1917, date of adjournment.

Art. 583. [572] Any person charged with misdemeanor may plead guilty without jury in the county court at special session held for that purpose.

Constitutionality.—This article held to violate Const. art. 5, § 29. Ex parte Collins (Cr. App.) 185 S. W. 580.

7. Of the Argument and Decision of Motions, Pleas and Exceptions

Art. 587. [576] Motions, etc., to be heard and decided without delay.

Allegations taken as true.—In determining the validity of an indictment, the court must necessarily take its allegations as true. Carrell v. State (Cr. App.) 184 S. W. 217.

Art. 598. [587] Amendment of indictment or information.

Matters of form.—A nunc pro tunc placing by the clerk of file mark on complaint and information, as of the date they were filed with him, may be permitted by the court. Milstead v. State (Cr. App.) 182 S. W. 305.

Under this article and arts. 269, 599, it was not error to refuse to quash an information based upon an unsigned complaint, where complaint was signed at trial before the prosecuting attorney announced himself ready. Adams v. State (Cr. App.) 192 S. W. 1067.

Matters of substance.—Indictment for abandonment after seduction and marriage cannot be amended to supply omission of allegation of date of abandonment. Kirkendall v. State (Cr. App.) 180 S. W. 676.

Art. 599. [588] Amendments, made how.

Matters of form.—See Adams v. State (Cr. App.) 192 S. W. 1067; note under art. 598.

8. Of Continuance

Art. 605. [594] For sufficient cause shown.

1. Discretion of court.—A continuance is no longer a matter of right, but addressed to the sound discretion of the court. Knight v. State (Cr. App.) 183 S. W. 1158.

2. Grounds in general.—Denial of continuance was not erroneous, where accused was not deprived of any testimony. Word v. State (Cr. App.) 179 S. W. 1175.

Court's refusal to postpone hearing on motion for new trial to allow counsel to procure affidavits concerning statements of state's witness held not error; diligence not being shown, and the evidence being only impeaching and apparently hearsay. Lanier v. State (Cr. App.) 182 S. W. 451.

Accused held not entitled to a continuance because the prosecutor refused before trial to deliver him a letter or copy removed from his person on arrest, where the letter was promptly introduced in evidence and accused had an opportunity to examine it. Sanford v. State (Cr. App.) 185 S. W. 22.

Neither the trial nor the appellate court will supply, by inference and presumption, allegations not contained in an application for continuance which should be stated therein, but the application must be complete in itself. Sorrell v. State (Cr. App.) 186 S. W. 336.

3. Other prosecution pending.—Where a prosecution is based on an act upon which defendant has already been convicted of an offense, motion to postpone trial until the conviction is finally disposed of on appeal should be granted. Barnes v. State (Cr. App.) 185 S. W. 2.

6. Physical and mental condition of accused.—Overruling of application for continuance because of defendant's claimed illness held not error, where there was no evidence to contradict physician appointed by the court, who swore he could find nothing wrong with defendant. Smith v. State (Cr. App.) 182 S. W. 451.

7. Want of preparation.—Under art. 557, permitting arraignment two days after service of summons, held it could not be said it was error to refuse postponement to enable additional counsel, brought into the case, to prepare for trial. Bader v. State (Cr. App.) 183 S. W. 146.

Where accused and his attorneys were both present at his habeas corpus trial and heard witnesses testify, and such witnesses were present at his trial and three of the four testified, accused's inability to obtain a stenographic transcript of testimony did not entitle him to a continuance. Sanford v. State (Cr. App.) 185 S. W. 22.

Art. 608. [597] First application by defendant for a continuance.

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4. Diligence and excuse for delay in general.—In prosecution for unlawfully carrying a pistol, held, that there was no error in refusing a continuance on the ground of surprise; no diligence being shown. Grant v. State (Cr. App.) 179 S. W. 871.

Denial for want of diligence of a continuance sought for absence of witness who would give material testimony, held error. Coleman v. State (Cr. App.) 179 S. W. 1172.

A defendant indicted for seduction in November, 1913, whose trial was set for May, 1915, held not to have exercised such diligence in obtaining the presence of a witness as to make it error to refuse a continuance. May v. State (Cr. App.) 179 S. W. 1176.

A motion filed by accused for a continuance was properly denied where it clearly showed a lack of diligence. Roberts v. State (Cr. App.) 180 S. W. 1079.

Defendant is entitled to a continuance for the absence of a witness, whose testimony, material to the defense, he has used due diligence to secure. Mansell v. State (Cr. App.) 182 S. W. 1137.

Refusal of continuance for absent witness is proper, where no diligence was shown. Jones v. State (Cr. App.) 183 S. W. 141.

Accused is not entitled to a continuance on account of the absence of witnesses, where no diligence to procure their testimony or attendance was shown. Sanford v. State (Cr. App.) 185 S. W. 22.

Upon showing on motion for a continuance on the ground of the absence of defendant's witnesses, held that the overruling of the motion was not error. Scott v. State (Cr. App.) 185 S. W. 994.

Accused was not entitled to a continuance on the ground of the absence of a witness who had testified during the trial. Ellis v. State (Cr. App.) 185 S. W. 997.

The law requires of a defendant compliance with the exact terms prescribed for applications for continuance, and if there is a lack of diligence shown, the continuance must be denied, nor can accused cease his diligence to secure witnesses when the trial begins, but must continue it up to conclusion of the arguments, and the state need not show want of diligence in opposition to an application for a continuance, but the defendant must show affirmatively that he has used all the diligence to obtain his witnesses required by law, the facts not showing such diligence. Sorrell v. State (Cr. App.) 186 S. W. 336.

Continuance for absence of witnesses is properly denied, where no diligence at all is shown. Vansickle v. State (Cr. App.) 188 S. W. 1006.

In an assault trial, held not reversible error to deny continuance, in view of the insufficiency of the application, the testimony at the trial, the failure to produce the alleged absent witnesses on motion for new trial, and failure to show injury to accused. Hill v. State (Cr. App.) 189 S. W. 257.

Overruling motion for continuance for absent witness was not error, under evidence showing lack of diligence in that accused and his father knew long prior to trial that the witness was outside the state, but made no effort to secure his attendance, and did not know his whereabouts at time of trial, or whether he would ever return. Tindel v. State (Cr. App.) 189 S. W. 948.

Where an application for postponement showed materiality of testimony, and presence of witnesses at beginning of trial, and their absence without knowledge of accused, held that postponement should have been granted. Jones v. State (Cr. App.) 194 S. W. 1109.

5. Process.—Defendant held not entitled to a continuance on account of absence of witnesses; failure to summons being due to his lack of due diligence. Clayton v. State (Cr. App.) 180 S. W. 1089.

Where defendant was immediately arrested upon killing deceased, and indicted in 12 days, but for 3 weeks made no application for process for a witness, who had left for California, not showing in his application for continuance any reason for delay, when the witness left, or that defendant did not know he was going, defendant was not entitled to continuance for absence of the witness. Furnace v. State (Cr. App.) 182 S. W. 454.

Where in her affidavit an absent witness whose testimony is assigned as a ground for continuance does not swear that she was ever subpœnaed and it does not appear that she was not able to appear on day following application for continuance, no diligence was shown. Pearson v. State (Cr. App.) 187 S. W. 336.

Motion for continuance showing that accused waited until day before trial to have process issued to an absent witness, held not to show that accused exercised diligence. Wyatt v. State (Cr. App.) 190 S. W. 153.

Where accused made only one attempt to subpœna a witness residing in an adjoining county, although the witness was home part of the time during the trial, it was proper to refuse continuance. Porter v. State (Cr. App.) 190 S. W. 159.

An accused is not entitled to a continuance on account of the absence of a witness where process for such witness was not issued until two months after indictment and just before trial, without a showing of further diligence to locate witness. Marta v. State (Cr. App.) 193 S. W. 323.

6. —— Duplication of process for witnesses.—Where subpœna for witness at term prior to trial was returned not served, and accused could have then learned that witness had left the county, the requirement of diligence authorizing continuance is not met by merely issuing new subpœna just prior to trial and several months after the first return. Tindel v. State (Cr. App.) 189 S. W. 948.

7. Deposition.—One seeking continuance for want of a witness must, in order to show diligence in securing a deposition, show that he placed the interrogatories in the hands of an officer authorized to take depositions. Murrell v. State (Cr. App.) 184 S. W. 831.

Where accused sent interrogatories to a notary public in another state who was not authorized to take depositions, it was proper to refuse continuance because of his lack of diligence. Porter v. State (Cr. App.) 190 S. W. 159.

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8. Facts expected to be proved, and their materiality in general.—In a prosecution for bigamy, held, that accused's first application for a continuance on account of absent witnesses should have been granted, as he could have procured evidence which would have showed he believed he was divorced. Chapman v. State (Cr. App.) 179 S. W. 570.

In a prosecution for abandonment after seduction and marriage, testimony of a witness to the chastity of prosecutrix held material, so that absence of the witness could be ground for continuance. Coleman v. State (Cr. App.) 179 S. W. 1172.

The appellate court will not reverse a conviction for a refusal of continuance for absence of a witness, unless in connection with the evidence adduced on trial it is impressed that if the absent testimony, relevant, material, and probably true, had been before the jury, a verdict more favorable to defendant would have resulted. Furnace v. State (Cr. App.) 182 S. W. 454.

There was no error in denying a continuance based on absence of a witness, where he makes affidavit that he did not know and would not testify what defendant in his application alleged he would. Jordan v. State (Cr. App.) 182 S. W. 890.

Showing by accused held insufficient to show error in denying continuance on the ground of absence of material witnesses. Wood v. State (Cr. App.) 182 S. W. 1122.

Refusal of continuance for absence of witness is proper; his proposed testimony being inadmissible. Jones v. State (Cr. App.) 183 S. W. 141.

Where the evidence introduced showed that an absent witness would not, if present, testify as claimed by defendant, or that she was not in a position to have seen the acts as to which defendant alleged she would testify, refusal of a continuance was not error. Reed v. State (Cr. App.) 183 S. W. 1168.

Continuance is properly refused for absence of a witness whose testimony would be altogether immaterial and not applicable to the case. Barnes v. State (Cr. App.) 185 S. W. 5.

Accused's application for a continuance which did not contain a statement of the facts expected to be proven by an absent witness was insufficient. Ellis v. State (Cr. App.) 185 S. W. 997.

Denial of continuance for absence of witnesses for defendant, held not error where affidavits as to what witnesses would testify were not attached to application and no reason for not doing so given; for the court, on appeal, will not revise or reverse the judgment of the lower court refusing a continuance because of absent witnesses unless it appears from the evidence at the trial that testimony of such witnesses was relevant, material, and probably true. Thomas v. State (Cr. App.) 189 S. W. 139.

Refusal of continuance held proper where the testimony of the absent witnesses appeared immaterial, and the court offered to postpone the case until the next morning to give defendant time to get his witnesses from a place 23 miles away. Walter v. State (Cr. App.) 189 S. W. 257.

11. Assault and homicide.—Denial of a continuance to procure the attendance of an absent witness, who would have testified in support of accused's testimony, which was contradicted, and to deceased's vile slanders concerning accused's girls, held error; accused being convicted of murder. Knight v. State (Cr. App.) 183 S. W. 1158.

In a homicide case, action of court in refusing continuance on the ground of the absence of a witness who would testify that the deceased was in his restaurant drinking and had insulted his wife shortly before the crime, was not error. Hall v. State (Cr. App.) 185 S. W. 574.

13. —— Self-defense.—Where it was a contested issue whether deceased was armed with a knife during the quarrel in which he was killed, the refusal of continuance for absence of a witness who would have testified that he was so armed was reversible error. Mansell v. State (Cr. App.) 182 S. W. 1137.

14. —— Threats.—A showing of absence, sick, of the only person other than defendant, present the night before the homicide, when deceased was alleged to have made threats, held sufficient for continuance. Melton v. State (Cr. App.) 182 S. W. 289.

Fact that a witness would testify that he knew the deceased was quarrelsome and knew of two men who had made threats, where it was not shown that either were in a position to commit the crime, was not ground for a continuance, and where witnesses for state testified that they had heard defendant make threats against the deceased, testimony of an absent witness that he had never heard such threats would be immaterial and not ground for continuance. Thompson v. State (Cr. App.) 187 S. W. 204.

Court held to have erroneously denied continuance to defendant charged with murder for absence of witness who would have testified that he knew a person was dead to whom deceased had stated that he intended to beat defendant up. Wilson v. State (Cr. App.) 190 S. W. 155.

18. Robbery.—In a prosecution for robbery of whisky, where only admissible testimony of an absent witness was that defendant day before robbery had taken two bottles

of alcohol out of a box in her presence, refusal of a continuance was not error, since fact was immaterial. Pearson v. State (Cr. App.) 187 S. W. 336.

21. **Seduction.**—It was not error to refuse a continuance in a prosecution for seduction, where defendant failed to produce any affidavits that the absent witnesses would testify as stated in his motion. May v. State (Cr. App.) 179 S. W. 1176.

22. **Cumulative testimony.**—The rule against cumulative evidence does not apply to a first application for a continuance, nor is it applied with strictness where the witnesses present are nearly related to accused. Chapman v. State (Cr. App.) 179 S. W. 570.

Whether testimony of absent witness is cumulative is immaterial on the first application for a continuance. Clayton v. State (Cr. App.) 180 S. W. 1089.

The fact that all other eyewitnesses had appeared and testified, and that testimony of a desired absent witness would be but cumulative is no ground to refuse a first continuance to secure his attendance. Hall v. State (Cr. App.) 185 S. W. 574.

Accused was not entitled to a continuance on the ground of the absence of a witness who would testify about matters which can be shown by other available persons. Ellis v. State (Cr. App.) 185 S. W. 997.

There is no error in refusing a continuance for an absent witness, who would have testified to facts which could have been established by other parties not called to the stand. Baker v. State (Cr. App.) 187 S. W. 949.

Where several witnesses in the neighborhood testified to hearing no screams the night of the alleged rape, refusal of continuance because of absence of witness who would have testified similarly was not error. Wood v. State (Cr. App.) 189 S. W. 474.

In prosecution for murder, where absent witness' testimony would have been merely cumulative, motion for continuance was properly overruled. Edwards v. State (Cr. App.) 191 S. W. 542.

That testimony of an absent witness would be cumulative cannot deprive one accused of crime of a continuance on his first application where due diligence has been used to secure witness' attendance. Marta v. State (Cr. App.) 193 S. W. 323.

25. **Impeaching testimony.**—A continuance sought to secure a witness whose testimony can only be available to impeach a state's witness should be denied. Galvan v. State (Cr. App.) 179 S. W. 875.

In a criminal prosecution, it was not error to refuse a continuance, where the affidavit of the absent witness stated that he had seen the prosecuting witness intoxicated at about the time of the offense; the fact of the witness' intoxication not rendering him incompetent. Fletcher v. State (Cr. App.) 179 S. W. 879.

Accused was not entitled to a continuance on the ground of the absence of a witness whose testimony would be impeaching in character. Ellis v. State (Cr. App.) 185 S. W. 997.

26. **Alibi.**—Denial of continuance because of absence of witnesses who would have testified to defendant's whereabouts at a different time than the times when sales of liquor were claimed to have been made held not error. Bagley v. State (Cr. App.) 179 S. W. 1167.

A continuance to obtain the testimony of accused's wife, who would have testified that on the day of the offense he and she spent the day with third persons, held improperly denied. Taylor v. State (Cr. App.) 184 S. W. 224.

Denial of motion for postponement for purpose of securing attendance of witnesses to prove alibi held reversible error. Jones v. State (Cr. App.) 194 S. W. 1109.

27. **Admissions to prevent continuance.**—Continuance is properly denied, where the testimony of the absent witness, given on a former trial, is admitted. Reed v. State (Cr. App.) 183 S. W. 1168.

Where the state agreed that the affidavit of an absent witness should be received in lieu of his testimony, the denial of a continuance requested by accused on account of such witness' absence was not error. Sanford v. State (Cr. App.) 185 S. W. 22.

It is not error to deny continuance for absent witnesses, where one was a fugitive from justice, and the state admitted truth of testimony the others were expected to give. Derrick v. State (Cr. App.) 187 S. W. 759.

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28. **Cause of absence of witness.**—Though conduct of witness in criminal case in willfully absenting himself is censurable, defendant cannot be held responsible to justify denial of motion for continuance on ground of absence of witness. Wilson v. State (Cr. App.) 190 S. W. 155.

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30. **Probability of securing attendance of witness.**—Refusal of continuance for absence of a witness, for a long time a fugitive from justice, is proper. Jordan v. State (Cr. App.) 182 S. W. 890.

Continuance on the ground of absence of a witness who is a fugitive from justice is properly denied. Reed v. State (Cr. App.) 183 S. W. 1168.

Refusal of the court to grant a continuance to secure attendance of an eyewitness, who was a traveling vaudeville actor and whom defendant had been unable to locate from November 13th to December 9th, was not error. Hall v. State (Cr. App.) 185 S. W. 574.

In a homicide case, the accused was not entitled to a continuance on the ground of the absence of a witness shown to be a transient person for whom process had been issued in several counties without success and whose attendance probably could not be obtained. Ellis v. State (Cr. App.) 185 S. W. 997.

It is not error to deny continuance for absent witnesses, where one was a fugitive from justice, and the state admitted truth of testimony the others were expected to give. Derrick v. State (Cr. App.) 187 S. W. 759.

Overruling motion for continuance for absent witness is not error when there is no showing as to whereabouts of the witness or that he could be produced, or would testify as indicated in the motion. Tindel v. State (Cr. App.) 189 S. W. 948.

31. **Expectation of securing attendance of witness during term.**—An application for a continuance to secure testimony of witness which fails to state that there is no reasonable expectation of procuring attendance at the present term is insufficient. Marta v. State (Cr. App.) 193 S. W. 323.

32. **Discretion of court.**—Defendant is not entitled to continuance as a matter of right for the absence of a witness, but his application is addressed to the sound discretion of the trial court. Furnace v. State (Cr. App.) 182 S. W. 454.

Under this subdivision, the application must be addressed to the sound discretion of the court, and it is the judicial, but not arbitrary, power of the judge to grant or refuse a continuance. Sorrell v. State (Cr. App.) 186 S. W. 336.

Under the statute, and the decisions, the first continuance is addressed to the sound discretion of the court, and "shall not be granted as a matter of right." Thomas v. State (Cr. App.) 189 S. W. 139.

33. **Denial of continuance as ground for new trial—In general.**—The court, after hearing all the evidence on motion for new trial, must reconsider the motion for continuance on ground of absent witnesses, and if he then concludes that testimony of such witnesses was not material or that their claimed testimony was not probably true, may properly refuse a new trial. Thomas v. State (Cr. App.) 189 S. W. 139.

If oral testimony of witness on cross-examination was first intimation defendant received that witness had been in penitentiary, he should have asked postponement of case until he could get a copy of the witness' sentence, if he desired, setting up that he had not before been aware of the fact. Smiley v. State (Cr. App.) 189 S. W. 482.

Where defendant, when he first learned that a witness had been in the penitentiary by such witness' oral testimony on cross-examination, did not ask postponement until he could get a copy of the sentence, the facts presented on appeal no ground for new trial. Id.

When continuance for absence of witnesses is overruled, motion for new trial, if absent testimony would have been material, and proper diligence was used, should be granted. Wilson v. State (Cr. App.) 190 S. W. 155.

Where accused sent interrogatories to a notary public in another state who was not authorized to take depositions, it was proper to refuse new trial because of lack of diligence. Porter v. State (Cr. App.) 190 S. W. 159.

34. —— **Materiality, truth, and effect of absent testimony.**—It is not error sufficient to warrant a new trial to refuse a continuance for taking the testimony of a witness by whose affidavit it appeared that he could only testify as to what a certain witness had told him, when that witness was not allowed to testify. Clayton v. State (Cr. App.) 180 S. W. 1089.

The court on appeal will not reverse the judgment of the lower court refusing a continuance, and the overruling of the motion for a new trial, based upon the application for continuance, unless it appears by the evidence that the proposed testimony was relevant, material, and probably true. Sorrell v. State (Cr. App.) 186 S. W. 336.

It was error to refuse new trial where the court refused continuance for absence because of sickness of one of accused's witnesses, whose affidavit as to testimony on new trial was strongly corroborative of accused's claim of self-defense. Moody v. State (Cr. App.) 187 S. W. 758.

The court, on appeal, will not revise or reverse the judgment of the lower court overruling a motion for new trial for absence of witnesses, unless it appears from the evidence at the trial that testimony of such witnesses was relevant, material, and probably true, not unless it is convinced not merely that defendant might have been prejudiced thereby, but that it was reasonably probable that testimony of such witnesses would have resulted in a verdict more favorable to him. Thomas v. State (Cr. App.) 189 S. W. 139.

In prosecution for murder, court erred in not granting new trial for absence of three witnesses, materiality of whose testimony was made manifest, although testimony of one, defendant's mother, would be cumulative of his father's, and testimony of another would be cumulative to some extent. Wilson v. State (Cr. App.) 190 S. W. 155.

Under this article, an application for a continuance is properly overruled where it appears that the testimony of the absent witness is not "probably true," or would not change the result. Watson v. State (Cr. App.) 191 S. W. 546.

Difference between statement in application for a continuance and in an application for postponement held too technical, where both might be true. Jones v. State (Cr. App.) 194 S. W. 1109.

Trial court's refusal to grant a continuance will not be disturbed on appeal unless it appears from the evidence that if the absent testimony had been before jury a verdict more favorable to accused would have resulted. Marta v. State (Cr. App.) 193 S. W. 323.

35. —— **Presence or accessibility of witnesses during trial.**—Where defendant moved for a continuance on account of the absence of three witnesses, but the witnesses were afterwards procured on subpœna by the state, though they did not testify, the defendant claiming that they were not the witnesses desired, it was not error to refuse the continuance. Satterwhite v. State (Cr. App.) 181 S. W. 462.

Where defendant upon his motion for a new trial, filed after his conviction, did not show any diligence in having witnesses present at the trial, no new trial would be granted. Scott v. State (Cr. App.) 185 S. W. 994.

Where defendant declined to postpone conclusion of trial until arrival of an absent witness, and did not ask that jury hear testimony of such witness stated to trial judge, he waived any right to have such witness testify. Thomas v. State (Cr. App.) 189 S. W. 139.

Where accused made only one attempt to subpœna a witness residing in an adjoining county, although the witness was home part of the time during the trial, it was proper to refuse new trial because of accused's lack of diligence. Porter v. State (Cr. App.) 190 S. W. 159.

Art. 609. [598] Subsequent application by defendant.

Cumulative testimony.—Refusal of second application for continuance on ground of absent witness held properly denied, where the testimony of the absent witness would be but cumulative of witnesses in court and not called by defendant. Chamberlain v. State (Cr. App.) 183 S. W. 438.

A second motion for continuance will not be granted where the absent witness' testimony will be merely cumulative. Reed v. State (Cr. App.) 183 S. W. 1168.

Where accused's application was not his first, and the claimed absent testimony was clearly cumulative, he was not entitled to a continuance, under this article. Rose v. State (Cr. App.) 186 S. W. 202.

Art. 616. [605] Continuance after trial commenced, when.

Surprise.—Ruling that three year old witness was incompetent was not such an unexpected occurrence within this article, as to warrant a continuance at trial and a discharge of jury, on state's application, nor does a recital, in interlocutory judgment, of accused's consent, bar a plea of former jeopardy. Hipple v. State (Cr. App.) 191 S. W. 1150.

An accused is not entitled to a continuance on the ground of surprise where the surprise was caused by his own carelessness and neglect, and a motion for a continuance on the ground of surprise giving the name of no witness or other circumstance by which the effect of the testimony could be minimized at a later trial presents no ground for review. Marta v. State (Cr. App.) 193 S. W. 323.

9. Disqualification of the Judge

Art. 618. [607] Proceedings when judge of district court is disqualified.

Presumption on appeal.—Where election of special judge and his oath of office were shown by the record, and defendant went to trial without objection, held, that on appeal it would be conclusively presumed that he was qualified to act. Bennett v. State (Cr. App.) 181 S. W. 197.

10. Change of Venue

Art. 626. [613] District judge may order change of venue on his own motion, when.

See Taylor v. State (Cr. App.) 197 S. W. 196.
Cited, Banks v. State (Cr. App.) 186 S. W. 840.

Art. 627. [614] State may have change of venue, when, etc.

Cited, Banks v. State (Cr. App.) 186 S. W. 840.

Art. 628. [615] Change of venue; when granted on application of defendant.

Cited, Satterwhite v. State (Cr. App.) 181 S. W. 462; Banks v. State (Cr. App.) 186 S. W. 840.

1. **Requisites of application in general.**—One seeking a change of venue should present, where possible, all of his grounds therefor in one application, although a second application cannot be denied where the evidence adduced on the hearing of the first showed probable grounds for the second. Howard v. State (Cr. App.) 184 S. W. 505.

2. **Affidavits and other testimony in support of application.**—While the court must have before it the evidence to show that one making affidavit for change of venue was wholly incredible, it is sufficient if that evidence was adduced on hearing on a former motion for a change of venue, and where on hearing on the first application for change of venue the evidence disclosed that one of the two compurgators was wholly incredible under oath, it could not be said that overruling the second application for change on the affidavits of the same persons was error, under this article. Howard v. State (Cr. App.) 184 S. W. 505.

Art. 633. [620] Application for change of venue may be controverted, how.

Time for filing contest.—It is not error to allow time to file a contest to defendant's motion for a change of venue, nor to extend the time for verification when the contest is not at first sworn to. Thompson v. State (Cr. App.) 179 S. W. 561.

Denial of motion.—A change of venue was properly denied where only one of defendant's witnesses swore he could not get a fair trial, while all the witnesses for the state, resisting the change, swore that he could. **Thompson v. State** (Cr. App.) 179 S. W. 561.

Art. 634. [621] Order of judge shall not be revised on appeal, unless, etc.

Review on appeal in general.—The court on appeal, where there was no abuse of the trial judge's discretion, could not disturb his ruling on a motion for change of venue. Satterwhite v. State (Cr. App.) 181 S. W. 462.

In the absence of record showing to the contrary, it must be presumed that evidence introduced on application for change of venue tending to show prejudice against the defendant was wholly insufficient, where the court overruled the motion. Howard v. State (Cr. App.) 184 S. W. 505.

The action of the trial court changing, or refusing to change, the venue, will not be reviewed on appeal, unless it clearly appears that such action was an abuse of discretion and prejudicial to the defendant. Vansickle v. State (Cr. App.) 188 S. W. 1006.

Bill of exceptions.—Under this article, a statement of the facts presented by bill of exceptions filed at the same term is necessary for review of denial of change of venue. Foster v. State (Cr. App.) 185 S. W. 1.

Where the record showed a motion for change of venue which was contested, but failed to show what testimony was heard, the legal presumption is that the court's action was right. Bell v. State (Cr. App.) 190 S. W. 732.

11. Of Dismissing Prosecutions

Art. 642. [629] Defendant in custody and no indictment presented, prosecution dismissed, unless, etc.

Pure food law violation.—Under Const. art. 1, § 10, White's Ann. Code Cr. Proc. art. 436, and this article, an indictment held not necessary to charge a violation of Pure Food Law, but prosecution by information was sufficient to justify retention of accused. Ex parte Drane (Cr. App.) 191 S. W. 1156.

TITLE 8

OF TRIAL AND ITS INCIDENTS

CHAPTER ONE

OF THE MODE OF TRIAL

Article 646. [633] Defendant must be personally present, etc.

Argument on motion for instructed verdict.—Under this article, absence of defendant, who was locked in jail, while counsel was arguing motion for instructed verdict, held to require a reversal. Brooks v. State (Cr. App.) 179 S. W. 447.

Voluntary absence.—Under this article, verdict was properly received in absence of defendant under bonds, who was voluntarily absent from the courthouse eating supper. Streich v. State (Cr. App.) 180 S. W. 266.

Where accused in forgery case having given statutory bond for remaining in court until verdict voluntarily absented himself during jury's deliberation, it was not error for the court in his absence, on sending a jury back for further deliberation, to remark that trials were expensive, that the cause was for the jury and not court to decide, and that court was not again retiring jury as punishment, or to extort verdict. Fry v. State (Cr. App.) 182 S. W. 331.

Art. 648. [635] Defendant on bail.

See art. 900, post, superseding this article.

Art. 652. [639] County court shall hold a term for criminal business.

Repeal.—Const. art. 5, § 29, providing that the county court shall hold at least four terms for both civil and criminal business annually as may be provided by the Legislature or commissioners' court, and such other terms as are fixed by that court, being of later adoption, supersede article 5, § 17, requiring the county court to hold a term for criminal business once every month, and abolishes separate terms of the county court for criminal business, so that terms fixed for civil business are also terms for criminal business, and an order of the commissioners' court fixing a separate term for criminal business is ineffective. Wells Fargo & Co. Express v. Mitchell (Civ. App.) 165 S. W. 139.

CHAPTER TWO

OF THE DRAWING OF JURORS, AND OF THE SPECIAL VENIRE IN CAPITAL CASES

Article 655. [642] Definition of a special venire.

Cited, Smith v. State (Cr. App.) 180 S. W. 278 (in dissenting opinion).

Art. 656. [643] State may obtain order for special venire, etc.

Cited, Smith v. State (Cr. App.) 180 S. W. 278.

Art. 657. [644] Defendant may obtain special venire, when.

Waiver.—Under this article, defendant, charged with a capital crime, held to have waived special venire by announcing ready for trial after the district attorney and the court had agreed that capital punishment should not be inflicted. Smith v. State (Cr. App.) 180 S. W. 278.

Art. 664. Certain officers to select jurors.

Constitutionality.—The jury wheel law, held not unconstitutional and void as working an improper discrimination against defendants tried where the law is in force, in that nontaxpayers are excluded as jurymen in such counties. Herrera v. State (Cr. App.) 180 S. W. 1097.

Art. 671. [653] Copy of list of jurors shall be served on defendant, etc.

Requisites of copy.—In a prosecution for murder, the clerical error of writing the name of a venireman in the list served on defendant as J. Stam Davis, while in drawing the venire the clerk drew the name of J. Stam Davenport, was not ground for quashing the venire. Hampton v. State (Cr. App.) 183 S. W. 887.

CHAPTER THREE

OF THE FORMATION OF THE JURY IN CAPITAL CASES

Article 676. Persons summoned as jurors may claim exemption, how and when.

Civil officers.—Civil officers are not disqualified to serve as petit jurors, and their exemption from jury service is a personal privilege to be claimed only by them, and which they may waive. Counts v. State (Cr. App.) 181 S. W. 723.

Foreigner.—A juror, who had lived in America only five years, could read, write, and understand English only a little, and did not understand all that was asked him touching his qualifications as a juror, and who would have to guess at what was said on trial, was not qualified. Sullenger v. State (Cr. App.) 182 S. W. 1140.

Art. 680. [661] Defendant may challenge array, when.

Previous jury service.—Where 7 of a panel of 14 jurors answered that while they had sat as jurors in other similar cases and had an opinion they could disregard it, action of court in overruling a challenge of whole panel held not error. Wilson v. State (Cr. App.) 189 S. W. 1071.

Amendment of sheriff's return.—Overruling of order to quash venire in a criminal case for sheriff's failure to summon all veniremen issued for, and to state sufficient reason why they had not been summoned, held proper, where the sheriff was required to amend his return, and thereafter attachments were issued for such veniremen. Herrera v. State (Cr. App.) 180 S. W. 1097.

Art. 690. [671] A peremptory challenge.

Juror challenged for cause.—Where defendant did not exhaust all peremptory challenges, and no unacceptable juryman was forced on him, there was no error in requiring him to exhaust one of his peremptory challenges on a venireman as to whom the court should have sustained his challenge for cause. De Arman v. State (Cr. App.) 189 S. W. 145.

Art. 692. [673] A challenge for cause may be made for what reason.

SUBD. 3

5. **In general.**—One convicted in the federal court for sending obscene matter through the mail is not qualified to serve as juror in murder trial. Harrison v. State (Cr. App.) 191 S. W. 548.

SUBD. 11

20. **In general.**—In prosecution for murder, state's counsel was properly permitted to ask veniremen whether, if taken as jurors, and the evidence justified it, and the law required it, they would hesitate to inflict the death penalty. De Arman v. State (Cr. App.) 189 S. W. 145.

SUBD. 12

23. **In general.**—Refusal of defendant's challenge of a juror for cause held proper, where the question whether he would acquit if from the evidence he believed accused guilty and would acquit if he had a reasonable doubt was inconsistent. Coy v. State (Cr. App.) 180 S. W. 264.

SUBD. 14

42. **In general.**—Under this subdivision, in murder case, where it was not shown there were enough qualified persons in county who could read and write, out of whom jury could be impaneled, Court of Criminal Appeals cannot review overruling of motion for new trial on ground that juror, illiterate to court's knowledge, was impaneled. De Arman v. State (Cr. App.) 189 S. W. 145.

DECISIONS IN GENERAL

43. **In general.**—Where a bill of exceptions clearly shows that a juror was disqualified, and that appellant properly objected and preserved the question by proper bill, the Court of Criminal Appeals cannot hold that the trial judge properly exercised his discretion in holding the juror qualified. Sullenger v. State (Cr. App.) 182 S. W. 1140.

50. **Examination of jurors.**—Refusal to permit a juror to be asked if, after hearing the evidence, he has a reasonable doubt of defendant's intent to kill, he would give defendant the benefit of the doubt, held not error, in view of question asked and allowed. McKinney v. State (Cr. App.) 187 S. W. 960.

51. **Time to raise objection.**—Where a juror swears he was not asked on his examination whether he could read and write, objection on that score after verdict comes too late. De Arman v. State (Cr. App.) 189 S. W. 145.

Art. 696. [677] Names of persons summoned shall be called in their order.

Absence of jurors.—Where veniremen failed to appear and answer as their names were called in impaneling the jury, but were later called and examined, and the defendant exhausted only 12 of his 15 peremptory challenges, there is no error in proceeding with the trial. Thompson v. State (Cr. App.) 179 S. W. 561.

Delay.—Action of court in excusing special veniremen, and summoning talesmen to supply deficiency in venire on later trial and compelling accused to select from them after only short delay to procure absent veniremen, held not error under statute as to special venire, and this article; accused not having exhausted his challenges. Rose v. State (Cr. App.) 186 S. W. 202.

Art. 697. [678] Judge shall decide qualifications of jurors, etc.

Discretion of court.—A large discretion is vested in the trial judge in passing upon the qualifications of a juror. Sullenger v. State (Cr. App.) 182 S. W. 1140.

Art. 698. [679] Oath to be administered to each juror.

Necessity of oath.—Trial of a murder case by an unsworn jury is a denial of due process of law, and violates defendant's constitutional right to a jury trial. Howard v. State (Cr. App.) 192 S. W. 770.

CHAPTER FOUR

OF THE FORMATION OF THE JURY IN CASES LESS THAN CAPITAL

Article 704. [684] When other jurors to be summoned.

Time for objection.—Accused knowing that sheriff had employed special counsel to aid in prosecution, could not wait until after the verdict to object that sheriff should not have been permitted to summon the jury. Villareal v. State (Cr. App.) 189 S. W. 156.

Art. 708. [688] Peremptory challenge to be made, when.

In general.—Accused, not having exhausted peremptory challenges, learning that a juror on voir dire was employed by one who had contributed funds to prosecute accused, and failing to challenge cannot complain after verdict. Villareal v. State (Cr. App.) 189 S. W. 156.

Art. 714. [694] Oath to be administered to jurors.

In general.—Where a jury was sworn to try a case, and the case was dismissed, and defendant in the next case consented to go to trial before the same jury, the jury was duly sworn for the second case. Lyons v. State (Cr. App.) 189 S. W. 269.

This article is not complied with by swearing the entire jury panel at the beginning of the week pursuant to art. 5213, Civil Statutes. Howard v. State (Cr. App.) 192 S. W. 770.

CHAPTER FIVE

OF THE TRIAL BEFORE THE JURY

Article 717. [697] Order of proceeding in trial.

SUBD. 1

4. **In general.**—This subdivision is directory, and in the absence of injury from omission of such statement, there was no error. Bell v. State (Cr. App.) 190 S. W. 732.

SUBD. 4

5. **In general.**—In prosecution for keeping a house for prostitution, the state could not show on direct who the persons were who told witnesses of the bad reputation of the house. Goosby v. State (Cr. App.) 189 S. W. 143.

SUBD. 7

12. **Admissible rebuttal.**—In rebuttal of testimony of witness, who claimed that he, and not accused, assaulted the prosecuting witness, testimony of prosecuting witness as to how he was dressed and that he had a lantern held permissible. Vinson v. State (Cr. App.) 179 S. W. 574.

In prosecution for unlawful sale of intoxicating liquor in prohibition territory, where defendant on cross-examination of state's witness brought out details of purchase as

testified to by another state's witness, the admission of testimony of latter witness in rebuttal was not erroneous. Martin v. State (Cr. App.) 189 S. W. 264.

CONDUCT OF TRIAL IN GENERAL

13. In general.—This article is directory, and not mandatory. White v. State (Cr. App.) 181 S. W. 192.

Bill showing that when prosecutrix was called in a trial for breach of promise she came into the courtroom with her child in her arms, and that it was at once removed, held to present no error. Gleason v. State (Cr. App.) 183 S. W. 891.

18. Misconduct of prosecuting attorney.—Prosecuting attorneys are officers of the state, whose duty it is to see that justice is done, and they should never attempt to get before the jury evidence they know to be inadmissible. Short v. State (Cr. App.) 187 S. W. 955.

19. —— Improper questions.—In a prosecution for theft of a lap robe, a question asked defendant if he had heard a witness for state testify in which he said he stood beside defendant's car, and if it was not a fact that witness had testified to a lie, was error. Black v. State (Cr. App.) 187 S. W. 332.

Where defendant's attorneys learned that certain questions would be asked witnesses, seeking to impeach them, and which were illegal, and then known to be so by prosecuting attorney, and though requested by defendant, trial court refused to require prosecuting attorney not to ask them, the asking of such questions was reversible error. Faulkner v. State (Cr. App.) 189 S. W. 1077.

23. Consultation with adverse witness.—Permitting a witness under indictment for the same offense to talk with his attorney after being placed on the witness stand and before testifying held not error. Smith v. State (Cr. App.) 182 S. W. 311.

Art. 718. [698] Testimony allowed at any time before argument.

Rebuttal evidence.—Under this article, there was no error in permitting the state to introduce another witness where its only witness had not rebutted the testimony of defendant's witness. Martin v. State (Cr. App.) 189 S. W. 264.

Harmless error.—Any error in refusing to admit under this article, evidence offered out of order was harmless, its sole purpose being to support testimony to reduce the homicide to manslaughter, which, as shown by the verdict, was believed. Spence v. State (Cr. App.) 189 S. W. 269.

Art. 719. [699] Witnesses placed under rule.

In general.—In trial for rape of accused's daughter, it was proper for the court to place all his children in custody of an officer, and allow no communication with them, nor comment to the jury by accused's counsel on such action; it all occurring out of the presence of the jury. Marion v. State (Cr. App.) 190 S. W. 499.

Although court asked parties before trial if either desired the rule, refusal to put witnesses under rule after they have been seated at request of court is reversible error, where it does not clearly appear that no injury could have resulted, in view of this article; for discretion of court is not arbitrary, nor is defendant limited to any particular time for making demand for exclusion of witnesses, but may do so at any time while evidence is being taken. Bishop v. State (Cr. App.) 194 S. W. 389.

Exemptions from rule.—Where the rule excluding witnesses was invoked, but state's counsel requested that the prosecuting witness be excepted and permitted to remain to assist him, the exception was not an abuse of discretion. Redmond v. State (Cr. App.) 180 S. W. 272.

Testimony of witnesses violating, or not under, rule.—The jailer being an officer of the court may, in a prosecution for homicide, where insanity was urged, testify as to accused's acts in jail, though he was not, as were other witnesses, placed under the rule. Wilganowski v. State (Cr. App.) 180 S. W. 692.

In a prosecution for perjury, exclusion of material testimony on the ground that the witnesses had heard part of the testimony before they were placed under the rule held error. Clayton v. State (Cr. App.) 180 S. W. 1089.

Material evidence as to bias of prosecuting witness was erroneously excluded, although the witness was in court in violation of the rule, where the defendant did not know of his presence, or of his testimony, but had him called as soon as he discovered him. Hernandez v. State (Cr. App.) 183 S. W. 440.

Punishment for violation of rule.—In prosecution for murder, court's conduct in relation to punishing defendant's impeaching witness for violation of rule, the impeachment being of great importance to defendant, held erroneous. Waters v. State (Cr. App.) 192 S. W. 778.

Art. 720. [700] Witnesses under rule kept separate, or, etc.

Cited, Bishop v. State (Cr. App.) 194 S. W. 389 (in dissenting opinion).

Art. 721. [701] Part of witnesses may be placed under rule.

Cited, Bishop v. State (Cr. App.) 194 S. W. 389 (in dissenting opinion).

Art. 722. [702] When under rule, shall be attended by an officer.

Cited, Bishop v. State (Cr. App.) 194 S. W. 389 (in dissenting opinion).

Art. 723. [703] Shall be instructed by the court, etc.

Cited, Vinson v. State (Cr. App.) 179 S. W. 574; Bishop v. State (Cr. App.) 194 S. W. 389 (in dissenting opinion).

Art. 724. [704] Order of argument.

5. Scope of argument.—Prosecuting attorneys in their argument should confine themselves to legitimate deductions from the facts as they apply to the law of the case. Hawkins v. State (Cr. App.) 179 S. W. 448.

6. Stating proceedings.—In trial for rape of accused's daughter, it was proper for the court to place all his children in custody of an officer, and allow no communication with them, and to prevent comment to the jury by accused's counsel on such action; it all occurring out of the presence of the jury. Marion v. State (Cr. App.) 190 S. W. 499.

10. Matters outside of issues.—Remark of state's counsel that defendant's counsel could have his bill of exceptions when he appealed held not improper or to authorize a reversal. Bennett v. State (Cr. App.) 181 S. W. 197.

11. Facts not in evidence.—Statements of prosecuting attorney in murder trial held not objectionable as outside the record. Taylor v. State (Cr. App.) 180 S. W. 242.

Arguments of the prosecuting attorney, with respect to the horrors of a murder with which the defendant was not shown to have had any connection, were improper. Kelley v. State (Cr. App.) 185 S. W. 570.

Where a district attorney, in his closing address in a rape trial, addressed to accused the remark, "You know no more about love than a hog does about decency," this was justified by testimony of accused that the act of intercourse was the result of the relations existing between him and prosecutrix by reason of their feelings toward each other, and a remark that accused "was not only born a cripple, but he was born with a deformed heart," accused's father having testified as to his having been born with a crippled foot and leg, was proper, where the testimony of prosecutrix, if true, would authorize such a statement. Wood v. State (Cr. App.) 189 S. W. 474.

Both counsel for the state and the accused should in their argument discuss only the evidence adduced on the trial and legitimate deductions to be drawn therefrom. Cleveland v. State (Cr. App.) 190 S. W. 177.

The making of unsworn statements by state's counsel before the jury on material facts adverse to defendant and not in evidence will require reversal of conviction. Lynch v. State (Cr. App.) 103 S. W. 667.

Prosecuting attorney was unwarranted in stating from his own knowledge that defendant was at time of trial charged in district court with assault with intent to murder, particularly when fact was a damaging one which would not have been admissible in evidence. Wilson v. State (Cr. App.) 194 S. W. 828.

12. —— Excluded evidence.—In criminal prosecution, remark of private prosecuting attorney bringing before the jury testimony which the court had excluded was erroneous. Sarli v. State (Cr. App.) 189 S. W. 149.

14. —— Character of witness.—It is improper for the prosecuting attorney in argument to say that his only witness had, at the first opportunity and consistently, told the same story, there being no evidence to that effect. Derrick v. State (Cr. App.) 187 S. W. 759.

16. Comment on evidence.—On trial for permitting drinking of liquor in disorderly house, district attorney's remark in his argument, as to the character of defendant's place, held justified by the evidence. Bennett v. State (Cr. App.) 181 S. W. 197.

In trial for murder, argument of defendant denouncing the widow of deceased, whose adulterous relations with defendant were relied upon as a motive, and argument of counsel for state as to the record showing of defendant's guilt, held legitimate. Ingram v. State (Cr. App.) 182 S. W. 290.

In a prosecution for wife murder, the argument of state's counsel that while defendant was in a saloon drinking good whisky, his wife was out in the field picking cotton to support her children, which had support in evidence, was not improper. Mikeska v. State (Cr. App.) 182 S. W. 1127.

In a prosecution for larceny, comment upon the fact that accused was unduly intimate with one witness was error, where the accused had not placed his reputation in issue. Black v. State (Cr. App.) 183 S. W. 439.

18. —— Witnesses.—Where in his closing address the district attorney stated women usually lie about having had intercourse, this was either not prejudicial to accused, who claimed prosecutrix was lying about the act, or else it was legitimate argument that, if prosecutrix had consented to the act, she would not have complained of it to others. Wood v. State (Cr. App.) 189 S. W. 474.

20. Opinion as to guilt.—In a prosecution for theft of a lap robe, statements of prosecuting attorney to jury that he had taken stand to testify himself because he had seen defendant make out owner of lap robe to be a liar when he knew defendant to be as guilty as a dog was reversible error. Black v. State (Cr. App.) 187 S. W. 332.

22. Failure of defendant to testify or to produce witnesses.—In a prosecution for arson, where there was a conspiracy charged between defendant and his wife to burn the property, the county attorney might argue on defendant's failing to introduce his wife as a witness for him. Arensman v. State (Cr. App.) 187 S. W. 471.

In murder trial, where accused contended that another who had also been indicted for the crime, and was a witness against him, was insane, and therefore an incompetent

witness, comment by the state on the fact that accused had called several doctors and yet had questioned none of them on such issue, was legitimate. Carson v. State (Cr. App.) 190 S. W. 145.

23. Other offenses by accused.—Where one accused of larceny of a buggy admitted his prior conviction of murder, the district attorney could refer to him as a murderer in discussing his testimony on the trial. Villareal v. State (Cr. App.) 189 S. W. 156.

24. Appeal to sympathy or prejudice.—In prosecution for abandonment after seduction and marriage, district attorney's remark in argument that defendant stole virtue and destroyed happiness of prosecutrix was legitimate. Furr v. State (Cr. App.) 194 S. W. 395.

25. —— Enforcement of law.—District attorney's insistence on the highest penalty, and his comment on testimony of prosecuting witness before grand jury when defendant undertook to impeach her, held not error. Scott v. State (Cr. App.) 185 S. W. 994.

It is no ground for reversal that the assistant criminal district attorney argued "that the only way to stop redhanded murders was to write verdicts of guilty that will stand out as the noonday sun." Bergin v. State (Cr. App.) 188 S. W. 423.

A district attorney's statement in his closing address in a rape trial that, "If the law will not protect this girl with her innocence, to the devil with the law," was not improper. Wood v. State (Cr. App.) 189 S. W. 474.

26. —— Effect of acquittal.—Statements of prosecuting attorney to jury that, if they wished to foster crime, to find defendant not guilty, and, if so, write their grounds in verdict, and never complain to him that crime was prevalent and that the citizens would not convict criminals, held reversible error. Black v. State (Cr. App.) 187 S. W. 332.

In murder trial, statement by prosecutor that acquittal would bring end of law enforcement and reference to intemperance of accused held improper. McPeak v. State (Cr. App.) 187 S. W. 754.

29. Abusive language.—In a prosecution for wife murder, defended on the ground of insanity, argument of state's counsel that when there is no other defense they always resort to the "lowdown, cowardly stinking defense of insanity" did not authorize reversal. Mikeska v. State (Cr. App.) 182 S. W. 1127.

In prosecution for abandonment after seduction and marriage, it was improper for district attorney to call defendant an infernal scoundrel. Furr v. State (Cr. App.) 194 S. W. 395.

31. Retaliatory remarks.—Where defendant, accused of assault, testifying on his own behalf, stated the district attorney had offered to let him off with a $25 fine if he would plead guilty, it is not error for the district attorney, in his argument to the jury, to state he was glad the offer was not accepted, because the evidence showed defendant to be a different negro than he thought he was. Epps v. State (Cr. App.) 185 S. W. 578.

Argument that acquittal would be saying "Thou shalt kill" is not improper, when in answer to argument of accused's counsel that the jury ought to acquit, if only to stamp with disapproval as a disgrace to his race the deceased white man, killed in a locality occupied by negro prostitutes. Freeman v. State (Cr. App.) 188 S. W. 425.

The accused cannot complain that the state's attorney in argument went beyond the record, if the argument was occasioned, justified, or provoked by accused's attorney, as by the introduction of illegal testimony. Dupree v. State (Cr. App.) 190 S. W. 181.

In trial for rape of accused's young daughter, where accused's counsel commented on failure to make the victim a witness, the prosecutor was justified in stating that the jury could see why she was not called from the fact that her little brother, as witness for the state, was caused to change his testimony by his father's influence. Marion v. State (Cr. App.) 190 S. W. 499.

Argument of district attorney in response to, and brought out by, the argument for the defense, cannot be complained of. Deisher v. State (Cr. App.) 190 S. W. 729.

32. Action by court.—Where defendant had not put his character in issue, remark of county attorney, that he did not know whether defendant had been previously charged with an offense, presented no error where objection was sustained with an instruction not to consider it. Rice v. State (Cr. App.) 179 S. W. 876.

Action of state's attorney, in asking accused if he had not been convicted of crime, held not reversible, where the court sustained an objection to the question and directed the jury not to consider it. Park v. State (Cr. App.) 179 S. W. 1152.

Where the court orally charged the jury to disregard argument not based on the evidence and gave a requested charge that the district attorney's statements were not evidence, accused cannot complain that the district attorney used notes of evidence taken at trial. Tyrone v. State (Cr. App.) 180 S. W. 125.

Improper statements of prosecuting attorney did not present error, where the court repeatedly admonished both the prosecuting attorney and the jury as to the proper effect of the evidence commented upon. Taylor v. State (Cr. App.) 180 S. W. 242.

Argument by the prosecutor, which was unfinished and which the jury were directed to disregard, held to present no error. Wilganowski v. State (Cr. App.) 180 S. W. 692.

The error in admitting improper argument of the prosecuting attorney is cured by instructions to disregard it. Crowder v. State (Cr. App.) 180 S. W. 706.

In a prosecution for homicide, error in discussing inadmissible evidence before the jury held cured by subsequent instruction specifically to disregard it. Satterwhite v. State (Cr. App.) 181 S. W. 462.

Where argument by the county attorney was in reply to that of accused's attorney, the refusal of a requested charge to disregard such argument was proper. Major v. State (Cr. App.) 185 S. W. 878.

Error, if any, in permitting alleged improper argument of counsel is cured by express charge to the jury not to consider the argument excepted to. Sorrell v. State (Cr. App.) 186 S. W. 336.

Where the court instructed jury to disregard improper arguments of county attorney, and in his qualifications shows that argument was provoked by arguments of appellant's attorneys, there was no error. Pearson v. State (Cr. App.) 187 S. W. 336.

The evidence for the state showing a foul assassination, remarks of counsel that, "In my opinion, the evidence shows that these defendants are guilty of having foully assassinated Eugene Smith," that accused's attorney's refusal to talk to a witness through court's interpreter was strong evidence of guilt, that accused's request to make a further statement after being excluded from the stand by both state and defense was a strong circumstance of guilt, and that he had read hundreds of cases in which convictions had been secured and affirmed on circumstantial evidence not nearly so strong as in this case, held without prejudice in view of instruction to disregard the same; for, where remarks of counsel as to accused's guilt are not highly inflammatory and prejudicial, the court's instructions in withdrawing such remarks in the absence of any request for further instructions will be deemed sufficient on appeal to cure the effect of remarks. Marta v. State (Cr. App.) 193 S. W. 323.

In prosecution for abandonment after seduction and marriage, where district attorney called defendant an infernal scoundrel, but court promptly told jury not to consider remark, and withdrew it from consideration, error was harmless. Furr v. State (Cr. App.) 194 S. W. 395.

34. **Prejudice.**—In prosecution for assault with intent to kill, remarks by the district attorney which were partly outside of the record and partly based on testimony improperly received held so inflammatory as to necessitate reversal. Bullington v. State (Cr. App.) 180 S. W. 679.

Remarks of district attorney, to authorize a reversal, must be clearly improper and of such a material character as calculated to injuriously affect defendant's rights. Bennett v. State (Cr. App.) 181 S. W. 197.

In trial for murder, remarks of district attorney in closing argument as to attitude of widow of deceased, whose adulterous relations with defendant were relied upon as motive, withdrawn by the attorney, with instructions to disregard it, held not error. Ingram v. State (Cr. App.) 182 S. W. 290.

38. **Necessity of request for charge.**—A statement by state counsel, in a prosecution for homicide not supported by the evidence, is not ground for reversal, where there was no request to charge thereon. Taylor v. State (Cr. App.) 180 S. W. 242.

Where argument by the district attorney is so inflammatory that the effect could not be removed by instructions, the failure of accused to request instructions to disregard will not preclude review. Bullington v. State (Cr. App.) 180 S. W. 679.

For defendant to complain of statement of prosecuting attorney in argument, held, that he should have asked an instruction that the jury disregard it. Jordan v. State (Cr. App.) 182 S. W. 890.

Defendant not having requested an instruction to disregard argument of the district attorney, it is enough that the court, on objection, reprimanded said attorney. Jones v. State (Cr. App.) 183 S. W. 141.

In prosecution for statutory rape, argument of district attorney on matters of evidence, erroneously admitted, and afterwards withdrawn, could not be reviewed on appeal upon a mere objection, and were not reviewable unless defendant requested an instruction that it be disregarded. Miller v. State (Cr. App.) 185 S. W. 29.

The action of the trial court in permitting the district attorney to make a statement is not reviewable where accused merely objected to it, and did not request the court to instruct the jury not to consider it. Longoria v. State (Cr. App.) 188 S. W. 988.

Accused could not complain of certain remarks of the district attorney's which were withdrawn by the court from the jury, the district attorney being instructed to remain in the record, where no other or additional instructions were requested by accused. Wood v. State (Cr. App.) 189 S. W. 474.

Accused cannot complain of alleged improper argument of the prosecutor in the absence of requested instructions to disregard it. Bullington v. State (Cr. App.) 190 S. W. 154.

The accused cannot complain of alleged improper argument of the state's attorney in the absence of request for written charge to disregard it. Dupree v. State (Cr. App.) 190 S. W. 181.

The misconduct of the prosecuting attorney in his argument does not require a reversal, where accused did not request the court to charge the jury not to consider it. Deisher v. State (Cr. App.) 190 S. W. 729.

Art. 727. [707] Defendant's right to sever on trial.

Cited, Carson v. State (Cr. App.) 190 S. W. 145.

Right to severance.—Application for severance in order that codefendant, who was an important witness, might be first tried, held erroneously denied. Dieter v. State (Cr. App.) 179 S. W. 557.

Under this article, where two defendants accused of the same crime each filed motions that the other be first tried, it is within the discretion of the court to order the trial of one to precede the other. Howard v. State (Cr. App.) 184 S. W. 505.

A request for severance by one jointly accused after a portion of jury has been selected is not a matter of right under statute. Marta v. State (Cr. App.) 193 S. W. 323.

This article was not intended to change rule of evidence, or to modify article 791, or Pen. Code 1911, art. 91, but was intended to designate procedure whereby defendant

might make available testimony of one prohibited from testifying in his behalf by latter sections, and it has no application to case of defendant charged with theft who desires testimony of parties charged with receiving and concealing stolen property. Clark v. State (Cr. App.) 194 S. W. 157.

Affidavit.—Under this article requiring that an affidavit for severance shall state that evidence of codefendant is material to defense, and that it is verily believed that codefendant cannot be convicted, a request for a severance which does not so state is insufficient. Marta v. State (Cr. App.) 193 S. W. 323.

Art. 734. [714] The jury are judges of fact.

Cited, Villareal v. State (Cr. App.) 182 S. W. 322 (in dissenting opinion).

In general.—Under the evidence and defendant's admission at the time stolen property was taken from his person, held, that there was no question of venue in the case. Whitfield v. State (Cr. App.) 179 S. W. 558.

Where the evidence was conflicting as to whether a purported confession was made on proper warning, and whether defendant knew what it contained, it was error to fail to submit both such issues to the jury. Cook v. State (Cr. App.) 180 S. W. 254.

A conflict in the testimony on a criminal trial was a matter for the jury. Bennett v. State (Cr. App.) 181 S. W. 197.

Where a witness admitted he had made a different statement to accused's counsel and gave his reasons therefor, the weight to be given his testimony was not a matter of law to be given in charge. Marta v. State (Cr. App.) 193 S. W. 323.

Review.—In view of this article and art. 786, appellate court cannot in reviewing sufficiency of testimony take place of jury and disturb conviction because court would not have rendered same verdict. Norwood v. State (Cr. App.) 192 S. W. 248.

Art. 735. [715] Charge of court to the jury.

I. NECESSITY, NATURE, REQUISITES AND SUFFICIENCY OF CHARGE

1. Law applicable to case in general.—Where, in a prosecution for embezzlement, there was no evidence that defendant returned the money, the court properly refused to instruct on that issue. Messner v. State (Cr. App.) 182 S. W. 329.

Where accused claimed it was customary to discharge firearms from a store door as he did, a charge that to fire a pistol was to rudely display it held improper, as taking from the jury accused's contention. Lloyd v. State (Cr. App.) 184 S. W. 192.

Where defendant's evidence tended to show that another who had had several fights with deceased and bore ill will toward him was in the neighborhood of the killing, the refusal to affirmatively charge upon such defensive matter was error, notwithstanding charges negatively presenting it. Burkhalter v. State (Cr. App.) 184 S. W. 221.

Instructions on issue not raised by evidence are properly refused, but in prosecution for homicide, state is entitled to have presented by charge its theory of killing, which has support in evidence, as well as that of defendant. Smith v. State (Cr. App.) 185 S. W. 576.

In trial for murder by handing a pistol to a person as to whose identity evidence is conflicting, and encouraging him to kill, an instruction that jury, in order to convict, must believe that both accused and certain named person were present and participated in the offense is properly refused, as ignoring issue as to identity. Rose v. State (Cr. App.) 186 S. W. 202.

Where an issue is in a case favorable to accused, he should have that issue submitted in an affirmative way untrammeled by unfavorable conditions. McPeak v. State (Cr. App.) 187 S. W. 754.

In prosecution for violating local option law, court's refusal to submit defendant's plea of former jeopardy unsupported by evidence held not erroneous. Stephens v. State (Cr. App.) 188 S. W. 976.

The state, as well as the defendant, has the right to have issues in its favor submitted properly. Berry v. State (Cr. App.) 188 S. W. 997.

Two state witnesses having testified positively, in a prosecution for engaging in the business of selling liquors in prohibition territory, to a sale of whisky to them by defendant, and he having sworn positively that he made neither sale nor delivery to either of them, the court correctly refused to submit the question whether defendant acted as agent in such sales. Johnson v. State (Cr. App.) 191 S. W. 1165.

In prosecution for assault with intent to murder, the charge must be confined to the issues raised by the pleadings and evidence. Price v. State (Cr. App.) 194 S. W. 827.

8. Offenses or counts thereof alleged.—Where there were two counts charging cattle theft, one charging ownership in husband, and one in wife, charge on question of theft of cow as property of husband held good. McAninch v. State (Cr. App.) 179 S. W. 719.

9. Definition or explanation of terms.—It was not necessary for the court to define the meaning of the word "corroborate," as it has a definite well-understood meaning. Buckley v. State (Cr. App.) 181 S. W. 729.

12. Presumptions, burden of proof and reasonable doubt.—Instruction that burden of proof is on state held usually sufficient, unless some peculiarity requires the further instruction that the burden never shifts to defendant. Hawkins v. State (Cr. App.) 179 S. W. 448.

13. Elements and incidents of offenses and defenses in general.—Refusal of an instruction that prosecutrix traded her virtue for a promise of marriage, the only prom-

ise being to marry if she became pregnant from the intercourse, was not error, where the testimony of the prosecutrix showed the reverse to be true. Wood v. State (Cr. App.) 182 S. W. 1122.

Where defendant's evidence tended to show that another who had had several fights with deceased and borne ill will toward him was in the neighborhood of the killing, the refusal to affirmatively charge upon such defensive matter was reversible error, notwithstanding charges negatively presenting it. Burkhalter v. State (Cr. App.) 184 S. W. 221.

If the evidence raises an issue favorable to the defendant, which would extenuate, mitigate, or excuse the crime, it should be given in the charge to the jury. Kelley v. State (Cr. App.) 185 S. W. 874.

In a prosecution for violating Pen. Code 1911, art. 500, held, that requested instructions enumerating facts alleged to constitute special defenses were properly refused. Speers v. State (Cr. App.) 190 S. W. 164.

15. Intent or motive.—Where court at defendant's request submitted question as to whether alleged stolen cow was taken by mistake, held that the provisions of Pen. Code, arts. 46, 47, as to mistakes, was properly charged, and use of the word "conjecture" as used in said articles, held not to render the charge objectionable. Walker v. State (Cr. App.) 181 S. W. 191.

In prosecution for aggravated assault, where defense as developed by defendant's testimony raised issue of fact as to whether she struck blow by accident or intentionally, court's failure to submit issue of accident, when properly requested, was erroneous. Bowman v. State (Cr. App.) 192 S. W. 769.

In prosecution for cattle theft, where the evidence raised issue as to the intent with which the cattle were driven away, an instruction permitting acquittal if accused did not intend to deprive the owner of the cattle permanently was properly refused. Pope v. State (Cr. App.) 194 S. W. 590.

20. Insanity or intoxication.—In the absence of evidence that defendant was suffering from disease when he killed his wife, or at the trial, the charge that the jury should acquit if they believed defendant was temporarily insane from disease and the use of liquor was properly refused, and in the absence of evidence that he was suffering from delirium tremens at the time of the homicide, the refusal of a charge, as to his being permanently insane at the time from the long-continued use of intoxicants, was not erroneous. Mikeska v. State (Cr. App.) 182 S. W. 1127.

Refusal to submit to the jury accused's insanity from use of drugs was proper; there being no evidence thereof. Marion v. State (Cr. App.) 190 S. W. 499.

22. Alibi.—Where, on a trial for cow theft, the testimony raised and the court without objection charged on the subject of principals, a charge on alibi would have been in direct conflict therewith. Walker v. State (Cr. App.) 181 S. W. 191.

Where the evidence in a prosecution for violation of the local option law tended to show alibi, held, that it was error to refuse requested instructions on alibi. Venn v. State (Cr. App.) 182 S. W. 315.

In a trial for homicide, where defendant admitted that he was within 250 yards of the scene of the homicide, at the time of its commission, the issue of an alibi should be fully presented by the charge and made applicable to the evidence. Burkhalter v. State (Cr. App.) 184 S. W. 221.

A cause should not be reversed for refusal of charge on alibi, unless, in light of all testimony, evidence excludes theory of defendant's presence at place of crime, and in a prosecution for aggravated assault and battery upon female, refusal of charge on alibi held not error. Woods v. State (Cr. App.) 188 S. W. 980.

23. —— Sufficiency.—Charge on alibi instructing jury to acquit upon reasonable doubt of presence of defendant at time and place of offense held good. McAninch v. State (Cr. App.) 179 S. W. 719.

In a prosecution for stealing a horse, refusal of the court to charge on alibi held not erroneous. Hughes v. State (Cr. App.) 180 S. W. 259.

Any error in not submitting alibi held harmless, the jury being instructed that the circumstances must show to a moral certainty that accused, and no other person, committed the offense, and exclude every other reasonable hypothesis. Cozart v. State (Cr. App.) 188 S. W. 750.

26. Acts and declarations of conspirators and codefendants.—Instruction as to conspiracy and as to defendant's responsibility for a killing, done upon an independent motive of one of the conspirators, held not erroneous as shifting to defendant the burden of showing that the killing was done upon an independent motive. Buckley v. State (Cr. App.) 181 S. W. 729.

27. Accomplices and testimony thereof.—The fact that officers went to one charged with practicing medicine unlawfully and procured him to treat them does not make them his accomplices so as to require a charge on accomplices' testimony. Hyroop v. State (Cr. App.) 179 S. W. 878.

The usual stereotyped form of charge with reference to accomplice testimony in seduction cases is not erroneous. Self v. State (Cr. App.) 188 S. W. 978.

Since the court should instruct on necessity of corroboration, whether requested or not, it is error to charge merely not to convict alone on accomplice testimony, but the jury should be told that she must be corroborated as to the facts by evidence to connecting accused with the offense. Hollingsworth v. State (Cr. App.) 189 S. W. 488.

29. Purpose and effect of evidence.—In a prosecution for rape, the court in his charge to the jury was not called upon to limit evidence which was a part of the res gestæ. Tennel v. State (Cr. App.) 181 S. W. 458.

30. —— **Limiting evidence admitted for specific purpose in general.**—In a trial for murder, instruction limiting the jury's consideration of evidence on the issue of motive held proper. Orner v. State (Cr. App.) 182 S. W. 1172.

In a prosecution for assault with intent to kill, an instruction that uncommunicated threats against the life of defendant may be considered in ascertaining the condition of mind of the party assaulted at the time of the assault held erroneous in not permitting the jury to consider such uncommunicated threats for other purposes. Crippen v. State (Cr. App.) 189 S. W. 496.

32. —— **Limiting effect of evidence competent only as against one of several defendants.**—In prosecution for murder, charge that in determining whether defendants or either of them killed deceased, claimed to have been hired by one defendant to kill his wife, the jury should consider testimony as to relationship of that defendant and his wife after their marriage should not be given. Sapp v. State (Cr. App.) 190 S. W. 489.

33. —— **Limiting proof of other offense.**—In prosecution for riding on railroad pass of another, charge held objectionable as not specifically and properly submitting that evidence of use of pass on other trips was admitted to show chance of railroad auditor's identifying defendant and to contradict owner of pass as witness. Leach v. State (Cr. App.) 189 S. W. 733.

In prosecution for murder of named party instruction that defendants could not be convicted of the killing of other parties, though that might be considered on question whether defendants killed named party, should be omitted on defendant's objection, and if necessary to caution jury should not state directly that defendant killed either of such other parties. Sapp v. State (Cr. App.) 190 S. W. 489.

36. **Circumstantial evidence.**—Though corroboration of accomplice be by circumstantial evidence, yet, accomplice testifying to a confession by defendant, no charge on circumstantial evidence is required. Tyler v. State (Cr. App.) 180 S. W. 687.

In a prosecution for larceny, defendant held entitled to a charge on circumstantial evidence; the taking of the stolen article being only inferentially shown by its disappearance and subsequent possession by defendant of a similar article. Pierson v. State (Cr. App.) 180 S. W. 1080.

It is not necessary to charge on circumstantial evidence where the evidence as to the actual commission of the offense by a certain person, and that he was aided by defendant, is direct and positive. Davis v. State (Cr. App.) 180 S. W. 1085.

Where defendant's connection with a forged instrument was to be deduced from circumstances, the court improperly refused to give an instruction on circumstantial evidence. Carrell v. State (Cr. App.) 184 S. W. 190.

Where the case depended on direct and positive evidence consisting of dying declarations of deceased, court properly refused to charge on circumstantial evidence. Thompson v. State (Cr. App.) 187 S. W. 204.

Where the persons robbed were ordered from a wagon at a point of a pistol, and robbers took charge of the wagon as shown by positive testimony, refusal to charge on circumstantial evidence was not error. Pearson v. State (Cr. App.) 187 S. W. 336.

Requested instruction on circumstantial evidence was properly refused, although victim did not herself testify, where there was res gestæ testimony of condition and complaint of the victim; this being positive testimony. Marion v. State (Cr. App.) 190 S. W. 499.

Where there was an admission that defendant received stolen property knowing it to have been stolen, but the proof of the theft was solely circumstantial, it was error not to give a charge on circumstantial evidence. Bloch v. State (Cr. App.) 193 S. W. 303.

In prosecution for murder, where there was no evidence that defendant actually took part in the homicide, and where the evidence, if any, that he aided or abetted the person committing homicide was wholly circumstantial, the law of circumstantial evidence should be submitted. Pizana v. State (Cr. App.) 193 S. W. 671.

38. —— **Admissions and confessions by accused.**—Where defendant admits that he did the act which constitutes the factum probandum, whatever be the offense charged, it is unnecessary to charge on circumstantial evidence. Sullenger v. State (Cr. App.) 182 S. W. 1140.

Where witness testifies that accused admitted to him his guilt of larceny, refusal of charge on circumstantial evidence is not erroneous. Villareal v. State (Cr. App.) 189 S. W. 156.

42. —— **Intent.**—In a prosecution for cattle theft, where the taking of a cow by defendant was shown directly, but circumstantial evidence was introduced to show the intent with which the taking was committed, a charge on circumstantial evidence was not required. Sullenger v. State (Cr. App.) 182 S. W. 1140.

43. —— **Identity of accused.**—Where the defendant was identified by a witness, who stated that she recognized him as the man who made the entry into the house, that a light was burning, and that she recognized him, it was not error to fail to charge on circumstantial evidence. Wilson v. State (Cr. App.) 182 S. W. 891.

51. **Principals and accessories.**—In a prosecution for homicide, a charge on the question of principals held erroneous under the circumstances. Taylor v. State (Cr. App.) 179 S. W. 113.

Instruction in prosecution for cattle theft held sufficient on the distinction between principal and accomplice, and the necessity of acquittal if accused was the latter. McAninch v. State (Cr. App.) 179 S. W. 719.

Where the evidence in a prosecution for homicide showed that defendant and another acted together, agreed to go to decedent's place of business, to kill him, and did so for the purpose of robbery, a charge on the law of principals was proper. Sampson v. State (Cr. App.) 181 S. W. 193.

In a prosecution for burglary of a saloon, where defendant testified that he was called into the place to have a drink by parties, engaged in committing the crime, and that he left as soon as he understood the true condition of affairs, he had the right to have presented to the jury the law, applicable to his defense, that he was not guilty as a principal, unless he aided in the commission of the crime. McPherson v. State (Cr. App.) 182 S. W. 1114.

Evidence in a prosecution for assault with intent to murder justified a charge on principals, but the given charge held erroneous. Hoecker v. State (Cr. App.) 183 S. W. 141.

Under Pen. Code arts. 74, 75, 78, declaring the law of principals, when the evidence shows any one of the conditions named, the court must charge and apply the law of principals. Lake v. State (Cr. App.) 184 S. W. 213.

In a prosecution for arson, in view of evidence, inclusion, in charge on principals, of words "whether in point of fact all were actually bodily present or not," held not erroneous. Arensman v. State (Cr. App.) 187 S. W. 471.

In a trial for horse theft, where no one saw who took the stock, and defendant offers no explanation, it was held proper to charge law of principals. Lusport v. State (Cr. App.) 190 S. W. 151.

In an instruction defining who are principals, the court should only quote that part of the statute relating to principals, omitting the part not applicable to principals. Sapp v. State (Cr. App.) 190 S. W. 489.

Where the state's evidence tended to show that one defendant held the deceased while the other defendant shot him, it is proper to charge the law of principals as to the first defendant. Bell v. State (Cr. App.) 190 S. W. 732.

Whether there was a conspiracy depending on the deduction to be drawn from circumstances, the court having submitted for the state the law of principals on the theory of conspiracy, in case of homicide committed by another than defendant, he was entitled to an instruction presenting the converse proposition. Holland v. State (Cr. App.) 192 S. W. 1070.

56. Grade or degree of offense—Manslaughter.—Refusal to charge on manslaughter is proper; the evidence raising only the issues of murder and self-defense. Jones v. State (Cr. App.) 183 S. W. 141.

In manslaughter and murder trial, charge on question of accused approaching deceased to provoke assault held defective for failure to state what offense accused would be guilty of, or what verdict should be if issue was resolved in accused's favor. Mason v. State (Cr. App.) 183 S. W. 1153.

59. —— Assault with intent to kill.—Evidence held to justify a charge on assault with intent to murder. Hoecker v. State (Cr. App.) 183 S. W. 141.

60. —— Aggravated assault.—On evidence in a trial resulting in conviction of assault to murder, held, that there was no error in refusing to submit the issue of aggravated assault. Schultz v. State (Cr. App.) 182 S. W. 316.

In a prosecution for assault to murder, the refusal of special charges presenting the issue, raised by defendant's evidence, that if he fired without intent to kill he was guilty of no higher offense than aggravated assault, held error. Hernandez v. State (Cr. App.) 182 S. W. 494.

Evidence held to justify a charge on aggravated assault. Hoecker v. State (Cr. App.) 183 S. W. 141.

65. Self-defense.—In a prosecution for homicide, held, that a charge on self-defense should have been given. Taylor v. State (Cr. App.) 179 S. W. 113.

In a prosecution for manslaughter, instruction held erroneous as improperly presenting issue of self-defense. Welborn v. State (Cr. App.) 179 S. W. 1179.

Instructions, in a prosecution for murder, held to sufficiently present the issue of self-defense. Jackson v. State (Cr. App.) 180 S. W. 260.

In murder trial, it is not error to submit affirmatively the state's theory of claim of self-defense, where defendant's theory of self-defense is also fully charged. Neyland v. State (Cr. App.) 187 S. W. 196.

66. —— Provoking difficulty.—In a prosecution for homicide, evidence held to raise the issue as to whether accused provoked the difficulty so that a charge on self-defense properly submitted the question whether accused provoked the difficulty. Atkison v. State (Cr. App.) 182 S. W. 1099.

Charges on self-defense and provoking affray held defective as saying "calculated to" instead of "did" provoke, and for failure to assert right to self-defense, though accused armed himself for the meeting. Mason v. State (Cr. App.) 183 S. W. 1153.

Where the question of provoking a difficulty is in the case and forms an issue, defendant is entitled to an affirmative charge, presenting the counter proposition to that given for the state. Kilpatrick v. State (Cr. App.) 189 S. W. 267.

67. —— Threats.—Where the evidence in a trial for murder raised the issue of self-defense based on threats, the refusal to submit it was error. Vollintine v. State (Cr. App.) 179 S. W. 108.

69. —— Attack, and danger of injury or bodily harm, or apprehension thereof.—An instruction to consider the relative strength and size of deceased and accused, who claims self-defense, is not error, though evidence upon their relative size is meager. Ward v. State (Cr. App.) 180 S. W. 239.

The defendant testifying to having killed in self-defense, the charge held to aptly state the law applicable to the evidence and to be sufficiently full as to apparent danger. Duhig v. State (Cr. App.) 180 S. W. 252.

In a prosecution on a charge of being an accomplice to a murder where the fact showed that the principal pursued, and deceased brought on the difficulty, the issue of self-defense should be presented. Gerard v. State (Cr. App.) 181 S. W. 737.

No issue arises on right of defendant if it appeared to him that deceased was about to inflict on him serious bodily harm where he shot after deceased threw away his pistol and called to him not to shoot, and a given instruction in homicide held not to intimate that, if defendant was resisting arrest, the officer would have the right to kill him. Bader v. State (Cr. App.) 183 S. W. 146.

In a prosecution for murder, a charge on the subject of self-defense that there must be evidence of some act manifesting an intention to execute the threats mentioned, but omitting the words, "or that it so reasonably appeared to the defendant at the time," was erroneous. Carter v. State (Cr. App.) 183 S. W. 881.

70. —— **Force used.**—The issue of using greater force than necessary to effectuate an arrest held not raised where defendant drove back one of the officers, and at once shot the other officer when overtaken by him. Bader v. State (Cr. App.) 183 S. W. 146.

72. —— **Retreat.**—Failure to charge on law of retreat as applied to defendant peace officer and two brothers who were being attacked by deceased when the officer came up, the question being inapplicable to any theory of the case, held not erroneous. Moser v. State (Cr. App.) 179 S. W. 104.

73. **Defense of another.**—Upon evidence under indictment for assault with intent to murder, a charge on assault to murder and aggravated assault, not stating that defendant had a right to defend not only himself, but the one whom the complaining witness had first assaulted, nor stating that if he interfered to separate the party assaulted and another, he would be guilty of no offense, held erroneous, and defendant was entitled to his requested charges on his right of self-defense while interfering to prevent the assaulted party from attacking another. Hoecker v. State (Cr. App.) 183 S. W. 141.

75. **Manner of arriving at verdict.**—Conduct of jury in prosecution for theft, in determining term of imprisonment by totaling the amount desired by all and dividing by their number, the result not being followed ultimately, but a different term of imprisonment being agreed upon, held to present no error. Luna v. State (Cr. App.) 179 S. W. 1152.

In a prosecution for felony, it was not error for the court to inform the jury, after they had been deliberating, that it would be necessary for him to go to his home, and to urge them to continue their deliberations and arrive at a verdict. Tyrone v. State (Cr. App.) 180 S. W. 125.

77. **Time for giving instructions.**—Reading charge before argument held not mandatory in misdemeanor cases. Robison v. State (Cr. App.) 179 S. W. 1157.

79. **Form and language in general.**—An instruction that accused was justified in killing deceased if he asked for a knife and said he would kill accused, or made either statement, is not error, since the coupling of the statements is cured by the alternative clause. Wilson v. State (Cr. App.) 187 S. W. 207.

In a prosecution for arson, where the court told the jury under what circumstances they could consider defendant's wife's statements in his absence tending to show by them a common design, purpose, or intent to burn "said stock of millinery," he should have said "said building." Arensman v. State (Cr. App.) 187 S. W. 471.

80. —— **Inadvertent errors or omissions.**—In a prosecution for murder, the insertion of the word "not" before the word "presumed," in a charge otherwise correct under the statute relating to the presumption of intent from the use of a deadly weapon was error. Carter v. State (Cr. App.) 183 S. W. 881.

In prosecution for arson by burning a building for the insurance, charge that jury could consider defendant's wife's statements in his absence tending to show common design, purpose, or intent to burn "said stock of millinery," when he should have said "said building," was not misleading where the court charged, when the testimony was admitted, that the jury could only thus consider it. Arensman v. State (Cr. App.) 187 S. W. 471.

81. **Repetition.**—In a prosecution for murder, the court having, in the main charge, fully presented the proposition that if defendant killed deceased, not for his own protection, or because of a reasonable apprehension of harm to himself, he could not rely on self-defense, it was error to unduly emphasize that phase of the case by again charging thereon. Carter v. State (Cr. App.) 183 S. W. 881.

After instructing that, to convict, the jury must find beyond a reasonable doubt that the house was entered by force in the nighttime, it is not error in instruction precluding conviction on uncorroborated confession to fail to reiterate such charge. Miller v. State (Cr. App.) 189 S. W. 259.

81½. **Undue prominence.**—It cannot be said that the court gave undue prominence to the issue of provoking the difficulty, where he presented it but once. Bergin v. State (Cr. App.) 188 S. W. 423.

84. **Inconsistent or contradictory instructions.**—Objection that charge in prosecution for carrying pistol was contradictory cannot prevail, when charge, as a whole, was clear and could not mislead jury. Davis v. State (Cr. App.) 179 S. W. 702.

The general charge, and one given at defendant's request on self-defense, as to real and apparent danger, held not conflicting. Clay v. State (Cr. App.) 180 S. W. 277.

In a prosecution for betting a special charge defining a wager held not in conflict with a definition in the main charge, but merely supplementary thereto. Ellis v. State (Cr. App.) 189 S. W. 1074.

87. **Examination of charge by counsel and objections thereto.**—See Johnson v. State (Cr. App.) 193 S. W. 674.

This article, being in relation solely to procedure, held to apply to a trial subsequent to its enactment, though the offense was committed prior thereto. James v. State, 72 Cr. R. 457, 163 S. W. 61.

Although the homicide, for which accused was tried, was committed before the act of April 15, 1913 (Acts 33d Leg. c. 138), which changed the procedure in homicide cases by amending this article and arts. 737, 737a, and 743, became effective, such changes in procedure must be followed where the trial was not had until after the statute went into effect. Ybarra v. State, 73 Cr. R. 70, 164 S. W. 10.

This article, which went into effect July 1, 1913, applies to all criminal prosecutions thereafter, and complaints to the charge made for the first time in the motion for new trial cannot be considered. Manning v. State, 73 Cr. R. 72, 164 S. W. 11.

Statutory provision as to objections to charge and failure to charge held one the Legislature had a right to enact, and one which the courts can neither ignore nor emasculate. Vinson v. State (Cr. App.) 179 S. W. 574.

Objection to a charge that it did not directly submit the issues raised by the evidence, and did not instruct on certain subjects, held not to point out specific errors, as required by statute. McDonald v. State (Cr. App.) 179 S. W. 880.

Where defendant failed to except to the charge in a misdemeanor trial he could not raise objection on motion for new trial. Robison v. State (Cr. App.) 179 S. W. 1157.

Where exceptions are taken to the court's charge before it is read to the jury, the record must show such exceptions in order for them to be taken advantage of on appeal. Salter v. State (Cr. App.) 180 S. W. 691.

An objection to an instruction made after the trial was too late under the very terms of the statute. Walker v. State (Cr. App.) 181 S. W. 191.

The objection to the court's charge first made in the motion for new trial is too late, unless it relates to fundamental error. Sampson v. State (Cr. App.) 181 S. W. 193.

Complaint of the charge must be made before it is read to the jury. McPherson v. State (Cr. App.) 182 S. W. 1114.

Unless contrary to the law and the facts, a charge, though erroneous, will not be treated as fundamental error unless exception is taken on the trial and before charge is read to the jury, either in felony or misdemeanor cases. Debth v. State (Cr. App.) 187 S. W. 341.

Objections to the charge should be made before reading to the jury; it being too late to do so after trial. Arensman v. State (Cr. App.) 187 S. W. 471.

Accused or his counsel may waive right to examine the charge before it is given to the jury. Freeman v. State (Cr. App.) 188 S. W. 425.

Under the statute exceptions must be taken to charge before it is read to jury and before argument, unless there is fundamental error; so that, where exceptions were first raised in motion for new trial, and in absence of fundamental error, conviction would not be reversed, and there is no exception in favor of accused who is not represented by counsel. Childs v. State (Cr. App.) 193 S. W. 664.

Under this article, where case was tried by state and defendant on theory that issue of provoking difficulty was raised, and court exhibited charge submitting issue to defendant's counsel before it was read to jury, and charge was not complained of, propriety of charge will not be reviewed. Holder v. State (Cr. App.) 194 S. W. 162.

Under this article, where court submitted charge, and defendant made no objection because of omission of expression "beyond a reasonable doubt," in paragraph submitting the case, defendant could not object on appeal. Furr v. State (Cr. App.) 194 S. W. 395. See, also, notes under art. 743.

II. DISCUSSION OF FACTS, WEIGHT OF EVIDENCE, AND SUMMING UP TESTIMONY

89. Weight of evidence in general.—Where the court correctly charged that no conviction could be had unless the body or portions of it were found and identified, a qualification that deceased's absence could not be considered is properly refused as on the weight of the evidence. Wilganowski v. State (Cr. App.) 180 S. W. 692.

A charge clearly upon the weight of the evidence was properly refused. Berry v. State (Cr. App.) 188 S. W. 997.

In prosecution for selling intoxicating liquor in prohibition territory, instruction held erroneous as on the weight of testimony. Cogburn v. State (Cr. App.) 189 S. W. 158.

In a prosecution for making wagers, a charge that matching money determining which of the persons shall pay for thing is a bet or wager, provided said thing is of value, held not erroneous as on weight of evidence. Ellis v. State (Cr. App.) 189 S. W. 1074.

In a prosecution under Pen. Code, art. 500, held, that an instruction was properly refused as on the weight of the testimony. Speers v. State (Cr. App.) 190 S. W. 164.

93. Opinion or belief as to facts.—An instruction that appellant "stands charged by indictment with the offense of the murder of S. G., alleged to have been committed by him," does not suggest to the jury the opinion of the court that the defendant was guilty. Munoz v. State (Cr. App.) 179 S. W. 566.

98. Assumption as to facts.—In prosecution for being an accomplice to murder, where declarations of alleged principal after the killing and the conspiracy were inadmissible against accomplice, charge that alleged principal was an accomplice held erroneous, as assuming crucial point in case against defendant. Sarli v. State (Cr. App.) 189 S. W. 149.

124. Purpose and effect of evidence—Evidence of other acts or offenses.—In prosecution for riding on railroad pass of another, charge, that jury should not consider testimony tending to show defendant rode on pass on other trips and dates, was on weight of testimony. Leach v. State (Cr. App.) 189 S. W. 733.

130. Credibility of witnesses.—It is not error to refuse a requested charge that the jury should consider, as to his credibility, that a witness was charged with murder; such a charge being on the weight of evidence. Moore v. State (Cr. App.) 180 S. W. 677.

134. **Corroboration of witness.**—Refusal of an instruction as to insufficiency of certain corroborative testimony in prosecution for perjury held not error, where there was other corroborative evidence introduced. Reed v. State (Cr. App.) 183 S. W. 1168.

III. CONSTRUCTION AND OPERATION OF CHARGE

154. **Construction and effect of charge as a whole.**—There being evidence that accused, while armed, stopped an automobile, in which deceased was riding, in order to kill deceased if such act were resented, an instruction as to want of justification in case these facts were found, held proper in connection with other portions of the charge. Bush v. State (Cr. App.) 189 S. W. 158.

When any part of the charge is attacked, the whole charge must be looked to, and if no injury is shown thereby there is no error. Bell v. State (Cr. App.) 190 S. W. 732; Arensman v. State (Cr. App.) 187 S. W. 471; Berry v. State (Cr. App.) 188 S. W. 997.

155. **Correction of instructions, and error in instructions cured by other instructions given.**—The charge, "If you believe from the evidence beyond a reasonable doubt that defendant with a deadly weapon assaulted deceased," is not objectionable as implying that the knife used was a deadly weapon, in view of further instruction that, unless the knife used was a deadly weapon, accused was guilty of no graver offense than manslaughter. Bergin v. State (Cr. App.) 188 S. W. 423.

A paragraph in a charge requiring the jury to find beyond a reasonable doubt that accused did by force "violently ravish," etc., prosecutrix, was not objectionable as not requiring the jury to believe that prosecutrix used her utmost endeavor to prevent the act, where "force" was defined in two paragraphs of the charge. Wood v. State (Cr. App.) 189 S. W. 474.

Though court inadvertently omitted expression "beyond a reasonable doubt" from a paragraph of his charge submitting the case, where, in another paragraph, he charged as to reasonable doubt, and applied it to the whole case, that was sufficient. Furr v. State (Cr. App.) 194 S. W. 395.

Art. 737. [717] Either party may ask written instructions.

1. **In general.**—Under this article and art. 743, in misdemeanor cases, only way appellate court is authorized to consider complaints of charge of court and giving and refusal of charges requested is by bill of exceptions taken at time giving reasons why court erred, and it is essential even in a felony case to give a reason or statement why a requested charge should be given. Wilson v. State (Cr. App.) 189 S. W. 1071.

2. **Application of amendatory act.**—Although the homicide, for which accused was tried, was committed before the act of April 15, 1913 (Acts 33d Leg. c. 138), which changed the procedure in homicide cases by amending this article and arts. 735, 737a, and 743, became effective, such changes in procedure must be followed where the trial was not had until after the statute went into effect. Ybarra v. State, 73 Cr. R. 70, 164 S. W. 10.

3. **Necessity for request.**—Under Pen. Code, arts. 15, 17, as to change in penalty after commission of offense, held, there was no error in charging, as the penalty, for murder in the first degree, the penalty for murder under the new statute, absent request to the contrary. Gibbs v. State (Cr. App.) 180 S. W. 612.

9. —— **Request unnecessary.**—Error in statement of prosecuting attorney where statement would be inadmissible in evidence and is damaging is not waived by failure to request a special charge. Wilson v. State (Cr. App.) 194 S. W. 828.

11. **Time for request.**—Written charges in prosecution, submitted after close of argument, held properly refused. O'Toole v. State (Cr. App.) 183 S. W. 1160.

Where it does not appear that requested instructions were presented to judge at the time required by statute, they will not be reviewed. Pearson v. State (Cr. App.) 187 S. W. 336.

Under this article and arts. 735, 737a, and 743, a bill of exceptions to the refusal of a requested charge cannot be considered where neither the bill nor the record showed that the request was presented to the judge before the charge was read to the jury. Johnson v. State (Cr. App.) 193 S. W. 674.

13. **Erroneous requests.**—In a homicide case, where defendant applied for suspension of sentence and put his reputation as a moral, as well as a peaceable, man in issue by direct questions to his witnesses, the refusal to charge not to consider cross-examination, on the issue of defendant's moral character was not erroneous. Duhig v. State (Cr. App.) 180 S. W. 252.

Refusal of a requested charge which did not state a correct legal proposition applicable to the testimony, was not error. Berry v. State (Cr. App.) 188 S. W. 997.

14. —— **Applicability to evidence.**—The testimony raising the issue of defendant with two others being guilty of the offense, his requested instructions, that the evidence must show that he and no one else committed the offense, were improper. Casey v. State (Cr. App.) 180 S. W. 233.

A charge without the evidence to sustain it is properly refused. Duhig v. State (Cr. App.) 180 S. W. 252.

The refusal of a charge that a confession could not be considered if not voluntarily made held not error, where testimony that it was free and voluntary was uncontradicted. Wilganowski v. State (Cr. App.) 180 S. W. 692.

18. **Repetition of charge.**—Refusal of special charges requested by accused is not error, where they are covered by instructions given. Wood v. State (Cr. App.) 189 S.

W. 474; Davis v. State (Cr. App.) 179 S. W. 702; Edwards v. State (Cr. App.) 179 S. W. 1163; Durley v. State (Cr. App.) 179 S. W. 1170; Duhig v. State (Cr. App.) 180 S. W. 252; Beesing v. State (Cr. App.) 180 S. W. 256; Young v. State (Cr. App.) 181 S. W. 472; Williams v. State (Cr. App.) 182 S. W. 327; Mikeska v. State (Cr. App.) 182 S. W. 1127; Hare v. State (Cr. App.) 185 S. W. 47; Hutspeth v. State (Cr. App.) 187 S. W. 340; Arensman v. State (Cr. App.) 187 S. W. 471; Bush v. State (Cr. App.) 189 S. W. 158; Cozby v. State (Cr. App.) 189 S. W. 957.

Defendant's requested charges, if covered by the court's main charge or by others given at defendant's request, are properly refused. Sorrell v. State (Cr. App.) 186 S. W. 336; Engman v. State (Cr. App.) 180 S. W. 235; Waggoner v. State (Cr. App.) 190 S. W. 493.

On a trial for theft, a requested instruction as to defendant's possession of the stolen property and his explanation held sufficiently presented by instructions given. Whitfield v. State (Cr. App.) 179 S. W. 558.

Where in a prosecution for murder the court's charge embraced every proper question of self-defense, instructions on the same question requested by the defendant were properly refused. Thompson v. State (Cr. App.) 179 S. W. 561.

In prosecution for larceny, held, in view of the charge as to defendant's explanation of his possession of the property, that it was unnecessary to give requested special charges on that issue. Rice v. State (Cr. App.) 179 S. W. 876.

Defendant's requested instructions held repetition of those already given, so that their refusal was not error. Jackson v. State (Cr. App.) 180 S. W. 260.

The court's charge in larceny held to sufficiently present the question of venue, as to place of original taking, so that defendant's requested instructions need not be given. Witten v. State (Cr. App.) 180 S. W. 671.

In a prosecution for homicide, the refusal of an instruction on the law of conspiracy held not erroneous; the court adequately presenting all issues under charges including a charge on the law of principals. Salter v. State (Cr. App.) 180 S. W. 691.

Where the court charged that, if accused was insane at the time of the killing, he should be acquitted, the refusal of a special request that, if accused's drinking habits produced insanity, the jury should acquit, was not error. Burgess v. State (Cr. App.) 181 S. W. 465.

Where the court gave an adequate instruction on self-defense, the refusal of requested charges on that issue is not error. Atkison v. State (Cr. App.) 182 S. W. 1099.

Where the court's charge and a special charge of defendant fully and completely presented the issue of insanity as made by the testimony, the refusal of other special charges on the issue was proper. Mikeska v. State (Cr. App.) 182 S. W. 1127.

In a prosecution for cattle theft, where the court properly submitted the defense of defendant's claimed purchase of the cow from a third party, the refusal of the specific charge that, if defendant bought the cow, to acquit him was proper. Sullenger v. State (Cr. App.) 182 S. W. 1140.

In a prosecution for seduction where the court fully instructed on the presumption of innocence, reasonable doubt, and accomplice testimony, it was not necessary to give the special charges requested on those issues. Gleason v. State (Cr. App.) 183 S. W. 891.

In prosecution for violating local option law, refusal of charge on burden of proof being on state throughout, and jury's duty to acquit if they have reasonable doubt of defendant's guilt, held not erroneous, in view of other charge substantially to same effect. Stephens v. State (Cr. App.) 188 S. W. 976.

Where the court's charge in a prosecution for an unlawful sale of liquor in prohibition territory fully covered the subject of defendant's agency for his father, the refusal of defendant's special charges thereon was not error. Martin v. State (Cr. App.) 189 S. W. 264.

Where the court's charge on presumption of innocence and burden of proof was in accordance with the statutory provisions, there was no necessity to give a requested special charge. Wood v. State (Cr. App.) 189 S. W. 474.

In a prosecution for assaulting a police officer with intent to kill, where the court properly submitted the issue of self-defense without a limiting charge on the issue of provocation, it was not error to refuse an instruction that defendant, after being arrested by such officer without warrant, had a right to arm himself and seek such officer to demand an explanation. Crippen v. State (Cr. App.) 189 S. W. 496.

Instructions defining self-defense, and stating the conditions under which one would be justified in killing in self-defense, held to properly present the issue of self-defense, and warrant refusal of special charges which it substantially covered; for where the court does not limit defendant's right of self-defense by a charge on provoking the difficulty, or otherwise, but gives him the perfect right of self-defense on every defensive theory, it is not error to refuse to charge on his right to arm himself and seek an explanation. Marshall v. State (Cr. App.) 189 S. W. 499.

The accused cannot complain of refusal of a requested instruction, when the court gave a similar instruction which omitted only one word, but did not change the effect of that requested. Lunsford v. State (Cr. App.) 190 S. W. 157.

In prosecution for assault to murder an officer, requested charge on defendant's right to resist held properly refused; other charges fully informing jury as to defendant's right to resist. Kelley v. State (Cr. App.) 190 S. W. 169.

In prosecution for illegally selling intoxicants, charge at defendant's request held to embrace issue that, if defendant ordered whisky, and prosecuting witness paid him $5 on order, defendant was not guilty, so that another charge on issue was properly refused. Waggoner v. State (Cr. App.) 190 S. W. 493.

Where the court submitted self-defense fully, but did not limit the defense by reference to provoking difficulty, and there was no objection to the charge, it was not error

to refuse special charge that accused had a right to carry his razor with him to deceased's wagon. Ray v. State (Cr. App.) 190 S. W. 1111.

In trial for unlawfully carrying a bowie knife, a specific charge on accused's right to carry the knife on premises rented by him held improperly refused; the charge given not being sufficient. Mireles v. State (Cr. App.) 192 S. W. 241.

In prosecution for theft by a bailee, a general charge to acquit if the transaction was a sale, rendered unnecessary the giving of requested special charges on the same issue. Lee v. State (Cr. App.) 193 S. W. 313.

In prosecution for theft of automobile, failure of charge to inform jury that, if defendant bought it, which was his account of his possession, or if they had reasonable doubt of it they should acquit, was not error, where the court in an approved charge submitted his reasonable account and explanation of his possession. Childs v. State (Cr. App.) 193 S. W. 664.

In prosecution for abandonment after seduction and marriage, court was not in error in failing to charge separately that it was necessary to corroborate prosecutrix as to promise of marriage. Furr v. State (Cr. App.) 194 S. W. 395.

19. Repetition of special requests already given.—Where question as to whether alleged stolen cow was taken by mistake was submitted in charge requested by defendant, refusal of other charges on the subject held not error. Walker v. State (Cr. App.) 181 S. W. 191.

Under rule requiring court to avoid repetition in charge, it was not error to refuse to give more than one of three requested charges on the same issue. McBride v. State (Cr. App.) 194 S. W. 825.

20. Argument of counsel.—Where defendant did not think the court's instruction given on sustaining his objection to the prosecutor's argument was sufficient, but did not request further instruction in writing, no error was presented. Ingram v. State (Cr. App.) 182 S. W. 290.

Art. 737a. Correction of charge after objections thereto; no further charge after argument begins, except, etc.; review.

See Johnson v. State (Cr. App.) 193 S. W. 674.

Presumption on appeal.—Where the court's original charge was delivered to defendant's attorneys for examination, and court made some corrections to conform to objections made, there being nothing in the record to contrary, it will be assumed that the court complied with statute and resubmitted the charge to defendant's attorneys after making corrections. Ferguson v. State (Cr. App.) 187 S. W. 476.

Time for reading.—Reading charge before argument held not mandatory in misdemeanor cases. Robison v. State (Cr. App.) 179 S. W. 1157.

Art. 739. [719] No charge in misdemeanor, except, etc.

Cited, O'Toole v. State (Cr. App.) 183 S. W. 1160.

Necessity of request to raise question on appeal.—In a misdemeanor case in a county court, accused, if desirous of presenting an error in charge given, must seasonably object, preserve his objections by bill of exceptions, and request in writing a correct charge covering the error or omissions. Teem v. State (Cr. App.) 183 S. W. 1144.

Art. 740. [720] No verbal charge, except, etc.

Argument of counsel.—A verbal charge to disregard a portion of argument of county attorney objected to is violative of this article. Pecht v. State (Cr. App.) 192 S. W. 243.

Presumption on appeal.—When a party is only charged with and convicted of a misdemeanor and no instructions appear in the record, it will be presumed that a verbal charge was given by consent, or that no charge was given, and, if the former, that it was correct. Wagner v. State (Cr. App.) 188 S. W. 1001.

Art. 743. [723] Judgment not to be reversed unless error prejudicial, etc.

II. HARMLESS ERROR

(A) Instructions Given

5. In general.—In a prosecution for forgery in inducing making of a false note, error in using the word "possibly" in an instruction which told the jury that it need not be proved the forgery was intended to or did injury to any persons, but it is sufficient that "possibly" some one might be injured, was harmless. Ferguson v. State (Cr. App.) 187 S. W. 476.

Where accused objected to testimony of a woman, claiming she was his wife, and the preponderance of evidence showed she was not, submission to jury of question of her wifehood, with instruction to disregard her testimony, if the jury had reasonable doubt of her nonmarriage, was not prejudicial to accused. Johnson v. State (Cr. App.) 188 S. W. 995.

8. Invited error.—Defendant cannot complain of charge given at his request, even though erroneous. Debth v. State (Cr. App.) 187 S. W. 341.

Accused cannot complain of instructions literally following the special charge requested by him. Bell v. State (Cr. App.) 190 S. W. 732.

Defendant could not, on appeal, complain of an instruction on self-defense given at his request, even though it was erroneous. McBride v. State (Cr. App.) 194 S. W. 825.

19. **Errors harmless under the evidence.**—Where all the evidence showed that the sale, violating the prohibition law, was within less than two years prior to the return of the indictment, the court's error in authorizing a conviction for a sale before the two years was harmless. Sloan v. State (Cr. App.) 179 S. W. 111.

In a prosecution for larceny, committed by accused and another, an instruction on principals which authorized a conviction as a principal, though accused was not present or performing any act to carry out the design, is harmless, where the evidence showed accused's actual presence. Gilbert v. State (Cr. App.) 186 S. W. 324.

20. **Error favorable to accused.**—In a criminal prosecution, defendant cannot complain of an instruction in his favor. Lowery v. State (Cr. App.) 185 S. W. 7.

21. —— **Unnecessary instructions.**—Although there is evidence supporting a charge of murder, but no evidence of negligent homicide, an instruction submitting that issue is not reversible error, since it is more favorable to the defendant than the evidence justifies. Crowder v. State (Cr. App.) 180 S. W. 706.

An instruction, that where a person making an instrument in writing acts under what he believes, or has reason to believe, is sufficient authority is not guilty, although not called for by the testimony, was harmless error, since it was favorable to defendant. Ferguson v. State (Cr. App.) 187 S. W. 476.

29. **Effect of verdict.**—In a prosecution for forgery in inducing making of a false note and passing it, where defendant was not convicted of passing instrument, an instruction as to passing a forged instrument was harmless. Ferguson v. State (Cr. App.) 187 S. W. 476.

30. —— **Conviction of lesser offense.**—An exception as to a charge of murder will not be considered where defendant was acquitted of murder and convicted of manslaughter. Cook v. State (Cr. App.) 180 S. W. 254; Atkison v. State (Cr. App.) 182 S. W. 1099; Bergin v. State (Cr. App.) 188 S. W. 423.

On appeal from conviction of manslaughter where accused received lowest penalty, error in charging on murder was harmless, and where no error in charging on manslaughter is pointed out which could have tended to bring about conviction, other errors in charge will not be considered. Neyland v. State (Cr. App.) 187 S. W. 196.

Though a charge on express and implied malice might not be correct, it was nonprejudicial, where the jury convicted of manslaughter, taking malice from the case. Freeman v. State (Cr. App.) 188 S. W. 425.

31. —— **Punishment.**—Where jury assessed lowest punishment for manslaughter, charge on murder and manslaughter held, in view of the verdict not so general as to mislead jury. Lockett v. State (Cr. App.) 179 S. W. 716.

Error if any, in the court's charge on the suspended sentence law was harmless, in view of jury's assessment of penalty of 10 years in the penitentiary, where they could not on assessing that penalty have recommended a suspension of sentence. Scott v. State (Cr. App.) 185 S. W. 994.

(B) Failure or Refusal to Give Instructions

44. **In general.**—In trial for murder, instruction on manslaughter that, if defendant believed that deceased had improper relations with his wife, it would be adequate cause, was sufficient, and failure to further instruct that his belief of such relations would be real to him whether such relations existed or not, was not reversible error. Vollintine v. State (Cr. App.) 179 S. W. 108.

Where accused was convicted only of manslaughter, the refusal of charges directing that under given circumstances accused could not be convicted of murder as well as charges submitting more than one theory of manslaughter was harmless. Atkison v. State (Cr. App.) 182 S. W. 1099.

Refusal to instruct that accused had a right to visit the place of the murder is not prejudicial, where the right was not disputed at the trial. Baker v. State (Cr. App.) 187 S. W. 949.

The erroneous refusal of instructions on the issue of assault with intent to kill, will not be reviewed, where conviction was for offense of aggravated assault. Crippen v. State (Cr. App.) 189 S. W. 496.

The question of correctness of court's refusal to instruct as to matters pertaining to a charge of assault to murder passes out on accused's acquittal of such offense. Porter v. State (Cr. App.) 190 S. W. 159.

III. OBJECTIONS AND EXCEPTIONS

(B) Decisions Under Act of 1897

53. **Motion for new trial.**—Under the statute providing that unless a charge is excepted to when given or on motion for new trial, it is not ground for reversal, error in a charge not assigned in motion for new trial will not be considered on appeal. Martin v. State (Cr. App.) 189 S. W. 264.

(C) Decisions Under Act of 1913

61. **Applicability of act.**—Although the homicide, for which accused was tried, was committed before the act of April 15, 1913 (Acts 33d Leg. c. 138), which changed the procedure in homicide cases by amending this article and arts. 735, 737, 737a, became effective, such changes in procedure must be followed where the trial was not had until after the statute went into effect. Ybarra v. State, 73 Cr. R. 70, 164 S. W. 10.

62. **Objections and exceptions.**—In absence of bills of exception, complaints as to charge, and requests for special charges, the only question on appeal from a conviction of crime was the sufficiency of the evidence. Looper v. State (Cr. App.) 179 S. W. 110.

Statutory provision as to objections to charge and failure to charge held one the Legislature had a right to enact, and one which the courts can neither ignore nor emasculate, and under this article defendant, in the absence of objection or request for special charge, cannot complain of court's failure to charge as to contention not made at the trial, and all alleged errors must be contained in the motion for a new trial or in the bills of exceptions filed in the trial court, especially in view of rule 101a for district and county courts (159 S. W. xi). Vinson v. State (Cr. App.) 179 S. W. 574.

Where defendant failed to except to the charge in a misdemeanor trial he could not raise objection on motion for new trial. Robison v. State (Cr. App.) 179 S. W. 1157.

Where there were no exceptions preserved on trial to the charges given, errors not of a fundamental nature cannot be reviewed, and exceptions to the refusal of special charges are not equivalent to exceptions to the charge given. Salter v. State (Cr. App.) 180 S. W. 691.

Bills of exception to the overruling of defendant's motion for new trial, and to the refusal to instruct a verdict, setting out no facts, but simply reciting that defendant excepted to the action of the court, presented nothing for review. Rowlett v. State (Cr. App.) 180 S. W. 1078.

Under Pen. Code art. 310, an erroneous instruction as to the minimum penalty for perjury, where the jury assessed the minimum as stated, was fundamental error, and could be first complained of on motion for new trial, in spite of this article. Clayton v. State (Cr. App.) 180 S. W. 1089.

Where no exception was reserved to the charge as given, nor any special charge refused, the question of whether the law as submitted to the jury was applicable to the evidence is not an issue on appeal. Herrera v. State (Cr. App.) 180 S. W. 1097.

Where the charge in a criminal case was not objected to on the trial and before it was read to the jury, as required by the statute, and there were no bills of exception in the record, the sufficiency of the evidence was the only question presented to the Court of Criminal Appeals for review. Tennel v. State (Cr. App.) 181 S. W. 458.

In a misdemeanor case in a county court, which is not required by art. 739 to give any charge, accused, if desirous of presenting an error in charge given, must seasonably object, preserve his objections by bill of exceptions, and request in writing a correct charge covering the error or omissions. Teem v. State (Cr. App.) 183 S. W. 1144.

On appeal from conviction of a misdemeanor, instructions not objected to cannot be reviewed, and where defendant, charged with aggravated assault, failed to object to the submission of the issue of simple assault, he cannot after conviction, raise the question that he could have been convicted only of aggravated assault. Bennett v. State (Cr. App.) 185 S. W. 14.

Exceptions to the court's charge in a criminal case should be verified in some way by the court. White v. State (Cr. App.) 185 S. W. 22.

Where no exception is taken to a charge by the court below, it cannot be considered for the first time on appeal. Rodriques v. State (Cr. App.) 186 S. W. 335.

Under this article and art. 737, in misdemeanor cases, only way appellate court is authorized to consider complaints of charge of court and refusal of charges requested is by bill of exceptions taken at time giving reasons why court erred. Wilson v. State (Cr. App.) 189 S. W. 1071. See, also, notes under art. 735.

63. —— **Requests.**—Where no exceptions were reserved to the court's charge when submitted to defendant's counsel for inspection, the refusal of special charges requested by defendant was proper. Galvan v. State (Cr. App.) 179 S. W. 875.

Error in refusing charges held not shown, where transcript did not show exception to charge and request for submission of special charges before the charge was read. Taylor v. State (Cr. App.) 179 S. W. 1161.

Defendant's bill of exceptions, which fails to show that he presented a refused charge at the proper time, presents no question for review. Moore v. State (Cr. App.) 180 S. W. 677.

Defendant's bills to the refusal to give special charges, merely stating that upon trial he asked them, quoting, and they were refused, to which he excepted and asked approval of the bills, which was done, were insufficient as failing to show the charges were presented to the court before its charge was read to the jury. Cline v. State (Cr. App.) 183 S. W. 1152.

In a misdemeanor case, unless exceptions are reserved to given charges, and other charges requested and exceptions reserved to refusal to give requested charges, appellate court cannot review such charges. Ellis v. State (Cr. App.) 189 S. W. 1074.

Where accused objected to the charge on principals, and the court then stated that he would give the charge requested by accused and withdraw his own charge, but through error withdrew only a part thereof, but his attention was not called to it until the motion for new trial, was no reversible error. Bell v. State (Cr. App.) 190 S. W. 732.

64. **Time for objections and exceptions.**—Where there was no exception to court's instructing jury as to their duties during defendant's absence from room, at the time or until after verdict, held, that there was no error. Simmons v. State (Cr. App.) 186 S. W. 325.

Objections to the court's charge, not made at the time of the trial, are too late. Powell v. State (Cr. App.) 187 S. W. 334.

65. —— **Motion for new trial.**—Exceptions to the charge of the court in a prosecution for the unlawful practice of medicine, made for the first time on a motion for new trial, cannot be considered on appeal of the cause. Young v. State (Cr. App.) 181 S. W. 472.

Court of Criminal Appeals cannot consider objections to instructions assigned after verdict in motion for new trial, unless fundamental error is presented, and it was not fundamental error to fail to submit issue of aggravated assault where but little testimony tended to raise it. Tudyk v. State (Cr. App.) 185 S. W. 568.

Exception to alleged erroneous charge, set up for first time in motion for new trial, is too late. Freeman v. State (Cr. App.) 188 S. W. 425.

Where the first objection to a charge is in accused's motion for new trial, it is not reviewable. Samples v. State (Cr. App.) 190 S. W. 486.

66. Sufficiency of objections and exceptions.—See notes under art. 744.

Art. 744. [724] Bill of exceptions.

1. Rulings which may be made subject of bill of exceptions.—A bill of exceptions to the overruling of a motion for new trial will not be considered on appeal. Sanford v. State (Cr. App.) 185 S. W. 22.

2. Necessity of bill of exceptions.—Without a statement of facts or bill of exceptions, no question is presented for review. Rosboro v. State (Cr. App.) 184 S. W. 197; Wells v. State (Cr. App.) 184 S. W. 509; Rogers v. State (Cr. App.) 184 S. W. 830; Calvert v. State (Cr. App.) 179 S. W. 98; Smith v. State (Cr. App.) 187 S. W. 758; Sparks v. State (Cr. App.) 188 S. W. 981; Martinez v. State (Cr. App.) 190 S. W. 727; Fulps v. State (Cr. App.) 192 S. W. 1063.

Where the record contains no bills of exception, no ruling of the trial court is presented for review. White v. State (Cr. App.) 185 S. W. 22; Burks v. State (Cr. App.) 185 S. W. 2.

Where the record on appeal contains no statement of facts, bill of exceptions, or motion for new trial, no question is presented which can be reviewed. Garza v. State (Cr. App.) 179 S. W. 556.

Contention in motion for new trial that special judge was not a lawyer and could not be legally elected held not to be considered when not verified by bill of exceptions or otherwise. Bennett v. State (Cr. App.) 181 S. W. 197.

Where accused pleaded guilty to violating the local option law and received the lowest punishment, his appeal presents nothing for review, there being no statement of facts or bill of exceptions showing the proceedings at trial. Looper v. State (Cr. App.) 182 S. W. 308.

Where the indictment charges an offense under the law, no questions are reviewable without a statement of facts or a bill of exceptions. Warren v. State (Cr. App.) 182 S. W. 327.

Where no statement of the evidence on the trial accompanies the record, and no bill of exceptions is contained therein, there is nothing in the motion for a new trial which the Court of Criminal Appeals can review. Holt v. State (Cr. App.) 182 S. W. 1119.

Where there was nothing in a motion for new trial that could be considered in the absence of the testimony, and neither a statement of fact nor a bill of exceptions was in the record, there was nothing to review on appeal. Large v. State (Cr. App.) 184 S. W. 197.

Where the record contained no bills of exception or statement of facts, and a transcript of the evidence was not signed by the attorneys nor approved by the trial judge, there was no question presented for review. Case v. State (Cr. App.) 185 S. W. 570.

Where no statement of the evidence heard on trial accompanies the record on appeal from a conviction and it contains no bill of exceptions, the judgment must be affirmed. Glover v. State (Cr. App.) 188 S. W. 1006.

5. —— Denial of continuance.—Denial of continuance is not reviewable where no bill of exceptions was reserved. Moore v. State (Cr. App.) 188 S. W. 978; Smith v. State (Cr. App.) 179 S. W. 1165; Rodriques v. State (Cr. App.) 186 S. W. 335; House v. State (Cr. App.) 189 S. W. 488; Carson v. State (Cr. App.) 190 S. W. 145; Parris v. State (Cr. App.) 194 S. W. 1111.

Denial of continuance and new trial must be presumed correct; there being no statement of facts or bills of exceptions filed in term showing the testimony heard. Jordan v. State (Cr. App.) 182 S. W. 890.

7. —— Rulings and objections respecting jurors.—In a prosecution for rape, evidence as to incompetency of a juror, consisting of an affidavit as to an opinion expressed by the juror, not being preserved by a bill filed in term time, will not be considered on appeal. Simmons v. State (Cr. App.) 186 S. W. 325.

9. —— Rulings respecting indictment, information or complaint.—A record which contained neither a statement of fact nor a bill of exceptions presented nothing for review on appeal, except a motion in arrest of judgment, on the ground that the indictment was fatally defective. Galindo v. State (Cr. App.) 183 S. W. 886.

10. —— Conduct of trial in general.—That the trial court threatened to imprison accused's attorney for contempt does not, where no bill of exceptions to such proceeding was reserved and the proceeding occurred out of the presence of the jury, show error. Sanford v. State (Cr. App.) 185 S. W. 22.

15. —— Rulings on evidence.—The legal presumption is that the ruling of the trial court on an objection to evidence was correct unless the bill of exceptions shows otherwise. Edwards v. State (Cr. App.) 181 S. W. 195; Baxter v. State (Cr. App.) 194 S. W. 1107.

Objections to rulings on testimony cannot be reviewed, in the absence of bill of exceptions. Wagner v. State (Cr. App.) 188 S. W. 1001; Bloch v. State (Cr. App.) 193 S. W. 303.

The court on appeal cannot review the admission of evidence, alleged as grounds for a new trial, to which no exceptions were preserved on the trial below. Munoz v. State (Cr. App.) 179 S. W. 566.

Complaints in the motion for new trial of rulings on evidence, as to which no bills of exceptions appear in the record, cannot be considered on appeal. Rea v. State (Cr. App.) 179 S. W. 706.

In the absence of a proper bill of exceptions, showing that a girl 5 years of age, testifying in a prosecution for rape, did not possess sufficient intellect to relate the transaction, or that she did not understand the obligation of an oath, it would be presumed that she was competent to testify. Tennel v. State (Cr. App.) 181 S. W. 458.

Admission of testimony is not reviewable where there is no bill of exceptions showing that the ruling was excepted to at the trial. Moore v. State (Cr. App.) 188 S. W. 978.

16. —— **Verdict contrary to law and evidence.**—Sufficiency of evidence cannot be reviewed in absence of statement of facts or bill of exceptions. Gragara v. State (Cr. App.) 179 S. W. 1185.

Insufficiency of the evidence, asserted as ground for a new trial, held not reviewable, in the absence of a bill of exceptions or statement of facts. Ridgeway v. State (Cr. App.) 179 S. W. 1185.

On appeal from conviction, where there is no bill of exceptions, and no complaint is made of the charge, the only question presented is whether or not the evidence sustains the conviction. Crockett v. State (Cr. App.) 182 S. W. 1119.

Where there is no statement of facts or bill of exceptions, the court must conclusively presume that the state proved a violation of one or more of the phases of the offense prescribed by Pen. Code, art. 615, under which the prosecution was brought. Armendariz v. State (Cr. App.) 194 S. W. 826.

17. —— **Error relating to instructions.**—Where requested special charges merely appeared copied in record, nothing in them or in connection with them showing at what time they were presented, acted upon, or why they should have been given, and no bill of exceptions was taken to trial court's refusal to give them, court will not review court's action. Ferguson v. State (Cr. App.) 187 S. W. 476.

In the absence of statement of facts and bill of exceptions, it will be presumed that the charge presented the law and all of it applicable to the evidence. Suggs v. State (Cr. App.) 189 S. W. 266.

19. —— **Evidence heard and proceedings had on motion for new trial.**—Questions presented in motion for new trial held not reviewable, in the absence of a statement of facts or bill of exceptions. Davidson v. State (Cr. App.) 188 S. W. 991; Lawson v. State (Cr. App.) 179 S. W. 557; Austin v. State (Cr. App.) 184 S. W. 152; Curry v. State (Cr. App.) 184 S. W. 510.

Where there is neither statement of facts nor bill of exceptions, and the only ground of motion for new trial was that the verdict was contrary to the law and evidence, the ruling thereon cannot be reviewed. Lockhart v. State (Cr. App.) 179 S. W. 556.

Where there was no bill of exceptions or statement of facts or verification of the testimony set out in motion for new trial based on insufficiency of the evidence, held that nothing was presented for review. Besenta v. State (Cr. App.) 179 S. W. 1185.

Bill of exceptions complaining of failure to grant new trial for newly discovered evidence, not including the witnesses' affidavits, which were not attached to the motion and did not appear in the transcript, cannot be reviewed. Duhig v. State (Cr. App.) 180 S. W. 252.

Where the court found against accused's contention of misconduct of the jury hearing evidence, and such evidence was not preserved by a bill of exceptions or statement of facts filed during term time, it will be presumed on appeal that the evidence warranted denial of accused's motion for new trial. Sanford v. State (Cr. App.) 185 S. W. 22.

The Court of Criminal Appeals will presume that the trial court's action, on a motion for a new trial, after hearing evidence which is not set forth by a statement of facts or bill of exceptions, was correct. Humphries v. State (Cr. App.) 186 S. W. 332.

Where motion for new trial was denied five days after judgment, after the court heard evidence, and the record does not contain proper bill or statement of facts filed during term time, the court on appeal must presume that the evidence justified the court's action. Sorrell v. State (Cr. App.) 186 S. W. 336.

The court on appeal will not consider separate grounds in a motion for new trial, when that is the only way exception is taken to the proceedings. Diaz v. State (Cr. App.) 189 S. W. 491.

Error in overruling a motion for new trial based on alleged misconduct of the jury cannot be reviewed where the evidence heard by the court below was not reserved by a bill of exceptions filed during the term at which the case was tried. Bloch v. State (Cr. App.) 193 S. W. 303.

Where the record contains no statement of facts or bill of exceptions, and the matters set out in the motion for new trial cannot be considered in the absence of such statement or bill, the judgment must be affirmed. Lee v. State (Cr. App.) 194 S. W. 137.

Where it appears from order overruling motion for new trial that court heard evidence as to alleged agreement with assistant district attorney regarding suspended sentence, in absence of bill of exceptions and statement of facts, held, that it will be presumed that conclusion of trial court that allegation was not sustained was correct. Nolan v. State (Cr. App.) 194 S. W. 825.

The court cannot, in the absence of bill of exceptions or statement of facts, consider objections, made only in the motion for new trial, to the court's charge and the introduction of some testimony. Armendariz v. State (Cr. App.) 194 S. W. 826.

20. **Substitutes for bill of exceptions.**—Where qualification of bill of exceptions showed that court and counsel disagreed as to sufficiency of preliminary proof to justify admission of impeaching evidence, held that the appellate court could look to the record. Hopkins v. State (Cr. App.) 180 S. W. 1094.

21. **Form, requisites, and sufficiency of bill.**—See Baxter v. State (Cr. App.) 194 S. W. 1107.

Bill of exceptions in prosecution for carrying weapon, held too indefinite and vague to require consideration. Beesing v. State (Cr. App.) 180 S. W. 256.

In criminal prosecution refusal to allow defendant to state defense to the jury held not reversible error, where bill of exceptions failed to disclose what his statement would have been, and whole record discloses no injury to defendant because of such refusal. White v. State (Cr. App.) 181 S. W. 192.

Objection that the justice taking defendant's voluntary statement on his examining trial was not sworn to act as interpreter will not be considered where the bill of exceptions shows that statement was made in English. Rios v. State (Cr. App.) 183 S. W. 151.

A bill of exceptions to overruling by court of a motion for new trial, where motion is on many grounds and none of them stated in bill, will not be considered. Ferguson v. State (Cr. App.) 187 S. W. 476.

25. —— **Denial of continuance or postponement.**—Error cannot be predicated on the refusal of a new trial prayed on account of the absence of witnesses, where the record shows that the court in hearing the motion, heard evidence, but the evidence heard is not disclosed by statement of facts, bill of exceptions, or other proper method. Wood v. State (Cr. App.) 182 S. W. 1122.

Where accused's bill of exceptions shows a motion for a continuance to secure a witness, but does not disclose what he expected to prove by the witness, the bill of exceptions presents no ground for review. Marta v. State (Cr. App.) 193 S. W. 323.

Where motion for continuance was on ground of absence of witnesses by whom accused expected to prove alibi, but neither application nor bill shows whether it was first or second application, matter is not so presented as to be considered, although such testimony was material. Jones v. State (Cr. App.) 194 S. W. 1109.

27. —— **Misconduct of court.**—In a prosecution for burglary, a bill of exception held sufficient to present for review the propriety of a remark of the court that cross-examination of a witness could have been eliminated upon objection by the state, because the testimony was immaterial. McPherson v. State (Cr. App.) 182 S. W. 1114.

Bills of exceptions relating to remarks made by the court to a witness for the defendant on her cross-examination, merely stating that the defendant objected, without stating any ground of objection, were insufficient. Bankston v. State (Cr. App.) 189 S. W. 142.

The bill of exceptions to remark of court that a state's witness was an unwilling witness, and the prosecuting attorney might lead him, failing to show that any testimony was elicited from the witness, is insufficient. Dolezal v. State (Cr. App.) 191 S. W. 1158.

28. —— **Misconduct of prosecuting attorney.**—A bill of exceptions to the conduct of a prosecuting attorney which states only appellant's conclusions, and not facts, does not show reversible error. Tinker v. State (Cr. App.) 179 S. W. 572.

A bill of exceptions, complaining of a remark of the state's attorney, held not to present reversible error. Park v. State (Cr. App.) 179 S. W. 1152.

Bills of exceptions, complaining of argument as being without the evidence, held sufficient to present the question whether there was any evidence to support the argument. Bullington v. State (Cr. App.) 180 S. W. 679.

29. —— **Rulings on evidence.**—Bills of exception, complaining of court's refusal to permit defendant to propound questions to a witness, should state what the witness would have answered or testified to in answer. De Arman v. State (Cr. App.) 189 S. W. 145; Williams v. State (Cr. App.) 182 S. W. 327; Villareal v. State (Cr. App.) 182 S. W. 322; Gleason v. State (Cr. App.) 183 S. W. 891.

A bill of exceptions showing merely the substance of evidence objected to, but failing to show when the objections were made or what the other evidence on the subject was, is insufficient. Tinker v. State (Cr. App.) 179 S. W. 572.

Where the record fails to include questions which the court rules call for opinions of witnesses, and to which ruling the defendant excepts, the ruling must be taken as correct, and no question is presented for review. Rea v. State (Cr. App.) 179 S. W. 706.

A bill of exceptions, complaining of the refusal to strike out the testimony of a witness, held not to present reversible error, where the testimony of the witness was not shown. Park v. State (Cr. App.) 179 S. W. 1152.

Where the record did not disclose the answer, the impropriety of a question on cross-examination cannot be urged on appeal. Tyrone v. State (Cr. App.) 180 S. W. 125.

Where the bill of exceptions on appeal does not show the grounds of objection to evidence excluded, or the purpose for which the testimony was sought, nor the evidence objected to or that it was actually received, its admissibility is not presented for review, and a bill of exceptions, on appeal from a conviction of murder, which used the pronouns "he" and "him," without identifying who was indicated, and failed to give the answer of the witness to questions excluded, is too indefinite to be considered. Taylor v. State (Cr. App.) 180 S. W. 242.

A bill of exceptions which fails to set out the excluded answers, presents nothing for review. Id.

A bill complaining of admission of evidence in a manslaughter case which fails to state grounds of objection thereto does not show error. Cook v. State (Cr. App.) 180 S. W. 254.

Bill of exceptions complaining of question asked defendant's wife on cross-examination, but showing that the question was not answered, and not showing the wife's direct testimony, held not to show error. Rogers v. State (Cr. App.) 180 S. W. 674.

A bill of exceptions not showing any ruling by the court on the state's objection to testimony offered by defendant presented nothing for review, and a bill taken to the exclusion of testimony must disclose the relevancy and materiality of the proposed evidence, and inferences will not be indulged to supply the omission of such essentials. Edwards v. State (Cr. App.) 181 S. W. 195.

A bill of exceptions setting forth a mass of testimony, part of which is admissible, is too general to be considered, but must specifically point out that testimony against which objection is urged. Schley v. State (Cr. App.) 181 S. W. 470.

On bill of exception not showing the object of the testimony sought to be introduced by defendant, or the testimony which the witness would have given, held, that the court could not determine whether there was error in its exclusion. Solan v. State (Cr. App.) 182 S. W. 317.

Bill of exceptions, in prosecution showing that defendant's motion to strike evidence was filed with clerk, but not presented to court until after motion for new trial came up for hearing and court made no notation on motion, presented no error. O'Toole v. State (Cr. App.) 183 S. W. 1160.

A bill of exceptions including a number of statements objected to, some of which are clearly admissible, not directly pointing out the supposed objectionable parts thereof, presents no error. Orner v. State (Cr. App.) 183 S. W. 1172.

Bills of exception showing the propounding of immaterial questions to accused, but not disclosing any answer, fail to show error. Sanford v. State (Cr. App.) 185 S. W. 22.

In a prosecution for forgery, a bill of exceptions, which did not contain the answer of witnesses to a question objected to, showed no error. Ferguson v. State (Cr. App.) 187 S. W. 476.

Bill of exceptions, not showing defendant's purpose in offering excluded evidence, nor showing connection of admitted testimony with the case, its relevancy, or how it could be harmful, presents nothing for review, and a bill presents nothing for review which alleges error in admitting a conversation between defendant and the deceased, relative to defendant's signing of a waiver in her divorce case, where it did not state the conversation nor any facts in connection with it, nor is a bill sufficient which recites that a witness was permitted to testify that, about two or three days after defendant had gotten his clothes from his house he stopped his wife, the deceased, and her sister, and sought to have a conversation with his wife, but did not state the conversation, and a bill is likewise defective which recites that, while defendant was testifying, the state asked whether he had not made repeated threats to kill his wife, and that objections thereto were overruled, but not setting out the answer. Resendez v. State (Cr. App.) 187 S. W. 483.

A bill of exceptions to admission of testimony as to conversation with accused while in custody and without warning, which does not state the conversation or its purport, nor show that it was within the statute forbidding confessions while under arrest, is totally insufficient. Freeman v. State (Cr. App.) 188 S. W. 425.

Where a bill of exceptions to the court's refusal to permit accused to introduce and read to the jury the testimony of a witness taken upon a former trial, does not give the testimony of this witness, but states conclusions therefrom, the trial court will not be put in error. Berry v. State (Cr. App.) 188 S. W. 997.

In prosecution for theft of buggy, the court cannot say that exclusion of testimony as to value of that type of buggy after 60 days' use was erroneous, where the bill fails to show what the answer would have been. Villareal v. State (Cr. App.) 189 S. W. 156.

A bill of exceptions to review error in admitting proof of dying declarations must state that it contains all the predicate laid on which the dying declarations are admitted and set out the declaration. Smith v. State (Cr. App.) 189 S. W. 484.

Bills of exceptions to the admission of the entire evidence as to resistance to arrest are not sufficient to show error in admitting evidence of the details and circumstances of the resistance. Kelley v. State (Cr. App.) 190 S. W. 173.

A bill of exceptions to the admission of an entry in a family Bible in evidence, which does not disclose the date of the birth or the age of prosecutrix as shown by the Bible entry, is defective. Deisher v. State (Cr. App.) 190 S. W. 729.

A bill of exceptions to testimony held insufficient in form to present a question for review. Ray v. State (Cr. App.) 190 S. W. 1111.

A bill of exceptions taken to leading questions held required to show affirmatively that the questions did not fall within any of the exceptions to the rule excluding leading questions. Marta v. State (Cr. App.) 193 S. W. 323.

Bill of exceptions to allowing a witness who had been in penitentiary to testify, on ground that it was not sufficiently shown that he had regained his rights of citizenship, should state evidence to enable appellate court to determine its materiality. Baxter v. State (Cr. App.) 194 S. W. 1107.

30. —— Rulings relating to instructions.—In the absence of the evidence, the court cannot intelligently pass upon exceptions taken to instructions. Hamilton v. State (Cr. App.) 189 S. W. 482.

Though the record contains a purported requested charge, yet, if it fails to show that it was presented to, or acted on, or refused by, the judge, and there is no bill to the court's refusal, or objection to the charges given, no question thereon is presented for review. Diaz v. State (Cr. App.) 189 S. W. 491.

Accused should take a separate bill to the court's action in each instance where he does not correct or change his charge to meet accused's objection, and accused's bill to refusal to give instruction requested, stating merely that at the proper time he presented his said charge, and asked that it be given, and that the court refused to give

it, did not authorize or require review of such refusal. Porter v. State (Cr. App.) 190 S. W. 159.

Bill of exceptions, based on refusal of a requested instruction, held sufficient under statute. Rasberry v. State (Cr. App.) 191 S. W. 356.

Defendant's objections to court's charge should be preserved by separate bills to each objection to any paragraph, and not by being grouped altogether in one paper. Furr v. State (Cr. App.) 194 S. W. 395.

33. Approval and signature of judge.—A bill of exceptions not approved by the trial judge cannot be considered. Longoria v. State (Cr. App.) 188 S. W. 988; Morgan v. State (Cr. App.) 182 S. W. 451.

Bills of exception cannot be considered where the trial court refused expressly to approve them. Backus v. State (Cr. App.) 179 S. W. 1166.

A so-called "Appellant's Exceptions to the Charge of the Court," not verified by the trial judge, or shown to have been presented to him for his action before the trial was concluded, cannot be considered. Grisham v. State (Cr. App.) 179 S. W. 1186.

Where accused was tried by a judge other than the regular judge, the regular judge could not approve the bill of exceptions. McGee v. State (Cr. App.) 182 S. W. 309.

The Court of Criminal Appeals cannot consider bills of exception which the trial court declined to approve on the ground of incorrectness where there is attached to them no proof, as by bystanders, of their correctness, as required by statute. Hampton v. State (Cr. App.) 183 S. W. 887.

Objections to the introduction of evidence presented by bills of exceptions which were not approved by the trial court cannot be considered on appeal. Sanford v. State (Cr. App.) 185 S. W. 22.

A bill of exception to the refusal of a specific charge, and a bill containing the argument of the district attorney, neither of which was approved by the trial judge, will not be considered. Hernandez v. State (Cr. App.) 185 S. W. 878.

Ordinarily no bill of exceptions can be considered unless properly approved and signed by some judge authorized to do so, and the parties cannot by agreement dispense with the judge's signature, and the judge who tries the case, whether a regular or special judge, and regardless of whether the term has adjourned or he has been succeeded by another, must sign the bills of exceptions and other documents for appeal. Sorrell v. State (Cr. App.) 186 S. W. 336.

Ordinarily no bill will be considered unless properly approved and signed by a judge authorized to do so, nor can the parties nor their counsel by agreement dispense with such approval and signature. Vansickle v. State (Cr. App.) 188 S. W. 1006.

35. —— Qualification or correction by court.—One who accepts a bill of exceptions with the judge's qualification cannot be heard to dispute the truth of the qualification. Reed v. State (Cr. App.) 183 S. W. 1168; Sorrell v. State (Cr. App.) 186 S. W. 336; Arensman v. State (Cr. App.) 187 S. W. 471.

A bill of exceptions to conduct of the district attorney presents no error; the judge's statement showing that defendant withdrew his objection. Medlock v. State (Cr. App.) 185 S. W. 566.

Where the court below in his qualification of accused's bills of exceptions stated that he referred to the statement of facts for the testimony "on this question or subject," the bills were considered by the appellate court in connection with the testimony as shown by the statement of facts. Capshaw v. State (Cr. App.) 186 S. W. 209.

An objection by defendant to court's qualification of one of his bills of exceptions should have been made before filing bill as qualified. Thompson v. State (Cr. App.) 187 S. W. 204.

Defendant's bill of exceptions to court's holding that witness was not qualified as expert, having been accepted with qualification, Court of Criminal Appeals must test question by conditions and facts stated in court's explanation to bill. Holder v. State (Cr. App.) 194 S. W. 162.

38. —— Conclusiveness and effect of approved bill.—Where bills of exceptions and statements of facts have been properly agreed to and approved and filed in the lower court, after term has expired they cannot be amended or attacked without showing fraud, but during the term in which conviction is had, upon proper motion and service thereof, the court, having the proceedings and judgment still in his control can, if through mistake or otherwise a bill of exceptions is untruthful, or certifies to matters which did not occur, upon proper notice to the interested parties, make the matter appear of record as it occurred in fact. Sullenger v. State (Cr. App.) 182 S. W. 1140.

Where no excuse is given in the motion for new trial for newly discovered evidence for not exercising diligence, but in argument, defendant's counsel states an excuse, the court must consider the record as made below. Newman v. State (Cr. App.) 188 S. W. 426.

39. Proof by bystanders.—Where a bill of exceptions as qualified by the court and a bystander's bill are filed, the court must consider the questions raised by bystander's bill. Word v. State (Cr. App.) 179 S. W. 1175.

If approval of bill of exceptions by the trial judge is held invalid, it is appellant's duty to prove them up by bystanders. Sorrell v. State (Cr. App.) 186 S. W. 336.

Where, in allowing accused's bill of exceptions to overruling motion for continuance, the court did so with the qualification stated that he offered to postpone the case until the next morning, which offer was not accepted by defendant, affidavits contradicting such qualification were correctly refused as a bill of exceptions, and could not be considered as such by the appellate court. Walter v. State (Cr. App.) 189 S. W. 257.

43. Necessity of objection, exception, or other presentation in trial court in general.—The court of criminal appeals can pass only upon such questions as are properly raised in the trial court. Davis v. State (Cr. App.) 179 S. W. 702.

Objection that jurors were not sworn in the order in which the unscratched and unmarked names appeared on the list as returned to the clerk, but that one of them was omitted, cannot be made for the first time after verdict. Engman v. State (Cr. App.) 180 S. W. 235.

Objections, other than those made below, to the court's refusal to receive a verdict of guilty until it had been corrected by the jury could not be considered. Williams v. State (Cr. App.) 182 S. W. 335.

Where bill of exceptions shows that admission of evidence of reputation was excluded in so far as defendant objected thereto below, no error was presented. O'Toole v. State (Cr. App.) 183 S. W. 1160.

Matters not excepted to but set up for the first time in motion for new trial cannot be noticed, and evidence cannot be held insufficient merely because the statement of facts fails to show on its face that witnesses were sworn, if no exception was taken at the trial. Debth v. State (Cr. App.) 187 S. W. 341.

46. **Objection or exception to preserve grounds for new trial.**—A motion for new trial in a criminal case because a juror was rendered incompetent by previously serving in a case in which accused was interested, was properly denied, where the juror was apparently unbiased and had admitted such prior jury service, although accused's counsel did not hear him. Lee v. State (Cr. App.) 193 S. W. 313.

In a criminal case, where facts were known and witnesses were terrorized, it was duty of counsel or defendant to call such facts to attention of court and not rely thereon as ground for new trial. Savalla v. State (Cr. App.) 194 S. W. 829.

47. **Sufficiency of objection or exception.**—Exception to charge in prosecution for practicing medicine without authority held too general to point out error. Young v. State (Cr. App.) 181 S. W. 472.

In a prosecution for theft by a bailee, an objection that the charge was "vague, indefinite, and erroneous" is too general to necessitate a review. Lee v. State (Cr. App.) 193 S. W. 313.

Art. 751. [731] Jury may take all papers in the case.

Evidence.—Under this article, there was no error in delivering to jury written statement or confession, signed by defendant, after it had been introduced in evidence. Holder v. State (Cr. App.) 194 S. W. 162.

Art. 754. [734] Jury may ask further instruction.

In general.—Under this article, where the judge verbally answered the foreman's verbal question, having directed that both question and answer be taken down by the stenographer, which was done, the judge signing his answer and delivering it to the jury, there was no error. Mikeska v. State (Cr. App.) 182 S. W. 1127.

Art. 755. [735] Jury may have witness re-examined, when.

In general.—Under this article, court in trial for murder on request by jury returning into court, held to properly permit the written testimony of witness taken on former trial to be read to jury as to which the jury disagreed. Orner v. State (Cr. App.) 183 S. W. 1172.

Where accused consented to the reading to jury of the testimony of certain witnesses, after jury had been out several hours, a refusal to grant his request for several charges in respect to such evidence after the jury had returned to jury room held not error. Watson v. State (Cr. App.) 191 S. W. 546.

In prosecution for murder, where, after retirement, jury disagreed as to testimony of witness, and wrote out interrogatories to be asked him, court could only limit examination or answer of witness to jury's question as to his former testimony, and could not inhibit witness from repeating testimony in reply to query. Waters v. State (Cr. App.) 192 S. W. 778.

Art. 757. [737] If a juror become sick after retirement.

Cited, Hipple v. State (Cr. App.) 191 S. W. 1150.

Art. 758. [738] In misdemeanor case in district court.

Cited, Renfro v. State (Cr. App.) 189 S. W. 137.

CHAPTER SIX

OF THE VERDICT

Article 763. [743] Definition of "verdict."

Nature and requisites of verdict.—Where the defendant was charged with carrying a pistol, a verdict finding him guilty and assessing a fine is sufficient and responds to the information. Robison v. State (Cr. App.) 185 S. W. 565.

—— **Mistakes of grammar and spelling.**—Misspelling of word "years" in a verdict, otherwise perfect, does not vitiate it. Pearson v. State (Cr. App.) 187 S. W. 336.

Impeachment of verdict.—A conviction cannot be impeached by affidavits of the jury. Chapman v. State (Cr. App.) 179 S. W. 570.

Refusal of new trial in criminal case on the testimony of four jurors heard by the judge to impeach their verdict held proper. Bessett v. State (Cr. App.) 180 S. W. 249.

Verdict held not subject to impeachment by juror's affidavit that he and others believing defendants not guilty voted to convict, thinking this would force defendants to tell what they knew about the crime. Villareal v. State (Cr. App.) 182 S. W. 322.

Art. 764. [744] In felony case, twelve jurors must concur, etc.

Cited, Bessett v. State (Cr. App.) 180 S. W. 249 (in dissenting opinion).

Art. 765. [745] When nine jurors may render verdict, etc.

Failure to discharge.—In a prosecution for misdemeanor, where regular jury of twelve was empaneled, but nine only found verdict of guilty, three refusing to concur, none having been discharged before verdict, judgment of conviction could not stand. Cortonelia v. State (Cr. App.) 189 S. W. 139; Lane v. State (Cr. App.) 189 S. W. 138.

Under Const. art. 5, § 13, and this article, in prosecution for misdemeanor, where there were 12 jurors, and none were discharged, but only 11 signed the verdict, one disagreeing, conviction could not stand. Renfro v. State (Cr. App.) 189 S. W. 137.

Art. 769. [749] Defendant must be present, when.

Misdemeanor cases.—In misdemeanor case in which a jail penalty is part of the punishment, it is not necessary that defendant be present when the verdict is received. Booher v. State (Cr. App.) 188 S. W. 977.

Art. 770. [750] Verdict must be general.

4. **Requisites and sufficiency in general—Verdict held sufficient.**—A contention in the motion for a new trial that the verdict was written on an indictment, but did not show which defendant was convicted of the charge, presented no reversible error, where a severance had been obtained and defendant alone was on trial. Gomez v. State (Cr. App.) 185 S. W. 569.

8. **Finding of guilt—Sufficiency in general.**—Where the court submitted three forms of verdict, the action of the jury in filling out the blank in the form finding defendant guilty and recommending that sentence be not suspended, which was received by the court without exception, was a good verdict. Lee v. State (Cr. App.) 181 S. W. 728.

Art. 771. [751] When offense of different degree is charged.

Offenses for which conviction may be had.—Under this article and art. 772, negligent homicide is included in the offense of murder, and conviction of that offense may be had under an indictment for murder. Crowder v. State (Cr. App.) 180 S. W. 706.

Under this article and arts. 772, 837, held, that indictment charging assault with intent to rape includes aggrevated assault, and where evidence tended to show such assault, it is properly submitted. Stockton v. State (Cr. App.) 192 S. W. 236.

Specifying grade or degree of offense.—Where accused was charged with cattle theft, and with receiving stolen property, knowing it was stolen, a general verdict of guilty could be applied to either count. Longoria v. State, 188 S. W. 987. And the court properly applied the verdict to the count, charging theft established by the evidence. Longoria v. State (Cr. App.) 188 S. W. 988.

A jury should specify in its verdict the grade of the offense of which accused is convicted in cases where more than one degree or grade of the offense included in the indictment is given in charge to the jury. Kinchen v. State (Cr. App.) 188 S. W. 1004.

Art. 772. [752] Offenses consisting of degrees.

Subdivision 1.—Under this and preceding article, negligent homicide is included in the offense of murder, and conviction of that offense may be had under an indictment for murder. Crowder v. State (Cr. App.) 180 S. W. 706.

Subdivision 2.—Under this article and arts. 771, 837, held, that indictment charging assault with intent to rape includes aggravated assault, and where accused made an indecent assault on prosecutrix, he may be convicted of aggravated assault, though prosecutrix did not in her complaint state that assault caused her a sense of shame and humiliation. Stockton v. State (Cr. App.) 192 S. W. 236.

Subdivision 3.—In every indictment or information charging aggravated assault, simple assault is necessarily included. Bennett v. State (Cr. App.) 185 S. W. 14.

Subdivision 6.—There cannot under an ordinary theft indictment be a conviction of larceny for conversion by one of property coming into his possession honestly. Looney v. State (Cr. App.) 189 S. W. 954.

In prosecution for cattle theft, the accused could not be convicted of willfully driving cattle from their accustomed range. Pope v. State (Cr. App.) 194 S. W. 590.

Art. 773. [753] Informal verdict may be corrected.

Matters which may be corrected.—This article had no application to render improper the action of the court in entering up judgment and sentence on a verdict recommending suspension of sentence, where no plea therefor had been filed before trial and the judge had directed them not to make such recommendation. Bessett v. State (Cr. App.) 180 S. W. 249.

Where a verdict of guilty of theft—a misdemeanor—assessed a fine only, the court properly directed the jury to retire to their room, and if they found defendant guilty, assess a jail penalty. Williams v. State (Cr. App.) 182 S. W. 335.

Review.—Objections, other than those made below, to the court's refusal to receive a verdict of guilty until it had been corrected by the jury could not be considered. Williams v. State (Cr. App.) 182 S. W. 335.

Art. 774. [754] If jury refuse to have verdict corrected.

Cited, Bessett v. State (Cr. App.) 180 S. W. 249 (in dissenting opinion).

Art. 782. [762] Conviction of lower is acquittal of higher offense.

Cited, Howard v. State (Cr. App.) 192 S. W. 770 (in dissenting opinion).

CHAPTER SEVEN

OF EVIDENCE IN CRIMINAL ACTIONS

1. GENERAL RULES

Article 783. [763] Rules of common law shall govern, except, etc.

4. Judicial notice—In general.—Personal knowledge of a presiding judge is not judicial knowledge. Lerma v. State (Cr. App.) 194 S. W. 167.

In a prosecution for violation of the tick eradication law (Acts 33d Leg. c. 169), judicial notice could not be taken of notices from and orders of state sanitary live stock commission. McGee v. State (Cr. App.) 194 S. W. 951.

6. —— **Geographical facts.**—The Court of Criminal Appeals takes judicial notice that Kerrville is in Kerr county, where the act creating the county provided that the point selected as the county seat should be called Kerrville. Baker v. State (Cr. App.) 187 S. W. 949.

8. —— **Laws and ordinances.**—An indictment for larceny by embezzlement, alleging that the accused was agent for a life insurance company lawfully doing business in the state, was equivalent to alleging that it was a corporation; the act regulating insurance companies being a general law of which the courts must take judicial notice. Meredith v. State (Cr. App.) 184 S. W. 204.

Court cannot take judicial notice that under local option law prohibition is in force in any county or subdivision thereof. Lerma v. State (Cr. App.) 194 S. W. 167.

In a prosecution for violation of the tick eradication law (Acts 33d Leg. c. 169), as under law court and jury had to take judicial notice of Governor's proclamation that a county had adopted the law, it was unnecessary to prove proclamation alleged. McGee v. State (Cr. App.) 194 S. W. 951.

9. —— **Organization and terms of courts and judicial proceedings.**—The trial court may take judicial notice of convictions in its own court. Baker v. State (Cr. App.) 187 S. W. 949.

Relative to competency of a witness for defendant, the court has judicial notice of the pendency in that court of a complaint against the witness for the same offense. Sola v. State (Cr. App.) 188 S. W. 1005.

11. —— **Intoxicating beverages.**—Court will take judicial notice that whisky is intoxicating liquor. Lerma v. State (Cr. App.) 194 S. W. 167.

13. **Presumptions.**—The state need not prove that the alleged adulterer's spouse was actually living at the time of the offense charged, but from proof that he was alive within one year prior thereto the rebuttable presumption that he still lived arises. Simmons v. State (Cr. App.) 184 S. W. 226.

A witness, proven to be incompetent because of a felony conviction, presumably remains incompetent. Baker v. State (Cr. App.) 187 S. W. 949.

An accused person is presumed to be innocent until his guilt is established beyond a reasonable doubt. New York Life Ins. Co. v. Veith (Civ. App.) 192 S. W. 605.

14. **Relevancy of evidence—In general.**—In prosecution for forgery, evidence of accused's visit to courthouse in effort to destroy forged check on which prosecution was based and other similiar checks, held properly admitted in evidence. Fry v. State (Cr. App.) 182 S. W. 331.

In a prosecution for burglary of a saloon, where defendant had admittedly been at the scene of the crime, but, as he claimed, with an innocent purpose, testimony that from the appearance of his clothing shortly after he had none of the stolen property on his person, and a detective's testimony that he searched defendant's house and found none of the missing property, defendant claiming that others, who had previously pleaded guilty to the burglary, and in whose possession stolen property had been found, were alone guilty, was admissible. McPherson v. State (Cr. App.) 182 S. W. 1114.

Refusal to permit defendant to testify that since his arrest the sheriff had allowed him to go at large was proper. Hampton v. State (Cr. App.) 183 S. W. 887.

In a prosecution for an assault with intent to kill, there was no error in refusing to permit defendant to prove to the jury by the sheriff that if he had an attachment he could have secured the attendance of his absent witnesses. Scott v. State (Cr. App.) 185 S. W. 994.

In prosecution for riding on railroad pass of another, auditor of road could have testified he had seen defendant previously to the offense, if defendant showed auditor did not know him. Leach v. State (Cr. App.) 189 S. W. 733.

18. —— **Circumstantial evidence.**—In a prosecution for murder, where it was evident that there had been a struggle in the killing, and that the murderer might well have become bloody, evidence that a sifting of defendant's fireplace ashes yielded a set of overall buttons and a set of shirt buttons, other testimony showing that he had worn overalls and a shirt on the day of the crime, and evidence that defendant's dog was seen coming from deceased's house and going toward defendant's was admissible, where evidence of footprints and horse tracks tended to show that defendant was traveling in the same direction near where the dog was. Hampton v. State (Cr. App.) 183 S. W. 887.

20. —— **Incriminating others.**—The fact that prosecuting witness was engaged in illegal act held not admissible in mitigation of the penalty. Gilbert v. State (Cr. App.) 181 S. W. 200.

In a prosecution for burglary of a saloon, any testimony tending to show that parties other than defendant broke and entered the saloon was admissible, and the judgment showing that two persons, other than defendant, also charged with the crime, had pleaded guilty to burglarizing the saloon on the particular occasion, was admissible. McPherson v. State (Cr. App.) 182 S. W. 1114.

22. **Transactions to which accused is not a party—Evidence held inadmissible.**—Where deceased permitted himself to be disarmed shortly before the killing, a witness cannot testify as to the impression he received when deceased again armed himself; the fact not having been communicated to accused. Atkison v. State (Cr. App.) 182 S. W. 1099.

27. **Conduct of accused subsequent to offense—Flight or resisting arrest.**—Flight or attempted flight may be shown as a criminating circumstance. Porter v. State (Cr. App.) 190 S. W. 159; Kelley v. State (Cr. App.) 190 S. W. 173.

In a prosecution for burglary, evidence that the defendant had been in several states since the alleged burglary was admissible as a circumstance tending to show guilt. Williams v. State (Cr. App.) 182 S. W. 327.

In a prosecution for robbery, evidence that accused had resisted arrest, the resistance offered, and that he had attempted to escape, was admissible. Kelley v. State (Cr. App.) 185 S. W. 570.

28. —— **Attempt or opportunity to escape.**—It is always proper to show that when accused is arrested or sought to be arrested for an offense, he resists it. Porter v. State (Cr. App.) 190 S. W. 159; Kelley v. State (Cr. App.) 190 S. W. 173.

In murder trial, testimony that the witness, searching for evidence of cause of the death at accused's home, found a trunk packed with clothes of deceased and another, accused of part in the crime, was admissible as evidence of readiness for flight. Carson v. State (Cr. App.) 190 S. W. 145.

In a prosecution for robbery, evidence held to show that the officers whom defendant resisted had a right to arrest him without warrant and attempted to do so in a proper manner. Kelley v. State (Cr. App.) 190 S. W. 173.

30. —— **Suborning or interfering with witnesses.**—In prosecution for rape, where it appeared that prosecutrix had at first denied the act, and that accused attempted to persuade her and her parents not to testify against him, evidence of a request by him to her sister to talk to prosecutrix was admissible, and a threat by accused to whip two men whom he knew were important witnesses against him was admissible as a circumstance tending to show that he was trying to prevent them from testifying. Deisher v. State (Cr. App.) 190 S. W. 729.

31. **Matters explanatory of facts in evidence or inferences therefrom.**—Where defendant introduced evidence that deceased refused to make a dying declaration, the county attorney was properly allowed to testify that deceased did not refuse, but said that he felt too weak, and asked the attorney to come back later. Mansell v. State (Cr. App.) 182 S. W. 1137.

Evidence of a subsequent gathering to pursue defendant is not admissible to explain his flight immediately after the killing. Bader v. State (Cr. App.) 183 S. W. 146.

Where accused claimed he thought deceased was about to procure a pistol from a grip, evidence that when deceased left home the grip only contained asthma medicines, and that deceased always carried a bag with him containing asthma medicines is admissible. Sanford v. State (Cr. App.) 185 S. W. 22.

In a prosecution for manslaughter, remark by defendant's wife to which he replied: "Go back in the house. I have done nothing but kill a d——n dog"—held properly admitted, being necessary to explain defendant's statement. Smith v. State (Cr. App.) 189 S. W. 484.

In a trial for horse theft, where a number of witnesses testified accused was one of men in a wagon, fact that four other witnesses were unable to identify accused as one of the men would not render their testimony inadmissible when they do identify wagon. Lusport v. State (Cr. App.) 190 S. W. 151.

In a prosecution for unlawful sale of intoxicating liquors in prohibition territory, it was proper for the court to permit the state's witness to explain why he had transported whisky, since a witness may always explain his action from his standpoint when attacked. Dupree v. State (Cr. App.) 190 S. W. 181.

In prosecution where accused was convicted of aggravated assault, where prosecutrix asserted accused bit her, prosecuting attorney may testify that several days after assault when prosecutrix called on him there was a black mark on her arm. Stockton v. State (Cr. App.) 192 S. W. 236.

32. **Character or reputation of accused.**—Where the court declined to submit the issue of manslaughter, it was error to permit the state to attack defendant's good reputation, which he had not placed before the jury. Boyd v. State (Cr. App.) 180 S. W. 230.

In a prosecution for carrying weapons, evidence of good character of defendant at the time of trial held properly excluded; for evidence of good character of accused is admissible only when guilty knowledge or criminal intent is of the essence of the offense charged. Beesing v. State (Cr. App.) 180 S. W. 256.

Where reputation of one accused of robbery was not in issue, evidence that he had been in the penitentiary was inadmissible. Kelley v. State (Cr. App.) 185 S. W. 570.

Unless the state has attacked defendant's general reputation for truth or has attempted to prove contradictory statements, he is not entitled to introduce evidence of his good reputation for truth. Matthews v. State (Cr. App.) 189 S. W. 491.

It is not error to exclude testimony of witnesses to prove defendant's good reputation, where the state admitted that he bore such reputation prior to his difficulty with deceased. Becker v. State (Cr. App.) 190 S. W. 185.

33. —— **Evidence of particular acts.**—Where accused put his good character as a peaceable citizen in issue, testimony that it had been reported some 30 years before that he killed a man in another state and was a member of a gang of outlaws is too remote to be considered. Taylor v. State (Cr. App.) 179 S. W. 113.

In a prosecution for larceny, evidence that the accused was unduly intimate with one witness was inadmissible, where the accused had not placed his reputation in issue. Black v. State (Cr. App.) 183 S. W. 439.

In a prosecution for murder, evidence that the defendant had threatened to shoot his father-in-law on a former occasion was inadmissible. Carter v. State (Cr. App.) 183 S. W. 881.

34. **Materiality or competency of evidence.**—Written employment contract held not to merge previous representations of accused so as to prevent their proof by state in prosecution for swindling. Arnold v. State (Cr. App.) 179 S. W. 1183.

It was not error to allow a city detective to testify that the persons who had signed confession by defendant as witnesses did not hold any official position in the city or county. Jernigan v. State (Cr. App.) 179 S. W. 1187.

Witness showed himself competent to testify to value of tires stolen, by testimony that the value of tires was uniform over the state, and that he knew their value. Tyler v. State (Cr. App.) 180 S. W. 687.

Exclusion of testimony as being negative, when the witness had as great an opportunity to observe as other witnesses, and testified that she did not see at defendant's house a can of lard claimed to have been stolen by defendant, held error. Pierson v. State (Cr. App.) 180 S. W. 1080.

On issue of venue, evidence of witness that county line was about at certain place held proper where witness gained information from seeing line run by county surveyor and knew that it was recognized as county line. Carter v. State (Cr. App.) 181 S. W. 473.

Permitting the complaining witness to testify that, when he went to defendant's house and identified peas found there as being the ones stolen, the sheriff was with him held not error. Williams v. State (Cr. App.) 182 S. W. 335.

In a prosecution for cattle theft, where defendant claimed that he bought the black muley cow charged to have been stolen, testimony as to his taking and possession of a red cow was admissible. Sullenger v. State (Cr. App.) 182 S. W. 1140.

Testimony as to the reputation of the house held admissible, though the witness could not limit his knowledge to the time after defendant began working there. Davis v. State (Cr. App.) 184 S. W. 510.

The exclusion of a question to accused's daughter as to whether she knew where her father was, when the shot was fired, was not error, the question calling for an immaterial answer. Sanford v. State (Cr. App.) 185 S. W. 22.

In murder trial, evidence that accused had given the victim "rough on rats," pretending it was medicine, was admissible; it appearing that "rough on rats" contains arsenic, and arsenic in quantities was found in the victim's stomach. Carson v. State (Cr. App.) 190 S. W. 145.

35. —— Remoteness.—Though witnesses stated that they got acquainted with deceased 15 or 20 years before the killing, but did not state what his reputation was at that time, their evidence was not inadmissible as too remote. Ray v. State (Cr. App.) 190 S. W. 1111.

37. —— Admissibility by reason of admission of other evidence.—In prosecution for keeping house for prostitution, where defendant testified that, upon arrest for vagrancy, she had been mistreated and induced to plead guilty through misrepresentations, etc., it was proper in rebuttal to permit police officers to explain the whole matter. Jackson v. State (Cr. App.) 179 S. W. 711.

On defendant's admission that a circular was one used by him in advertising his business as a masseur, the circular was properly admitted in evidence to show the purpose for which he held himself out. Hyroop v. State (Cr. App.) 179 S. W. 878.

Where the state contended that the mother of prosecutrix compelled her to submit to intercourse with accused and there was testimony showing the mother's incontinence, evidence of her good reputation is admissible. Heitman v. State (Cr. App.) 180 S. W. 701.

In a prosecution for perjury in swearing that no gambling occurred as charged, where evidence that one accused of gambling pleaded guilty was admitted, defendant was entitled to show the others who pleaded not guilty were acquitted. Clayton v. State (Cr. App.) 180 S. W. 1089.

Where the state proved defendant's statement that the widow of deceased, an accomplice, was accused, but that he did not believe it, testimony for defendant held to furnish no basis for such statement by defendant and was properly excluded. Ingram v. State (Cr. App.) 182 S. W. 290.

In a prosecution for manslaughter committed in a quarrel, where defendant made the physical condition of deceased an issue, the state was properly allowed to show that he had suffered from rheumatism since a child. Mansell v. State (Cr. App.) 182 S. W. 1137.

Where the hoof of defendant's horse was measured and shown to have fitted the tracks leading from near where decedent's body was found to defendant's premises where the horse was, evidence that a pony was tracked from near decedent's home to defendant's lot was admissible. Hampton v. State (Cr. App.) 183 S. W. 887.

Where only way cut of defendant's was referred to by state's witnesses was incidental in fixing time of occurrence a year before the killing, court properly refused to permit defendant to go into details of how he received it. De Arman v. State (Cr. App.) 189 S. W. 145.

40. Res gestæ—Accompanying and surrounding circumstances.—Details of a difficulty between defendant and another, being part of the res gestæ, may be shown on a prosecution for carrying a pistol. Dolezal v. State (Cr. App.) 191 S. W. 1158; Pecht v. State (Cr. App.) 192 S. W. 243.

41. —— Subsequent condition of injured person.—In prosecution for assault with intent to rape, testimony of those to whom complaint was made soon after offense as to condition of assaulted party's clothes, person, etc., held res gestæ, and admissible. Jennings v. State (Cr. App.) 190 S. W. 733.

42. —— Acts and statements of accused prior to offense.—In trial for aggravated assault upon a constable endeavoring to arrest accused, evidence of the whole transaction held admissible as part of the res gestæ. Porter v. State (Cr. App.) 190 S. W. 159.

44. —— Acts and statements of accused subsequent to offense.—What defendant said immediately after his assault was res gestæ thereof, and admissible as original testimony. Eitel v. State (Cr. App.) 182 S. W. 318.

A statement made by one accused of burglary, while imprisoned, more than a month after the offense charged, is not a part of the res gestæ. Howard v. State (Cr. App.) 184 S. W. 505.

Accused's denial that he stabbed deceased is admissible as part of the res gestæ, when made a few minutes after the crime. Baker v. State (Cr. App.) 187 S. W. 949.

In a prosecution for manslaughter, a remark by defendant to his wife: "Go back to the house. I have done nothing but kill a d——n dog"—was properly admitted in evidence; the statement being made almost immediately following the killing. Smith v. State (Cr. App.) 189 S. W. 484.

In murder trial, accused's version of the killing, given in conversation not over 12 or 20 minutes thereafter, after going 700 or 800 yards from the scene, was admissible as part of the res gestæ. Gillespie v. State (Cr. App.) 190 S. W. 146.

In prosecution of schoolboy for shooting his teacher, testimony as to what defendant told witness immediately after shooting, when defendant was still laboring under excitement held admissible. Wilson v. State (Cr. App.) 190 S. W. 155.

45. —— **Other offenses part of same transaction.**—In a prosecution for rape on a girl 6 years old, in the presence of another girl 5 years old, the testimony of the latter as to rape committed on her at the same time by accused was admissible as a part of the res gestæ. Tennel v. State (Cr. App.) 181 S. W. 458.

48. —— **Acts and statements of injured person after the offense—Evidence held admissible.**—In a prosecution for rape upon a girl aged 4 years and 9 months, her statements to her mother, made from half an hour to an hour after the commission of the offense, and the mother's action thereon, were admissible as a part of the res gestæ. Watkins v. State (Cr. App.) 180 S. W. 116.

Where doctor who attended deceased within 15 minutes after blows were inflicted believed her about to die and told her so, and believed her to be thoroughly conscious, his testimony as to her replies by nods to his questions as to who hit her, and testimony of a witness, who arrived before doctor, as to statements of deceased in response to doctor's questions, held admissible as res gestæ. Thompson v. State (Cr. App.) 187 S. W. 204.

Deceased's declaration that accused stabbed him is admissible as part of the res gestæ, when made from three to five minutes after the stabbing. Baker v. State (Cr. App.) 187 S. W. 949.

Statement of a witness that the prosecuting witness had come running to her house and was about to cry, and stated that accused "throwed me on the bed and got on top of me," held admissible if brought within the rule governing res gestæ statements. Smith v. State (Cr. App.) 188 S. W. 983.

Testimony as to what prosecutrix said in making complaint is admissible where complaint is made so soon after the occurrence as to be res gestæ of the act. Wood v. State (Cr. App.) 189 S. W. 474.

Where victim of rape does not herself testify, testimony of res gestæ statements by her are not inadmissible as being secondary or inferior evidence. Marion v. State (Cr. App.) 190 S. W. 499.

Evidence of complaints of prosecutrix made to people with whom she was staying immediately upon her jumping from defendant's buggy and reaching the house was admissible as part of res gestæ. Stockton v. State (Cr. App.) 192 S. W. 236.

50. —— **Acts and statements of third persons.**—On a trial for assault with intent to murder, evidence that, while defendant and another were assaulting the prosecuting witness, a third person told them not to do it, was admissible as res gestæ. Freeman v. State (Cr. App.) 179 S. W. 1157.

Evidence of acts of defendant's father immediately after the shooting by defendant, held improperly admitted as part of the res gestæ. Brod v. State (Cr. App.) 179 S. W. 1189.

What the wife of defendant said in the presence of defendant immediately after an assault by him was admissible as res gestæ. Eitel v. State (Cr. App.) 182 S. W. 318.

Evidence that immediately after deceased was cut, his brother entered the house and assaulted other occupants and "was drunk and seemed very mad" was a part of the res gestæ, showing the situation, and should have been admitted. Carr v. State (Cr. App.) 190 S. W. 727.

In a prosecution for homicide, where state's witness testified that accused's knife was only partly open when he found it, etc., held, that a doctor who went to deceased at the same time might testify that the witness told him the knife was open. Stubbs v. State (Cr. App.) 193 S. W. 677.

51. **Evidence of other offenses—In general.**—In a prosecution for swindling, held proper to prove other similar transactions had about the same time. Arnold v. State (Cr. App.) 179 S. W. 1183.

Where the identity of the accused and his intent to commit robbery was admitted, and he had not put his reputation in issue, evidence that he had attempted another robbery and shot at the witness, not being a part of the res gestæ, was inadmissible. Kelley v. State (Cr. App.) 185 S. W. 570.

In a criminal prosecution, evidence of other offenses or offenses of a like nature is as a rule inadmissible. Webb v. State (Cr. App.) 187 S. W. 485.

Testimony that the accused had been convicted 16 years before, when he was 16 years of age, and remained in the penitentiary less than 2 years, should have been excluded. Smith v. State (Cr. App.) 188 S. W. 983.

In a prosecution for knowingly permitting a house to be used for prostitution, testimony that accused pleaded guilty to disturbing the peace is not admissible in the absence of proof of connection of such offense with that charged. Goosby v. State (Cr. App.) 189 S. W. 143.

Evidence of other offenses having nothing to do with that for which defendant is tried, and occurring two years before and in another county, and which could not be

basis for conviction or impeachment, should not be admitted. Clemens v. State (Cr. App.) 193 S. W. 1066.

Evidence in rebuttal, to effect that accused could not have lived with her present husband long because she was living with another man, is not subject to contention that it proves another offense. Lerma v. State (Cr. App.) 194 S. W. 167.

In prosecution for carrying a pistol, fact that defendant was at time of trial charged in district court with assault with intent to murder held inadmissible. Wilson v. State (Cr. App.) 194 S. W. 828.

53. —— **In prosecutions for forgery.**—Evidence that accused had for two years pursued system of cashing checks issued to fictitious payees, held admissible in prosecution for forgery of one of such checks. Fry v. State (Cr. App.) 182 S. W. 331.

54. —— **In prosecutions for embezzlement or theft.**—In a prosecution for theft of a lap robe, question, asked a witness if he did not steal whisky from alleged owner of lap robe was error. Black v. State (Cr. App.) 187 S. W. 332.

In a trial for horse theft, where defendant's defense was purchase of animals stolen, evidence of a similar transaction a short time prior held admissible on that issue. Lusport v. State (Cr. App.) 190 S. W. 151.

In prosecution for theft by a bailee, testimony regarding accused's transactions with other parties than his alleged bailor held properly excluded. Lee v. State (Cr. App.) 193 S. W. 313.

55. —— **Violations of liquor laws.**—On the issue of whether defendant gave away whisky, as he claimed, or sold it, as claimed by those receiving it, testimony that an hour later he sold liquor to others is admissible. Graham v. State (Cr. App.) 182 S. W. 453.

It being shown on cross-examination of a witness, who had testified to purchase of liquor from defendant, that he got it at defendant's house from his wife, and afterwards paid defendant, he may testify to it having been customary to so make purchases from defendant. McAlister v. State (Cr. App.) 183 S. W. 145.

In a prosecution for violating the local option law by making a sale of liquor, the state cannot show that, in addition to making a sale to one witness, defendant also sold a number of times to others. Barnes v. State (Cr. App.) 185 S. W. 2.

In prosecution for illegally selling liquor, admission of testimony that sheriff took from defendant's residence some beer, wine, and whisky some time subsequent to alleged sale was reversible error. Weinberg v. State (Cr. App.) 194 S. W. 1116.

56. —— **In prosecutions for burglary.**—In a prosecution for burglary of a saloon, evidence that a drug store in the same building was burglarized on the same night, the two transactions being so interwoven as to be but one in effect, was admissible. McPherson v. State (Cr. App.) 182 S. W. 1114.

Proof of burglary depending on circumstantial evidence, and the stolen property being found in defendant's possession, other property then found in his possession may be shown to have been stolen about the same time from near the same place. Thornton v. State (Cr. App.) 188 S. W. 749.

57. —— **In prosecutions for rape and incest.**—Where evidence in prosecution for rape showed that prosecutrix, 13 years old, was left by mother in accused's care, while away from the house, prosecutrix's testimony to several acts of rape was admissible. Carter v. State (Cr. App.) 181 S. W. 473.

In prosecution for statutory rape, other acts of intercourse between appellant and prosecutrix were admissible. Miller v. State (Cr. App.) 185 S. W. 29.

In trial for assault to rape, evidence of other offenses against the prosecutrix committed at about the same time is admissible. Webb v. State (Cr. App.) 187 S. W. 485.

59. —— **Evidence relevant to offense and also showing another offense.**—Where circumstantial evidence is relied on to prove guilt, evidence of another offense connecting or tending to connect accused with the offense charged or tending to defeat his defensive theory is admissible. Longoria v. State (Cr. App.) 188 S. W. 988.

In prosecution for carrying on slaughterhouse in manner injurious to health of those in vicinity, evidence that head of cattle was on defendant's premises near residence of G. was admissible, although there was separate prosecution to which this testimony would have been relevant, and fact that accused might have been prosecuted under another statute for polluting stream would not render testimony thereof inadmissible, where it was relevant to offense charged. Moore v. State (Cr. App.) 194 S. W. 1112.

60. —— **Other offenses to prove identity.**—In a prosecution for riding on railroad pass of another, testimony of train auditor, that pass was used on certain trips and certain dates other than those charged, held inadmissible. Leach v. State (Cr. App.) 189 S. W. 733.

Evidence of the commission of another robbery, in which defendant was recognized as one of the robbers, held admissible to identify defendant as one who committed the robbery with which he was charged, which occurred a short time before the other. Batemen v. State (Cr. App.) 193 S. W. 666.

61. —— **Acts showing knowledge.**—In prosecution for keeping house where prostitutes were permitted to reside, testimony of officer as to character of other houses formerly kept by defendant held admissible to show guilty knowledge. Guthrie v. State (Cr. App.) 189 S. W. 256.

62. —— **Acts showing intent, malice, or motive.**—In a prosecution for embezzlement of horses, where defendant claimed that he acted under an honest belief of his right to deal with the horses, evidence of his dealings with other stock at the same time held admissible to show intent. McDaniel v. State (Cr. App.) 186 S. W. 320.

In a prosecution for assault to rape, evidence of other similar offenses against other persons than prosecutrix is admissible on the question of intent, where defendant's testimony tends to show that his otherwise illegal acts were without wrongful intent; for where intent is an element, and there is testimony tending to show that an act otherwise illegal was committed with innocent intent, evidence of other offenses of like nature is admissible. Webb v. State (Cr. App.) 187 S. W. 485.

63. —— **Acts of series showing system or habit.**—To show system of making sales, witness testifying that defendant laid whisky at a certain place, and he picked it up, and left money, may state that he often obtained whisky of defendant, and always in the same way. Engman v. State (Cr. App.) 180 S. W. 235.

In a prosecution for rape on a female under age of consent, evidence of sexual intercourse between the parties subsequent to date for which state elected to prosecute was admissible for purpose of showing a continuous course of conduct. Simmons v. State (Cr. App.) 186 S. W. 325.

65. **Best and secondary evidence.**—Parol evidence of the contents of a circular was properly rejected, where the circular itself could be put in evidence. Hyroop v. State (Cr. App.) 179 S. W. 878.

66. —— **Judicial proceedings and records.**—In a prosecution for perjury, the official stenographer who took down the evidence in the former case, but did not transcribe it, may reproduce the same notwithstanding an objection that the written testimony was the best evidence, or any one who heard the alleged false testimony may reproduce it. Schley v. State (Cr. App.) 181 S. W. 470.

70. —— **Conveyances, contracts and other instruments.**—Where a contract of employment is in writing and specifically stipulates the amount of commissions to be paid, oral testimony as to the amount of commissions is inadmissible, but the agent may testify that he did make a contract of employment with the principal. Meredith v. State (Cr. App.) 184 S. W. 204.

72. —— **Letters and telegrams.**—Witness, having lost a letter to her, could testify to its contents. McDonald v. State (Cr. App.) 179 S. W. 880.

73. —— **Admissibility of secondary evidence.**—Where it was shown that proper search had been made for the writing to which dying declarations of deceased had been reduced and it was lost, oral proof of the declarations was admissible. Rodriques v. State (Cr. App.) 186 S. W. 335.

In prosecution for knowingly permitting house to be used for prostitution, it is not proper predicate for oral testimony that an inmate pleaded guilty to vagrancy, and accused to disturbing the peace, for a witness to say that he did not know where the complaint was, that he had not looked for it, and on plea of guilty the complaint was usually destroyed. Goosby v. State (Cr. App.) 189 S. W. 143.

75. **Demonstrative evidence.**—In a prosecution for homicide, bones claimed to be those of deceased held admissible in evidence. Wilganowski v. State (Cr. App.) 180 S. W. 692.

Decedent's clothing should not be displayed in front of the jury unless virtually in the same condition as at the time of the killing. Mansell v. State (Cr. App.) 182 S. W. 1137.

76. —— **Matters explanatory of offense.**—Where the only witness to the killing besides accused was discredited by proof of her use of morphine, and even the doctors disagreed as to whether the bullets entered from the front or back of deceased's body, the bloody clothing worn by deceased is admissible in evidence to show the course of the balls. Burgess v. State (Cr. App.) 181 S. W. 465.

Clothes worn by decedent at the time he was shot by accused are admissible to show where the wounds took effect in the body of decedent. Hiles v. State (Cr. App.) 182 S. W. 1121.

In a murder trial, unless there is an issue as to the position of the parties, or character of the wound, on which examination of the bloody clothing of the victim might be enlightening, such clothing is inadmissible. Gillespie v. State (Cr. App.) 190 S. W. 146.

78. —— **Articles subject of offense.**—The bloody clothing of deceased was admissible in connection with testimony as to whether wounds were inflicted by one bullet or more. McKinney v. State (Cr. App.) 187 S. W. 960.

80. **Admissions by accused.**—In prosecution for seduction, it was proper to permit an entire conversation between defendant and witness amounting to a confession of illicit intercourse to be shown to make defendant's statements to the witness intelligible. Gleason v. State (Cr. App.) 183 S. W. 891.

Where defendant told persons that he was going to surrender, and asked them to accompany him, and some of them did so, his statements to them are admissible, he not being under arrest or restraint, and they not being officers. Martin v. State (Cr. App.) 186 S. W. 331.

In a prosecution for arson, testimony of the city marshal, that defendant, after the fire, admitted that he lied when he denied he was in the building immediately preceding the fire, was admissible. Arensman v. State (Cr. App.) 187 S. W. 471.

Evidence as to accused's testimony before grand jury when subpœnaed and required to answer without being informed of her privilege against self-incrimination, which evidence tended to show accused guilty of the offense charged, is inadmissible. Allen v. State (Cr. App.) 188 S. W. 979.

Overruling on objection to admission in evidence of a statement by accused held not erroneous in the absence of a showing that he was under arrest at the time of making of statement. Longoria v. State (Cr. App.) 188 S. W. 987.

81. —— **Acquiescence or silence.**—It is permissible for the state to introduce conversations with the defendant while not under arrest relative to the crime for which he is on trial and prove statements made to him calling for a denial, and that he made no denial or made a qualified admission. Burkhalter v. State (Cr. App.) 184 S. W. 221.

85. **Declarations by accused.**—Statements of defendant and of another party, made while the police officer was making an investigation, held not inadmissible as made while defendant was under arrest. Rice v. State (Cr. App.) 179 S. W. 876.

Testimony of officer as to searching deceased's rooms for money, and defendant's statements held admissible, even though defendant was under arrest; the money having been found by reason of her statements. Hand v. State (Cr. App.) 179 S. W. 1155.

Evidence of what defendant told his wife after commission of the offense charged is inadmissible. Beesing v. State (Cr. App.) 180 S. W. 256.

In prosecution on charge of being an accomplice to a murder, evidence as to what defendant did and said when he had visited deceased while in jail 4 years before the offense charged, held admissible, in the light of defendant's own testimony. Gerard v. State (Cr. App.) 181 S. W. 737.

86. —— **Self-serving declarations.**—Refusing to allow defendant in seduction to show his prior statements that he was to marry another than prosecutrix held not error, where they were not communicated to prosecutrix. McDonald v. State (Cr. App.) 179 S. W. 880.

Where defendant, when first informed that the mules belonged to the prosecuting witness, made no explanation of his possession, evidence of his statement as to where he obtained possession, made thereafter, is inadmissible, it being a self-serving declaration. Blackburn v. State (Cr. App.) 180 S. W. 268.

It is not error to exclude testimony of the parents of one accused of murder as to his acts and statements some time after the killing, where all res gestæ evidence was admitted; the excluded evidence being self-serving. Crowder v. State (Cr. App.) 180 S. W. 706.

Self-serving declarations made by defendant two hours prior to his difficulty with deceased were properly excluded from evidence. Becker v. State (Cr. App.) 190 S. W. 185.

87. —— **Explanatory declarations.**—Where the state introduced as evidence that blood had been on defendant's hat testimony of a witness that when he arrested defendant his hat was slightly burned, also evidence that his arm was scratched, testimony of such witness of the explanation defendant gave at the time as to why the scratches were on his arm and how his hat got burned, was improperly excluded. Hampton v. State (Cr. App.) 183 S. W. 887.

88. **Declarations by person injured.**—In prosecution of brothers for murder, declarations of deceased that he had been hired by defendant to kill wife of one of the defendants brought to that defendant's knowledge, were admissible against defendants to show motive. Sapp v. State (Cr. App.) 190 S. W. 489.

89. **Declarations of third persons.**—In a prosecution for manslaughter, where defendant killed deceased in a quarrel over a standing difficulty, testimony of defendant's wife, that when she was made aware of the quarrel she said it was nothing more than she expected, was inadmissible. Mansell v. State (Cr. App.) 182 S. W. 1137.

90. —— **Declarations in accused's absence.**—In trial for murder, statements to officers who had gone to another state in search of defendant that he was going under an assumed name, made while he was not present, held hearsay, and inadmissible. Boyd v. State (Cr. App.) 180 S. W. 230.

Declarations and acts of others, including the woman, in the absence of defendant, with which he is not connected, held inadmissible on prosecution for adultery. Moore v. State (Cr. App.) 180 S. W. 271.

That defendant was not present when the complaining witness identified property found on defendant's premises as being the stolen property did not render inadmissible such witness' testimony as to his identification of the property. Williams v. State (Cr. App.) 182 S. W. 335.

In a prosecution for murder, evidence as to remarks made mostly out of the hearing of the defendants by the witness and a third person was inadmissible, though such remarks were related to defendant on the following day. Carter v. State (Cr. App.) 183 S. W. 881.

91. —— **Declarations to or by officer.**—It was error to permit the county attorney to testify that he heard the testimony on an inquiring investigation, of another witness, and to state what such witness then testified, where it subsequently was made to appear that accused was not then present. Lunsford v. State (Cr. App.) 190 S. W. 157.

In trial for aggravated assault on a constable who had been summoned by a third party to arrest accused for robbery, it was proper to permit the constable to state what the third party had said when he came to get him to make the arrest, and evidence that the constable communicated with other officers who arrested accused was also proper. Porter v. State (Cr. App.) 190 S. W. 159.

93. —— **Declarations to accused.**—Evidence of what defendant's wife told him after commission of the offense charged is inadmissible. Beesing v. State (Cr. App.) 180 S. W. 256.

95. —— **Letters.**—A letter of prosecutrix's father to accused charging him with the offense, to which accused had replied, indignantly denying the charge, was inadmissible. Hollingsworth v. State (Cr. App.) 189 S. W. 488.

96. —— **Declarations in accused's presence.**—Remark to assaulted party before the assault and his reply held admissible, where it appeared that defendant was near enough

that the assaulted party heard a remark by him or one of his companions. Southall v. State (Cr. App.) 179 S. W. 872.

In a prosecution for theft of a hog, the witness to whom accused sold the animal, in testifying to a conversation wherein accused was informed that another claimed the hog, may testify as to the assertions of the claimant. Casey v. State (Cr. App.) 180 S. W. 673.

97. **Hearsay in general.**—In a prosecution for violating Pen. Code art. 500, relating to keeping disorderly houses, held, that a witness' testimony as to what others told him should have been excluded as hearsay. Speers v. State (Cr. App.) 190 S. W. 164.

It is not hearsay to permit a witness to testify that he pointed out to the sheriff and others the place where he saw defendants on the night of the homicide, and that a certain place was the place where they on the morning of the homicide had noticed the wagon began to drag as if the brakes had been thrown on. Marta v. State (Cr. App.) 193 S. W. 323.

101. —— **Oral statements in general.**—On trial for assault, accused's testimony that he made the assault because he was told by his wife and others that the prosecuting witness had raped her held erroneously excluded; the hearsay rule not applying. Dieter v. State (Cr. App.) 179 S. W. 557.

Testimony of witness who had translated deceased's alleged dying declaration in the presence of officers, who only understood what she said, and testimony of such officers as to what she said, held inadmissible, as being hearsay. Boyd v. State (Cr. App.) 180 S. W. 230.

In prosecution for wife desertion, the wife's testimony that after the desertion she went to defendant's parents, and was told by a Mexican that the father said she could not see defendant, was inadmissible. Redmond v. State (Cr. App.) 180 S. W. 272.

On trial for statutory rape, evidence as to statements of girl's mother as to purpose for which girl was sent to defendant's home held properly excluded as hearsay. Edwards v. State (Cr. App.) 181 S. W. 195.

In trial for murder, ex-sheriff's testimony that a witness who had been investigating with him had found a gun at the residence of one other than the defendant and had brought it to him, saying that it was the gun that killed deceased, held inadmissible. Burkhalter v. State (Cr. App.) 184 S. W. 221.

In a prosecution for robbery of whisky, testimony of a witness that she had heard that there was more whisky in a box from which she had seen defendant take alcohol and as to a conversation which she had heard defendant have with a veterinary doctor, was inadmissible as hearsay. Pearson v. State (Cr. App.) 187 S. W. 336.

103. —— **Identification of property stolen.**—While evidence of other extraneous crimes, if a part of the res gestæ, or tending to connect defendant with the offense for which he is on trial, is admissible, yet testimony that another person identified certain cotton stolen as his is hearsay and not admissible in a prosecution for stealing other cotton. Lunsford v. State (Cr. App.) 190 S. W. 157.

In a prosecution for cattle theft, it was not error to permit a witness to testify that he had heard the names of persons who recognized the cattle at the place to which they were driven. Pope v. State (Cr. App.) 194 S. W. 590.

105. —— **Written statements.**—In an incest case, where the woman testified accused never had intercourse with her, held, that a copy of a letter in which she charged accused with being father of her child was not admissible as original evidence. Hollingsworth v. State (Cr. App.) 182 S. W. 465.

A diary entry made by defendant's wife relative to abusive treatment by her husband held objectionable as hearsay, and diary entries made by her after the homicide held inadmissible since they were not only hearsay and could not have operated on defendant's mind when he killed deceased, but were inhibited by arts. 794 and 795. Bennett v. State (Cr. App.) 194 S. W. 148.

106. **Evidence founded on hearsay.**—Assaulted party held improperly permitted to testify that his assailant beat him with a fence rail; his knowledge having been acquired from G., who found the rail with blood on it. Southall v. State (Cr. App.) 179 S. W. 872.

In view of latitude given defendant to prove prosecutrix unchaste, court properly refused to permit him to answer question whether he knew or had heard of any one having had intercourse with prosecutrix. Johnson v. State (Cr. App.) 188 S. W. 426.

107. —— **Matters provable by reputation.**—Where witness testified about reputation of defendant's claimed disorderly house, objection to question as irrelevant, immaterial, and incompetent hearsay, held properly overruled. Bennett v. State (Cr. App.) 181 S. W. 197.

In trial for murder by handing a pistol to a person as to whose identity the evidence is conflicting and encouraging him to kill, it was not error to exclude testimony as to general reputation of a certain person claimed to be the person to whom accused handed the pistol. Rose v. State (Cr. App.) 186 S. W. 202.

108. —— **Evidence as to age.**—The age of the prosecutrix in a statutory rape case cannot be shown by the school record, through her mother may testify thereto. Heitman v. State (Cr. App.) 180 S. W. 701.

109. **Acts and declarations of conspirators in general.**—On trial for assault, remark of one of four boys who were together that they would get the prosecuting witness held admissible against another of them. Southall v. State (Cr. App.) 179 S. W. 872.

Where testimony showed a conspiracy of defendant and others to whip a negro or negroes, testimony about whipping other negroes, shooting into other houses, and going

to the house of one to kill him held admissible. Buckley v. State (Cr. App.) 181 S. W. 729.

Where jury could find there was a conspiracy between defendant and his wife to burn a building and her merchandise therein for insurance, testimony of witness, that the wife had told him she would burn the place for the insurance before she would go broke, held admissible. Arensman v. State (Cr. App.) 187 S. W. 471.

The acts and declarations of coconspirators are admissible, where they occur before the completion of the conspiracy. Sarli v. State (Cr. App.) 189 S. W. 149.

Where evidence of a witness present at a conversation between deceased and a third person tended to show a conspiracy between the third person and appellant to murder deceased, it was admissible. Edwards v. State (Cr. App.) 191 S. W. 542.

109½. Who are accomplices.—The statements and acts of deceased's wife are not inadmissible as those of a bystander, where she took an active part in the quarrel preceding the murder. Baker v. State (Cr. App.) 187 S. W. 949.

110. Furtherance or execution of common purpose.—That defendant and other companions of W. followed him and party assaulted by him, and remarked that W. ought to beat such person's head off, strongly tended to show that defendant was a principal, and evidence as to remark by W. regarding his intention to whip the prosecuting witness, just prior to the assault, and as to what W. did to the assaulted party after he ran away, pursued by W., held admissible. Southall v. State (Cr. App.) 179 S. W. 872.

Where defendant and three others, armed and disguised, whipped and shot at negroes, their acts and statements when together on the day of the expedition are admissible to show a conspiracy in a prosecution for a murder committed during the raid. Davis v. State (Cr. App.) 180 S. W. 1085.

The acts and declarations of coconspirators made by either in furtherance of the common design, are admissible, where they show the criminal relation between them. Sarli v. State (Cr. App.) 189 S. W. 149.

111. —— Absence of defendant.—What accomplices said and did together, as testified by one of them, though in defendant's absence, held admissible. Tyler v. State (Cr. App.) 180 S. W. 687.

Declarations of a coconspirator are admissible against all the parties to the conspiracy whether they heard it or had it communicated to them or not. Sapp v. State (Cr. App.) 190 S. W. 489.

112. —— Acts and declarations during actual commission of crime.—In a prosecution for burglary, testimony of defendant as to what another, also charged with the crime, with whom defendant denied acting in concert, had told defendant while the other was in the very commission of the act, as to how such other had gained entrance, was competent, though such other was not competent as a witness. McPherson v. State (Cr. App.) 182 S. W. 1114.

113. —— Acts and declarations prior to conspiracy or defendant's joinder therein.—The declarations or statements by conspirators, even if made before a conspirator entered into the conspiracy, are admissible against him, even though what was said or done by any of the others was done in his absence. Sapp v. State (Cr. App.) 190 S. W. 489.

115. Acts and declarations after accomplishment of object.—In trial for murder, evidence held inadmissible under rule that acts and statements of coconspirators after the completion of the conspiracy cannot be used against another party thereto who was not present and did not hear. Boyd v. State (Cr. App.) 180 S. W. 230.

In prosecution for being an accomplice to murder, acts and declarations of alleged principal made after murder and the alleged conspiracy and out of defendant's presence were hearsay, and inadmissible to connect defendant with crime. Sarli v. State (Cr. App.) 189 S. W. 149.

Proper predicate being laid, confession of codefendant in defendant's presence, practically the same and made at the same time as his confession, is admissible. Blake v. State (Cr. App.) 193 S. W. 1064.

117. Preliminary proof of conspiracy.—Evidence that defendant with others went out armed and disguised, whipped negroes, shot into houses, and killed a negress is sufficient to show a conspiracy, so that evidence of the acts and conduct of each is admissible in a prosecution of one for the murder. Davis v. State (Cr. App.) 180 S. W. 1085.

Evidence held to tend to show a conspiracy between appellant and his nephew to murder deceased. Edwards v. State (Cr. App.) 191 S. W. 542.

120. Documentary evidence in general.—Unrecorded brands as evidence, see Civ. St. art. 7160.

Where in a rape case the parents of prosecutrix testified she was born one year after their marriage, the record of the marriage licenses, being properly proven, is admissible to establish prosecutrix's age. Taylor v. State (Cr. App.) 184 S. W. 224.

121. —— Official records.—Under Pen. Code, art. 606, entry book duly kept by express company held admissible, in prosecution for pursuing business of selling intoxicating liquor in prohibition territory, to show deliveries to defendant. Counts v. State (Cr. App.) 181 S. W. 723.

123. —— Private writings and publications.—In a prosecution for embezzling money sent defendant for a particular purpose, defendant's replies to letters written for the sender by a bank cashier were properly admitted in evidence, where they related to a transaction in connection with which the money was sent, and there was evidence authenticating defendant's signature to them. Messner v. State (Cr. App.) 182 S. W. 329.

In a prosecution for passing a forged check, extraneous checks or vouchers should

not be admitted, in the absence of proof that they were forgeries and that defendant was connected therewith. Carrell v. State (Cr. App.) 184 S. W. 190.

In prosecution for riding on railroad pass of another, held, that evidence of witness familiar with a Sunday school and its roll book, that defendant had been present there on the day when the road's auditor testified he had used the pass, should have been admitted. Leach v. State (Cr. App.) 189 S. W. 733.

Recitals in the diary of defendant's wife held admissible only on the issue of defendant's motive and state of mind, and not to establish the existence of any fact. Bennett v. State (Cr. App.) 194 S. W. 148.

124. —— **Maps and photographs.**—Photograph of the scene of the homicide taken a year after the difficulty, on a showing that the conditions were practicaliy the same then as at the time of the homicide, was admissible. Hassell v. State (Cr. App.) 188 S. W. 991.

125. —— **Authentication and proof.**—The original waybill held admissible, on theft from a car, while in a railroad yard, on testimony of the station agent, without testimony of the person who made it out. Tyler v. State (Cr. App.) 180 S. W. 687.

In a prosecution for being an accomplice to murder, letter claimed to have been written by defendant held improperly admitted for want of a sufficient predicate. Sarli v. State (Cr. App.) 189 S. W. 149.

In a prosecution for violation of the tick eradication law (Acts 33d Leg. c. 169), if state undertook to introduce the Governor's proclamation that a county had accepted the act as alleged, held, that a certified copy of such proclamation was sufficient, but a notice from state sanitary live stock commission, not signed or properly authenticated or proven, should have been excluded. McGee v. State (Cr. App.) 194 S. W. 951.

126. —— **Compelling production.**—For production of a telegram sent immediately after the homicide, by witnesses for the state, contradictory of their testimony, and so impeaching, an order should be made; it not being obtainable otherwise. Kilpatrick v. State (Cr. App.) 189 S. W. 267.

128. **Opinion evidence in general.**—Under Pen. Code, art. 1143, as to showing character of deceased, when defendant shows threats of deceased, witness may, over objection of opinion, state whether or not deceased was a person who would likely execute a threat made. Melton v. State (Cr. App.) 182 S. W. 289.

129. **Facts or conclusions.**—A question whether a confession was voluntarily made and signed is properly refused as calling for the conclusion of the witness. Wilganowski v. State (Cr. App.) 180 S. W. 692.

Testimony that one has the reputation of being a bootlegger is not a conclusion, but as to a fact. Medlock v. State (Cr. App.) 185 S. W. 566.

It was not error to permit prosecutrix to tell that she resisted "all she could," where she also specified various acts of resistance on her part and of violence on the part of accused. Wood v. State (Cr. App.) 189 S. W. 474.

In prosecution for murder, testimony of witness that there was not any doubt but that defendants were guilty, was a conclusion or opinion, and inadmissible. Sapp v. State (Cr. App.) 190 S. W. 489.

Where defendant's wife testified on direct that defendant had shot deceased in self-defense, evidence that she had stated to the son of deceased that defendant had killed deceased because he had sued him held inadmissible, as a conclusion of the witness. McDougal v. State (Cr. App.) 194 S. W. 944.

130. —— **Evidence as to intent, belief, or knowledge.**—In a prosecution for rape, it was not error for the court to permit the prosecutrix to testify that she knew what it was to be and that she was pregnant. Carter v. State (Cr. App.) 181 S. W. 473.

Where accused's daughter did not know her father's whereabouts at the time of the shooting, her testimony that when she heard the shot she knew it came from about the mail box is properly rejected. Sanford v. State (Cr. App.) 185 S. W. 22.

In trial for aggravated assault, it was proper for the state to elicit from accused's witness on cross-examination that it looked to him as if when accused was running with a gun toward the assaulted party, he was getting ready to shoot. Porter v. State (Cr. App.) 190 S. W. 159.

The statement of an effect produced on the mind becomes primary evidence and admissible where the matter cannot be reproduced and made palpable in the concrete. Marta v. State (Cr. App.) 193 S. W. 323.

131. —— **Nature, condition, relation and identity of things.**—Where witness did not form opinion as to identity of persons when he saw them, subsequent conclusion based on reasoning and subsequent information was properly excluded. Clark v. State (Cr. App.) 183 S. W. 437.

Testimony of physicians that they had examined a witness alleged to be of unchaste character, and that she had never had intercourse with a man, giving the facts as to her physical condition, is not opinion evidence, but a statement of fact. Reed v. State (Cr. App.) 183 S. W. 1168.

In a prosecution for homicide, a witness may properly testify that bushes at the place of the killing showed shot marks. Sanford v. State (Cr. App.) 185 S. W. 22.

Though the owner of a store which was burglarized could not positively identify snuff found in a store to which accused said he had taken snuff stolen from witness' store, he could state his best judgment as to the identity thereof. Miller v. State (Cr. App.) 189 S. W. 259.

Testimony that handwriting is defendant's, by one familiar with his handwriting has the status of primary evidence. Jackson v. State (Cr. App.) 193 S. W. 301.

Statement that defendant's place of business and premises were most filthy and unsanitary places he ever saw was not conclusion of witness. Moore v. State (Cr. App.) 194 S. W. 1112.

132. —— **Evidence as to tracks and stains.**—Opinion of witness as to whether horses were running, determined by tracks, held admissible, the foundation being properly laid. Taylor v. State (Cr. App.) 180 S. W. 242.

A witness' testimony that he saw some wagon and mule tracks near where the peas were stolen, and that he followed them for some distance and found peas spilled on the ground and walked on and saw similar tracks, held admissible over objection that it was a statement of a conclusion. Williams v. State (Cr. App.) 182 S. W. 335.

133. —— **Evidence as to manner, appearance and conduct.**—Testimony that deceased was angry when he made threats against defendant was not incompetent as an opinion. Mason v. State (Cr. App.) 183 S. W. 1153.

Testimony of accused's jailer that while accused was in jail at night he would stumble against the benches and seats in walking around, offered by accused in murder trial for the purpose of showing he could not see in the dark, was properly excluded, as not being that of an expert. Warbington v. State (Cr. App.) 189 S. W. 147.

A witness may testify, in a prosecution for murder, that another was mad from his tone of voice. Ray v. State (Cr. App.) 190 S. W. 1111.

134. —— **Evidence as to meaning of words and acts.**—Defendant, though entitled to testify that prosecuting witness said he would be sorry if he did not let her have some groceries, held not entitled to state that he understood this as a threat of a criminal prosecution. Edwards v. State (Cr. App.) 181 S. W. 195.

Where the statute specifically defines the term "practicing medicine," it is not error to exclude testimony as to the general meaning of those words in a prosecution for practicing medicine without authority. Young v. State (Cr. App.) 181 S. W. 472.

Witnesses should not be permitted to testify that defendant was told "a great many things damaging to him" as bearing on his failure to deny such charges. Burkhalter v. State (Cr. App.) 184 S. W. 221.

Where deceased's statement that he intended to take possession of accused's house and that he had an instrument worth $25 was communicated to accused, held, that witness' interpretation of reference to instrument was inadmissible, not having been communicated to accused. Stanley v. State (Cr. App.) 193 S. W. 151.

136. **Admissibility of opinions of nonexperts.**—Where accused asserted her insanity, a witness may testify that he saw nothing unusual when she interpreted for her husband upon whom he called. Wilganowski v. State (Cr. App.) 180 S. W. 692.

Where a witness testified that she had seen deceased moaning and raising her body while doctor was examining her wounds, had heard what witnesses said to her, and her answers, her opinion that deceased was conscious was admissible. Thompson v. State (Cr. App.) 187 S. W. 204.

138. —— **Impressions from collective facts.**—It was proper to allow one who saw affray to testify that accused's conduct made impression on witness that accused was about to attack deceased. Mason v. State (Cr. App.) 183 S. W. 1153.

142. —— **Facts forming basis of opinion.**—Testimony of nonexperts may be received only where they state sufficient facts on which to base their conclusions. Hazelwood v. State (Cr. App.) 186 S. W. 201.

143. **Subjects of expert testimony.**—Where deceased testified that she killed her husband with a wooden maul, medical testimony as to whether a woman of her size could strike a death blow with such an instrument is admissible. Wilganowski v. State (Cr. App.) 180 S. W. 692.

Expert testimony that a person laboring under a sudden attack of insanity and having a slip of the mind would not, upon recovering normal consciousness, know anything that he did or what took place during the time, and that one insane to the extent of not knowing right from wrong would not and could not detail the incidents attendant upon a homicide by him, and the events just before and subsequent, was admissible. Mikeska v. State (Cr. App.) 182 S. W. 1127.

In a prosecution for homicide, medical expert may testify that, in his opinion, one of the shot found in deceased's eye did not enter straight but entered at an angle. Sanford v. State (Cr. App.) 185 S. W. 22.

In a prosecution for rape, whether it is the natural impulse of a girl to deny the guilt of a lover and charge some other man was for the jury, and not a subject for expert testimony. Simmons v. State (Cr. App.) 186 S. W. 325.

The testimony of a surgeon is admissible to prove the nature of a wound and the probable cause and effect. Bush v. State (Cr. App.) 189 S. W. 158.

In prosecution for assault with intent to murder, court properly permitted witness to testify about claimed wounds which defendant testified were inflicted upon him by assaulted party; witness' testimony showing his competency to testify as he did. Fleming v. State (Cr. App.) 194 S. W. 159.

Testimony of deputy sheriff, fully qualified as expert on pistols, that pistol exhibited at trial, and shown to have been in deceased's possession at time of killing, had been fired only once, in his opinion, was admissible. Holder v. State (Cr. App.) 194 S. W. 162.

144. —— **Cause and effect.**—Opinion evidence by a doctor, who qualified as an expert witness, as to the cause of the injuries inflicted, held properly admitted. Chisom v. State (Cr. App.) 179 S. W. 103.

Admitting statement of witness, after describing the wounds, that they would have produced death, that such wounds could have been produced with the hammer in evidence, and death could be produced by an ordinary man striking one in the back of the head with it, held not error. Martin v. State (Cr. App.) 186 S. W. 331.

145. **Competency of experts.**—Chemist who analyzed deceased's stomach held competent to express an opinion as to how much strychnine sulphate would cause a man's death. Hand v. State (Cr. App.) 179 S. W. 1155.

Witnesses held sufficiently qualified to testify that during their acquaintance with defendant they observed nothing in him leading them to believe he was mentally afflicted. Mikeska v. State (Cr. App.) 182 S. W. 1127.

A medical witness need not be an alienist or specialist, to give his opinion as an expert on insanity. Holland v. State (Cr. App.) 192 S. W. 1070.

Court held not to have abused its discretion in holding witness not qualified to testify as expert as to how many times deceased's pistol in evidence had been fired, but deputy sheriff, who had been such for about eight years, and was at time of trial, had been familiar with pistols, and claimed to have made study of them, and that he could tell by examination of pistol in evidence how often it had been fired, was qualified as expert to give opinion as to such matter. Holder v. State (Cr. App.) 194 S. W. 162.

147. **Examination of experts—Facts forming basis of opinion.**—Examination of witness for state and cross-examination of defendant's witness as to whether separate ailments or defects mentioned by defendant's witness showed insanity held proper. Rogers v. State (Cr. App.) 180 S. W. 674.

149. **Evidence on former trial or hearing.**—In a prosecution for assault to murder, where a witness on examining trial, whose testimony was reduced to writing, went to Mexico, on trial defendant could reproduce so much of his testimony as showed that the party assaulted was armed with a pistol and had secured cartridges from the witness. Hernandez v. State (Cr. App.) 182 S. W. 494.

On proof that a witness who testified at former trial was no longer resident of state, his testimony at such former trial was admissible. Chamberlain v. State (Cr. App.) 183 S. W. 438.

Testimony of one given at a former trial with due opportunity for cross-examination is admissible on a subsequent trial after death of such witness. Bergin v. State (Cr. App.) 188 S. W. 423.

Refusal to permit defendant to read to the jury the testimony of a witness taken upon a former trial, which evidence did not show the said witness was out of the jurisdiction of the court, was not error. Berry v. State (Cr. App.) 188 S. W. 997.

A witness was properly permitted to state what he testified to at the examining trial. De Arman v. State (Cr. App.) 189 S. W. 145.

152. **Weight and sufficiency of evidence.**—In a prosecution for arson, evidence held not to show that defendant was in a different city when his building was burned. Kline v. State (Cr. App.) 184 S. W. 819.

153. —— **Circumstantial evidence.**—In a trial for murder, it was necessary for the state to prove that deceased was unlawfully killed, and that defendant had killed him or was a party to the crime, which requisites may be shown by circumstantial evidence. Ingram v. State (Cr. App.) 182 S. W. 290.

158. **Examination, credibility, impeachment and corroboration of witnesses.**—Accused cannot complain that the district attorney used a memorandum in examining witnesses, where there was nothing to show that such memorandum was notes of the testimony given at the preliminary examination or before the grand jury. Tyrone v. State (Cr. App.) 180 S. W. 125.

Prosecuting attorneys are officers of the state, whose duty it is to see that justice is done, and they should never attempt to get before the jury evidence they know to be inadmissible, and where court and district attorney were informed that accused, who was charged with assault to kill, had, 14 years before, been acquitted on a charge of murder, the court, having ruled that the former charge was too remote, should admonish the district attorney not to interrogate accused thereon. Bullington v. State (Cr. App.) 180 S. W. 679.

Where the district attorney, though knowing that the court held evidence of a former charge of crime too remote, brought it before the jury by examining accused concerning it, he was guilty of improper conduct. Id.

In a prosecution for burglary, there was no error in the court's failing to place defendant among other men for identification by pawnbroker. Rowlett v. State (Cr. App.) 180 S. W. 1078.

162. **Limiting effect of evidence.**—Part of testimony tending to show that alleged principal to murder was a principal should have been limited exclusively to that purpose, and not allowed to show defendant an accomplice to the murder, and acts and declarations of alleged principal after murder, though relating to the accomplice, should be limited to proof of principal's guilt. Sarli v. State (Cr. App.) 189 S. W. 149.

Where birth of a child to prosecutrix was proved as of such date that the act originally relied on could not have caused the pregnancy, while the state should be permitted to prove the two acts, the force of the later should be limited, or the state should be required to elect upon which act it would rely. Hollingsworth v. State (Cr. App.) 189 S. W. 488.

It is neither necessary nor proper to limit the evidence which goes to prove motive. Sapp v. State (Cr. App.) 190 S. W. 489.

163. —— **Impeaching evidence.**—Evidence admitted to impeach one of accused's witnesses by showing his statements indicating a desire to help accused cannot be considered for any other purpose. Casey v. State (Cr. App.) 180 S. W. 673.

Where testimony is introduced that is not original, but for collateral or impeaching purposes, it will be limited for the purposes for which it is introduced. Hollingsworth v. State (Cr. App.) 189 S. W. 488.

Where testimony was admissible only to impeach a witness, the jury should have been so told. Leach v. State (Cr. App.) 189 S. W. 733.

164. —— **Evidence of other offenses.**—In a prosecution against defendant for shooting his wife while in the company of her paramour, who was also shot, the court should have limited the effect of testimony as to the killing of the latter to its consideration as affecting the killing of the wife. Cook v. State (Cr. App.) 180 S. W. 254.

In a prosecution for assault to rape, the jury should be instructed that evidence of other similar offenses against prosecutrix should be considered only to determine defendant's intention to have sexual intercourse with her at the time of the assault for which he is on trial, and not whether he attempted to have such intercourse. Webb v. State (Cr. App.) 187 S. W. 485.

In prosecution for riding on railroad pass of another, held, that court should have limited to issue of identity purpose for which testimony of railroad's auditor that defendant had previously ridden on the pass was introduced. Leach v. State (Cr. App.) 189 S. W. 733.

165. **Cumulative evidence.**—Where a given fact is sufficiently shown by a number of witnesses, it is not error to exclude testimony of another witness which is merely cumulative. Tinker v. State (Cr. App.) 179 S. W. 572.

167. **Admission of evidence dependent on preliminary proof.**—In a trial for criminal seduction, evidence of conversation of district attorney with prosecutrix's father as to defects in her testimony, which she later supplied, held not admissible, where accused did not offer to show she knew of the conversation. Capshaw v. State (Cr. App.) 186 S. W. 209.

Where it was not shown that prosecutrix, who had worked in laundry, associated with another girl who worked in such laundry, or knew anything about the associates or conduct of such other girl, court was correct in excluding answer of plaintiff to question whether such other girl became pregnant and made some man marry her, and letters and poetry of obscene nature written by prosecutrix to defendant more than a year after commission of alleged offense, defendant not offering any testimony as to general reputation of prosecutrix for chastity, were also properly excluded. Johnson v. State (Cr. App.) 188 S. W. 426.

In a prosecution for matching coins for cold drinks held not necessary for state to first prove the kind of a drink drunk before introducing evidence as to value of drinks. Wilson v. State (Cr. App.) 189 S. W. 1071.

170. **Objections to evidence.**—In a prosecution for unlawfully carrying a pistol about April 1st, evidence that defendant was seen with a pistol in September, admitted without objection until after conviction, presented no error. Moreno v. State (Cr. App.) 180 S. W. 124.

171. —— **Sufficiency of objection.**—Admission of evidence over objection to the whole of it, when part only of it is inadmissible, presents no error. McKinney v. State (Cr. App.) 187 S. W. 960; Medlock v. State (Cr. App.) 185 S. W. 566; Martin v. State (Cr. App.) 189 S. W. 264.

An objection to testimony as irrelevant, immaterial, and inadmissible for any purpose and highly prejudicial, was equivalent to no objection unless the testimony was obviously inadmissible for any purpose. Bennett v. State (Cr. App.) 181 S. W. 197.

Where evidence for defendant to meet and explain evidence offered by the state was inadmissible on any phase of the case, it was immaterial as to what objection to it was made, or as to what reason the court gave for excluding it. Ingram v. State (Cr. App.) 182 S. W. 290.

Testimony being admissible for some purpose, admitting it over a general objection that it is incompetent and illegal is not error. Medlock v. State (Cr. App.) 185 S. W. 566.

Where defendant objected to testimony as to contents of a letter and postal from his wife to a witness, but assigned no ground, so that court made no ruling and defendant did not except to the admission of the evidence or any ruling of the court or the failure of the court to make a ruling, there was no error, no proper predicate having been laid. Arensman v. State (Cr. App.) 187 S. W. 471.

On objection to testimony, part of which is admissible and part perhaps inadmissible, specific objection must be made to the inadmissible portion. Short v. State (Cr. App.) 187 S. W. 955.

172. —— **Effect of failure to object.**—Where defendant and his attorney agreed to use of affidavit of absent witness and made no objection to its introduction at the trial, its admission is not ground for reversal. Debth v. State (Cr. App.) 187 S. W. 341.

The court, on reviewing rulings on evidence, must consider only the objections to the evidence made below. Longoria v. State (Cr. App.) 188 S. W. 987.

There was no error because of remoteness of time of the incident admitted as affecting defendant's credibility, the question of time not being raised at the trial, and being known by the judge only on the motion for new trial. Spence v. State (Cr. App.) 189 S. W. 269.

173. —— **Motions to strike out.**—Improper evidence, though admitted without objection, should be struck out, on motion made at any time before submission to the jury. Lewis v. State (Cr. App.) 180 S. W. 248.

Objection to unauthorized testimony of the general reputation of state's witness, made for the first time by requested charge to withdraw, presented before argument, is not too late. Clay v. State (Cr. App.) 180 S. W. 277.

It was error to refuse to strike county attorney's testimony as to testimony of another witness on an inquiring investigation, where it subsequently was made to appear that accused was not then present. Lunsford v. State (Cr. App.) 190 S. W. 157.

174. **Waiver or cure of error in admitting or excluding evidence.**—Answer of a witness, in impeaching accused that he made a statement to witness "just after he was tried for killing a man" cannot be complained of by accused, when it was promptly ex-

cluded and the jury directed not to consider it, in the absence of request for further instructions. Bullington v. State (Cr. App.) 190 S. W. 154.

Art. 785. [765] Defendant presumed to be innocent; reasonable doubt.

11. **Reasonable doubt in general.**—The state need not prove defendant sane beyond a reasonable doubt. Mikeska v. State (Cr. App.) 182 S. W. 1127.

16. —— **Sufficiency of instructions in general.**—Instruction on self-defense on question of accused, approaching deceased to provoke assault, held defective for omitting reasonable doubt as sufficient to acquit. Mason v. State (Cr. App.) 183 S. W. 1153.

On conflicting evidence, though court required jury to find beyond reasonable doubt that girl was under 15 to convict of rape, failure to charge for acquittal if jury believed she was more than 15, or had reasonable doubt, was reversible error. Mills v. State (Cr. App.) 184 S. W. 509.

An instruction held to clearly apply the rule of reasonable doubt in favor of accused. Murrell v. State (Cr. App.) 184 S. W. 831.

An instruction that defendant was entitled to be acquitted if the jury believed that he committed the assault as a means of defense, believing that he was in danger of losing his life or of serious bodily injury, held not erroneous as ignoring the doctrine of reasonable doubt. Crippen v. State (Cr. App.) 189 S. W. 496.

23. **Burden of proof—When on defendant.**—Burden of proof held sometimes on defendant, but usually with reference to special matters, like nonage and insanity, and never until the state has overcome the presumption of innocence and reasonable doubt. Hawkins v. State (Cr. App.) 179 S. W. 448.

25. —— **Instructions.**—Instructions in prosecution for wife murder by poison held to sufficiently require the state to prove that arsenic was the poison used. Rea v. State (Cr. App.) 179 S. W. 706.

An instruction that defendant was entitled to be acquitted if the jury believed that he committed the assault as a means of defense, believing that he was in danger of losing his life or of serious bodily injury, held not erroneous as shifting the burden of proof. Crippen v. State (Cr. App.) 189 S. W. 496.

Art. 786. [766] Jury are the judges of facts.

Cited, Villareal v. State (Cr. App.) 182 S. W. 322 (in dissenting opinion).

2. **Jury as judges of the facts in general.**—In a prosecution for assault with intent to kill, the issue as to who began the difficulty is a question for the jury. Crippen v. State (Cr. App.) 189 S. W. 496.

Practice of submitting to jury question of whether proper predicate was laid for introduction of dying declarations, upon proper instructions, held proper, but in prosecution for murder, proper predicate was shown, and hence the court could have so held without submitting question to jury. Marshbanks v. State (Cr. App.) 192 S. W. 246.

3. **Weight of evidence and credibility of witnesses.**—Where the evidence of accused and his witnesses, if believed, would have authorized an acquittal, whether it should be believed was for the jury and the trial court. Jones v. State (Cr. App.) 180 S. W. 669.

4. —— **Weight of evidence.**—Where the evidence would support conviction, it is not error to refuse to direct a verdict of acquittal. Bennett v. State (Cr. App.) 185 S. W. 14.

The weight of the testimony is for the jury. Sanford v. State (Cr. App.) 185 S. W. 22.

Question whether accused had proved an alibi held for jury. Ferguson v. State (Cr. App.) 187 S. W. 476.

5. —— **Credibility of witnesses.**—The credibility of witnesses is for the jury. Sanford v. State (Cr. App.) 185 S. W. 22.

The credibility of witnesses is exclusively for the trial court and jury. Medlock v. State (Cr. App.) 185 S. W. 566.

Although the jury might have acquitted, it was their province to decide the credibility of the witnesses and weight to be given their testimony. Ellis v. State (Cr. App.) 185 S. W. 997.

Under conflicting evidence, credibility of the witnesses is a question for the jury. Bell v. State (Cr. App.) 190 S. W. 732.

7. —— **Conflicting evidence.**—Where evidence was sufficient to sustain the verdict, whether defendant or the witnesses for the state were to be believed was a matter for the jury and the trial court alone. Taylor v. State (Cr. App.) 179 S. W. 1161.

Where the state's evidence, which was apparently believed, sustained a conviction, and defendant's evidence, if believed, would have justified his acquittal, the sufficiency of the evidence was for the jury. Martin v. State (Cr. App.) 182 S. W. 1119.

The verdict finding defendant guilty of murder cannot be disturbed; there being evidence warranting this, and conflicting evidence of self-defense. Jones v. State (Cr. App.) 183 S. W. 141.

Where evidence is conflicting, it is for the jury to determine. Capshaw v. State (Cr App.) 186 S. W. 209.

13. **Instructions.**—Where facts in criminal prosecution are admitted or proved without contest, court may assume their truth in conducting trial and charging jury without infringing rule against comment on weight of evidence. Carter v. State (Cr. App.) 181 S. W. 473.

15. **Review of questions of fact.**—Where defendant attacked verdict for misconduct of jury in discussing his failure to testify, testimony tending to support defendant's con-

tention, opposed to testimony tending to disprove it, raised question of fact for the trial judge. Arensman v. State (Cr. App.) 187 S. W. 471.

16. **Conclusiveness of verdict—Verdict supported by evidence.**—A conviction will not be reversed solely on the ground of the insufficiency of the evidence, if the state's evidence is worthy of credit, and if true supports the verdict. Mitchell v. State (Cr. App.) 179 S. W. 116.

17. —— **Weight of evidence and credibility of witnesses.**—In a criminal case credibility of witnesses, weight of testimony, and facts established, are questions for the jury, and the court on appeal cannot disturb its finding thereon. Wood v. State (Cr. App.) 182 S. W. 1122.

The court, on appeal from a conviction of cattle theft, is not authorized by law to pass on the question of sufficiency of evidence. Duncan v. State (Cr. App.) 184 S. W. 195.

Credibility of witnesses was question for lower court. Waggoner v. State (Cr. App.) 190 S. W. 493.

In view of this article and art. 734, appellate court cannot in reviewing sufficiency of testimony take place of jury and disturb conviction because court would not have rendered same verdict. Norwood v. State (Cr. App.) 192 S. W. 248.

Failure of jury to accept explanation by accused of incriminating evidence is no ground for reversal on appeal. Marta v. State (Cr. App.) 193 S. W. 323.

18. —— **Conflicting evidence.**—A conviction on conflicting evidence will not be disturbed. Smith v. State (Cr. App.) 191 S. W. 138; Alexander v. State (Cr. App.) 180 S. W. 123; Robison v. State (Cr. App.) 185 S. W. 565; Fritz v. State (Cr. App.) 188 S. W. 978; Diaz v. State (Cr. App.) 189 S. W. 491.

On appeal from conviction, verdict will not be set aside where evidence, though conflicting, is sufficient to sustain. Summerville v. State (Cr. App.) 183 S. W. 439; Tinker v. State (Cr. App.) 179 S. W. 572; Wilburton v. State (Cr. App.) 179 S. W. 1169; Warbington v. State (Cr. App.) 189 S. W. 147.

Where a direct conflict in the testimony has been decided adversely to the accused, the judgment will not ordinarily be reversed. Grant v. State (Cr. App.) 179 S. W. 871.

Conflicting evidence in criminal trial is for determination, not of appellate court, but of jury and lower court. Rose v. State (Cr. App.) 186 S. W. 202.

Where the state's evidence was clear and positive as to defendant's guilt, though contradicted by defendant's testimony, a verdict of guilty cannot be disturbed on appeal. Gomez v. State (Cr. App.) 188 S. W. 991.

21. —— **Approval of verdict by trial court.**—Conviction of burglary approved by trial court will not be reversed where the evidence showed without controversy that a house was broken and jewelry stolen, which the next day was pawned by one whom the pawnbroker identified as defendant. Rowlett v. State (Cr. App.) 180 S. W. 1078.

Verdict of guilty under proper instructions and on sufficient evidence, approved by the trial judge, held not to be set aside on appeal unless clearly wrong. Edwards v. State (Cr. App.) 181 S. W. 195.

When there is sufficient evidence in the record, if believed, to support a conviction and it is approved by the trial judge, it will not be set aside on appeal unless clearly wrong. Tennel v. State (Cr. App.) 181 S. W. 458.

Art. 787. [767] Judge shall not discuss evidence offered, etc.

1. **Remarks of judge in general.**—Objections to remarks by the court to the regular jury panel cannot be sustained, where accused made no objections to the jurors drawn from such panel, and it did not appear that when such jurors were accepted he had exhausted his peremptory challenges. Tyrone v. State (Cr. App.) 180 S. W. 125.

In disposing of an objection by the defense to the mode of examining witnesses, held, that it was not error for the court to remark that he did not desire further time wasted on frivolous controversies. Id.

2. **Examination of witnesses by judge.**—Qualifications of bill of exceptions to examination of witness by the court in the absence of the jury held to show no error in the examination, where defendant had alleged that it was calculated to intimidate the witness. Reed v. State (Cr. App.) 183 S. W. 1168.

It was not prejudicial error for the trial court to ask accused if he intended to testify that it was his policy as an attorney to withhold from the authorities information as to stolen property in his possession. Cuilla v. State (Cr. App.) 187 S. W. 210.

3. **Comments on evidence.**—In a prosecution for burglary of a saloon, where a detective testified that the morning after the burglary they searched the defendant's house and found none of the stolen property, the court's remark that all the testimony could have been eliminated by objection by the state, because immaterial, was improper. McPherson v. State (Cr. App.) 182 S. W. 1114.

In prosecution for perjury before grand jury in investigating charge against another, for rape, where prosecutrix and defendant both testified that he knew her at the time of the crime, court's remark that she would not know whether defendant knew her or not was not error. Cozby v. State (Cr. App.) 189 S. W. 957.

In trial for aggravated assault, a comment by the court on the legal aspects of certain evidence held not such as to justify reversal. Porter v. State (Cr. App.) 190 S. W. 159.

In a trial for murder, the court's remark that he admitted certain evidence to enable the jury to pass upon credibility of a witness was proper, and not a comment on the weight of testimony. Edwards v. State (Cr. App.) 191 S. W. 542.

7. **Proceedings against witness or counsel.**—In prosecution for rape, where prosecutrix, as state's witness, was impudent and hostile with intention to exonerate accused,

action of court in punishing her for contempt by jail sentence, which induced her to testify, held proper. Carter v. State (Cr. App.) 181 S. W. 473.

Where a witness was captious and gave evasive argumentative answers, the court had the right to require her to answer the questions propounded. Bankston v. State (Cr. App.) 189 S. W. 142.

In prosecution for murder, court's conduct in relation to punishing defendant's impeaching witness for violation of rule, the impeachment being of great importance to defendant, held erroneous. Waters v. State (Cr. App.) 192 S. W. 778.

8. Prejudice from remarks.—Remarks of court that, "I do not like this kind of procedure and would not have allowed it if the prosecuting attorney had not yielded," held not important enough to cause reversal. Taylor v. State (Cr. App.) 180 S. W. 242.

Remarks by the trial court concerning an alleged medical expert, who admitted that he was not up on insanity, held not error because not weakening the expert's testimony more than he did. Wilganowski v. State (Cr. App.) 180 S. W. 692.

2. Of Persons Who May Testify

Art. 788. [768] Persons incompetent to testify.

Cited, Hipple v. State (Cr. App.) 191 S. W. 1150.

IN GENERAL

1. Disqualification in general.—Under the general rules of evidence, all persons are competent witnesses to testify to any fact relative and material to the matter under investigation, and which is within their knowledge, and are disqualified to so testify only because excepted by some special statute. Peil v. Warren (Civ. App.) 187 S. W. 1052.

2. Knowledge of witness or means of knowledge.—In prosecution for selling intoxicating liquors in prohibition territory, a question to fix the time of sale within the period of limitations held not objectionable as seeking to make the witness testify as to facts of which he had no recollection. Alverez v. State (Cr. App.) 179 S. W. 714.

In a prosecution for carrying weapons held not error to exclude testimony of a witness as to defendant's general good reputation in the absence of proof that the witness knew of such reputation. Beesing v. State (Cr. App.) 180 S. W. 256.

It is not error to exclude testimony of defendant's wife as to whether he had a pistol on his return home, where she says she had an opportunity to observe him but does not say that she did in fact observe him. Id.

A witness who stated that he knew the custom in the vicinity of plaintiff's land as to the distribution of Colorado grass hay between landlord and tenant is competent to testify thereto. Taylor v. Jackson (Civ. App.) 180 S. W. 1142.

Where state's witnesses testified to a conversation with defendant during which defendant stated that he was going to kill deceased it was not error to exclude testimony of a witness offered in rebuttal, where it did not appear that he was present. Baxter v. State (Cr. App.) 194 S. W. 1107.

SUBD. 1

6. Incompetency of insane person in general.—That it appeared on cross-examination of state's witness that he was once convicted of lunacy held not ground for reversal as for insufficiency of the evidence from the incompetency of the witness. Lanier v. State (Cr. App.) 182 S. W. 451.

SUBD. 2

10. Competency of children in general.—In a prosecution for rape upon a girl aged 4 years and 9 months she was not a competent witness. Watkins v. State (Cr. App.) 180 S. W. 116.

11. Witnesses held competent.—Examination as to competency of prosecutrix under 15 years old reviewed and in connection with fact that she made intelligent witness, held not to render her incompetent. Carter v. State (Cr. App.) 181 S. W. 473.

13. Determination of competency.—In a prosecution for rape, the admission of the testimony of a witness 5 years of age, herself present and claiming to have been raped, was properly within the sound discretion of the trial court. Tennel v. State (Cr. App.) 181 S. W. 458.

Under this article the court will not revise an order permitting deceased's seven-year old son to testify as to the homicide in the absence of showing that the discretion of the court was abused. Bell v. State (Cr. App.) 190 S. W. 732.

SUBD. 3

18. Nature of offense for which convicted.—A conviction for a misdemeanor did not render the convict incompetent as witness for state in a criminal case. Solan v. State (Cr. App.) 182 S. W. 317.

19. What constitutes conviction.—Regarding competency as a witness, one though pleading guilty is not a convict, till his case has finally been determined against him by affirmance or acceptance of sentence. Blake v. State (Cr. App.) 193 S. W. 1064.

20. Necessity of conviction.—That a witness is confined on a charge of murder does not render him incompetent to testify in another criminal prosecution, where he has not been tried or convicted. Moore v. State (Cr. App.) 180 S. W. 677.

23. Restoration of competency by pardon.—Granting of pardon to ex-convict who had served his term for felony on request of state and to enable him to testify for the state,

held a matter for the Governor, so that the Court of Criminal Appeals could not hold, on objection, that such witness was incompetent. Solan v. State (Cr. App.) 182 S. W. 317.

23½. Competency of one under suspended sentence.—One adjudged guilty of theft at a prior term of court, whose sentence has been suspended, was a competent witness. Simonds v. State (Cr. App.) 175 S. W. 1064.

One convicted of a felony, whose sentence was suspended in good behavior, is, until the suspension is revoked and sentence pronounced, a competent witness. Coleman v. State (Cr. App.) 187 S. W. 481.

25. Proof of disqualification.—Permitting judgment of conviction to be offered held not error, where upon production of pardon witness was permitted to testify and neither judgment nor pardon was read to the jury. Wolnitzek v. Lewis (Cr. App.) 183 S. W. 819.

Oral testimony on cross-examination that witness had been in penitentiary did not render him incompetent. Smiley v. State (Cr. App.) 189 S. W. 482.

As general rule, a party desiring to exclude testimony of felon must prove his disqualification by record showing final conviction. Baxter v. State (Cr. App.) 194 S. W. 1107.

26. Proof of pardon.—A copy of the pardon is the best evidence to show that a witness previously incompetent was rendered competent. Baker v. State (Cr. App.) 187 S. W. 949.

Art. 789. [769] Female alleged to be seduced may testify.

5. Testimony of prosecutrix—Admissibility.—In prosecution for seduction, held not improper to permit prosecutrix to testify that shortly before the birth of a child the defendant said that he was not going to marry her, and fled the country for six or eight months. Gleason v. State (Cr. App.) 183 S. W. 891.

In trial for seduction, where defendant undertook to show that further testimony of prosecutrix on second trial was a recent fabrication, it was proper to allow the state's counsel to ask her in rebuttal whether he told her the case had been reversed and that he wanted to know the whole truth. Id.

6. Impeachment of prosecutrix.—Where prosecutrix testified that she left her home before marrying defendant because of her pregnant condition, it was error to exclude evidence of declarations made by her to another on that trip that she was leaving home because of unpleasantness there. Coleman v. State, 71 Cr. R. 20, 158 S. W. 1137.

Testimony of mother of prosecutrix that she had made statements prior to the prosecution agreeing with her testimony on the trial, held admissible on the credibility of the prosecutrix and not permitting her to corroborate herself. Gleason v. State (Cr. App.) 183 S. W. 891.

7. Necessity of corroboration.—Under Pen. Code 1911, art. 498, a female solicited to illicit sexual intercourse, who consents without persuasion, is not an accomplice of the solicitor making requisite corroboration of her testimony for conviction thereon. Denman v. State (Cr. App.) 179 S. W. 120.

In prosecution for seduction, defendant cannot be convicted on testimony of prosecutrix unless it is believed to be true and to connect defendant with the offense, and is corroborated by evidence tending to connect him with the offense. Gleason v. State (Cr. App.) 183 S. W. 891.

8. Extent of corroboration required.—The testimony of the prosecuting witness need not be directly corroborated in every element of the offense, and circumstantial evidence is sufficient in corroboration if it connects the accused with the commission of the offense beyond a reasonable doubt, on the questions of intercourse and promise of marriage. Wood v. State (Cr. App.) 182 S. W. 1122.

In prosecution for seduction, defendant cannot be convicted on testimony of prosecutrix unless it is believed to be true and to connect defendant with the offense, and is corroborated by evidence tending to connect him with the offense. Gleason v. State (Cr. App.) 183 S. W. 891.

While prosecutrix as an accomplice must be corroborated by evidence connecting accused with the offense, corroboration need not extend to every essential of the offense. Tindel v. State (Cr. App.) 189 S. W. 948.

9. Admissibility of corroborative evidence.—Where prosecutrix testified that accused had exhibited a protector to her, testimony of other witnesses that they had seen such appliances in his possession prior to the alleged seduction is admissible in corroboration. Wood v. State (Cr. App.) 182 S. W. 1122.

In prosecution for seduction, where defendant introduced testimony of prosecutrix on the former trial to impeach her as to any prior existing promise of marriage, the state might support her testimony by evidence tending to show an engagement prior to the seduction. Gleason v. State (Cr. App.) 183 S. W. 891.

10. Sufficiency of corroboration.—In trial for seduction, statement of defendant that he would not mind marrying prosecutrix, if he could get a divorce, amounted to an admission that he was legally bound to marry her, and corroborated her statement that they were engaged. Gleason v. State (Cr. App.) 183 S. W. 891.

Evidence held to corroborate prosecutrix on issue of promise of marriage. Tindel v. State (Cr. App.) 189 S. W. 948.

Defendant's flight, when prosecution for seduction was instituted against him, corroborated prosecutrix in prosecution for abandonment after seduction and marriage as to his promise to marry her as inducing cause of their relations. Furr v. State (Cr. App.) 194 S. W. 395.

In prosecution for abandonment after seduction and marriage, marriage itself was corroboration of prosecutrix's testimony as to defendant's promise to marry her as inducing cause of their relations. Id.

Art. 790. [770] Defendant may testify.

7. Use of evidence on subsequent trial.—In trial for passing a forged instrument, signature of accused, written by him at a former trial as a means of comparison of the names written on the alleged forged instrument, was admissible in a subsequent trial for comparison with such instrument, where it was not written in the presence of the jury for comparison purposes. Martin v. State (Cr. App.) 189 S. W. 262.

10. Examination of defendant—Cross-examination.—Where the defendant had made an affidavit as to the testimony that would be given by three absent witnesses, held error to compel him to testify on cross-examination as to what he had heard those witnesses testify at the inquest, and at a hearing on habeas corpus. Swilley v. State, 73 Cr. R. 619, 166 S. W. 733.

In a trial for murder, where defendant, on his direct examination, testified that he was an Odd Fellow, it was permissible for the state to ask him if he said he was an Odd Fellow and to elicit a reply that he had been, but improper to ask him when he had been expelled from the Odd Fellows. Ingram v. State (Cr. App.) 182 S. W. 290.

Where accused testified that deceased's wife caressed and wrote him letters, he might be cross-questioned as to whether he did not tell her that deceased tried to kill him. Sanford v. State (Cr. App.) 185 S. W. 22.

Where accused takes the stand considerable latitude should be allowed in his cross-examination, which to a large extent must be left to the discretion of the trial court. Id.

Cross-examination of accused eliciting that a relative visited him in jail was admissible, where the state contended that accused and his relative conspired to place evidence which would be apparently found by them after accused got out on bond. Wood v. State (Cr. App.) 189 S. W. 474.

In prosecution for perjury before grand jury, cross-examination of defendant as to approaching a witness against him and as to what he said to such witness was proper. Cozby v. State (Cr. App.) 189 S. W. 957.

12. Impeachment of defendant.—Where accused, charged with cattle theft, testified to a purchase of the cattle, the state could ask if he was in possession of other stolen cattle at the time he sold the cattle he was charged with stealing. Longoria v. State (Cr. App.) 188 S. W. 987.

13. —— Character or reputation.—In a prosecution for adultery where accused put in evidence her reputation for chastity and virtue, cross-examination as to birth of illegitimate child to accused occurring 14 years before was proper. Anderson v. State (Cr. App.) 193 S. W. 301.

15. —— Accusation or conviction of crime in general.—Evidence that 14 years before accused, who was charged with assault with intent to kill, was acquitted on a charge of murder was not admissible, being too remote, though he filed a plea to suspend sentence. Bullington v. State (Cr. App.) 180 S. W. 679.

In a prosecution for statutory rape the state might show that defendant had been arrested on a charge of seducing another, whom he had married to prevent her testimony against him, but could not show the details of such other offense. Miller v. State (Cr. App.) 185 S. W. 29.

Where accused testified in his own behalf, the state could show that he had been indicted for a felony within the past seven years. Baker v. State (Cr. App.) 187 S. W. 949.

In an assault trial, it was proper to ask accused, testifying in his own behalf, if he had not been indicted, convicted, and confined in the penitentiary. Hill v. State (Cr. App.) 189 S. W. 257.

Evidence of conviction on a former trial in the instant case cannot be used to impeach an accused testifying for himself. Martin v. State (Cr. App.) 189 S. W. 262.

It is always permissible to impeach an accused to show by him on his examination that he had been indicted or convicted of any felony if not too remote. Sapp v. State (Cr. App.) 190 S. W. 489.

It was not permissible to require an accused to state whether he had committed any other offense and whether he had been arrested on complaint therefor, if sufficient time had in fact elapsed to show that grand jury had had an opportunity to investigate and had not found a bill of indictment. Id.

Accused cannot be impeached by proof of indictment or conviction of a crime not imputing moral turpitude. Johnson v. State (Cr. App.) 191 S. W. 1165.

Allowing district attorney on cross-examination of accused to show that accused was twice convicted of perjury and finally acquitted was erroneous. Cox v. State (Cr. App.) 194 S. W. 138.

16. —— Accusation of particular offenses.—In prosecution for swindling, previous similar charges held admissible in evidence to impeach the credibility of accused as a witness. Arnold v. State (Cr. App.) 179 S. W. 1183.

Where accused testified, held, that it was permissible to elicit from him that he was under indictment for horse theft. Villareal v. State (Cr. App.) 182 S. W. 322.

17. —— Conviction of particular offenses.—Cross-examination of defendant to impeach his testimony, as to his conviction together with admission of certified copy of conviction for cattle theft 12 years before when a mere boy, held erroneous, as too remote. Leach v. State (Cr. App.) 180 S. W. 122.

23. —— Rebutting impeaching evidence.—Where the state developed that accused had been indicted for a felony within the past seven years, he could show his acquittal of the charge. Baker v. State (Cr. App.) 187 S. W. 949.

26. Contradicting defendant.—Where accused claimed she shot deceased because he had previously raped her by force, evidence that she had gone frequently to deceased's

room after the alleged rape was competent to contradict her claim of use of force in the rape, but evidence of lewd conduct by accused with others than deceased, etc., before the killing but long after her alleged rape by deceased, was inadmissible. Harrison v. State (Cr. App.) 191 S. W. 548.

To meet defendant's testimony that the pistol he was shown to have carried could not be shot, and that he had no other, it could be shown that several weeks before he was shooting one in the road, and that he had had difficulty with a person at the time and pulled his pistol from his pocket. Dolezal v. State (Cr. App.) 191 S. W. 1158.

27. **Corroboration.**—In prosecution for murder, evidence to support defendant's testimony, not contradicted by state, held inadmissible. Bolden v. State (Cr. App.) 178 S. W. 533.

Where the state proved a statement by accused that he had purchased the mules he was charged with stealing and would produce the check given, accused, who testified he paid for the mules in money, was not impeached so as to warrant the admission of evidence of corroborating statements. Blackburn v. State (Cr. App.) 180 S. W. 268.

28. —— **Proving reputation for veracity.**—Where defendant had been impeached by proof of contradictory statements as to a material issue, the mere withdrawal of the impeaching evidence does not justify excluding evidence of defendant's reputation for truth and veracity. Becker v. State (Cr. App.) 190 S. W. 185.

29. **Reference by counsel to accused's failure to testify.**—Remarks of state's counsel held not an allusion to defendant's failure to testify, and, if it was such an allusion, not to require a reversal. Rogers v. State (Cr. App.) 180 S. W. 674.

A remark of the prosecuting attorney, in a prosecution for burglary, that the accused on his arrest failed to explain his possession of stolen goods, is not a comment on his failure to testify. Howard v. State (Cr. App.) 184 S. W. 505.

Argument of district attorney asking why there was no evidence that defendants did not kill the hog held a direct allusion to defendants' failure to testify. Jemison v. State (Cr. App.) 184 S. W. 807.

32. —— **Reference to failure to call witnesses or produce evidence.**—In a prosecution for theft of mules, held, that it was not improper for state's counsel to comment on the fact that accused did not place on the stand one who he claimed was present when he purchased the mules. Blackburn v. State (Cr. App.) 180 S. W. 268.

When accused fails to introduce available witness who would testify in his favor, it is a legitimate deduction against him, and can be argued against him before jury. Furr v. State (Cr. App.) 194 S. W. 395.

33. —— **Wife of accused.**—State's counsel held entitled to comment on defendant's failure to explain criminative facts by his wife or upon omissions in her testimony. Bennett v. State (Cr. App.) 181 S. W. 197.

The prosecuting attorney may comment on the failure of defendant to produce his wife as a witness. Jordan v. State (Cr. App.) 182 S. W. 890. See, also, notes under art. 795.

40. **Reference by jury to failure to testify.**—Evidence held insufficient to show such discussion by the jury of defendant's failure to testify as to entitle him to a new trial. Bogan v. State (Cr. App.) 180 S. W. 247.

That a juror only incidentally referred to accused's failure to take the stand is no ground for new trial. Wilganowski v. State (Cr. App.) 180 S. W. 692.

Discussion by jury, in deliberating, of accused's failure to testify, held ground for reversal of judgment of conviction. Fry v. State (Cr. App.) 182 S. W. 331.

That the jury, in violation of this article considered accused's failure to take the stand necessitates reversal. Stone v. State (Cr. App.) 184 S. W. 193.

Art. 791. [771] Principals, accomplices and accessories.

Cited, Clayton v. State (Cr. App.) 180 S. W. 1089 (in dissenting opinion).

2. **Effect of other statutes.**—Code Cr. Proc. 1911, art. 727, was not intended to change rule of evidence, or to modify article 791, or Pen. Code 1911, art. 91, but was intended to designate procedure whereby defendant might make available testimony of one prohibited from testifying in his behalf by latter sections, and it has no application to case of defendant charged with theft who desires testimony of parties charged with receiving and concealing stolen property. Clark v. State (Cr. App.) 194 S. W. 157.

3. **Incompetency in general.**—Under this article and art. 792, accused may not complain that the state proved that a witness called by him was indicted for the same offense, although the court permitted the state to disqualify him, on the erroneous theory that the inquiry affected the credibility of the witness and not because he was indicted for the same offense. Fondren v. State (Cr. App.) 179 S. W. 1170.

Pen. Code 1911, arts. 10, 91, and this article held to make incompetent witnesses for each other, persons prosecuted for the same offense, though by complaint and information, instead of indictment in its technical sense. Sola v. State (Cr. App.) 188 S. W. 1005.

Where parties were so connected with a theft as to make them principals, accessories, and accomplices within Pen. Code 1911, arts. 74-91, state could have indicted them as such, and their testimony could not have been used by defendant charged with the theft without a severance. Clark v. State (Cr. App.) 194 S. W. 157.

7. —— **Necessity of indictment to disqualify.**—Testimony of principals, accessories, and accomplices is not denied to defendant under Pen. Code 1911, art. 91, and this article when they are not indicted. Clark v. State (Cr. App.) 194 S. W. 157.

8. —— **Identity of offense.**—In a prosecution for perjury in a trial for gambling, that witnesses were indicted for perjury in the same case would not render them incompetent, in the absence of a conspiracy between them and defendant to commit the perjury. Clayton v. State (Cr. App.) 180 S. W. 1089.

Defendant, charged with theft of buggy, could have used testimony of parties referred to on motion to sever, charged with receiving and concealing stolen property, unless theft and receiving of property were offenses growing out of same transaction. Clark v. State (Cr. App.) 194 S. W. 157.

9. —— **Declarations of co-defendant.**—While the accused may show that another committed the offense charged, he cannot produce statements of a codefendant made to other persons showing that he was innocent. Howard v. State (Cr. App.) 184 S. W. 505.

11. **Competency as witnesses for the state.**—That a witness is a codefendant of accused and under indictment for the same offense, and that such witness has been promised immunity, does not make him incompetent as a witness for the state. Smith v. State (Cr. App.) 182 S. W. 311.

That a witness was under indictment for a felony, even though charged with the same crime as the defendant, does not render him an incompetent witness for the state. Robison v. State (Cr. App.) 185 S. W. 565.

In a prosecution for cattle theft, an accomplice could testify for the state when he had first told anybody about the theft, though his statements at the time could not be shown, for the purpose of corroborating his testimony at the trial, and he could testify whether he participated in the crime willfully or whether he was coerced into aiding therein. Pope v. State (Cr. App.) 194 S. W. 590.

13. —— **Impeachment of accomplice.**—Where an accomplice witness was impeached by proof of conviction of theft involving moral turpitude, he could state that shortly after the crime charged he told another of the transaction in substantially the words used in testifying on the trial. Pope v. State (Cr. App.) 194 S. W. 590.

Art. 792. [772] Court may interrogate witness touching competency.

In general.—Under this article and art. 791, accused may not complain that the state proved that a witness called by him was indicted for the same offense. Fondren v. State (Cr. App.) 179 S. W. 1170.

Art. 794. [774] Husband and wife shall not testify as to, etc.

Cited, Bennett v. State (Cr. App.) 194 S. W. 148; McDougal v. State (Cr. App.) 194 S. W. 944.

Privileged communications—In general.—Under this article and art. 795, one spouse is not competent to testify against the other as to incriminating communications, save in prosecution for offense against him or her. Norwood v. State (Cr. App.) 192 S. W. 248.

—— **Communications in presence of third persons.**—In a prosecution for murder, testimony that when witness was visiting defendant and his wife she heard the wife, quarreling with defendant, charge him with the crime, which he admitted, was admissible; the matter not being privileged. Hampton v. State (Cr. App.) 183 S. W. 887.

—— **Competency of testimony of third person.**—Where defendant's wife testified that she saw her husband buy peas identified as those stolen, permitting the sheriff to testify that she told him all she knew about the peas was that her husband told her he had bought them was not error, as permitting her to be contradicted by a confidential communication made to her by her husband. Williams v. State (Cr. App.) 182 S. W. 335.

Competency of wife's testimony in general.—Under this article and art. 795, a wife can be cross-examined only as to matters about which she testified in chief for her husband. Lewis v. State (Cr. App.) 180 S. W. 248.

Art. 795. [775] Same subject.

Cited, McDougal v. State (Cr. App.) 194 S. W. 944.

2. **Witness for defendant—Cross-examination.**—In a prosecution for murder, defendant's wife, testifying to the identity of a knife found near deceased's body and as to a threat made by deceased, may be cross-examined in reference thereto. Stacy v. State (Cr. App.) 177 S. W. 114.

State cannot, on cross-examination of defendant's wife, prove a material fact on a branch of the case as to which she did not testify in chief. Mitchell v. State (Cr. App.) 179 S. W. 116.

Under this article and art. 794, a wife can be cross-examined only as to matters about which she testified in chief for her husband. Lewis v. State (Cr. App.) 180 S. W. 248.

In a trial for murder, where defendant's wife had testified that he shot deceased in self-defense, she could not be cross-examined so as to bring out her opinion of defendant's guilt and her conclusion as to what caused him to kill deceased. McDougal v. State (Cr. App.) 185 S. W. 15.

Under this article, the state may not on wife's cross-examination develop new matter. Blake v. State (Cr. App.) 193 S. W. 1064.

3. —— **Impeachment and contradiction.**—In a prosecution for homicide, where defendant's wife denied having made a certain statement to a deputy sheriff, the state

could introduce him and prove that she had made such statement, and where she testified that deceased was the father of her first child, the state was properly allowed, on cross-examination, to ask her if accused was its father. Hicks v. State (Cr. App.) 171 S. W. 755.

Where defendant's wife admitted adultery with deceased, which had been set up as provocation, the state could prove her contradictory statements to the county attorney after the homicide. Mitchell v. State (Cr. App.) 179 S. W. 116.

Where accused's wife testified that deceased hypnotized her and then had intercourse with her, she may be cross-questioned as to whether her husband did not examine her as to such transaction. Tyrone v. State (Cr. App.) 180 S. W. 125.

Defendant's wife, who testified that defendant was at home at time of alleged homicide, held subject to impeachment by showing attempt to bribe another witness to testify to the same fact. Jones v. State (Cr. App.) 180 S. W. 669.

Where defendant's wife testified that she saw him buy the peas identified as those stolen, the state was properly permitted to ask her, on cross-examination, whether she did not tell the sheriff that all she knew about the peas was that her husband told her he bought them, and to impeach her by testimony of the sheriff to that effect. Williams v. State (Cr. App.) 182 S. W. 335.

Where defendant's wife testified on direct examination that defendant had shot deceased in self-defense, evidence that she had stated to deceased's son that defendant had killed deceased because he had sued him was admissible as going to her credibility. McDougal v. State (Cr. App.) 185 S. W. 15.

The wife of a defendant placed on the stand as a witness may be impeached by showing that she made contradictory statements, the same as any other witness, as to matters to which she testifies on direct examination at defendant's instance. Id.

Where deceased's wife testified that the killing was done in self-defense, her statement soon after the crime that the killing was uncalled for is admissible. Baker v. State (Cr. App.) 187 S. W. 949.

4. Incompetency as witness for state.—Testimony of defendant's wife in a prosecution for carrying weapons of what she observed when defendant returned home after commission of the offense held inadmissible. Beesing v. State (Cr. App.) 180 S. W. 256.

That among the names of witnesses called before a jury was impaneled or announcement of ready made was that of defendant's wife shows no error. Jordan v. State (Cr. App.) 182 S. W. 890.

State cannot use testimony of defendant's wife, nor call her as witness. Redwine v. State (Cr. App.) 184 S. W. 196.

A wife is incompetent to testify against her accused husband. Johnson v. State (Cr. App.) 188 S. W. 995.

Under this article and art. 794, one spouse is not competent to testify against the other save in prosecutions for offenses against him or her. Norwood v. State (Cr. App.) 192 S. W. 243.

6. —— Existence and severance of marriage relation.—Evidence held to show a witness was not defendant's wife, and competent to testify. Galvan v. State (Cr. App.) 179 S. W. 875.

One obtaining a decree of divorce by perjury as to his residence cannot, when prosecuted for the perjury, object, as to his former wife's being a witness against him, that she is still his wife because the divorce decree is void because of his insufficient residence. Laird v. State (Cr. App.) 184 S. W. 810.

Evidence held to show that a person introduced as a witness was not the wife of accused. Johnson v. State (Cr. App.) 188 S. W. 995.

8. Reference to failure of wife to testify.—Statements by prosecutor referring to accused's objections to allowing his wife to testify as to conversation with accused just before killing held prejudicial; the wife not being competent to testify thereto, under this article and art. 794. Norwood v. State (Cr. App.) 192 S. W. 248. See, also, notes under art. 790.

9. —— Offenses by defendant against spouse.—Under Pen. Code 1911, art. 1450, denouncing offense of abandonment after seduction and marriage, wife or female is competent to testify against defendant just as any other witness. Furr v. State (Cr. App.) 194 S. W. 395.

10. Evidence of acts and declarations of spouse.—In prosecution for rape, census affidavits of prosecutrix's mother, wife of defendant, offered as original evidence, are inadmissible. Redwine v. State (Cr. App.) 184 S. W. 196.

In prosecution for arson, where jury could find a conspiracy between defendant and his wife to burn a building for insurance, testimony of a witness that the wife told him in absence of her husband she would burn the place for the insurance before she would go broke, held admissible, despite statute prohibiting the state from making a wife testify against her husband. Arensman v. State (Cr. App.) 187 S. W. 471.

Under this article and art. 795, held error to admit in evidence diary entry of defendant's abuse and ill treatment of his wife. Bennett v. State (Cr. App.) 194 S. W. 148.

Diary entries made by defendant's wife after the homicide held inadmissible since they were not only hearsay and could not have operated on defendant's mind when he killed deceased, but were inhibited by this article and art. 795. Id.

Art. 801. [781] Testimony of accomplice not sufficient to convict, unless, etc.

4. Who are accomplices—Detectives and informers.—The fact that officers went to one charged with practicing medicine unlawfully and procured him to treat them does

not make them his accomplices so as to require a charge on accomplices' testimony. Hyroop v. State (Cr. App.) 179 S. W. 878.

6. —— **Participation in adultery, fornication, incest or rape.**—A female solicited to illicit sexual intercourse, who consents without persuasion, is not an accomplice of the solicitor. Denman v. State (Cr. App.) 179 S. W. 120.

In prosecution for seduction, the prosecutrix was in law an accomplice. Gleason v. State (Cr. App.) 183 S. W. 891.

10. —— **Violations of liquor laws.**—Sheriff and person employed by him to detect bootleggers, and who, pursuant thereto, purchased whisky from defendant, held not accomplices in view of Pen. Code 1911, art. 602. Bagley v. State (Cr. App.) 179 S. W. 1167.

11. —— **Persons jointly indicted.**—In a prosecution for cattle theft, it was essential to a conviction that the testimony of a witness, who was a codefendant of accused and under indictment for the same offense, should be corroborated by testimony tending to connect accused with the original taking. Smith v. State (Cr. App.) 182 S. W. 311.

14. **Sufficiency of evidence—Necessity of corroboration.**—A conviction cannot be had on the uncorroborated testimony of an accomplice. Gilbert v. State (Cr. App.) 186 S. W. 324.

In prosecution for being an accomplice to murder, wherein declarations of alleged principal, who was not a witness, were proved, rule of corroborative evidence applicable to accomplice's testimony could not apply, and it was error to so charge. Sarli v. State (Cr. App.) 189 S. W. 149.

15. **Scope and extent of corroboration required.**—Where a theft is established, a conviction may be had on accomplice testimony on proof of facts and circumstances tending to connect accused with the offense. Edwards v. State (Cr. App.) 179 S. W. 1163.

In a trial for murder the testimony of an accomplice alone cannot establish the fact of an unlawful killing, or that defendant was the guilty party, but must be corroborated by other facts and circumstances tending to show such facts, but state need not show unlawful killing independently of accomplice testimony. Ingram v. State (Cr. App.) 182 S. W. 290.

In prosecution for burglarizing railroad car under control of railroad agent, without his consent, etc., evidence, exclusive of testimony of accomplice, held insufficient to sustain conviction. Davis v. State (Cr. App.) 188 S. W. 985.

16. —— **Competency of corroborative evidence.**—Under this article, an accomplice witness can be corroborated by circumstantial evidence. Pope v. State (Cr. App.) 194 S. W. 590; Tyler v. State (Cr. App.) 180 S. W. 687.

Evidence to corroborate the widow of deceased, an accomplice, who would testify to adulterous relations with defendant, put in before defendant himself testified to such relations, held admissible. Ingram v. State (Cr. App.) 182 S. W. 290.

17. **Sufficiency of corroboration.**—In a prosecution for cattle theft, evidence of corroboration held sufficient to connect defendant with the offense and to justify conviction on an accomplice's testimony. Edwards v. State (Cr. App.) 179 S. W. 1163.

Defendant's guilt of an established offense is sufficiently proven by his extrajudicial confession and the testimony of an accomplice. Kennedy v. State (Cr. App.) 180 S. W. 238.

Statements and acts of defendant to and with a third person held sufficient corroboration of an accomplice. Tyler v. State (Cr. App.) 180 S. W. 687.

Under this article, evidence corroborating an accomplice is sufficient if it tends to connect defendant with the crime, though it is not sufficient to convict and does not corroborate in detail. Ingram v. State (Cr. App.) 182 S. W. 290.

Where the testimony of the wife of deceased placed her in the position of an accomplice, independent corroborating evidence held sufficient to sustain a conviction. Id.

Corroboration of accomplices in burglary held sufficient, within the requirement that it tends to connect defendant with commission of the crime. Whetstone v. State (Cr. App.) 182 S. W. 1117.

Evidence held sufficient to corroborate the testimony of an accomplice so as to warrant accused's conviction of larceny from the person. Gilbert v. State (Cr. App.) 186 S. W. 324.

Under this article, corroboration of accomplice witness is sufficient if it tends to connect the accused with the offense. Pope v. State (Cr. App.) 194 S. W. 590.

In prosecution for cattle theft, testimony of accomplice held sufficiently corroborated to warrant conviction. Id.

20. **Necessity of instructions as to accomplice testimony.**—If testimony suggested that the state's witnesses were accomplices, held, that the court should have charged the provisions of this article, as to the corroboration of accomplices. Bagley v. State (Cr. App.) 179 S. W. 1167.

Though corroboration of accomplice be by circumstantial evidence, yet, accomplice testifying to a confession by defendant, no charge on circumstantial evidence is required. Tyler v. State (Cr. App.) 180 S. W. 687.

3. Evidence as to Particular Offenses

Art. 806. [786] Perjury and false swearing; two witnesses, etc., required.

Sufficiency of corroboration.—Testimony of physicians that a woman had never had sexual intercourse with any man held sufficient corroboration of the woman's testimony that she had not had intercourse with defendant to support his conviction under this article, for perjury by his falsely swearing that she had. Reed v. State (Cr. App.) 183 S. W. 1168.

Art. 807. [787] Proof of intent to defraud in forgery.

Cited, Townser v. State (Cr. App.) 182 S. W. 1104.

4. Of Dying Declarations and of Confessions of the Defendant

Art. 808. [788] Dying declarations, evidence, when.

Consciousness of impending death.—Deceased's declaration that accused stabbed him, that he was turning blind, and would fall, is admissible as a dying declaration, where he did fall and die within a few minutes. Baker v. State (Cr. App.) 187 S. W. 949.

If dying declarations are made under a consciousness of impending death, without hope of recovery, length of time thereafter before death is immaterial. McKinney v. State (Cr. App.) 187 S. W. 960.

Signature.—Under this article, a dying declaration which deceased was too weak to sign, but which she said was correct, is admissible though her name was signed by another. Burgess v. State (Cr. App.) 181 S. W. 465.

Answers to interrogatories.—Testimony of a witness who arrived before doctor, as to statements of deceased in response to doctor's questions as to who struck her, although in answer to a question, held admissible as dying declarations. Thompson v. State (Cr. App.) 187 S. W. 204.

Mental condition of declarant.—Conflict in testimony as to whether deceased was conscious when making alleged dying declarations would not render the statements inadmissible, but would go to the weight of the evidence. Thompson v. State (Cr. App.) 187 S. W. 204.

Relevancy and competency of declaration.—Testimony of deceased's sister as to his dying statement, voluntarily made when he had no hope of recovery and was sane, was admissible. Mansell v. State (Cr. App.) 182 S. W. 1137.

Where doctor who attended deceased within 15 minutes after blows were inflicted believed her about to die and told her so, and believed her to be thoroughly conscious, his testimony as to her replies by nods to his questions as to who hit her held admissible as dying declarations. Thompson v. State (Cr. App.) 187 S. W. 204.

Predicate for admission of declaration and method of proof.—Statements made to undertaker some time after the crime was committed, while he was preparing to shave head of deceased, tending to show that deceased was conscious, held admissible as predicate to dying declarations. Thompson v. State (Cr. App.) 187 S. W. 204.

Requisites prescribed by this article for admission of dying declaration, need not be established by direct and positive statement of deceased at the time. McKinney v. State (Cr. App.) 187 S. W. 960.

In prosecution for murder, held, that proper predicate to introduction of dying declarations was shown, and hence the court could have so held without submitting question to jury. Marshbanks v. State (Cr. App.) 192 S. W. 246.

Practice of submitting to jury question of whether proper predicate was laid for introduction of dying declarations, upon proper instructions, held proper. Id.

Art. 810. [790] When confession shall not be used.

Cited, Rios v. State (Cr. App.) 183 S. W. 151; Fleming v. State (Cr. App.) 194 S. W. 159.

2. Confession distinguished from exculpatory statements.—A statute making certain confessions inadmissible does not exclude accused's denial, when arrested, that he stabbed deceased, where he pleaded self-defense. Baker v. State (Cr. App.) 187 S. W. 949.

3. Admissibility of confession in general.—Admission of written confession over the objection that it was not a voluntary statement freely made was not error. Sampson v. State (Cr. App.) 181 S. W. 193.

A confession or admission of guilt was admissible if it was a personal statement to the county attorney. Lunsford v. State (Cr. App.) 190 S. W. 157.

5. Confession by party not in confinement or in custody.—One's confession made after his discharge from arrest, and while his movements were wholly unrestricted, is admissible, though he knew that the officers would make further investigation, and while doing so would keep him under surveillance. Kennedy v. State (Cr. App.) 180 S. W. 238.

An incriminating statement of accused, made when he was neither under arrest nor believed himself to be, but when the owner of the stolen property woke him up, is admissible. Ariola v. State (Cr. App.) 183 S. W. 144.

In prosecution for arson, testimony as to confession or admission made by defendant out on bail, after consulting with attorneys, and some time after he had given the city marshal a written confession under promise of suspended sentence, held admissible. Arensman v. State (Cr. App.) 187 S. W. 471.

7. Confession while in confinement or in custody—Caution.—It is not error to admit, in rebuttal of the evidence given by accused, his confession, where there is both testimony that he was warned as to its being used against him and a statement in the confession that he was so warned. Williams v. State (Cr. App.) 185 S. W. 573.

A confession or admission of guilt is admissible if the accused was properly warned by the officer taking it. Lunsford v. State (Cr. App.) 190 S. W. 157.

12. —— Truth of statement of inculpatory facts or circumstances.—In a prosecution for murder, an oral confession by accused to the sheriff who claimed to be her friend held admissible, where bones were found in the place pointed out. Wilganowski v. State (Cr. App.) 180 S. W. 692.

Admission of defendant's verbal confession held not objectionable, where it pointed out where the property stolen from decedent could be found, and where it was found in accordance with the statements. Sampson v. State (Cr. App.) 181 S. W. 193.

Though an admission was made by accused while under arrest and without warning, it is admissible within this article, when it states the place the knife with which the crime was committed may be found and it was found there. Freeman v. State (Cr. App.) 188 S. W. 425.

13. Confessions by co-defendants or by persons other than defendant.—Proper predicate being laid, confession of codefendant in defendant's presence, practically the same and made at the same time as his confession, is admissible. Blake v. State (Cr. App.) 193 S. W. 1064.

14. Preliminary evidence as to admissibility of confession.—A district attorney to whom a confession of crime was made held competent to testify that it was made voluntarily after warning in accordance with this article. Jernigan v. State (Cr. App.) 179 S. W. 1187.

Proper predicate is necessary for admission of confession of defendant while under arrest. Blake v. State (Cr. App.) 193 S. W. 1064.

19. Effect of confession—Corroboration, and proof of corpus delicti.—While the confession of an accused may be used where the corpus delicti is established yet it is inadmissible to establish the corpus delicti. Brice v. State (Cr. App.) 179 S. W. 1178.

Defendant's guilt of an established offense is sufficiently proven by his extrajudicial confession and the testimony of an accomplice. Kennedy v. State (Cr. App.) 180 S. W. 238.

In view of Pen. Code 1895, art. 654, prohibiting conviction of homicide unless the body or portions of it are found, corpus delicti cannot be proven by accused's confession, but may be established by such confession and circumstantial evidence. Wilganowski v. State (Cr. App.) 180 S. W. 692.

That accused killed deceased may be established by her confession coupled with circumstantial evidence, though the confession alone is insufficient. Id.

A voluntary confession may with other evidence be considered as establishing the corpus delicti. Id.

The fact that deceased was unlawfully killed and the further fact of defendant's connection with the crime may be shown by confessions in connection with the other facts and circumstances in evidence. Ingram v. State (Cr. App.) 182 S. W. 290.

An extrajudicial verbal confession by defendant is not enough for conviction, being insufficient to establish the corpus delicti. Daugherty v. State (Cr. App.) 182 S. W. 306.

Testimony of witness' conversation with one accused of seduction held admissible in view of circumstantial evidence in corroboration thereof. Wood v. State (Cr. App.) 182 S. W. 1122.

In a prosecution for murder, where a confession by defendant was in evidence, circumstances tending to connect defendant with the crime, such as that a horse was tracked from decedent's premises to defendant's were admissible to support the confession. Hampton v. State (Cr. App.) 183 S. W. 887.

The corpus delicti of burglary need not be proved independent of accused's confession. Miller v. State (Cr. App.) 189 S. W. 259.

Evidence held to sufficiently corroborate confession of accused that he and another committed a burglary. Id.

5. Miscellaneous Provisions

Art. 811. [791] When part of an act, declaration, etc., is given in evidence.

Cited, Waters v. State (Cr. App.) 192 S. W. 778.

Evidence admissible.—Where accused elicited from a witness on cross-examination a partial answer to a question, the court properly permitted the witness to answer the question in full, though this included advice given the witness by a third person. Taylor v. State, 75 Cr. R. 20, 169 S. W. 672.

Accused could not predicate error on the admission of testimony that there was much drinking and drunkenness at the time and place of the alleged sale in violation of the local option law, where he had adduced testimony as to the same matter. Venn v. State (Cr. App.) 182 S. W. 315.

Permitting the sheriff to testify that, when he arrested defendant, he had had in his possession for about two years a warrant for defendant's arrest in a felony case,

and that he had been unable to arrest defendant because he was constantly on the dodge, was not error, where evidence as to such matter was first introduced by defendant. Id.

Where accused elicited testimony that the prosecuting witness had run off and forfeited his attachment bond as a witness, it was not error to permit the county attorney to prove by the witness why he had forfeited such bond. Id.

Where defendant set up insanity and attempted to prove the defense by evidence of his entire life history, the state could show in rebuttal by similar evidence, that at no period of his life was defendant's mind so unbalanced as to render him irresponsible for his acts. Mikeska v. State (Cr. App.) 182 S. W. 1127.

In a prosecution of a hackman for manslaughter of another whom he had reported to an officer for violating the law in crossing a line at the railroad depot, testimony that decedent had in fact violated no ordinance held admissible. Mansell v. State (Cr. App.) 182 S. W. 1137.

Where the state introduced in evidence part of a conversation between accused and another relating to difficulty with deceased, accused should be allowed to show the whole matter. Knight v. State (Cr. App.) 183 S. W. 1158.

Where defendant produced witnesses who testified that deceased threatened the defendant, the state could introduce the balance of the conversation had at the time of the threats. Sorrell v. State (Cr. App.) 186 S. W. 336.

Under this article, in murder case, where defendant introduced part of testimony given by witness on another trial for purposes of impeachment, state was properly permitted to introduce other portions relating to same matter. De Arman v. State (Cr. App.) 189 S. W. 145.

The testimony of a witness as to the balance of a conversation between deceased and appellant's nephew, which had been offered by appellant upon trial for murder, was admissible by state to impeach the nephew's testimony. Edwards v. State (Cr. App.) 191 S. W. 542.

Where defendant on trial for murder proved part of a conversation between deceased and witness, it was proper for the state to offer evidence of the balance of the conversation by a third person who was present, under this article. Id.

Defendant having on cross-examination of state's witness drawn out part of the details of the difficulty between them, the state may introduce other details. Dolezal v. State (Cr. App.) 191 S. W. 1158.

Under this article, held that, where defendant claimed that he drew certain inferences from entries in his wife's diary, and introduced part of the entries in evidence, the state was entitled to introduce such of the remaining entries as were material to the issues, but it was error to permit state to introduce an entry which was not accompanied by any of the marks described by defendant from which he drew his inferences. Bennett v. State (Cr. App.) 194 S. W. 148.

Evidence not admissible.—Where a portion of an affidavit was admitted only for the purpose of identifying it, after the state had been forced to introduce it, the defendant was not entitled to introduce the whole of it; the remainder being immaterial. Reed v. State (Cr. App.) 183 S. W. 1168.

Under this article, making admissible the whole of a conversation to explain a part thereof introduced by the opposite party, accused cannot testify as to alleged remarks in a conversation where they do not explain another portion thereof, introduced by the opposite party. Wood v. State (Cr. App.) 189 S. W. 474.

Entries in a diary held not part of the same writing within this article, where each entry bore a separate date and was complete in itself. Bennett v. State (Cr. App.) 194 S. W. 148.

Art. 814. [794] Evidence of handwriting by comparison.

Admissibility and effect of evidence as to handwriting.—In a prosecution for forgery, evidence of handwriting by comparison held sufficiently corroborated by other evidence to sustain a conviction. Jackson v. State (Cr. App.) 193 S. W. 301.

Under this article, one charged with forgery of a check cannot be convicted on proof by comparison of handwriting alone. Id.

Art. 815. [795] Party may attack testimony of his own witness, when and how.

See notes under art. 3687, rule 1, notes 58-61.

Cited, Miller v. State (Cr. App.) 185 S. W. 29.

Own witness.—Evidence that goes to bias and motive of a witness is original testimony of a material character, so that evidence showing motive of the prosecuting witness was admissible, in spite of his testimony, when recalled by defendant, that he had no ill feeling against the defendant. Hernandez v. State (Cr. App.) 183 S. W. 440.

That the defendant recalled the prosecuting witness did not constitute him defendant's witness, and his testimony might nevertheless be impeached by defendant's further evidence. Id.

Impeachment of witness.—Under this article the state cannot impeach its witness who failed to remember and testify to facts stated at the coroner's inquest as to which it was sought to refresh the witness' memory. Taylor v. State (Cr. App.) 179 S. W. 113.

Defendant, surprised by injurious testimony of a witness, might show witness' prior statements before the grand jury different from his testimony at the trial, but could not, in the absence of surprise, call his own witness to lay a predicate for impeaching him, and so secure the admission of testimony otherwise inadmissible. Ingram v. State (Cr. App.) 182 S. W. 290.

Where witness for state failed to testify to facts material to state's case as he had testified before the grand jury, and when recalled by defendant gave testimony detri-

mental to the state's case, there was no error in admitting his testimony before the grand jury. Id.

In an incest case, where the female testified that accused had never had intercourse with her, held, the state, having knowledge she would so testify, could not impeach her by a letter charging accused with being the father of her child. Hollingsworth v. State (Cr. App.) 182 S. W. 465.

Under this article the state, where its witness on cross-examination gave contradictory testimony in defendant's favor, might recall him and ask him whether his testimony for defendant was not an afterthought and to show that he had not so testified either in court of inquiry or before grand jury. Martin v. State (Cr. App.) 189 S. W. 264.

Irrespective of who subpœnaed a witness, the party introducing him is not permitted to impeach him unless he testifies to some fact damaging to the cause of introducing party, which the latter was unaware the witness would testify to before placing him on the stand. Wood v. State (Cr. App.) 189 S. W. 474.

Art. 816. [796] Interpreter shall be sworn to interpret, when.

Cited, Sapp v. State (Cr. App.) 190 S. W. 489.

CHAPTER EIGHT

OF THE DEPOSITIONS OF WITNESSES AND TESTIMONY TAKEN BEFORE EXAMINING COURTS AND JURIES OF INQUEST

Article 818. [798] May also be taken, when.

Cited, Hollingsworth v. State (Cr. App.) 182 S. W. 465.

Art. 820. [800] May be taken out of the state, by whom.

Officers authorized to take depositions.—This article does not authorize a notary public in another state to take depositions of residents thereof in criminal cases. Porter v. State (Cr. App.) 190 S. W. 159.

TITLE 9

OF PROCEEDINGS AFTER VERDICT

CHAPTER ONE

OF NEW TRIALS

Article 837. [817] New trial in felony cases granted, for what causes.

Cited, Nolan v. State (Cr. App.) 194 S. W. 825.

SUBD. 3

Verdict decided by lot.—Verdict held not invalid as verdict by lot, where the time of imprisonment was indicated by part of jurors and divided by 12, but was afterwards changed by agreement of all the jurors. Ingram v. State (Cr. App.) 182 S. W. 290.

Improperly influencing assent to verdict.—The fact that a juror in a criminal case agreed to the verdict as rendered, because he did not want to have a "hung" jury, did not entitle the defendant to a new trial. Powell v. State (Cr. App.) 187 S. W. 334.

SUBD. 4

Bias or prejudice of juror.—The refusal of a new trial claimed; on the ground that a juror had remarked before being drawn that he would hang her, held not an abuse of discretion; the showing being controverted. Wilganowski v. State (Cr. App.) 180 S. W. 692.

Where on application for new trial an affidavit that a juror was prejudiced was controverted, accused, if diligent, should produce the affiant, who lived only a few miles away. Id.

SUBD. 6

1. In general.—In a prosecution for seduction motion for new trial for newly discovered evidence, held improperly overruled. Long v. State (Cr. App.) 179 S. W. 564.

2. Discretion of trial court.—Denial of a new trial on the ground of newly discovered evidence will not be disturbed, unless it appears that the trial court abused its discretion, to defendant's prejudice. McDonald v. State (Cr. App.) 179 S. W. 880.

Where defendant had two days after verdict in which to secure the affidavits of absent witnesses on motion for new trial, it was not an abuse of discretion to overrule motion as soon as made, where such affidavits were not produced. May v. State (Cr. App.) 179 S. W. 1176.

Refusal to permit the filing of an additional or supplemental motion to an amended motion for a new trial setting up alleged newly discovered evidence, held not an abuse of discretion. Humphries v. State (Cr. App.) 186 S. W. 332.

4. Diligence in procuring evidence.—A new trial sought on the ground of newly discovered evidence held properly refused, accused not making a sufficient showing of diligence. Ellis v. State (Cr. App.) 179 S. W. 1163.

A new trial held properly denied where it appeared that the alleged newly discovered evidence could have been discovered with reasonable diligence, and that no diligence to discover same was used by accused. Roberts v. State (Cr. App.) 180 S. W. 1079.

Where accused set up insanity produced by excessive use of intoxicants and drugs, alleged newly discovered evidence that, before the killing, accused had been addicted to such practices, did not warrant new trial, for want of diligence at trial. Burgess v. State (Cr. App.) 181 S. W. 465.

In prosecution for manslaughter, defendant held not entitled to new trial for newly discovered evidence of eyewitness summoned, but not called to stand by state, whose testimony defendant made but slight efforts to discover. Jones v. State (Cr. App.) 185 S. W. 579.

New trial will not be granted for newly discovered evidence, where no sufficient diligence in attempting to procure the evidence for trial is shown, nor any excuse given for failure to exercise diligence. Newman v. State (Cr. App.) 188 S. W. 426.

The accused cannot have new trial for newly discovered evidence, which the least diligence would have disclosed before trial, without showing any diligence whatever. Page v. State (Cr. App.) 189 S. W. 951.

Where the application disclosed that the witness whose newly discovered testimony was its basis had been present at the trial and that no inquiry to secure her testimony was made, there was lack of diligence, and new trial should not be granted. Bullington v. State (Cr. App.) 190 S. W. 154.

Where witnesses for whose testimony a new trial is sought could have been easily secured, defendant's statement that such witnesses refused to talk to him, and that he did not know of their testimony, does not show sufficient diligence. Holloway v. State (Cr. App.) 193 S. W. 145.

7. Relevancy, materiality, and competency.—New trial, after conviction of assault to rape a child under 15 years, will not be granted for newly discovered testimony of a physician that he found no bruises on the child. Mays v. State (Cr. App.) 179 S. W. 1192.

Newly discovered evidence tending to overthrow the testimony of the state's medical experts who testified in opposition to accused's wife, who claimed deceased hypnotized and had intercourse with her, held no ground for new trial. Tyrone v. State (Cr. App.) 180 S. W. 125.

In view of defendant's testimony that he shot deceased when the latter was advancing toward him, denial of new trial for newly discovered evidence, deceased's coat with a hole in front, was prejudicial error. Young v. State (Cr. App.) 180 S. W. 686.

Refusal of new trial in prosecution for theft of hog held erroneous in view of affidavits of three persons that subsequent to trial they had seen the hog alleged to have been killed and stolen running at large. Leonard v. State (Cr. App.) 184 S. W. 225.

In prosecution for violation of the local option law, alleged newly discovered evidence, shown by affidavit on motion for a new trial held material on the issue as to whether the defendant or the state's witness had made the sale. Bryson v. State (Cr. App.) 186 S. W. 842.

In a prosecution for assault with intent to murder, prosecutrix having been shot through a window at night while in bed, refusal of new trial on ground of newly discovered evidence that witnesses had been to scene of crime since trial and could testify that it was impossible for prosecutrix to see a person outside the window at night held not error. Sparks v. State (Cr. App.) 187 S. W. 331.

In prosecution for illegally selling intoxicants, testimony of party present when defendant claimed he made agreement with state's witness held not newly discovered. Waggoner v. State (Cr. App.) 190 S. W. 493.

8. Cumulative evidence.—In prosecution for murder, where absent witness' testimony would have been merely cumulative, motion for new trial was properly overruled. Edwards v. State (Cr. App.) 191 S. W. 542.

9. Impeachment of witness.—A new trial will not be granted to enable the defendant to obtain witnesses to impeach the state's witnesses. Humphries v. State (Cr. App.) 186 S. W. 332.

Affidavits, showing a main witness for the state had a bad reputation for veracity did not support motion for new trial on the ground of newly discovered testimony. Johnson v. State (Cr. App.) 187 S. W. 336.

SUBD. 7

Statement by one juror to other jurors.—Statement of juror, before vote was taken, that he knew prosecuting witness would not swear another man into the penitentiary, held not to justify new trial. Wilburton v. State (Cr. App.) 179 S. W. 1169.

Where, after retirement, and before reaching their verdict, two members of the jury trying defendant for cattle theft stated that he had served a term in the penitentiary, and was a member of a family that died with their boots on, such misconduct of the jury was ground for new trial. Weber v. State (Cr. App.) 181 S. W. 459.

It is improper, after jury retires, for jurors favoring conviction to say to those favoring acquittal that conviction will stop disturbances in a certain community, where there was no evidence on that question. Derrick v. State (Cr. App.) 187 S. W. 759.

In view of this article, held ground for new trial that juror, after submission of cause, reminded jury that accused had once been convicted. McDougal v. State (Cr. App.) 194 S. W. 944.

Use of intoxicating liquors.—The drinking of a glass of beer by a juryman while eating his supper during trial does not constitute error, as the drinking of intoxicants by

jurors constitutes reversible error only where some of them become intoxicated. Mikeska v. State (Cr. App.) 182 S. W. 1127.

SUBD. 8

Misconduct in general.—That jurors during the trial made comments on accused's conduct at the time held not ground for new trial, in the absence of any showing that accused was not guilty of such conduct. Word v. State (Cr. App.) 179 S. W. 1175.

Evidence held insufficient to show such discussion by the jury of defendant's failure to testify as to entitle him to a new trial. Bogan v. State (Cr. App.) 180 S. W. 247.

That a juror only incidentally referred to accused's failure to take the stand is no ground for new trial. Wilganowski v. State (Cr. App.) 180 S. W. 692.

In a prosecution for homicide, accused's showing held not to establish misconduct by the jury warranting new trial. Id.

In prosecution for false imprisonment, jury's discussion as to the punishment they would assess, so that defendant should not escape some punishment, held not erroneous. Gilbert v. State (Cr. App.) 181 S. W. 200.

In prosecution for statutory rape, testimony of jurors called for defendant on his motion for a new trial held to show that they had not discussed or considered the details of defendant's seduction, marriage, and abandonment of another, erroneously admitted, and afterwards withdrawn. Miller v. State (Cr. App.) 185 S. W. 29.

Remark of juror while discussing the question of suspended sentence, not affecting such question, held no ground for a new trial. Powell v. State (Cr. App.) 187 S. W. 334.

That the jury, while considering their verdict, discussed whether the accused had testified he had been indicted, but as to the disposition of which accused had not testified, was not misconduct, where such evidence was admitted as affecting accused's credibility, and it did not appear that the jury considered it for any other purpose. Wood v. State (Cr. App.) 189 S. W. 474.

Affidavits and testimony of jurors as to misconduct.—Affidavit of juror, that jury had considered the fact that defendant did not testify, which was not attached to nor made a portion of nor an exhibit to the motion for new trial, cannot be considered. Ornelas v. State (Cr. App.) 179 S. W. 717.

SUBD. 9

Cited, Stockton v. State (Cr. App.) 192 S. W. 236.

Condition of degree of offense lower than that charged.—Although one accused of murder was convicted of the included offense of negligent homicide, as to which there was no evidence, he was not therefore entitled to a new trial. Crowder v. State (Cr. App.) 180 S. W. 706.

OTHER MATTERS RELATING TO NEW TRIALS

Misconduct of third persons.—Remark of state witness while leaving the stand, when near defendant, not understood by the judge, not shown to have been heard by the jury, and not complained of by defendant at the trial, cannot avail for new trial. McKinney v. State (Cr. App.) 187 S. W. 960.

Trial jury.—The fact that a juror failed to answer a question, which if he had answered would have caused defendant to have peremptorily challenged him, held no ground for new trial. Powell v. State (Cr. App.) 187 S. W. 334.

New trial should not be granted for incompetency of one juror, when it is not shown that the incompetency was not known when the juror was accepted, or that it could not have been known by proper inquiry. Guerra v. State (Cr. App.) 189 S. W. 952.

Defendant, seeking new trial for incompetency of juror, must show injury resulted to him by the juror's disqualification. Id.

Art. 839. [819] Must be applied for within two days, except.

Time for filing.—Under this article motion for new trial, filed five days after a conviction for selling intoxicating liquors, a misdemeanor, was properly denied. Banks v. State (Cr. App.) 186 S. W. 840.

Amendment of motion.—Where an original motion for new trial was filed within two days, after conviction of misdemeanor, the court could permit it to be amended at a later date. Banks v. State (Cr. App.) 186 S. W. 840.

Filing evidence.—Assignment with reference to misconduct of jury cannot be considered where evidence heard by court thereon was not filed until after end of term of court at which defendant was tried. Pizana v. State (Cr. App.) 193 S. W. 671.

Art. 840. [820] Motions for new trial shall be in writing.

2. Statement of grounds.—All alleged errors must be contained in the motion for a new trial or in the bills of exceptions filed in the trial court, especially in view of rule 101a for district and county courts (159 S. W. xi). Vinson v. State (Cr. App.) 179 S. W. 574.

In a motion for a new trial, appellant should specifically point out the reasons for a new trial, so as to give the court a chance to correct its own errors, if any. Jackson v. State (Cr. App.) 179 S. W. 711.

A motion for new trial in a prosecution for selling intoxicating liquors held properly overruled as too vague and indefinite. Alverez v. State (Cr. App.) 179 S. W. 714.

6. —— **Charge of court.**—A ground in a motion for a new trial, alleging that the court erred in its charge to the jury, but not attempting to point out any error, is too general to receive consideration. Vinson v. State (Cr. App.) 179 S. W. 574.

6½. —— **Verdict contrary to law and evidence.**—Where a motion for new trial alleges that the verdict is contrary to the evidence and that the judgment is contrary to the law, the only question raised is the sufficiency of the evidence to sustain the verdict. Bogan v. State (Cr. App.) 180 S. W. 247.

9. **Verification.**—A motion for new trial on the ground that the jury received testimony, after they retired, in no way sworn to, presents no question for review. Crabble v. State (Cr. App.) 186 S. W. 771.

10. —— **Oath administered by attorney in case.**—Affidavits by plaintiff's attorneys and other outside parties sworn to before such attorneys as notaries complaining of misconduct of the jury, will not show misconduct of jurors on appeal. Sanford v. State (Cr. App.) 185 S. W. 22.

11. **Amendment of motion.**—Where judgment overruling motions for new trial and notice of appeal had been duly entered, and notice of appeal was never withdrawn, refusal to permit filing of supplemental motions held proper. Walker v. State (Cr. App.) 181 S. W. 191.

12. **Affidavits and other proofs in general.**—Affidavits and testimony of jurors, see notes under art. 837, subd. 8.

That a juror stated that accused would have been acquitted but for facts injected into the case as to his shooting of a third person, unaccompanied by any affidavit, held not ground for new trial. Word v. State (Cr. App.) 179 S. W. 1175.

Where defendant's motion for new trial on the ground that two members of the jury, after retirement and before reaching verdict, had stated that defendant had served a term in the penitentiary, etc., was supported by affidavit, such affidavit was sufficient to raise the issue whether the verdict had been invalidated. Weber v. State (Cr. App.) 181 S. W. 459.

Where defendant's motion for a new trial did not contain the affidavits of any of the claimed witnesses on account of whose absence he had moved for a continuance, it was not error to overrule the motion for new trial. Satterwhite v. State (Cr. App.) 181 S. W. 462.

On an amended motion for a new trial on the ground that the certified copy of the indictment was read to the jury instead of the original indictment, evidence held to justify the trial judge's belief, on denying the motion, that the original indictment had been read to the jury. Orner v. State (Cr. App.) 183 S. W. 1172.

Evidence held insufficient to show that one accused of cattle theft was tried by an impartial jury. Duncan v. State (Cr. App.) 184 S. W. 195.

Where there was no affidavit attached to a motion for new trial, in support of an allegation that jury heard other evidence than that adduced on witness stand, and no evidence, it will not be considered on appeal. Simmons v. State (Cr. App.) 186 S. W. 325.

13. **Affidavits as to newly-discovered evidence.**—A motion for new trial on the ground of newly discovered evidence, not supported by affidavit, cannot be considered. Gomez v. State (Cr. App.) 188 S. W. 991.

In prosecution for theft, held, that in absence of statement in affidavit to support motion for new trial of sufficient reason for failure to produce alleged new evidence at trial, appellate court will not order a reversal. Nolan v. State (Cr. App.) 194 S. W. 825.

14. —— **By proposed witnesses.**—Where defendant had two days after verdict in which to secure the affidavits of absent witnesses on motion for new trial, it was not an abuse of discretion to overrule motion as soon as made, where such affidavits were not produced. May v. State (Cr. App.) 179 S. W. 1176.

There was no error in denying a new trial based on absence of a witness, where he makes affidavit that he did not know and would not testify what defendant in his application alleged he would. Jordan v. State (Cr. App.) 182 S. W. 890.

Where defendant upon his motion for a new trial, filed after his conviction, did not attach any affidavit of any absent witnesses that they would testify as claimed in the motion, no new trial would be granted. Scott v. State (Cr. App.) 185 S. W. 994.

Art. 843. [823] Effect of a new trial.

Allusion to or consideration of former conviction.—In view of this article held error for a juror after submission of the cause to remind the jury that accused had once been convicted, and it entitled accused to new trial under article 837. McDougal v. State (Cr. App.) 194 S. W. 944.

Art. 844. [824] When new trial is refused, statement of facts, etc.

2. **Deprivation of statement of facts.**—An appellant held entitled to reversal, when he was deprived of a statement of facts without his fault, and such statement was not made by the judge until over 90 days after trial. Wheat v. State (Cr. App.) 181 S. W. 455.

On affidavits, held that defendant was not deprived of a statement of facts. Day v. State (Cr. App.) 181 S. W. 726.

4. —— **Diligence of accused.**—While one convicted of an offense, if without fault on his part deprived of bill or statement by the adverse party or the judge, is entitled to reversal, he must use all diligence necessary to secure them, and, in the absence of diligence, he cannot have reversal. Vansickle v. State (Cr. App.) 188 S. W. 1006.

One convicted of manslaughter held not to have used due diligence to procure statement of facts and bill of exceptions. Id.

5. Decisions not reviewable without statement of facts.—Where there is neither a statement of facts nor any bill of exceptions, nothing is presented which the Court of Criminal Appeals can review. Calvert v. State (Cr. App.) 179 S. W. 98; Fielder v. State (Cr. App.) 180 S. W. 258; Rosboro v. State (Cr. App.) 184 S. W. 197; Wells v. State (Cr. App.) 184 S. W. 509; Rogers v. State (Cr. App.) 184 S. W. 830; Smith v. State (Cr. App.) 187 S. W. 758; Sparks v. State (Cr. App.) 188 S. W. 981; Glover v. State (Cr. App.) 188 S. W. 1006; Martinez v. State (Cr. App.) 190 S. W. 727; Fulps v. State (Cr. App.) 192 S. W. 1063.

On appeal from conviction of crime, where statement of facts does not accompany the record, judgment will be affirmed. Burks v. State (Cr. App.) 185 S. W. 2; Haley v. State (Cr. App.) 187 S. W. 754.

Where the record on appeal contains no statement of facts, bill of exceptions, or motion for new trial, no question is presented which can be reviewed. Garza v. State (Cr. App.) 179 S. W. 556.

Where accused pleaded guilty to violating the local option law and received the lowest punishment, his appeal presents nothing for review, there being no statement of facts or bill of exceptions showing the proceedings at trial. Looper v. State (Cr. App.) 182 S. W. 308.

Where the indictment charges an offense under the law, no questions are reviewable without a statement of facts or a bill of exceptions. Warren v. State (Cr. App.) 182 S. W. 327.

A record which contained neither a statement of fact nor a bill of exceptions presented nothing for review on appeal, except a motion in arrest of judgment, on the ground that the indictment was fatally defective. Galindo v. State (Cr. App.) 183 S. W. 886.

Where the record contained no bills of exception or statement of facts, and a transcript of the evidence was not signed by the attorneys nor approved by the trial judge, there was no question presented for review. Case v. State (Cr. App.) 185 S. W. 570.

6. —— Grounds for new trial in general.—Where the record on appeal contains neither statement of facts nor bills of exceptions, the ruling on a motion for new trial is not reviewable on appeal. Lawson v. State (Cr. App.) 179 S. W. 557; Jordan v. State (Cr. App.) 182 S. W. 890; Holt v. State (Cr. App.) 182 S. W. 1119; Austin v. State (Cr. App.) 184 S. W. 192; Curry v. State (Cr. App.) 184 S. W. 510; Davidson v. State (Cr. App.) 188 S. W. 991.

Where there was no bill of exceptions or statement of facts or verification of the testimony set out in motion for new trial based on insufficiency of the evidence, held that nothing was presented for review. Besenta v. State (Cr. App.) 179 S. W. 1185.

Where there was nothing in a motion for new trial that could be considered in the absence of the testimony, and neither a statement of fact nor a bill of exceptions was in the record, there was nothing to review on appeal. Large v. State (Cr. App.) 184 S. W. 197.

Where no statement of facts accompanies the record, the only ground presented in the motion for a new trial which is reviewable is that going to the sufficiency of the indictment. Wright v. State (Cr. App.) 185 S. W. 2.

The Court of Criminal Appeals will presume that the trial court's action, after hearing evidence on a motion for a new trial, which is not set forth by a statement of facts or bill of exceptions, was correct. Humphries v. State (Cr. App.) 186 S. W. 332.

Where motion for new trial was denied five days after judgment, after the court heard evidence, and the record does not contain proper bill or statement of facts filed during term time, the court on appeal must presume that the evidence justified the court's action. Sorrell v. State (Cr. App.) 186 S. W. 336.

The grounds of the motion for a new trial, in the absence of a statement of facts, cannot be considered. De Leon v. State (Cr. App.) 187 S. W. 485.

Where the record contains no statement of facts or bill of exceptions, and the matters set out in the motion for new trial cannot be considered in the absence of such statement or bill, the judgment must be affirmed. Lee v. State (Cr. App.) 194 S. W. 137.

7. —— Denial of continuance, recess, or postponement.—Denial of continuance and new trial must be presumed correct; there being no statement of facts or bills of exceptions filed in term showing the testimony heard. Jordan v. State (Cr. App.) 182 S. W. 890.

8. —— Incompetency of jurors.—Where court overruled defendant's motion to quash the jury panel because a witness was city marshal when he served as jury commissioner when jurors were selected, the Court of Criminal Appeals, without record showing of the evidence heard, must presume that trial court's action was correct. Counts v. State (Cr. App.) 181 S. W. 723.

9. —— Rulings on admissibility of evidence.—Without statement of facts, the grounds of a motion for new trial relating to the insufficiency of the evidence, to the improper conduct of counsel, and to the erroneous admission of evidence, cannot be reviewed. Dixon v. State (Cr. App.) 179 S. W. 561.

10. —— Rulings on instructions.—Error in refusing special charges in criminal case held not reviewable, in absence of a statement of facts. Dorris v. State (Cr. App.) 179 S. W. 718.

The court cannot review the refusal of instructions in the absence of evidence. Burks v. State (Cr. App.) 185 S. W. 2.

Without the evidence on a prosecution for incest, the refusal of defendant's requested instruction that the woman was an accomplice and would need corroboration will not be reviewed. Hernandez v. State (Cr. App.) 185 S. W. 878.

In the absence of a statement of facts, if the charge of the court below is applicable to any state of facts that might have been proven under the indictment, the court will presume the trial court submitted to the jury all the law, applicable to the testimony. Turner v. State (Cr. App.) 186 S. W. 322.

In the absence of statement of facts and bill of exceptions, it will be presumed that the charge presented the law and all of it applicable to the evidence. Suggs v. State (Cr. App.) 189 S. W. 266.

The court cannot, in the absence of bill of exceptions or statement of facts, consider objections, made only in the motion for new trial, to the court's charge and the introduction of some testimony. Armendariz v. State (Cr. App.) 194 S. W. 826.

11. —— **Absence of evidence and newly discovered evidence.**—That the motion for new trial for newly discovered evidence may be considered on appeal, there must be a statement of facts. Booth v. State (Cr. App.) 180 S. W. 234.

Error cannot be predicated on the refusal of a new trial prayed on account of the absence of witnesses, where the record shows that the court in hearing the motion, heard evidence, but the evidence heard is not disclosed by statement of facts, bill of exceptions, or other proper method. Wood v. State (Cr. App.) 182 S. W. 1122.

In the absence of a statement of facts, materiality of alleged newly discovered evidence to warrant new trial is not reviewable. Randle v. State (Cr. App.) 188 S. W. 981.

12. —— **Misconduct of jury, prosecuting attorney, and others.**—Prosecuting attorney's allusion to the negro race in harsh and bitter terms held not to require a reversal, in the absence of a proper statement of facts. Hawkins v. State (Cr. App.) 179 S. W. 448.

Where the court found against accused's contention of misconduct of the jury hearing evidence, and such evidence was not preserved by a bill of exceptions or statement of facts filed during term time, it will be presumed on appeal that the evidence warranted denial of accused's motion for new trial. Sanford v. State (Cr. App.) 185 S. W. 22.

Where it appears from order overruling motion for new trial that court heard evidence as to alleged agreement with assistant district attorney regarding suspended sentence, in absence of bill of exceptions and statement of facts, held, that it will be presumed that conclusion of trial court that allegation was not sustained was correct. Nolan v. State (Cr. App.) 194 S. W. 825.

13. —— **Verdict contrary to law and evidence.**—Sufficiency of evidence cannot be reviewed in absence of statement of facts or bill of exceptions. Gragara v. State (Cr. App.) 179 S. W. 1185; Smith v. State (Cr. App.) 179 S. W. 1165; Augustine v. State (Cr. App.) 179 S. W. 1185; Ridgeway v. State (Cr. App.) 179 S. W. 1185; Moreno v. State (Cr. App.) 180 S. W. 124; Westergreen v. State (Cr. App.) 185 S. W. 879.

Where there is neither statement of facts nor bill of exceptions, and the only ground of motion for new trial was that the verdict was contrary to the law and evidence, the ruling thereon cannot be reviewed. Lockhart v. State (Cr. App.) 179 S. W. 556.

Contentions that the conviction was contrary to the law and evidence, and was not supported by the evidence introduced by the state, cannot be considered, where the record contained no statement of facts. Gomez v. State (Cr. App.) 185 S. W. 569.

Where there is no statement of facts or bill of exceptions, the court must conclusively presume that the state proved a violation of one or more of the phases of the offense prescribed by Pen. Code 1911, art. 615, as amended by Acts 33d Leg. c. 75, under which the prosecution was brought. Armendariz v. State (Cr. App.) 194 S. W. 826.

20. **Preparation in general.**—All the rules applying to preparation of a bill of exceptions also apply to the statement of facts. Sorrell v. State (Cr. App.) 186 S. W. 336.

21. **Form, contents, and requisites of statement.**—Statement of facts, made up of questions and answers, held not to be considered. Hawkins v. State (Cr. App.) 179 S. W. 448.

22. **Approval, signing and authentication.**—Ordinarily no statement of facts will be considered unless properly approved and signed by a judge authorized to do so, nor can the parties nor their counsel by agreement dispense with such approval and signature. Vansickle v. State (Cr. App.) 188 S. W. 1006; Sorrell v. State (Cr. App.) 186 S. W. 336.

The statement of facts approved by a judge other than the one who tried the case cannot be considered. Blake v. State (Cr. App.) 193 S. W. 1064; Turner v. State (Cr. App.) 186 S. W. 322.

Where the statement of facts fails to show its presentment or approval below, it cannot be considered. Dorris v. State (Cr. App.) 179 S. W. 718.

Where accused was tried by a judge other than the regular judge, the regular judge could not approve the statement of facts. McGee v. State (Cr. App.) 182 S. W. 309.

A statement of facts not approved by the trial judge or signed by the prosecuting attorney cannot be considered. Morgan v. State (Cr. App.) 182 S. W. 451.

An order, granting additional time for the court and attorneys to pass on statement of facts and bills of exceptions, may be made by the successor of the deceased trial judge. Sorrell v. State (Cr. App.) 186 S. W. 336.

Where the special judge who tried the case dies before signing the statement of facts, the regular judge who succeeds him is competent to sign it, and he could be compelled to do so by mandamus if he refused. Id.

The judge who tries the case, whether a regular or special judge, and regardless of whether the term has adjourned or he has been succeeded by another, must sign the bills of exceptions, statement of facts and other documents for appeal. Id.

If approval of statement of facts by the judge is held invalid, it is appellant's duty to prove it up by bystanders. Id.

Defendant is estopped to have reversal of a conviction on the ground that he was deprived of a statement of facts, when in fact it was fully considered, and the only objection was that it was not properly signed. Id.

When the parties failed to agree on the statement of facts, it was court's duty to make statement of facts on point of difference speak the truth. Cozby v. State (Cr. App.) 189 S. W. 957.

24. **Conclusiveness and effect.**—It will be presumed that the statement of facts, agreed to by counsel and proved by the court, correctly presents the evidence, and the district attorney cannot support argument claimed to be without the record, on the ground that the statement of facts does not contain all the evidence. Bullington v. State (Cr. App.) 180 S. W. 679.

29. **Incorporation in record.**—In misdemeanor cases, the statement of facts must be copied in the record. Johnson v. State (Cr. App.) 186 S. W. 841.

Where statement of facts is not copied in the record on appeal, a motion to strike it out will be sustained. Lynch v. State (Cr. App.) 193 S. W. 667.

Art. 844a. Time for presentation of statements of fact and bills of exception; time for preparation of findings; authority of judge after expiration of term of office.

Time allowed for filing in general.—Statement of facts and bills of exception, filed after the 20 days authorized by law in which to file evidence in county court, cannot be considered. Cranfill v. State (Cr. App.) 189 S. W. 482; Todd v. State (Cr. App.) 180 S. W. 116; Ridgeway v. State (Cr. App.) 179 S. W. 1185; Green v. State (Cr. App.) 179 S. W. 1191; Martin v. State (Cr. App.) 179 S. W. 121.

A statement of facts, filed more than 20 days after adjournment of court, is too late for consideration by Court of Criminal Appeals. Hamilton v. State (Cr. App.) 189 S. W. 482; Lawson v. State (Cr. App.) 179 S. W. 1186; Pickens v. State (Cr. App.) 180 S. W. 234.

A bill of exceptions, taken on appeal from a conviction in the county court, could not be considered, where it was filed 22 days after court adjourned. Alexander v. State (Cr. App.) 180 S. W. 123.

Where the term at which defendant was tried adjourned September 25, 1915, and the statement of facts was not presented to court for approval, nor filed until November 10, 1915, and no sufficient reason for the delay was shown, the motion to strike out the statement of facts would be sustained. Johnson v. State (Cr. App.) 181 S. W. 455.

A statement of facts filed on October 23d on appeal from a conviction at a term adjourned September 25th cannot be considered; more than 20 days having elapsed. Morgan v. State (Cr. App.) 182 S. W. 451.

Where one appealing from a conviction of misdemeanor did not file his statement until 85 days after adjournment of the term of the county court and the bills of exception merely showed they were approved within the time allowed by law for filing, the state's motion to strike the statement and bills must be sustained. Cantrell v. State (Cr. App.) 184 S. W. 225.

Statement of facts and bills of exceptions in a misdemeanor case, filed after the expiration of 20 days after the adjournment of the court trying the case, will be stricken on motion. Lundschien v. State (Cr. App.) 185 S. W. 11.

Purported statement of facts, filed, not in term time, but weeks after trial court had adjourned, will not be considered. Guerra v. State (Cr. App.) 189 S. W. 952.

Extension of time for filing.—Court on appeal from county court cannot consider statement of facts or bill of exceptions filed after adjournment of the term, in absence of order allowing filing thereof. Williams v. State (Cr. App.) 179 S. W. 1167; Van Dyke v. State (Cr. App.) 179 S. W. 111; Luna v. State (Cr. App.) 179 S. W. 1152; Scott v. State (Cr. App.) 181 S. W. 454; Price v. State (Cr. App.) 188 S. W. 748.

Bills of exception filed several days after the time allowed by the court cannot be considered on appeal. Jones v. State (Cr. App.) 182 S. W. 306; Noe v. State (Cr. App.) 182 S. W. 1122.

A statement of facts in the county court must be filed within 20 days after its adjournment, preceded by an order entered of record, and hence a statement filed 26 days or more after adjournment would not be considered, notwithstanding an order entered of record allowing 30 days after adjournment. Carroll v. State (Cr. App.) 184 S. W. 508; Porter v. State (Cr. App.) 193 S. W. 147.

In prosecution for a misdemeanor, where bills of exceptions and statement of facts were filed in lower court after adjournment of term at which conviction was had, without order authorizing filing, court will not review them on appeal. Guild v. State (Cr. App.) 187 S. W. 215; Smith v. State (Cr. App.) 187 S. W. 758.

Where an order of the trial court authorizing the filing of statement of facts after adjournment was not carried forward into the minutes of the court, it does not authorize filing after adjournment. Van Dyke v. State (Cr. App.) 179 S. W. 111.

Code Cr. Proc. 1911, art. 845, does not authorize statements of fact or bill of exceptions to be filed after adjournment of court in the absence of an order to that effect, where no stenographer's transcript is filed. Id.

Where there was no order in the record authorizing a statement of facts to be filed after adjournment of county court, a purported statement of facts must be stricken. McGee v. State (Cr. App.) 179 S. W. 1165.

The record presented no question for review where it contained a statement of facts filed July 1st, and no excuse for delaying filing after the county court's adjournment June 5th, no 20-day order having authorized such filing, and no bill of exceptions having been filed. Harper v. State (Cr. App.) 180 S. W. 258.

The statement of facts in a misdemeanor case, having been filed after the adjournment of the term, without any order allowing it, will, on motion, be stricken, and not considered. Bradford v. State (Cr. App.) 180 S. W. 702.

Where court refused an extension of time at end of 20 days after adjournment of court, in which to file bills of exceptions and statement of facts, a motion to strike out papers filed by clerk at a later date will be sustained. Crutcher v. State (Cr. App.) 186 S. W. 327.

Where the statement of facts and bills of exceptions were filed 19 days after adjournment of the term without any order of extension after affirmance and motion for rehearing, an order in the trial court entering judgment nunc pro tunc and allowing 20 days to file the statement and bills was void, and the statement could not be considered. Bankston v. State (Cr. App.) 189 S. W. 481.

Approval by judge after time of filing has expired.—Where within the 20 days allowed the judge, on the parties failing to agree, undertook to prepare and file a statement of facts, and one was filed, it will be considered, though not specifically certified or approved by him till later. Eitel v. State (Cr. App.) 182 S. W. 318.

Effect of failure to file in time.—After conviction for a misdemeanor, a statement of facts not filed until 81 days after adjournment of the county court will be stricken. Celo v. State (Cr. App.) 179 S. W. 99.

Where the statement of facts and bills of exceptions were filed 19 days after adjournment of the term without any order of extension, motion to strike out must be granted. Bankston v. State (Cr. App.) 189 S. W. 481.

Art. 844c. Party appealing may make statement from transcript filed by shorthand reporter; agreement of parties; shorthand reporter may make statement of facts; fees.

Agreement by parties and approval of judge.—The court may not consider the stenographer's record of the case not approved by the trial judge nor agreed to by the attorneys. Longoria v. State (Cr. App.) 188 S. W. 988.

The stenographer's report of trial, not agreed to by any attorney in the case, and not approved by the trial judge, cannot be considered. Redwine v. State (Cr. App.) 189 S. W. 158.

Succinct statement without unnecessary repetition.—The stenographer's complete report of the trial, from which Vernon's Ann. Code Cr. Proc. 1916, art. 844c, requires appellant to prepare a statement of facts, though approved by the trial judge as the statement of facts, will not be considered as such by the appellate court. Foster v. State (Cr. App.) 185 S. W. 1.

Sending up original statement of facts.—A statement of fact in a criminal case transcribed in the record and certified as part of the transcript should be stricken and not considered on appeal. Bateman v. State (Cr. App.) 193 S. W. 666.

Art. 845. Time for preparing and filing statement of facts and bill of exceptions; extension of time; failure to agree on statement of facts; duty of court; what constitutes filing within time.

Cited, Daugherty v. State (Cr. App.) 182 S. W. 306.

4. **Time allowed for filing in general.**—Code Cr. Proc. 1911, art. 845, does not authorize statement of facts and bills of exceptions to be filed after adjournment of court, in the absence of an order to that effect, where no stenographer's transcript is filed. Van Dyke v. State (Cr. App.) 179 S. W. 111.

Allowance of bill of exceptions to remarks by county attorney not excepted to or called to the court's attention until the motion for a new trial, and denied by the county attorney to have been made, held properly refused. Taylor v. State (Cr. App.) 179 S. W. 1161.

The statement of facts, filed more than 90 days after denial of new trial and giving and entering of notice of appeal, cannot be considered. Council v. State (Cr. App.) 180 S. W. 612.

A statement of facts and bill of exceptions not filed until more than 90 days after denial of new trial and sentencing of accused, notice of appeal being given at time of sentence, will be stricken on motion. McGee v. State (Cr. App.) 182 S. W. 309.

Where accused was convicted at a term of county court lasting more than 8 weeks, statement of facts and bills of exception not filed within 90 days after overruling motion for new trial and sentence cannot be considered. Pettigrew v. State (Cr. App.) 184 S. W. 508.

Where defendant, upon the overruling of her motion for a new trial, gave notice of appeal and was sentenced, and no order was made allowing any time for filing bills of exceptions, bills filed more than 30 days after the overruling of the motion for a new trial were too late. Jones v. State (Cr. App.) 186 S. W. 840.

Bills of exception filed 80 days after pronouncement of sentence are too late, and cannot be considered. Freeman v. State (Cr. App.) 193 S. W. 147.

5. **Motion for new trial.**—Alleged newly discovered evidence and misconduct of jury and county attorney as to which evidence was heard on motion for new trial held not reviewable without a statement of facts filed during term time. Taylor v. State (Cr. App.) 179 S. W. 1161.

Bills of exceptions to the overruling of the motion for a new trial and embodying facts in connection with alleged misconduct of the jury, filed two weeks after the court adjourned, held too late. Wiley v. State (Cr. App.) 181 S. W. 728.

Where the term of court at which defendant was convicted adjourned, and the evidence heard on the motion for a new trial on the ground of newly discovered evidence

was not filed in the trial court until 7 weeks thereafter, such ground would not be considered on appeal. Ingram v. State (Cr. App.) 182 S. W. 290.

The statement of facts, with reference to the denial of new trial for newly discovered evidence having been filed after adjournment, cannot be considered. Whetstone v. State (Cr. App.) 182 S. W. 1117.

A statement of facts presenting the evidence heard on motion for new trial cannot be considered when not filed during term time. Sanford v. State (Cr. App.) 185 S. W. 22.

In order to get the benefit of the evidence heard on motion for new trial, the statement of facts heard thereon, in the form either of statement of facts or contained in a bill, must be filed during the term at which the trial occurred. Medford v. State (Cr. App.) 189 S. W. 155.

A bill of exceptions, filed more than 30 days after accused's motion for new trial has been overruled and he has appeared, is too late. Id.

Order overruling motion for new trial on the ground of newly discovered evidence cannot be reviewed when presented by bills and statements of facts filed after term time. Villareal v. State (Cr. App.) 189 S. W. 156.

A bill of exceptions to denial of new trial, filed nearly a month after termination of the court, cannot be considered. Page v. State (Cr. App.) 189 S. W. 951.

Where defendant moved for new trial for newly discovered evidence, and court heard testimony on motion during term time, but testimony was not filed until nearly 20 days after term time, ruling denying new trial cannot be reviewed. Waggoner v. State (Cr. App.) 190 S. W. 493.

9. Extension of time for preparation and filing.—Bills of exception filed more than 90 days after the overruling of the motion for a new trial and the sentence, notwithstanding two orders in the record each extending the time for filing 30 days, cannot be considered. Bowen v. State (Cr. App.) 186 S. W. 220.

To authorize the filing of bills of exception, an extension order should be made before the expiration of 30 days from the date of sentence. Samples v. State (Cr. App.) 190 S. W. 486.

Where an order erroneously allowed defendant 90 days after adjournment, instead of after sentence, to file statement and bills of exception, statement and bills filed more than 90 days from sentence will not be considered. Carter v. State (Cr. App.) 190 S. W. 731.

10. —— Making and entry of order.—An order granting additional time for the court and attorneys to pass on statements of fact and bills of exceptions may be made by the successor of the deceased trial judge. Sorrell v. State (Cr. App.) 186 S. W. 336.

18. Effect of failure to present and file in time—Striking statement or bill from record.—A statement of facts filed by appellant long after the time authorized by law must be stricken out on motion of the Attorney General. Medlock v. State (Cr. App.) 186 S. W. 323.

Where purported bills of exceptions and statement of facts were filed nearly 90 days after adjournment of court, a motion to strike them out, because filed too late, must be granted. McAfee v. State (Cr. App.) 189 S. W. 155.

Under the statute as to time for filing bills of exception, bills not filed within the 30 days allowed by law or within the additional time allowed by the court must be stricken. Limon v. State (Cr. App.) 192 S. W. 246.

19. —— Deprivation of statement of facts as ground for reversal.—An appellant held entitled to reversal when he was deprived of a statement of facts without his fault, and such statement was not made by the judge until over 90 days after trial. Wheat v. State (Cr. App.) 181 S. W. 455.

Defendant is estopped to have reversal of a conviction on the ground that he was deprived of bills of exceptions, when in fact they were fully considered, and the only objection was that they were not properly signed. Sorrell v. State (Cr. App.) 186 S. W. 336.

If defendant negligently delays to have his statement of facts or bill of exceptions signed by the trial judge, he cannot have reversal of a conviction on the ground that he was deprived of the record. Id.

20. Diligence and matters excusing failure to file in time.—Defendant, having prepared, and on the last day of the term presented, a statement of facts in time for its disposition on that day, was sufficiently diligent, so that he could have it considered on appeal, though under ruling, concurred in by county attorney, it was not approved and filed till next day. Daugherty v. State (Cr. App.) 182 S. W. 306.

An affidavit filed by appellant on opposition to a motion to strike out statement of facts and bills of exceptions which was not filed until more than 90 days after denial of motion for new trial held to show such lack of diligence as required that the motion be sustained. McGee v. State (Cr. App.) 182 S. W. 309.

On stated facts, held that accused, who was convicted on a plea of guilty, entered when he was unable to obtain counsel to represent him, did not show sufficient diligence in obtaining a statement of facts; hence denial of motion for new trial will not be reviewed on affidavits. Wright v. State (Cr. App.) 183 S. W. 884.

If the failure to have a statement of facts or bills of exceptions filed in time is due to neglect of defendant, or if he fails to show diligence or fails to exhaust the means provided by law to obtain these documents, they will not be considered, nor in such event will the judgment be reversed for failure to obtain them. Sorrell v. State (Cr. App.) 186 S. W. 336.

While one convicted of an offense, if without fault on his part deprived of bill or statement by the adverse party or the judge, is entitled to reversal, he must use all diligence necessary to secure them, and, in the absence of diligence, he cannot have reversal. Vansickle v. State (Cr. App.) 188 S. W. 1006.

One convicted of manslaughter held not to have used due diligence to procure statement of facts and bill of exceptions. Id.

21. Filing within time required by law for filing transcript.—Statement of facts filed within 90 days after sentence pronounced at term subsequent to that at which accused was convicted held filed in time. Wilburton v. State (Cr. App.) 179 S. W. 1169.

Appellant has 90 days from the date of sentence in which to file statement of facts. Samples v. State (Cr. App.) 190 S. W. 486.

22. Time allowed where parties are unable to agree as to facts.—Since the court, when the duty devolves upon it to prepare statements of fact and bills of exceptions has a reasonable time to do so, where appellant used 88 days of 90 allowed, and then requested the court to prepare them, and they were completed in three weeks, they would be considered, though filed after the 90 days. Vansickle v. State (Cr. App.) 188 S. W. 1006.

Art. 845a. Affidavit of inability to pay for transcript; false affidavit.—Provided that when any criminal case is appealed and the defendant is not able to pay for a transcript as provided for in Section 5 of this Act [Art. 844b, Vernon's Code Cr. Proc. 1916], or to give security therefor, he may make affidavit of such fact and upon the making and filing of such affidavit, the court shall order the stenographer to make such transcript in duplicate, and deliver them as herein provided in civil cases, but the stenographer shall receive no pay for same; provided, that should any such affidavit so made by such defendant be false he shall be prosecuted and punished as is now provided by law for making false affidavits. [Act 1903, ch. 60; Act 1905, ch. 112; Act 1907, S. S. ch. 24; Act 1909, p. 376, § 8; Acts 1911, p. 267, ch. 119, § 8; Act April 3, 1917, ch. 189, § 1; Act May 19, 1917, 1st C. S., ch. 27, § 1.]

Explanatory.—See art. 1925, Civil Statutes, ante, and note thereunder. The provision as to making false affidavit appears on its face to be more appropriate for the Penal Code, but it would seem to have no operative effect as a criminal statute, since there is no law providing a penalty for "making false affidavits" in judicial proceedings.

Affidavit of inability to pay.—The court which tried a murder case committed no error when it refused to entertain defendant's affidavit, praying that the official stenographer be required to prepare a statement of facts for him without charge, as for a pauper appellant, which was filed before sentence and pending motion for new trial. Herrera v. State (Cr. App.) 180 S. W. 1097.

Where a defendant who has given notice of appeal files affidavit that he cannot pay for a statement of facts or give security therefor, as provided by this article, it is the duty of the court to make an order requiring the stenographer to make out a statement. Id.

Conviction of murder on second trial would not be reversed for the court's failure to require the stenographer to furnish a statement of facts as to a pauper appellant where defendant took no steps to protect his rights beyond praying an order to that effect. Id.

Art. 846. Shorthand reporter shall keep stenographic record of trial of felony cases; duty in case parties cannot agree as to testimony; condensation; furnishing transcript to attorney appointed to represent defendant.

In general.—Under this article purported statement of facts delivered by court stenographer to defendant's attorney after conviction for felony theft could not be considered. Lewis v. State (Cr. App.) 177 S. W. 972.

Condensation.—Under this act, inclusion in statement of facts of questions and answers, where the attorneys or the court could have agreed on the testimony without the questions and answers, held improper, notwithstanding the trial judge's certificate that they were necessary. Cooley v. State, 73 Cr. R. 325, 165 S. W. 192.

Under this article, evidence placed in record in question and answer form, and not reduced to narrative form, will not be considered on appeal. Simmons v. State (Cr. App.) 186 S. W. 325.

CHAPTER THREE

JUDGMENT AND SENTENCE

1. In Cases of Felony

Article 853. [831] Definition of "judgment."

Clerk's powers and duties.—Where an indictment for perjury was tried during the term at which it was preferred, court committed no error in requiring clerk to enter his order appointing one as foreman of grand jury. Cozby v. State (Cr. App.) 189 S. W. 957.

After adjournment of the county court, the county clerk had no authority without permission to add to or take from the minutes approved by the court. Whitcomb v. State (Cr. App.) 190 S. W. 484.

Correction of judgment.—In view of this article and under the inherent power of the court and Vernon's Sayles' Ann. Civ. St. 1914, art. 2015, held, that the court had jurisdiction to render nunc pro tunc a judgment rendered after conviction at a previous term, but erroneously entered. Bennett v. State (Cr. App.) 194 S. W. 148.

What constitutes final judgment.—A judgment of conviction in justice court held a final judgment, warranting appeal to and trial de novo in the county court. Golson v. State (Cr. App.) 179 S. W. 560.

Art. 856. [834] In cases of appeal, sentence shall be pronounced.

Judgment including sentence prerequisite to appeal.—No appeal can be taken in criminal cases until sentence is pronounced, since sentence is the final judgment. Dodd v. State (Cr. App.) 179 S. W. 564.

An appeal does not lie until sentence has been pronounced. Wilburton v. State (Cr. App.) 179 S. W. 1169.

Art. 859. [837] Where there has been a failure to enter judgment.

Cited, Bennett v. State (Cr. App.) 194 S. W. 148.

Correction of judgment at subsequent term.—Under this article the district court at its term next after dismissal of defendant's appeal, and on application of the district attorney, with notice to defendant, was authorized to correct the clerk's insertion of the name of another, where defendant's name was intended to appear. Rios v. State (Cr. App.) 183 S. W. 151.

1½. Indeterminate and Suspended Sentences

Art. 865a. Indeterminate sentences of persons convicted of certain felonies.

Form and requisites of sentence.—Under the indeterminate sentence law, one convicted of murder should be sentenced to confinement for natural life or for not less than five years, and not merely for life. Wilganowski v. State (Cr. App.) 180 S. W. 692.

Reformation of judgment in appellate court.—Where, contrary to the Indeterminate Sentence Law, accused was sentenced to a definite term of imprisonment, the judgment will be reformed so as to comply with the law, and affirmed. Dixon v. State (Cr. App.) 179 S. W. 561.

Verdict requiring a determinate sentence where the statute requires an indeterminate one may be reformed and corrected by the Court of Criminal Appeals to conform to the statute. Taylor v. State (Cr. App.) 180 S. W. 242.

The sentence, not conforming to the indeterminate sentence law, but being for a definite term, will be reformed. Chandler v. State (Cr. App.) 184 S. W. 192.

Where the jury assessed punishment for murder at 10 years, and the judge imposed sentence for only 2 years, it was necessary on appeal to reform the sentence to conform with the indeterminate sentence law. Kirven v. State (Cr. App.) 186 S. W. 201.

In prosecution for crime, where sentence does not comply with indeterminate sentence law, Court of Criminal Appeals will order it reformed. Williams v. State (Cr. App.) 188 S. W. 430.

Art. 865b. Suspended sentence.

Cited, Holland v. State (Cr. App.) 187 S. W. 944.

Constitutionality and validity of acts.—The act of the Thirty-Third Legislature providing for suspended sentence on first convictions, is within the power vested by Const. art. 3, § 1, in the Legislature, and does not interfere with the pardoning power conferred on the Governor. Baker v. State, 70 Cr. R. 618, 158 S. W. 998.

Acts 33d Leg. c. 7, relative to suspension of sentence, held valid, and not to interfere with the pardoning power. King v. State, 72 Cr. R. 394, 162 S. W. 890.

Where a voter had been convicted of felony and his sentence suspended under Acts 32d Leg. c. 44, which was held unconstitutional, the suspension was void, and the voter was not qualified, not having been pardoned. Aldridge v. Hamlin (Civ. App.) 184 S. W. 602.

Art. 865c. Testimony as to defendant's reputation and criminal history.

Necessity and sufficiency of application by accused.—Notwithstanding Code Cr. Proc. 1911, art. 773, requiring consent of jury to correction of their verdict, the action of the court in entering up judgment and sentence on a verdict recommending suspension of sentence is proper, where no plea therefor had been filed before trial and the judge had directed them not to make such recommendation. Bessett v. State (Cr. App.) 180 S. W. 249.

Proof as to prior reputation.—The state on cross-examination of accused filing plea for suspension of sentence may show that he had been arrested for various crimes. Backus v. State (Cr. App.) 179 S. W. 1166.

Where accused prayed for a suspension of his sentence on the ground of previous good character and introduced evidence thereof, the state may show that accused had been prosecuted for running a disorderly house and had turned state's evidence. Casey v. State (Cr. App.) 180 S. W. 673.

Under Laws 1913, c. 7, § 2 (Vernon's Sayles' Ann. Civ. St. 1914, art. 6095d), testimony of reputation of one applying for suspension of sentence, if convicted, is admissible. Medlock v. State (Cr. App.) 185 S. W. 566.

In murder trial, testimony that accused had been residing in a house of prostitution held admissible as showing accused's habits on issue of suspended sentence asked by him; it having been proved that keeper of house was accused's wife. Neyland v. State (Cr. App.) 187 S. W. 196.

Under this article and art. 865b, testimony by the state upon application for suspended sentence by accused as to his reputation and habits should be liberally received, and may be introduced at the time of proving the offense itself; and the state can introduce testimony as to bad reputation of accused and also specific crimes, even minor misdemeanors and the general conduct and habits of accused, but purely hearsay testimony is inadmissible. The burden of proving that accused has never been convicted of a felony is upon accused. Upon application for accused for suspended sentence, if, when the state offers proof of his habits, reputation, etc., he withdraws his application, the court should permit no such proof. Holland v. State (Cr. App.) 187 S. W. 944.

Testimony that warrants are held for accused's arrest for offenses other than that for which he is being tried is admissible, where his request for a suspended sentence is submitted to the jury. House v. State (Cr. App.) 189 S. W. 488.

Recommendation by jury.—Under the suspended sentence law, jury's finding that accused has been convicted of a felony precludes further inquiry; but, if they find otherwise, it is for them to determine whether or not the evidence justifies a suspension of the sentence. Coleman v. State (Cr. App.) 185 S. W. 13.

Under this article and art. 865b, upon application for suspended sentence, where accused fails to prove that he has never been convicted of a felony, the jury may not pass on the question of recommending a suspended sentence. Holland v. State (Cr. App.) 187 S. W. 944.

Appealability of order for suspended sentence.—Notice of appeal should not be permitted where the court in its judgment suspended sentence, as, under the suspended sentence law, accused can appeal from the conviction only when, if ever, proper sentence is later pronounced against him. Gallier v. State (Cr. App.) 182 S. W. 306.

Submission of matter to jury.—Under the statute as to suspended sentence, expressly excepting murder out of its provisions, the refusal to submit a plea for a suspended sentence was proper, where the court did not submit manslaughter, but submitted murder. Boyd v. State (Cr. App.) 180 S. W. 230.

Where no issue of manslaughter appeared in case, it was not error to refuse to submit a suspension of accused's sentence and give his requested charge on that subject only in event he was convicted of manslaughter. Rose v. State (Cr. App.) 186 S. W. 202.

Form of verdict.—Where the court submitted three forms of verdict, the action of the jury in filling out the blank in the form finding defendant guilty and recommending that sentence be not suspended, which was received by the court without exception, was a good verdict. Lee v. State (Cr. App.) 181 S. W. 728.

Instructions.—Where defendant, filed application for suspension of sentence, there was no necessity to charge that the filing of the plea creates no presumption of guilt, unless the state so contended. Hughes v. State (Cr. App.) 180 S. W. 259.

Art. 865e. Conviction of other felony; pronouncement of sentence.

Cumulative sentence.—Where defendant was on the same day indicted in two cases, and was convicted in one, with suspended sentence, and later convicted in the other, it was proper, on motion of the county attorney setting out such facts, to impose two cumulative sentences. Hill v. State (Cr. App.) 189 S. W. 954.

2. Judgment in Cases of Misdemeanor

Art. 866. [844] May be rendered in absence of defendant.

Cited, Gay v. State (Cr. App.) 184 S. W. 200.

Art. 867. [845] Judgment when the punishment is fine only.

Cited, Gay v. State (Cr. App.) 184 S. W. 200.

Taking on capias.—Under Code Cr. Proc. 1911, arts. 869, 871, 867, 872, 875, and 877, as to jurisdiction, proceedings after conviction, and collection of fines in misdemeanor cases, where judgment is rendered for a fine against one accused of a misdemeanor in failing to work roads, but execution is delayed for a year, he may nevertheless be taken at any time before paying the judgment on capias pro fine, though execution does not issue. Ex parte Cook (Cr. App.) 188 S. W. 979.

Art. 868. [846] Judgment when the punishment is other than fine.

Cited, Gay v. State (Cr. App.) 184 S. W. 200.

CHAPTER FOUR

EXECUTION OF JUDGMENT

1. Collection of Pecuniary Fines

Article 869. [847] How judgment for fine satisfied and defendant discharged.

Cited, Ex parte Cook (Cr. App.) 188 S. W. 979.

Art. 871. [849] When judgment is fine, and defendant is present.

Cited, Ex parte Cook (Cr. App.) 188 S. W. 979.

Art. 872. [850] When defendant is not present, capias shall issue.

Cited, Ex parte Cook (Cr. App.) 188 S. W. 979.

Art. 875. [853] Execution may issue for fine and costs.

Cited, Ex parte Cook (Cr. App.) 188 S. W. 979.

Art. 876. [854] When execution is satisfied, etc.

Cited, Laird v. State (Cr. App.) 184 S. W. 810.

Art. 877. [855] Further enforcement of the judgment.

Cited, Ex parte Cook (Cr. App.) 188 S. W. 979.

3. Enforcing Judgment in Capital Cases

Art. 886. [864] Who shall be present.

Cited, Whitcomb v. State (Cr. App.) 190 S. W. 484.

Art. 887. [865] Reasonable request of convict.

Cited, Whitcomb v. State (Cr. App.) 190 S. W. 484.

Art. 888. [866] No torture shall be inflicted.

Cited, Whitcomb v. State (Cr. App.) 190 S. W. 484; Bennett v. State (Cr. App.) 194 S. W. 145.

TITLE 10

APPEAL AND WRIT OF ERROR

Article 894. [872] Defendant may appeal.

Defects in proceedings for appeal.—After dismissal of an appeal from a conviction and after the trial court's amendment by inserting another name in the judgment entry where defendant's name was intended to appear, defendant might appeal therefrom to the Court of Criminal Appeals. Rios v. State (Cr. App.) 183 S. W. 151.

Finality of judgment.—A judgment of conviction in justice court held a final judgment, warranting appeal to and trial de novo in the county court. Golson v. State (Cr. App.) 179 S. W. 560.

Pronouncement of sentence by the judge in vacation is not authorized, so that sentence so pronounced is not a final judgment on which an appeal may be rested. Dodd v. State (Cr. App.) 179 S. W. 564.

Art. 895. [873] Appeals from district and county courts.

Final jurisdiction in criminal cases.—The Constitution expressly places in the Court of Criminal Appeals, and not in the Supreme Court, the final jurisdiction in all criminal cases. Ex parte Mode (Cr. App.) 180 S. W. 708.

Art. 897. [874] From justices of the peace to county court.

Finality of judgment.—A judgment of conviction in justice court held a final judgment, warranting appeal to and trial de novo in the county court. Golson v. State (Cr. App.) 179 S. W. 560.

Art. 900. Bail not discharged until verdict or judgment; in misdemeanors no discharge until overruling of motion for new trial.—Where the Defendant in any criminal case pending in the Courts of this State, is on bail when the trial commences the same shall not thereby be considered as discharged until the jury shall return into court a verdict of guilty, or in case of trial without a jury, a judgment finding the defendant guilty has been rendered and the defendant is taken in custody by the Sheriff; and he shall have the same right to have and remain on bail during the trial of his case and up to the return into court of such verdict or judgment of guilty, as under the law he has before the trial commences; but immediately upon the return into court of such verdict or the rendition of a judgment of guilty, he shall be placed in the custody of the sheriff, and his bail considered discharged. Provided that where the defendant is convicted in a misdemeanor case and is on bail

when the trial commences, the same shall not thereby be considered discharged until the defendant's motion for a new trial shall have been overruled by the court. [Acts 1907, p. 31; Act March 28, 1917, ch 110, § 1.]

Explanatory.—The act amends art. 900, Title 10, Code Cr. Proc. Took effect 90 days after March 21, 1917, date of adjournment. Supersedes art. 648, ante.

Art. 901. [876] In felony cases where defendant is convicted and appeals, shall have right to remain on bail, when.

Cited, Laird v. State (Cr. App.) 184 S. W. 810.

Art. 902. When defendant appeals and bail is allowed, shall be committed to jail, until he enters into recognizance.

Cited, Laird v. State (Cr. App.) 184 S. W. 810; Lang v. State (Cr. App.) 190 S. W. 146.

Art. 903. Form of such recognizance.

Cited, Laird v. State (Cr. App.) 184 S. W. 810.

Art. 904. Where defendant fails to enter into recognizance during term time, he may give bail in amount fixed by court, to be approved by sheriff.

Effect of giving appeal bond in term time.—Where accused files appeal bond with the sheriff in term time, the appeal will be dismissed; a recognizance being necessary. Taylor v. State (Cr. App.) 189 S. W. 142; Taylor v. State (Cr. App.) 189 S. W. 141.

Where accused, after conviction, instead of entering into a recognizance, gives an appeal bond and is released from custody, his appeal must be dismissed. Bloss v. State (Cr. App.) 187 S. W. 487.

Under this article and art. 902, the Court of Criminal Appeals acquires no jurisdiction of appeal where appellant gives appeal bond during term time. Lang v. State (Cr. App.) 190 S. W. 146.

Since a defendant convicted of a felony can be legally discharged only by entering into a recognizance, his giving an appeal bond and obtaining his liberty thereby deprived the Court of Appeals of jurisdiction, and his appeal will be dismissed. Gallon v. State (Cr. App.) 194 S. W. 1116.

Time of giving recognizance.—Under Code Cr. Proc. 1911, arts. 901-904, where one convicted of perjury and appealing enters into a recognizance at the next term after the term at which convicted, and is allowed to go at large, his appeal should not be dismissed because he was allowed to go at large without bail. Laird v. State (Cr. App.) 184 S. W. 810.

Under Acts 29th Leg. c. 115, held, that an appellant who had entered no recognizance below cannot be permitted to enter into and file a recognizance in the Court of Criminal Appeals. Bennett v. State (Cr. App.) 194 S. W. 145.

Art. 912. [880] When defendant escapes, pending an appeal.

Cited, Laird v. State (Cr. App.) 184 S. W. 810.

Effect of escape in general.—Where, since conviction and pending appeal, accused escaped from custody, the appeal will be dismissed. Acosta v. State (Cr. App.) 179 S. W. 870.

Art. 914. [882] Appeal may be taken, when.

Appeal from judgment corrected or entered nunc pro tunc.—Where the judgment rendered was erroneously entered, defendant's failure to perfect his appeal therefrom did not deprive him of his right to appeal from an entry of judgment nunc pro tunc at a subsequent term. Bennett v. State (Cr. App.) 194 S. W. 148.

Entry of notice or recognizance nunc pro tunc.—The county judge held without authority to order that a recognizance taken during the term be entered after the term nunc pro tunc. Whitcomb v. State (Cr. App.) 190 S. W. 484.

Art. 915. [883] Appeal how taken; entry of notice after term.

Cited, Bennett v. State (Cr. App.) 194 S. W. 148.

Compliance with requirements in general.—Where proper steps have not been taken to confer appellate jurisdiction, the court cannot enter any order other than to dismiss the appeal. Bennett v. State (Cr. App.) 194 S. W. 145.

Necessity and requisites of notice in general.—Even if an appeal bond in a criminal case is deemed sufficient to operate as an appeal recognizance, the jurisdiction of the Court of Appeals does not attach in the absence of a notice of appeal. McCulloch v. State (Cr. App.) 191 S. W. 357.

Suspended sentence.—Notice of appeal should not be permitted where the court in its judgment suspended sentence, as, under the suspended sentence law, accused can

appeal from the conviction only when, if ever, proper sentence is later pronounced against him. Gallier v. State (Cr. App.) 182 S. W. 306.

Motion for new trial granted after notice of appeal.—Motion for new trial granted by trial judge during term, after notice of appeal has been given, sets aside such notice. Bankston v. State (Cr. App.) 192 S. W. 1064.

Art. 916. [884] Effect of appeal.

Cited, Bankston v. State (Cr. App.) 189 S. W. 481.

Transfer of jurisdiction.—Under this article the trial court could not, pending rehearing on appeal on motion of the state, amend defendant's bill of exceptions to overruling of his objection to a juror. Sullenger v. State (Cr. App.) 182 S. W. 1140.

Where defendant on the day of his sentence gave notice of appeal and entered into a recognizance and was discharged from custody, the district court, under the statute, lost jurisdiction, and properly refused to permit him to file another motion for a new trial, and the Court of Criminal Appeals acquired jurisdiction of the case. Humphries v. State (Cr. App.) 186 S. W. 332.

Where trial court has lost jurisdiction by sentence being pronounced, notice of appeal given, and appeal recognizance entered into, motion for new trial cannot be considered. Samples v. State (Cr. App.) 190 S. W. 486.

Art. 918. [886] When defendant appeals in misdemeanor, must give recognizance.

Cited, Bennett v. State (Cr. App.) 194 S. W. 145.

Necessity of recognizance.—Where, on appeal from conviction, the record fails to disclose that defendant entered into any recognizance or is in jail pending appeal, the Attorney General's motion to dismiss will be sustained. Fielder v. State (Cr. App.) 180 S. W. 258.

To confer jurisdiction on the Court of Criminal Appeals, the record on appeal from a conviction must disclose that a recognizance was given, or that defendant is in jail and has been continuously confined therein. Sparks v. State (Cr. App.) 183 S. W. 144.

An order overruling a motion for a new trial, stating that defendant, having failed to enter into a recognizance, was committed to jail pending appeal, sufficiently evidenced that appellant was confined in jail, so that the motion to dismiss the appeal will be overruled. Smith v. State (Cr. App.) 187 S. W. 758.

Under Code Cr. Proc. 1911, art. 920, an appeal in a misdemeanor case tried in the county court can only be perfected by a recognizance in open court. Whitcomb v. State (Cr. App.) 190 S. W. 484.

Appeal bond or recognizance.—The right to give an appeal bond arises at once upon the adjournment of court for the term. Bryson v. State (Cr. App.) 186 S. W. 842.

An appeal bond will not answer the purpose of a recognizance required by Code Cr. Proc. 1911, art. 920, to perfect an appeal in a misdemeanor case tried in the county court, nor will it confer jurisdiction on the Court of Criminal Appeals. Whitcomb v. State (Cr. App.) 190 S. W. 484.

Where accused entered into an appeal bond instead of a recognizance after adjournment of the term at which he was convicted, the appeal will be dismissed when the record fails to show that he is in jail. Cogburn v. State (Cr. App.) 193 S. W. 1066.

Where appellant from conviction entered into appeal bond signed by himself and sureties, and approved by sheriff, and filed it with county clerk, but did not in open court enter into recognizance as required by statute, appeal will be dismissed on state's motion. Mathis v. State (Cr. App.) 194 S. W. 159.

An appeal from a conviction of unlawfully carrying a pistol is not perfected by the giving of an appeal bond instead of entering in a recognizance, and will be dismissed. Owens v. State (Cr. App.) 194 S. W. 401.

Art. 919. [887] Form of recognizance.

Cited, Bennett v. State (Cr. App.) 194 S. W. 145.

Requisites in general.—Where the recognizance is fatally defective, the appeal must be dismissed. Wheat v. State (Cr. App.) 181 S. W. 727.

An instrument not taken in open court and made a matter of record held not a recognizance. Whitcomb v. State (Cr. App.) 190 S. W. 484.

Statement of nature of offense and extent of punishment.—A recognizance which recites no specific offense and does not comply with the statute requiring that the punishment itself must be stated is insufficient. Robertson v. State (Cr. App.) 179 S. W. 106.

Failure to set forth punishment assessed in recognizance in criminal case held to require dismissal of appeal. Dorris v. State (Cr. App.) 179 S. W. 718.

An appeal from a conviction of selling intoxicating liquors in prohibition territory must be dismissed, where the recognizance does not state the punishment as required by Code Cr. Proc. 1911, arts. 919, 920. Todd v. State (Cr. App.) 180 S. W. 116.

Art. 920. [888] Appeal shall not be entertained without sufficient recognizance.

Cited, Todd v. State (Cr. App.) 180 S. W. 116; Whitcomb v. State (Cr. App.) 190 S. W. 484.

Art. 921. [889] Appeals from justices' and other inferior courts.

Necessity and requisites of bond.—Under Code Cr. Proc. 1911, arts. 921, 922, 924, the absolute right of appeal is provided by either of two methods, and if the defendant is in custody no bond is necessary, but he may give bond and secure his liberty pending appeal. Burt v. State (Cr. App.) 186 S. W. 770.

Art. 922. When appeal bond provided for in preceding article is filed, appeal is perfected.

Cited, Burt v. State (Cr. App.) 186 S. W. 770.

Art. 924. [890] Appeal bond shall be given within what time.

Necessity of bond.—Under Code Cr. Proc. 1911, arts. 921, 922, 924, the absolute right of appeal is provided by either of two methods, and if the defendant is in custody no bond is necessary, but he may give bond and secure his liberty pending appeal. Burt v. State (Cr. App.) 186 S. W. 770.

Art. 925. [891] Trial in county court shall be de novo.

Cited, Burt v. State (Cr. App.) 186 S. W. 770.

Art. 929. [895] Clerk shall prepare transcript in all cases appealed.

1. What the record must contain or show in general.—Where exceptions are taken to the court's charge before it is read to the jury, the record must show such exceptions in order for them to be taken advantage of on appeal. Salter v. State (Cr. App.) 180 S. W. 691.

Where the work of perfecting the case on appeal is left by defendant to one of several attorneys employed by him, he is bound by such attorney's acts, and cannot complain of a defect in the record caused thereby. Sorrell v. State (Cr. App.) 186 S. W. 336.

3. Verdict, judgment and sentence.—The record must show a sentence, the final judgment, to give the appellate court jurisdiction. Gilliard v. State (Cr. App.) 182 S. W. 1136.

4. Proceedings after verdict and judgment.—Where, on appeal from conviction, the record fails to disclose that defendant entered into any recognizance or is in jail pending appeal, the Attorney General's motion to dismiss will be sustained. Fielder v. State (Cr. App.) 180 S. W. 258.

Where the only notice of appeal in the record is the recitals in the recognizance of the conditions that the defendant should appear to abide the judgment of the Court of Criminal Appeals, the record was insufficient to confer jurisdiction on the Court of Criminal Appeals. Breakwell v. State (Cr. App.) 181 S. W. 727.

17. Review dependent on scope of record.—Where the facts are not sent up with the record, an objection that the evidence was insufficient to support a conviction cannot be reviewed. Leonard v. State (Cr. App.) 161 S. W. 966.

The court, on appeal from a conviction of violating the local option law, in the absence of evidence on the point cannot consider whether the option election was invalid. Van Dyke v. State (Cr. App.) 179 S. W. 111.

Where the only question properly presented by the motion for new trial was the alleged insufficiency of the evidence and the only bill of exceptions was to the overruling of the motion, the sole question for review is the insufficiency of the evidence. Grubbs v. State (Cr. App.) 179 S. W. 718.

Contention that verdict was rendered without time for deliberation and consideration of the facts held not reviewable in absence of anything in the record to show how long the jury was out. Utley v. State (Cr. App.) 180 S. W. 613.

The act of court in overruling the motion for new trial on account of newly discovered evidence cannot be reviewed, where the evidence was heard but was not incorporated in the record, only the affidavits being included. Burgess v. State (Cr. App.) 181 S. W. 465.

An appeal from an order overruling motion for new trial, which recites that evidence was heard thereon, cannot be considered in the absence from the record of the evidence heard on the motion. Crabble v. State (Cr. App.) 186 S. W. 771.

18. Presumptions in aid of record.—Where evidence heard regarding matters mentioned in a motion for new trial was not brought up in any manner by record, correctness of trial court's conclusion overruling motion for new trial must be presumed. Baxter v. State (Cr. App.) 194 S. W. 1107; Furnace v. State (Cr. App.) 182 S. W. 454; Guerra v. State (Cr. App.) 189 S. W. 952; Edwards v. State (Cr. App.) 191 S. W. 542; Limon v. State (Cr. App.) 192 S. W. 246.

Where the record shows that on denial of motion for new trial the court heard evidence as to newly discovered testimony, but does not show what the evidence was, the court on appeal must presume that he was clearly authorized to refuse new trial. Ray v. State (Cr. App.) 190 S. W. 1111; Roberts v. State (Cr. App.) 180 S. W. 1079; Jones v. State (Cr. App.) 185 S. W. 579; Caldwell v. State (Cr. App.) 190 S. W. 152.

Where the record omits evidence on the question of qualification of jurors, the ruling on a motion to discharge the jury for want of qualifications must be presumed correct. Thompson v. State (Cr. App.) 179 S. W. 561.

Where the record fails to show the evidence upon which the court ruled, it will be presumed that the ruling was correct, and it cannot be reviewed. Jackson v. State (Cr. App.) 180 S. W. 260.

It will on appeal be presumed that the action of the trial court was correct, unless it appears to the contrary by the record. Wright v. State (Cr. App.) 183 S. W. 884.

In absence of recital in bill of exceptions to contrary, appellate court will assume that record showing conviction of a witness of felony was not introduced. Baxter v. State (Cr. App.) 194 S. W. 1107.

19. **Consideration of matters not shown by record.**—Court on appeal cannot consider an ex parte affidavit as to disqualification of a juror for bias, made after the term at which the verdict was rendered, but is confined to matters which are a part of the record in the trial court. Rea v. State (Cr. App.) 179 S. W. 706.

The appellate court cannot consider record entries appearing only on the motion docket and not in the minutes, so, though an application for suspended sentence appears on the motion docket, it cannot be considered, where it does not appear in the minutes. Bullington v. State (Cr. App.) 180 S. W. 679.

A record in criminal proceedings cannot be varied or qualified by matters occurring after the adjournment of court. Murrell v. State (Cr. App.) 184 S. W. 831.

Mere affidavits of accused's counsel relating to friction between counsel and the court, and the refusal of the court to permit them to state their objections to evidence, cannot be considered on appeal. Sanford v. State (Cr. App.) 185 S. W. 22.

Where no notice of appeal in a criminal case is in the record, an affidavit showing that accused gave notice of appeal in the trial court, but it was not entered of record, is insufficient. McCulloch v. State (Cr. App.) 191 S. W. 357.

In a criminal appeal it is never permissible to supplement the record by ex parte affidavits on any issue except the jurisdiction of the court. Marta v. State (Cr. App.) 193 S. W. 323.

Art. 931. [897] Transcript, how forwarded.

In general.—Under this article there is no duty upon the defendant or his counsel to forward the transcript. McDaniel v. State (Cr. App.) 186 S. W. 320.

Art. 938. [904] Judgment on appeal.

Cited, Villareal v. State (Cr. App.) 182 S. W. 322 (in dissenting opinion).

1. **Scope of review in general.**—Assignments of error filed in vacation have no place in a transcript in a criminal case, as the motion for a new trial alone will be looked to. Vinson v. State (Cr. App.) 179 S. W. 574.

Assignments of error, filed after the term at which appellant was tried has adjourned, have no place in the record. Jackson v. State (Cr. App.) 179 S. W. 711.

Where no exceptions were reserved to the introduction of any testimony, nor to the charge, and no special charge was requested, the only question presented for review was the sufficiency of the testimony. Richardson v. State (Cr. App.) 179 S. W. 1186.

Where, after defendant's motion for directed verdict at close of state's evidence, he introduced evidence, and the state rebutted, the court on appeal will consider, on the correctness of the ruling, all the evidence, and not merely the state's evidence. Tindel v. State (Cr. App.) 189 S. W. 948.

2. **Affirmance, reversal, or dismissal in general.**—Where appellant's assignments present no error, and no fundamental error appears in record, judgment of lower court must be affirmed. Nolan v. State (Cr. App.) 194 S. W. 825.

3. **Presumptions in general.**—Presumptions, as to a continuance when indulged, will be in favor of the rulings of the court. Sorrell v. State (Cr. App.) 186 S. W. 336.

Where appellant's motion for a new trial was overruled on the day court adjourned, and on that day he entered into an appeal bond, the Court of Criminal Appeals would, on motion to dismiss, presume that the law was complied with by filing the appeal bond after the adjournment of the court for the term. Bryson v. State (Cr. App.) 186 S. W. 842.

The presumption is that ruling of trial court was correct. Neyland v. State (Cr. App.) 187 S. W. 196.

Where, after conviction and motion for new trial because accused was under 17 no statement of facts or evidence on motion for new trial is in record, it will be presumed the trial court found either that accused was more than 18 years of age, or his case was such as should not be sent to the juvenile or delinquent court. Davis v. State (Cr. App.) 188 S. W. 990.

When a party is only charged with and convicted of a misdemeanor and no instructions appear in the record, it will be presumed that a verbal charge was given by consent, or that no charge was given and, if the former, that it was correct. Wagner v. State (Cr. App.) 188 S. W. 1001.

Where, in bill of exception, defendant recites testimony heard on motion for new trial for newly discovered evidence, and that bill was filed on day court adjourned, Court of Criminal Appeals will presume it was filed before actual adjournment. Waggoner v. State (Cr. App.) 190 S. W. 493.

4. **Presumption as to proof of venue.**—Defendant's bill of exceptions to the denial of a directed acquittal on the ground that venue was not shown, presents no question for review, where the bill does not contain the evidence on that point. Thompson v. State (Cr. App.) 179 S. W. 561.

Under this article, the court on appeal will not consider question of venue not raised in the case and no bill of exception taken thereto. Park v. State (Cr. App.) 179 S. W. 1152.

Under this article, a bill of exceptions complaining of refusal to direct acquittal on ground that venue had not been proven presents no question. Fondren v. State (Cr. App.) 179 S. W. 1170.

Under this article, providing that the Court of Criminal Appeals shall presume that venue was proven, the point that it was not proven cannot be first raised on appeal. Baker v. State (Cr. App.) 187 S. W. 949.

5. Presumption as to impaneling and swearing of jury.—Objection that jurors were not sworn in the order in which the unscratched and unmarked names appeared on the list as returned to the clerk, but that one of them was omitted, cannot be made for the first time after verdict. Engman v. State (Cr. App.) 180 S. W. 235.

Under this article where no issue as to swearing of jury was raised below, and judgment recited that court determined the evidence thereon against defendant, and the evidence was not presented, court could not say that jury was not sworn. Lyons v. State (Cr. App.) 189 S. W. 269.

The presumption created by this article providing the appellate court shall presume the jury was properly impaneled and sworn is overcome where the contrary is conceded by the trial court and proved by the sworn statements of the individual jurors. Howard v. State (Cr. App.) 192 S. W. 770.

9. Reformation and correction of judgment.—Error in changing the sentence, in defendant's absence, from one concurrent to one cumulative, may be corrected on appeal. Engman v. State (Cr. App.) 180 S. W. 235.

The sentence, not conforming to the indeterminate sentence law, but being for a definite term, will be reformed. Chandler v. State (Cr. App.) 184 S. W. 192.

Where the jury assessed punishment for murder at 10 years, and the judge imposed sentence for only 2 years, it was necessary on appeal to reform the sentence to conform with the indeterminate sentence law. Kirven v. State (Cr. App.) 186 S. W. 201.

In prosecution for crime, where sentence does not comply with indeterminate sentence law, Court of Criminal Appeals will order it reformed. Williams v. State (Cr. App.) 188 S. W. 430.

In prosecution for keeping disorderly house, where verdict of guilty assessed fine of $200 and 20 days' imprisonment, judgment ordering that state recover all costs, together with fine, will be amended on appeal to include jail imprisonment. Jones v. State (Cr. App.) 189 S. W. 490.

In prosecution under indictment in two counts charging assault with intent to murder and assault to commit robbery where the jury applied the verdict to the first count, a judgment, applying the verdict to the second count, will be amended. Freeman v. State (Cr. App.) 193 S. W. 147.

14. Invited error.—Where the court, on defendant's request, charges that his failure to testify shall not be taken as a circumstance against him, defendant cannot show error therein. Munoz v. State (Cr. App.) 179 S. W. 566.

15. Harmless error.—Defendant's exception to a ruling admitting evidence in his favor cannot be considered on appeal. Rea v. State (Cr. App.) 179 S. W. 706.

Admission of inadmissible testimony as to interest of witness in deceased held too unimportant to merit consideration. Taylor v. State (Cr. App.) 180 S. W. 242.

Where the case is necessarily reversed upon other grounds, alleged error in overruling a motion for new trial on the ground of newly discovered evidence will not be considered, since the newly discovered evidence would not be newly discovered on the second trial. Bullington v. State (Cr. App.) 180 S. W. 679.

Argument in rape case that women usually lie about having had intercourse held either legitimate or not prejudicial to accused, who claimed prosecutrix was lying about the act. Wood v. State (Cr. App.) 189 S. W. 474.

Exclusion of testimony which could not affect result is not reversible error. Gunter v. State (Cr. App.) 191 S. W. 541.

18. —— Denial of continuance.—The denial of a continuance because of the absence of witnesses whose presence was secured presents no error. Galvan v. State (Cr. App.) 179 S. W. 875.

Whether refusal to grant a continuance for defendant to produce his wife as a witness was error will not be reviewed, where the case is reversed on other grounds; her testimony being available on the second trial. Pierson v. State (Cr. App.) 180 S. W. 1080.

20. —— Remarks and other acts of judge.—Remark of the court in ruling on evidence held not reversible error, where the court, at the request of accused, directed the jury not to consider the question or answer. Word v. State (Cr. App.) 179 S. W. 1175.

Where, in prosecution for rape, prosecutrix's want of age was undisputed, request of court to sheriff that he hold witness, who had sworn to acts of intercourse with her, in jail for purpose of prosecution, held harmless error. Carter v. State (Cr. App.) 181 S. W. 473.

In a criminal prosecution, where accused was not given the minimum penalty, the action of the court in directing that during argument accused's wife should not sit beside him, and ordering removal of accused's young child, held prejudicial. Odell v. State (Cr. App.) 184 S. W. 208.

For remark of court that a state's witness is an unwilling witness, and that the prosecuting attorney may lead him, to be ground for reversal, the record must disclose probability of injury. Dolezal v. State (Cr. App.) 191 S. W. 1158.

22. —— Rulings as to jurors.—That the court refused to sustain a challenge for cause to two jurors is no ground for reversal where neither of the jurors served on the trial. Satterwhite v. State (Cr. App.) 181 S. W. 462.

23. —— **Prejudice from defects in and rulings on indictment, information and complaint.**—Defendant charged with burglary held without just ground to complain of the court's action in submitting to the jury only the first count of the indictment charging breaking and entering a house. Rowlett v. State (Cr. App.) 180 S. W. 1078.

Where alleged surplusage in an information would not render admissible any testimony that would not have otherwise been admissible, the failure to strike it out was not reversible error. Johnson v. State (Cr. App.) 181 S. W. 455.

25. —— **Admission of evidence—Materiality and effect in general.**—Error in not withdrawing testimony, improperly admitted, of the general reputation of state's unimpeached witness, his testimony, in direct conflict with that of defendant's witnesses being directed at the vital point of the case, was prejudicial. Clay v. State (Cr. App.) 180 S. W. 277.

Where witness had testified to bad reputation of defendant's alleged disorderly house, testimony as to why he signed a local option petition held not injurious to defendant. Bennett v. State (Cr. App.) 181 S. W. 197.

Defendant claiming deceased attacked him with a knife, not shown to have been found, the state's testimony of deceased's habit of whittling, and the finding of a whittled stick, was favorable, rather than prejudicial, to defendant. Jones v. State (Cr. App.) 183 S. W. 141.

In a prosecution for robbery, error in admission of testimony as to value of property taken was harmless, the value not affecting the penalty. Pearson v. State (Cr. App.) 187 S. W. 336.

27. —— **Error in admitting evidence cured by proper admission of other evidence of same fact.**—Admission of testimony based on what witness was told by G. held not reversible error, where G. testified to the same facts without contradiction. Southall v. State (Cr. App.) 179 S. W. 872.

Erroneous admission of testimony is not ground for reversal; the same fact having been testified to by another, without objection. McDonald v. State (Cr. App.) 179 S. W. 880.

Admission of evidence held harmless error, where the fact testified to was otherwise properly in evidence. Taylor v. State (Cr. App.) 180 S. W. 242.

Error, if any, in admitting corroborating evidence of defendant's adulterous relations with widow of deceased to show motive, held harmless, where defendant himself testified to such relations. Ingram v. State (Cr. App.) 182 S. W. 290.

Erroneous admission of evidence is not ground for reversal, if the fact testified to be proved by other evidence, not objected to. McKinney v. State (Cr. App.) 187 S. W. 960.

28. —— **Error in admitting evidence of facts admitted by defendant.**—Erroneous admission of evidence of a fact shown by defendant's own testimony is harmless. Medlock v. State (Cr. App.) 185 S. W. 566.

In prosecution for perjury before grand jury, investigating charge against another for rape, where there was no dispute as to age of prosecutrix, error, if any, in admitting record of her birth was harmless. Cozby v. State (Cr. App.) 189 S. W. 957.

In a prosecution for rape of a girl under 15, where the undisputed evidence of prosecutrix and her parents was that she was only 13, error in admitting an entry from the family Bible in evidence was harmless. Deisher v. State (Cr. App.) 190 S. W. 729.

30. —— **Error cured by withdrawal of evidence.**—Admission of evidence of propositions of defendant in seduction to witness was harmless, where it was stricken out, and the jury instructed to disregard it; the jury having assessed the lowest punishment. McDonald v. State (Cr. App.) 179 S. W. 880.

Where proper objection was not made till after witness had testified to part of the contents of a letter, and was then sustained, there was no error; the court having previously instructed that, under such circumstances, testimony should not be considered. Id.

Where in prosecution for homicide the state was permitted to introduce evidence that defendant had suggested to witness that they rob a bank, the error in admitting such testimony, if it was inadmissible, was cured by subsequent instruction to disregard such evidence for any purpose whatever. Satterwhite v. State (Cr. App.) 181 S. W. 462.

Error in asking defendant when he had been expelled from the Odd Fellows held harmless, where the court at once sustained objection thereto and instructed the jury not to consider the answer. Ingram v. State (Cr. App.) 182 S. W. 290.

Where objectionable questions are answered and the court then withdraws the matter from the jury and instructs them not to consider it, no reversible error is presented. Orner v. State (Cr. App.) 183 S. W. 1172.

The receipt of hearsay testimony which was subsequently withdrawn from the jury, held harmless in a homicide case. Sanford v. State (Cr. App.) 185 S. W. 22.

Impeaching testimony held not available error, where the court instructed the jury to consider only relevant testimony, and not reasons and irrelevant statements of the witness. Short v. State (Cr. App.) 187 S. W. 955.

Where court withdrew from jury defendant's testimony that he had one of the baby's pictures, there was no reversible error. Johnson v. State (Cr. App.) 188 S. W. 426.

On a trial for cattle theft, any error in asking accused if he was in possession of other stolen cattle, held cured by the withdrawal of the testimony, and a direction to the jury not to consider it. Longoria v. State (Cr. App.) 188 S. W. 987.

On trial for cattle theft, error in admitting evidence of theft by accused of other cattle was cured by the court withdrawing the evidence and directing the jury not to consider it. Longoria v. State (Cr. App.) 188 S. W. 988.

Limitation of inadmissible testimony does not cure error in its admission. Leach v. State (Cr. App.) 189 S. W. 733.

Where inadmissible testimony has been admitted, but is thereafter clearly excluded by the court's charge given at accused's instance, it is not reversible error. Porter v. State (Cr. App.) 190 S. W. 159.

Error in admitting answer to question whether the victim had ever been mistreated before was not reversible, where the court later expressly withdrew all such testimony and charged the jury to entirely disregard it. Marion v. State (Cr. App.) 190 S. W. 499.

Where the court withdrew from consideration of the jury evidence which had been objected to, telling them not to consider it for any purpose, any error in admitting such evidence was cured. Edwards v. State (Cr. App.) 191 S. W. 542.

31. —— **Error in admitting evidence cured by verdict.**—In a prosecution for arson, error in admitting evidence, prejudicial to defendant, held harmless where the jury assessed the lowest penalty. Kline v. State (Cr. App.) 184 S. W. 819.

On application for suspended sentence in burglary trial, where evidence of guilt was clear and accused offered no testimony as to good reputation, or not having been convicted of felony, and the jury assessed the lowest punishment, the admission of hearsay testimony was harmless error. Holland v. State (Cr. App.) 187 S. W. 944.

Where on the entire record it appears that the jury would have been authorized to return no other verdict than the one found which was manslaughter, the appellate court will not, in disregard of its rules, review alleged errors in the admission of a dying declaration, where such error was not urged on motion for new trial, and where the bill of exceptions is insufficient. Smith v. State (Cr. App.) 189 S. W. 484.

32. —— **Cure of error in admitting opinion or expert evidence.**—In murder trial, admission of opinion evidence as to manner of killing was not cause for reversal, where other testimony amply proved such manner. Neyland v. State (Cr. App.) 187 S. W. 196.

Taking into consideration fact that lowest penalty was assessed, allowing witness to give conclusion that premises were unsanitary was not reversible error, in prosecution for carrying on business injurious to health. Moore v. State (Cr. App.) 194 S. W. 1112.

33. —— **Cure of error in admitting parol evidence as to writings.**—In a prosecution for embezzling money sent defendant to use in getting a patent to school land, the admission of evidence that a third person had written defendant to get certain school land patented, if error, was harmless, where defendant's letters introduced in evidence showed that he had agreed to get the land patented. Messner v. State (Cr. App.) 182 S. W. 329.

34. —— **Prejudicial effect of evidence of other offenses.**—In a prosecution for statutory rape, error in the admission of details as to defendant's seduction of another, whom he had married to prevent her testimony against him, and at once abandoned, held cured and rendered harmless by its subsequent withdrawal with an instruction that the jury should not consider it. Miller v. State (Cr. App.) 185 S. W. 29.

38. —— **Prejudicial effect of error in exclusion of evidence—Materiality and effect of evidence.**—That the court permitted the state to disqualify accused's witness under Code Cr. Proc. 1911, arts. 791, 792, on the erroneous theory that the inquiry affected the credibility of the witness and not because he was indicted for the same offense, held not prejudicial. Fondren v. State (Cr. App.) 179 S. W. 1170.

In prosecution for statutory rape, exclusion of defendant's evidence offered to prove acts of intercourse by prosecutrix with other men, and subsequent permission to him to show such acts, which he did not do, held not reversible error. Miller v. State (Cr. App.) 185 S. W. 29.

In a prosecution for violation of the pistol law, error, in excluding defendant's testimony to explain his presence in a certain negro dive twice as a peace officer, and on the occasion in question, through curiosity, was harmless. Robison v. State (Cr. App.) 185 S. W. 565.

Limiting cross-examination of state witness was not reversible error, where it appears certain defendant had in substance got all he could by a longer cross-examination. McKinney v. State (Cr. App.) 187 S. W. 960.

Any error in refusing to admit under Code Cr. Proc. 1911, art. 718, evidence offered out of order was harmless, its sole purpose being to support testimony to reduce the homicide to manslaughter, which, as shown by the verdict, was believed. Spence v. State (Cr. App.) 189 S. W. 269.

39. —— **Error in exclusion of evidence cured by other evidence of same or other witness.**—Although it is error to admit oral evidence that a certain person insured burned property, and at the same time exclude the policy of insurance, in showing ownership, the error is harmless, where other evidence showed ownership. Tinker v. State (Cr. App.) 179 S. W. 572.

Where, on trial for cattle theft, a state's witness confessed that he was a thief and had aided in the theft, exclusion of testimony on cross-examination of his attempt to get a third person to aid in stealing cattle held not prejudicial, where he had also testified to such fact on the direct. Durley v. State (Cr. App.) 179 S. W. 1170.

The exclusion of evidence of matters shown by other evidence is not error. Blackburn v. State (Cr. App.) 180 S. W. 268.

In a prosecution for murder, the exclusion of the testimony of the witness who arrested defendant as to the explanation given by the latter of a scratch on his arm and burns on his hat, claimed by the state to have been made to remove blood, was harmless error, where defendant was allowed to testify as to the explanation he had made, and the state did not question it. Hampton v. State (Cr. App.) 183 S. W. 887.

Exclusion of evidence was harmless, when other evidence established without controversy the facts sought to be proved. McKinney v. State (Cr. App.) 187 S. W. 960.

Exclusion of testimony which tends to prove fact already proven, or which is conceded, is not reversible error. Gunter v. State (Cr. App.) 191 S. W. 541.

41. —— **Prejudice from improper cross and re-direct examination.**—In a trial for the murder of defendant's daughter by poisoning, cross-examination of defendant in respect to her travels with the child, her trial for insanity, and as to how her children had died, while improper as to some of the questions asked, held not reversible error. Orner v. State (Cr. App.) 183 S. W. 1172.

Allowing cross-examination of defendant's character witness to show defendant's trials and convictions of perjury, which were reversed, was harmless, where court instructed that there was no conviction, unless it was affirmed. Cox v. State (Cr. App.) 194 S. W. 138.

42. —— **Error in question cured by answer.**—In a prosecution for illegally selling liquor, where a witness on cross-examination denied that he was a drinking man, admitting that occasionally he took a drink, any error in permitting such cross-examination was harmless. Matthews v. State (Cr. App.) 189 S. W. 491.

43. —— **Error in question not answered.**—No error is presented by bills which merely show that some questions were asked witnesses, but defendant's objections thereto were sustained. Sorrell v. State (Cr. App.) 186 S. W. 336.

In murder trial questions, on cross-examination of a witness, if it were not true that accused was supported by prostitutes, it not appearing question was answered, and court instructing jury that it could only be considered by them in passing on whether or not they would suspend sentence should that question arise, and could not be considered in passing on guilt or innocence, did not injure defendant. Neyland v. State (Cr. App.) 187 S. W. 196.

A bill of exceptions, showing that court sustained appellant's objection to a question asked a witness, shows no error. Ferguson v. State (Cr. App.) 187 S. W. 476.

Where an alleged improper question was objected to and excluded, and the answer, if given, was not heard by the jury, and the court instructed them to disregard the question, there was no available error. Short v. State (Cr. App.) 187 S. W. 955.

44. —— **Prejudice from erroneous impeachment of witness.**—Where, upon a second trial of appellant for murder, the court sustained an objection to an impeaching question of whether a witness had signed an affidavit to get appellant a new trial, and instructed the jury to disregard all evidence relating to the former trial and not to consider the result thereof, appellant suffered no prejudice. Edwards v. State (Cr. App.) 191 S. W. 542.

Instruction that there was no conviction where appellate court had not affirmed it did not cure error of permitting cross-examination of accused as to his being twice tried and finally acquitted of perjury. Cox v. State (Cr. App.) 194 S. W. 138.

45. —— **Prejudice from improper argument and other misconduct of prosecuting attorney.**—Remarks of counsel for state in prosecution for murder held improper, and the judge's refusal to warn the jury against them prejudicial error. Brod v. State (Cr. App.) 179 S. W. 1189.

Where the district attorney, though knowing that the court held evidence of a former charge of crime too remote, brought it before the jury by examining accused concerning it, he was guilty of improper conduct warranting reversal. Bullington v. State (Cr. App.) 180 S. W. 679.

Bill of exceptions held not to show injury from district attorney's comment on defendant's objection to question asked his wife as to whether defendant cared about prostitutes coming to his alleged disorderly house. Bennett v. State (Cr. App.) 181 S. W. 197.

On trial for permitting drinking of liquor in disorderly house, district attorney's remark that more good young women had gone to hell through road houses than any way he knew of held not injurious, even if improper. Id.

In a prosecution for homicide committed in attempting to arrest deceased, argument by the prosecutor referring to the exclusion of deceased's dying declaration on accused's objection held harmless, if erroneous; the jury having been present when the declaration was excluded. Marshall v. State (Cr. App.) 182 S. W. 1106.

Remark of district attorney on the question of suspension of sentence held not reversible error where, under the plea of guilty and the evidence adduced, no different verdict could be reached on another trial. Coleman v. State (Cr. App.) 185 S. W. 13.

Remarks by the prosecuting attorney not confined to evidence adduced on the trial and legitimate deductions therefrom, and tending to prejudice the jury against the accused, were ground for reversal, though accused had admitted his guilt. Kelley v. State (Cr. App.) 185 S. W. 570.

In a prosecution for rape, a slight difference between the statement of the county attorney as to testimony of a witness, and the testimony as given, held not ground for reversal. Simmons v. State (Cr. App.) 186 S. W. 325.

The statement in the district attorney's closing address, "There never was a woman who went astray but some man was the cause of it," was not reversible error, as calculated to "rile the passion of the jury," where the verdict returned was the minimum fixed by law. Wood v. State (Cr. App.) 189 S. W. 474.

Where evidence on issue of insanity was conflicting, held, in view of testimony and juror's question to witness, that prosecutor's argument that state had no place to confine insane persons except the penitentiary, implying that, if acquitted and found insane, he would be discharged, was reversible error. Kiernan v. State (Cr. App.) 190 S. W. 165.

Statement by county attorney that reputation of prosecuting witness is good, and some of the jurors know that it is good, held prejudicial. Pecht v. State (Cr. App.) 192 S. W. 243.

47. —— **Prejudice from misconduct of jurors.**—Where prosecuting witnesses testified that they bought whisky from accused and that bottle and contents exhibited was that purchased, accused denying sale, that jury smelled or examined liquor was harmless error. Lerma v. State (Cr. App.) 194 S. W. 167.

48½. **Court's opinion.**—On appeal, the court is not compelled to discuss all questions discussed by appellant's attorneys in their briefs. Ferguson v. State (Cr. App.) 187 S. W. 476.

49. **Rehearing.**—A motion for rehearing, based upon statements that appellant was deprived of a statement of facts and bill of exceptions through the fault of the trial judge, will be denied where the statement is in no way verified. Robertson v. State (Cr. App.) 179 S. W. 106.

An objection that no predicate was laid for impeaching testimony cannot be presented for first time on motion for rehearing. Thompson v. State (Cr. App.) 187 S. W. 204.

If appellant in term time obtained an order granting time after adjournment for the term in which to file statement of facts and bills of exceptions, he might make such showing on rehearing, after granting of motion to strike his bills of exception and statement of facts. Smith v. State (Cr. App.) 187 S. W. 758.

Validity of an indictment as to substance may be attacked at any time, even for the first time on motion for rehearing. Ferguson v. State (Cr. App.) 189 S. W. 271.

Art. 939. [905] Cases remanded, when.

Cited, Villareal v. State (Cr. App.) 182 S. W. 322 (in dissenting opinion).

Art. 940. [906] Duty of clerk after judgment.

Issue of mandate.—Where there was an agreement on file that no motion for rehearing would be filed, and requesting immediate issuance of mandate, as accused was confined in the county jail, the mandate will be issued immediately on affirmance. Young v. State (Cr. App.) 187 S. W. 754.

Art. 949. [915] May make rules; briefs and oral argument.

Briefs.—It being stipulated in county court on appeal from recorder's court that briefs should not be filed there, failure to file them is not ground for dismissing appeal to the Court of Criminal Appeals. Adams v. State (Cr. App.) 193 S. W. 1067.

Art. 950. [916] Appeal in habeas corpus.

7. **Statement of facts.**—A transcript of the stenographer's notes attached to an application for writ of habeas corpus, not being agreed to by the attorneys nor approved by the judge as a statement of facts, cannot be considered as such. Ex parte Long (Cr. App.) 179 S. W. 567.

A statement of facts not approved by the trial judge cannot be considered on appeal in habeas corpus proceedings to procure release from custody on bail. Ex parte Parker (Cr. App.) 188 S. W. 983.

10. **Bail.**—The Court of Criminal Appeals has no jurisdiction of an appeal from the judgment in a habeas corpus proceeding remanding the petitioner to custody, where he is admitted to bail pending the appeal. Ex parte Hengy (Cr. App.) 179 S. W. 716.

Art. 953. [919] Shall be heard upon the record, etc.

Review in general.—Where, in habeas corpus, there was evidence warranting the conclusion of the court, in denying bail, that proof of guilt of a capital offense was strong, its order will be upheld on appeal. Ex parte Sapp (Cr. App.) 179 S. W. 109.

Review of facts and comment on evidence.—On appeal from a judgment in habeas corpus proceedings denying release from custody on bail, the appellate court will not state or discuss the testimony. Ex parte Parker (Cr. App.) 188 S. W. 983; Ex parte Sapp (Cr. App.) 179 S. W. 109; Ex parte Webster (Cr. App.) 192 S. W. 1063.

Art. 960. [926] Appeal from judgment on recognizance.

Cited, Mendlovitz v. State (Cr. App.) 189 S. W. 262.

Art. 962. [928] Same rules govern as in civil cases.

Brief.—An appeal from a judgment for the state in a suit on a forfeited bail bond will be dismissed, where briefs have not been filed in the trial court and in the Court of Criminal Appeals in compliance with the rules governing civil cases. Heiman v. State, 70 Cr. R. 480, 158 S. W. 276; Mendlovitz v. State (Cr. App.) 189 S. W. 262.

An appeal from a judgment against the principal and sureties on a bail bond given in a criminal prosecution will be dismissed, where appellants filed no brief in the lower court, though the requirement therefor was not waived, and none in the appellate court until the day before the submission. Rudy v. State (Cr. App.) 191 S. W. 698.

An affidavit on behalf of the principal and sureties appealing from a judgment forfeiting a bail bond held not sufficient to excuse their failure to comply with the requirement that they file their brief in the court below. Id.

Papers not filed below.—On appeal from a judgment in scire facias forfeiting a bail bond, Court of Criminal Appeals cannot consider original papers and documents not filed in the court below. Bell v. State (Cr. App.) 186 S. W. 328.

TITLE 11

OF PROCEEDINGS IN CRIMINAL ACTIONS BEFORE JUSTICES OF THE PEACE, MAYORS AND RECORDERS

CHAPTER TWO

OF THE ARREST OF THE DEFENDANT

Article 977. [942] Witnesses may be fined, etc., for refusing to make statements, etc.

Contempt.—A witness before a justice of the peace investigating violations of law who voluntarily answers questions which will incriminate him may not refuse to answer questions incriminating others without being guilty of contempt. Ex parte Adams, 76 Cr. R. 277, 174 S. W. 1044.

TITLE 14

OF FUGITIVES FROM JUSTICE

Article 1088. [1051] Fugitive from justice delivered up, when.

1. **What law governs.**—The laws of Texas touching the return of criminals to other states are governed by the federal act touching the matter. Ex parte Goodman (Cr. App.) 182 S. W. 1120.

3. **Requisition.**—Information or affidavit on which requisition was based, when considered as a whole, held not based on information and belief, and hence to be sufficient. Ex parte Brown (Cr. App.) 178 S. W. 366.

A complaint filed in Louisiana charging violation of its criminal law, based only upon belief or information, is insufficient as authority for a requisition demand on the Governor of Texas for the return of the offender. Ex parte Goodman (Cr. App.) 182 S. W. 1120.

Under the act of Congress and this article, an affidavit that affiant had good reason to and did believe that a party was a fugitive from justice from Louisiana, where he had committed a criminal offense under the laws of Louisiana, and that he fled into Texas, where he might be found, was insufficient to justify the alleged criminal's arrest as a fugitive from justice. Id.

4. **Conflicting requisitions.**—Under Const. U. S. art. 4, § 2, and this article, a fugitive brought into Texas by requisition from another state may while in custody be surrendered to a third state. Ex parte Innes (Cr. App.) 173 S. W. 291, L. R. A. 1916C, 1251, judgment affirmed Innes v. Tobin, 36 S. Ct. 290, 240 U. S. 127, 60 L. Ed. 562; Ex parte Innes (Cr. App.) 173 S. W. 297.

6. **Executive warrant.**—An extradition warrant, which uses the word "complaint," instead of reciting that the demand was accompanied by a copy of an affidavit duly certified as authentic by the Governor of the demanding state, presents a prima facie case of authority of a justice of the peace to act as magistrate in the demanding state. Ex parte McDaniel, 76 Cr. R. 184, 173 S. W. 1018, Ann. Cas. 1917B, 335.

9. **Prosecution by information.**—A certified copy of an information, on which accused had been convicted of a misdemeanor, held not a certified copy of an "affidavit or indictment," within the congressional act governing extradition, and hence was insufficient to authorize the granting of the application. Ex parte Lewis, 75 Cr. R. 320, 170 S. W. 1098.

TITLE 15

OF COSTS IN CRIMINAL ACTIONS

CHAPTER TWO

OF COSTS PAID BY THE STATE

3. Fees and Compensation of Clerk of District Court, District Attorney, County Attorney, Sheriff and Constables in Counties Casting Less than 3,000 Votes

Article 1130. Fees of sheriffs and constables.—To the sheriff or constable, shall be allowed the following fees in all cases when the charge is a felony; and all fees accruing under this article shall be due and payable at the close of each term of the district court, after approval as herein provided, except as provided for in subdivisions 8 and 9, which shall be paid when approved by the judge under whose order the writ was issued; provided, that in all cases when the defendant shall be finally convicted of a misdemeanor, the sheriff shall be required to pay back to the treasurer of the state a sum of money equal to the amount he may have received from the state in such case; and said sheriff and his bondsmen shall be responsible to the state for such sum: [Act 1891, ch. 93; Act 1895, ch. 93.]

1. For executing each warrant of arrest or capias, or for making arrest without warrant, when authorized by law, the sum of one dollar; and five cents for each mile actually and necessarily traveled in going to place of arrest, and for conveying the prisoner or prisoners to jail, mileage, as provided for in subdivision 5 (Article 1130) shall be allowed; provided, however, that in counties that have a population of less than forty thousand inhabitants, as shown by the last Federal census, the following fees shall apply: For executing each warrant of arrest or capias, or for making arrest without warrant, when authorized by law, the sum of three dollars; and fifteen cents for each mile actually and necessarily traveled in going to place of arrest, and for conveying the prisoner or prisoners to jail, mileage, as provided for in subdivision 5 (Article 1130) shall be allowed; and one dollar shall be allowed for the approval of a bond. [Act March 30, 1917, ch. 161, § 1.]

2. For summoning or attaching each witness, fifty cents; provided, however, that in counties that have a population of less than forty thousand inhabitants, as shown by the last Federal census, the following fees shall apply: For summoning or attaching each witness, fifty cents, and where a bond is required of said witness the sum of one dollar shall be allowed for the approval of said bond. [Id., § 1.]

6. For each mile the officer may be compelled to travel in executing criminal process, summoning or attaching witnesses, five cents; provided that in no case shall he be allowed to duplicate his mileage when two or more witnesses are named in the same or different writs in any case and he shall serve process on them in the same vicinity or neighborhood, during the same trip, he shall not charge mileage for serving such witness to and from the county seat, but shall only charge one mileage, and for such additional miles only as are actually and necessarily traveled in summoning or attaching each additional witness. When process is sent by mail to any officer away from the county seat, or returned by mail by such officer, he shall only be allowed to charge mileage for the miles actually traveled by him in executing such process, and the return of the officer shall show the character of the service and miles actually traveled in accordance with this sub-division; and his accounts shall show the facts; provided, however, that in counties that have a population of less than forty thousand inhabitants, as shown by the last Federal census, the following fees shall apply; For each mile the officer may be compelled to travel in executing criminal process, summoning or attaching witnesses, ten cents; provided that in no case shall he be allowed to duplicate his mileage when two or more witnesses are named in the same or different writs in any case and he shall serve process on them in the same vicinity or neighborhood, during the same trip, he shall not charge mileage for serving such witness to and from the county seat, but shall only charge one mileage, and for such additional miles only as are actually and necessarily traveled in summoning or attaching each additional witness. When process is sent by mail to any officer away from the county seat, or returned by mail by such officer, he shall only be allowed to charge mileage for the miles actually traveled by him in executing such process, and the return of the officer shall show the character of the service and miles actually traveled in accordance with this sub-division; and his accounts shall show the facts. [Id., § 1.]

7. To officers for service of criminal process not otherwise provided for, the sum of five cents a mile going and returning shall be allowed; provided if two or more persons are mentioned in the same or different writs, the rules prescribed in sub-division 6 (Article 1130) shall apply; provided, however, that in counties that have a population of less than forty thousand inhabitants, as shown by the last Federal census, the following fees shall apply; To officers for service of criminal process not otherwise provided for, the sum of ten cents a mile going and returning shall be allowed; provided, if two or more persons are mentioned in the same or different writs, the rule prescribed in sub-division 6 (Article 1130) shall apply. [Act 1891, ch. 93; Act 1895, ch. 93; Act March 30, 1917, ch. 161, § 1.]

Explanatory.—Act March 30, 1917, ch. 161, amends subdivisions 1, 2, 6, and 7 of art. 1130, ch. 2, Title 15, Code Criminal Procedure of 1911, so as to read as set forth above. Took effect 90 days after March 21, 1917, date of adjournment.

5. Fees of Witnesses

Art. 1137b.

Note.—Act March 9, 1917, ch. 66, § 1, repeals "section 4 of the acts of the Regular Session of the Thirty-Third Legislature, as amended by chapter 13 of the First Called Session of the Thirty-Third Legislature, providing for fees for in-county witnesses." The title of the act purports to repeal "section 4, chapter 150, acts of," etc. Took effect 90 days after March 21, 1917, date of adjournment.

CHAPTER THREE

OF COSTS PAID BY COUNTIES

Article 1143. [1098] Allowance for jail guards.—The sheriff shall be allowed for each guard necessarily employed in the keeping of prisoners two dollars for each day, and there shall not be any allowance made for the board of such guard nor shall any allowance be made for the jailer or his turnkey, except in counties having a population of forty thousand (40,000) or more and also containing a city having a population of twenty-five thousand (25,000) or more according to the last United States census, the commissioners' court may allow each jail guard, jailer and turnkey three dollars per day. [Act Aug. 23, 1876, p. 290; Act 1909, p. 98; Act 1915, 1st S. S., p. 40, ch. 20, § 1; Act March 10, 1917, ch. 68, § 1.]

Explanatory.—Took effect 90 days after March 21, 1917, date of adjournment. The act amends art. 1143, ch. 3, Title 15, Code Criminal Procedure, as amended by ch. 20, Acts First Called Session, 34th Legislature, so as to read as above.

Art. 1148. [1103] Account for keeping prisoners.

In general.—Under Rev. St. 1911, art. 5111, Code Cr. Proc. 1911, arts. 49, 52, and 1148, held that, in absence of any order of commissioners' court to contrary and of any provision for purchase of disinfectants for county jail, sheriff was proper agent to represent county in its purchase, and that county was liable therefor unless there was an accessible and adequate supply on hand. Frederick Disinfectant Co. v. Coleman County (Civ. App.) 188 S. W. 270.

In view of Vernon's Sayles' Ann. Civ. St. 1914, art. 7127, and this article, sureties on official bond of sheriff held liable to county for moneys received by sheriff on account of jail guards which he had never employed. Jeff Davis County v. Davis (Civ. App.) 192 S. W. 291.

TITLE 17

DELINQUENT CHILDREN

State Juvenile Training School

Article 1195. [1145] Male persons under the age of seventeen accused of felony to be prosecuted as juvenile delinquents; committed to State Industrial School for Boys upon indeterminate sentence; time of detention; proof of age; proviso.

2. Validity of statute.—The statute authorizing proceedings against delinquent children held not in violation of Pen. Code 1911, arts. 1, 3, not being criminal in its nature. Ex parte Bartee, 76 Cr. R. 285, 174 S. W. 1051.

5. Female delinquents.—Juvenile and delinquent acts apply only to boys, and do not require or authorize trial of a girl as a delinquent child or juvenile. Townser v. State (Cr. App.) 182 S. W. 1104.

8. Necessity of transfer of cause.—Under legislation as to delinquent children, a trial judge, when accused's youth is presented, has authority to determine whether the interest of accused and society require he be tried by the delinquent court or as a felon. Davis v. State (Cr. App.) 188 S. W. 990.

9. Necessity of finding as to age.—On a trial, after Acts 33d Leg. c. 112, relating to juvenile offenders, became operative, the issue of the age of accused must be disposed of; and where the officer arresting accused received information that he was not within the act, a judgment finding him guilty and assessing his punishment at a fine and imprisonment is not void. Ex parte Winfield, 74 Cr. R. 457, 168 S. W. 92.

17. Review.—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.

One declared to be a delinquent child does not have the right of appeal from such a judgment. Horn v. State (Cr. App.) 181 S. W. 727.

No appeal lies to the Court of Criminal Appeals from an order adjudging defendant a delinquent child, and ordering him conveyed to State Institute for the Training of Juveniles; it not being a conviction of a criminal offense. Klopner v. State (Cr. App.) 189 S. W. 268.

State Training School for Negro Boys

Art. 1196½. Negro boys under 17 to be confined in State Training School for Negro Boys.—Hereafter all negro male persons under the age of seventeen (17) years, who shall be convicted of a felony or other delinquency, in any court within this State, unless his sentence be suspended as provided by law, or otherwise disposed of or unless by reason of the length of the term for which he is sentenced, he is required under

the law to be confined in the State Penitentiary, shall be confined in the State Training School for Negro Boys. [Act Sept. 25, 1917, ch. 7, § 3.]

Note.—The other provisions of this act, creating the school named, are set forth ante as arts. 5234½-5234½b of the civil statutes.

DELINQUENT CHILD, TO REGULATE THE CONTROL AND TREATMENT OF SAME

Art. 1197. "Delinquent child" defined; disposition of child under Act not to have evidentiary effect.

Constitutionality.—The law authorizing the dismissal of indictments against boys under 17 and girls under 18, and the institution in the county court of proceedings against them as delinquent children, held not unconstitutional. Ex parte Bartee, 76 Cr. R. 285, 174 S. W. 1051.

Art. 1198. Jurisdiction of district and county courts; jury trial; entry of findings; name of court.

Jurisdiction.—Under this article the district court has jurisdiction to try a juvenile offender. McCallen v. State, 76 Cr. R. 353, 174 S. W. 611.

The county court may take jurisdiction of a proceeding to declare petitioner a delinquent child because he stole an automobile, though jurisdiction of criminal actions had been transferred to the county court at law. Ex parte Bartee, 76 Cr. R. 285, 174 S. W. 1051.

DELINQUENT SCHOOL CHILDREN

Art. 1207c. Incorrigible pupils to be proceeded against in juvenile court, etc.

Information.—Under this article an information is fatally defective which does not allege the child's age, name, or relationship to accused, except that accused stood in a parental relation. Odam v. State (Cr. App.) 194 S. W. 829.

COUNTY JUVENILE BOARDS

Art. 1207e. Board for certain counties created.—In any county of this State having a population of one hundred thousand, or over, and containing a city having a population of seventy thousand, or over, according to the United States census of 1910, the judges of the several district courts of such county, together with the county judge of such county, are hereby constituted a juvenile board for such county. [Act Feb. 13, 1917, ch. 16, § 1; Act March 5, 1917, ch. 58, § 1.]

Explanatory.—Acts 1917, c. 58, amends sec. 1 of House Bill No. 34, enacted by 35th Legislature, approved Feb. 13, 1917, so as to read as above. Became a law March 5, 1917.

The emergency clause (sec. 6 of Act Feb. 13, 1917) recites: "The fact that there is no law in this state authorizing or permitting an appeal from an order of the juvenile court, and that in the more populous counties and cities of the state there are many cases brought before such court, makes it necessary that, for the welfare of the children thus affected, there be some provision to [the end] that their cases may be brought to the attention of a board composed of trained persons, and creates an emergency," etc.

Art. 1207f. Appointment of probation officers; salary; duties of probation officers.—Said board shall have authority to appoint one or more, not exceeding six, discreet persons of good moral character to serve as probation officers during the pleasure of said board. Such officers shall be paid such salary per month as said board may recommend and the commissioners' court of such county may authorize, not to exceed $100 per month. Such probation officer shall have authority, and it shall be his duty, to make investigation of all cases referred to him as such by such board, to be present in court, and to represent the interests of the child when the case is heard, and to furnish to the court and such board such information and assistance as such board may require, and to take charge of any child before and after the trial, and to perform such

other services for the child as may be required by the court or said board. [Act Feb. 13, 1917, ch. 16, § 2.]

Art. 1207g. Sessions of board; recommendations to juvenile courts and pardoning power.—Such board shall hold regular or special meetings in accordance with the rules which it may prescribe, and at intervals of not less than once in every three months, and shall keep such records as it desires, and shall hear and consider such facts as may be brought to its attention, under such rules as it may prescribe, concerning the welfare of any child in such county or under the jurisdiction of any of its courts, and in the event such child has been adjudged to be dependent, neglected or delinquent, by any of the courts of such county, it may make to the court or person having custody of such child, or if such child has been adjudged guilty of any crime, then to the Board of Pardons and Governor, such recommendation in writing as it may think proper concerning the care and custody of such child. [Id., § 3.]

Art. 1207h. Powers of board.—Such board shall neither have nor exercise judicial power nor function; but in the event such board desires to make inquiry as to whether any child should be adjudged either dependent, neglected or delinquent, it shall have power to direct one of the probation officers of said board to file complaint against such child in some one of the courts of such county having jurisdiction to hear and determine such complaint, and such board or the members thereof may be present at such hearing, either in person or by one or more of its probation officers, and make such inquiry concerning such child as may be proper under the established rules of procedure in such court. [Id., § 4.]

Art. 1207i. Salary of members of board.—Hereafter the annual salary of each of the judges of the civil and criminal district courts of such county shall be $1,500 in addition to that paid the other district judges of the State, said additional salary of $1,500 to be paid monthly out of the general funds of such county, upon the order of the commissioners' court. [Id., § 5.]

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1917

Showing the articles of the Code of Criminal Procedure under which the various acts applicable to such Code still in force will be found.

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[End of Code of Criminal Procedure Texas]