Texas Historical Statutes Project

1911
CODE OF CRIMINAL PROCEDURE
OF THE
STATE OF TEXAS

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THE CODE

OF

CRIMINAL PROCEDURE

OF THE

STATE OF TEXAS

ADOPTED AT THE REGULAR SESSION OF THE
THIRTY-SECOND LEGISLATURE
1911

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Sec. 2. BE IT FURTHER ENACTED, That the following titles, chapters and articles shall hereafter constitute the CODE OF CRIMINAL PROCEDURE of the State of Texas, to-wit:

THE CODE

OF

CRIMINAL PROCEDURE

TITLE 1.

INTRODUCTORY.

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2. The General Duties of Officers Charged with the Enforcement of Criminal Laws.
   1. The Attorney General.
   2. District and County Attorneys.
   3. Magistrates.
Chapter 2. The General Duties of Officers Charged with the Enforcement of Criminal Laws — Continued.
   4. Peace Officers.
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   6. Clerks of the District and County Courts.
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CHAPTER ONE.

CONTAINING GENERAL PROVISIONS.

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Article 1. [1] **Objects of this Code.**—It is hereby declared that this Code is intended to embrace rules applicable to the prevention and prosecution of offenses against the laws of this state, and to make the rules of proceeding in respect to the prevention and punishment of offenses intelligible to the officers who are to act under them, and to all persons whose rights are to be affected by them. It seeks—

1. To adopt measures for preventing the commission of crime.

2. To exclude the offender from all hope of escape.

3. To insure a trial with as little delay as shall be consistent with the ends of justice.

4. To bring to the investigation of each offense on the trial all the evidence tending to produce conviction or acquittal.

5. To insure a fair and impartial trial; and

6. The certain execution of the sentence of the law when declared. [O. C. 1; amended by Act Feb. 15, 1858.]

Art. 2. [2] **Same subject.**—In order to collect together for the convenience of officers and all others charged with the enforcement of the laws the material provisions of the constitution of this state respecting the prosecution of offenses, the following provisions of said instrument are here inserted. [O. C. 2.]

Art. 3. [3] **Trial by due course of law.**—No citizen of this state shall be deprived of life, liberty, property or privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land. [Bill of Rights, § 19 O. C. 3.]

See Bill of Rights, Sec. 19, and Art. XIV, Amend. Const. of United States.

I. **"Due course of law."** For an exhaustive interpretation of the term, see Runge v. Wyatt, 25 T. Supp., 292; Huntsman v. State, 12 T. Cr. R., 619.

II. Indictment is an indispensable prerequisite to the trial for felony of a citizen "under the due course of the law of the land." It must be a legal indictment, duly presented by a legal grand jury, and must contain all the essential elements of the offense charged, with allegations necessary to put the accused upon notice of the charge against him. Bill of Rights, Sec. 10; Hewitt v. State, 25 T., 722; Wilburn v. State, Id., 738; Calvin v. State, Id., 789; Huntsman v. State, 12 T. Cr. R., 619; Lott v. State, 18 Id., 627; Saragosa v. State, 40 Id., 64, 48 S. W. R., 190.

III. **Grand jury,** to be legal must comprise twelve members, no more and no less. Const., Art. V, Sec. 13; Lott v. State, 18 T. Cr. R., 627; McNeese v. State, 19 Id., 48; Rainey v. State, Id., 479; Harrell v. State, 22 Id., 692, 3 S. W. R., 479.

The legality of the grand jury may be challenged by habeas corpus, even after convicted accused has been incarcerated in the penitentiary. Ex parte Reynolds, 35 T. Cr. R., 437, 34 S. W. R., 120, overruling Ex parte Fuller, 19 Id., 241.

The absence or discharge of one member of a properly organized grand jury will not affect its legality. Drake v. State, 25 T. Cr. R., 295, 7 S. W. R., 868; Trevinio v. State, 27 Id., 372, 11 S. W., 447.

Disqualification of grand jurors can not be raised on motion to quash indictment. Cubine v. State, 44 T. Cr. R., 596, 73 S. W. R., 396.

IV. **Petit jury,** to be legal, must comprise neither more nor less than twelve members. Lott v. State, 18 T. Cr. R., 627, and cases cited; Jester v. State, 26 Id., 369, 9 S. W. R., 616; Bullard v. State, 38 T., 504.

V. **Presence of accused** in a felony case is essential at every important stage of the trial. For instances, see Bell v. State, 32 T. Cr. R., 436, 24 S. W. R., 418; Upchurch v. State, 36 Id., 624, 38 S. W. R., 206; Mapes v. State, 13 Id., 85; Granger v. State, 11 Id., 454; Shipp v. State, Id., 46; Benevides v. State, 31 Id., 173, 20 S. W. R., 369; Massey v. State, Id., 371, 20 S. W., R., 758; Brown v. State, 38 T., 482; Cordova v. State, 6 T. Cr. R., 207, citing Pocket v. State, 5 Id., 552.

VI. **"Trial," etc.** Paris v. State, 35 T. Cr. R., 82, 31 S. W. R., 855; Rodgers v. State, 47 Id., 195, 82 S. W. R., 1041.

Art. 4. [4] **Rights of accused persons.**—In all criminal prosecutions, the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself, or counsel, or both; shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor. And no person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases aris-

ing in the army and navy or in the militia when in actual service in time of war or public danger. [Bill of Rights, § 10; O. C. 4.]

Const. United States, Amend. V, VI, and post, Art. 593.

Speedy Trial. This article merely imposes upon the judiciary the duty of proceeding with all reasonable dispatch in the trial of criminal accusations. Ex parte Turman, 26 T., 708. And it applies to all grades of criminal offenses. Id.

Habeas Corpus Available: Hernandez v. State, 4 T. Cr. R., 425; Ex parte Walker, 3 Id., 668; Rutherford v. State, 16 Id., 649.

Not available. Hernandez v. State, 4 T. Cr. R., 425.

Generally: Not until his case is regularly reached can a party be placed on trial. Thomas v. State, 36 T., 315; Johnson v. State, 12 T. Cr. R., 414. And see variously, Lott v. State, 41 T., 121; Shehane v. State, 13 T. Cr. R., 533, citing Jones v. State, 8 Id., 648; Garrett v. State, 37 Id., 198, 38 S. W. R., 1017; Venters v. State, 18 Id., 198; Grimmett v. State, 22 Id., 36, 2 S. W. R., 631; Eanes v. State, 10 Id., 421; Massey v. State, 31 Id., 371, 20 S. W. R., 758. And see Hamilton v. State, 36 Id., 372, 37 S. W. R., 431; Manning v. State, 37 Id., 180, 39 S. W. R., 118.

"Impartial jury." The provision of the Bill of Rights interpreting the legal significance of the phrase discussed. Steagald v. State, 22 T. Cr. R., 464, 3 S. W. R., 771; Massey v. State, 31 Id., 371, 20 S. W. R., 758; Randle v. State, 34 Id., 43, 28 S. W. R., 953; Burris v. State, 37 Id., 537, 40 S. W. R., 284.

Defendant's right to demand nature of charge against him, and service of indictment, upheld. Post, Arts. 540-546; Johnson v. State, 36 T., 202; Woodal v. State, 25 T. Cr. R., 617, 8 S. W. R., 802; Abrigp v. State, 29 Id., 143, 15 S. W. R., 408; Bomar v. State, Id., 223, 15 S. W. R., 821; Harris v. State, 32 Id., 279, 22 S. W. R., 1037; Stokes v. State, 35 Id., 279, 33 S. W. R., 350; Evans v. State, 36 Id., 32, 35 S. W. R., 169; Sims v. State, 36 Id., 154, 36 S. W. R., 256.

Defendant as a coerced witness against himself: Walker v. State, 7 T. Cr. R., 245; Bryant v. State, 18 Id., 107; Aston v. State, 27 Id., 574, 11 S. W. R., 637; Gallagher v. State, 28 Id., 247 12 Id., 1087; Bruce v. State, 31 Id., 590, 21 S. W. R., 681; Land v. State, 34 Id., 330, 30 Id., 788; Thomas v. State, 33 Id., 607, 28 S. W. R., 534; McMeans v. State, 55 Id., 69, 114 S. W. R., 837.

Defendant as witness in his own behalf: Taking the stand in his own behalf, the defendant waives the right guaranteed him by the sixteenth section of the Bill of Rights. Pyland v. State, 33 T. Cr. R., 382, 26 S. W. R., 621; Hargrove v. State, Id., 431, 26 S. W. R., 993; Thomas v. State, Id., 607, 28 S. W. R., 534; Brown v. State, 38 Id., 597, 44 S. W. R., 176.

Impeachment of. As a witness for himself, the defendant may be impeached as to credibility by compelling him to testify to his criminal antecedents. McCray v. State, 38 T. Cr. R., 609, 44 S. W. R., 170; Darbyshire v. State, 36 Id., 547, 36 S. W. R., 173.

Nor be impeached by showing him guilty or charged with misdemeanors not involving moral turpitude. Goode v. State, 32 T. Cr. R., 505, 24 S. W. R., 102; Willford v. State, 36 Id., 414, 37 S. W. R., 761, following Brittain v. State, Id., 406, 37 S. W. R., 758.

Nor queried on cross-examination as to unwarned confessions while under arrest. Morales v. State, 36 T. Cr. R., 234, 36 S. W. R., 846, overruling Quintana v. State, 29 Id., 401, 16 S. W. R., 258; Ferguson v. State, 31 Id., 93, 19 S. W. R., 901, and Phillips v. State, 35 Id., 480, 34 S. W. R., 272. And see Wright v. State, 36 Id., 427, 37 S. W. R., 732; Ware v. State, Id., 597, 38 S. W. R., 198.

Right to be heard. Tooke v. State, 23 T. Cr. R., 10, 3 S. W. R., 782; and see Roe v. State, 25 Id., 33, 8 S. W. R., 463; Reeves v. State, 34 Id., 483, 31 S. W. R., 382; Daugherty v. State, 33 Id., 173, 26 S. W. R., 60; Boothe v. State, 4 Id., 202; Stockholm v. State, 24 Id., 598, 7 S. W. R., 338; Webb v. State, 40 S. W. R., 989; Shaw v. State, 32 T. Cr. R., 155, 22 S. W. R., 588.

Limitation of Argument: Harrison v. State, 8 T. Cr. R., 183; Walker v. State, 32 Id., 175, 22 S. W. R., 685; McLean v. State, Id., 521, 24 S. W. R., 898; Bailey v. State, 37 Id., 579, 40 S. W. R., 281.

Confrontation by witnesses: Bill of Rights, Sec. 10; ante Arts 24, 26.

Deposition. Testimony taken before a legal examining trial, defendant being confronted by the witness and afforded the opportunity of cross-examination, and

the evidence being reduced to writing and properly authenticated, is, on the death of the witness, or his removal beyond the jurisdiction of the court, admissible against the defendant on final trial. Hobbs v. State, 53 T. Cr. R., 71, 112 S. W. R., 308, following Porch v. State, 51 Id., 7, 99 S. W. R., 1122, and overruling Cline v. State, 36 Id., 320, 36 S. W. R., 1099, and Childers v. State, 30 Id., 160, 16 S. W. R., 903, and reviving the cases therein overruled. See also Dowd v. State, 52 Id., 563, 108 S. W. R., 389; Nixon v. State, 53 Id., 325, 109 S. W. R., 931.

Art. 5. [5] **Protection against searches and seizures.**—The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches; and no warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation. [Bill of Rights, § 9; O. C. 5.]

Const. United States, IV Amend.

Searches and seizures. Arrest under warrant, see post, Arts. 263 to 289 inclusive; arrest without warrant, post, Arts. 355 to 376 inclusive.

Art. 6. [6] **Prisoners entitled to bail, except in certain cases.**—All prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found, upon examination of the evidence in such manner as may be prescribed by law. [Bill of Rights, § 11; O. C. 6.]

Bill of Rights, Sec. 11; post, Arts. 315 to 350 inclusive.

A capital offense is one for which the highest penalty is death. Penal Code, Art. 56.

The following are capital offenses:

Treason. Penal Code, Art. 93.

Murder of first degree. Penal Code, Art. 1163.

Perjury in a capital case when basis for conviction and execution. Penal Code, Art. 311.

Rape. Penal Code, Art. 1088.

Murder by wilful burning. Penal Code, Art. 1244.

Robbery by use of deadly weapon. Penal Code, Art. 1348.

"Proof evident" defined: Ex parte Foster, 5 T. Cr. R., 625; Ex parte Beacom, 12 Id., 318; Ex parte Coldiron, 15 Id., 464; Ex parte Smith, 23 Id., 100, 5 S. W. R., 99; Ex parte Evers, 29 Id., 539, 16 S. W. R., 343; Ex parte Jones, 31 Id., 422, 20 S. W. R. 983.

Art. 7. [7] **Writ of habeas corpus shall never be suspended.**—The writ of habeas corpus is a writ of right, and shall never be suspended. [Bill of Rights, § 12; O. C. 7.]

Art. 8. [8] **Excessive bail, fines, etc., forbidden.**—Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law. [Bill of Rights, § 18; O. C. 8.]

Post, Art. 329.

Excessive bail. Miller v. State, 42 T., 309; Miller v. State, 43 Id., 579; Ruston v. State, 15 T. Cr. R., 324; Ex parte Coldiron, Id., 464; Ex parte Hutchings, 11 Id., 28; Ex parte Catney, 17 Id., 332; Ex parte Walker, 3 Id., 668; Ex parte Wilson, 20 Id., 498; Ex parte Campbell, 28 Id., 376, 13 S. W. R., 141; Ex parte Tittle, 37 Id., 597, 40 S. W. R., 598.

Excessive fines, etc. Teague v. State, 4 T. Cr. R., 147; Smith v. State, 7 Id., 414; Albrecht v. State, 8 Id., 216; Wilson v. State, 14 Id., 524; Thompson v. State, 17 Id., 253; Walker v. State, 28 Id., 246, 13 S. W. R., 861; same case, Id., 503, 13 S. W. R., 860; Ingram v. State, 29 Id., 33, 14 S. W. R., 457; Wilcox v. State, 32 Id., 284,

22 S. W. R., 1109; Ex parte Kearby, 35 Id., 531, 34 S. W. R., 635; Brown v. State, 16 T., 122; Wallace v. State, 33 Id., 445; March v. State, 35 Id., 115.

Art. 9. [9] **No person shall be twice put in jeopardy for the same offense.**—No person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction. [Bill of Rights, § 14; O. C. 9.]

Const. United States, Amend. V.

"Jeopardy" defined. Powell v. State, 17 T. Cr. R., 345, overruling Moseley v. State, 33 T., 671, and Taylor v. State, 35 Id., 97; Ex parte Porter, 16 T. Cr. R., 321; Parchman v. State, 2 Id., 228; Davis 37 Id., 359, 38 S. W. R., 616; Pisano v. State, 20 Id., 139; Vestal v. State, 3 Id., 652; Pickett v. State, 43 Id., 1, 63 S. W. R., 325; Cook v. State, Id., 182, 63 S. W. R., 872; Ogle v. State, Id., 219, 63 S. W. R., 1009.

"Same offense" defined: Adams v. State, 16 T. Cr. R., 162; Hirshfield v. State, 11 Id., 207; Herero v. State, 35 Id., 607, 34 S. W. R., 943; McElmurry v. State, 21 Id., 691, 2 S. W. R., 892; Ex parte Rogers, 10 Id., 655; Grisham v. State, 19 Id., 504; Stewart v. State, 35 Id., 174, 32 S. W. R., 766.

Dismissal of original indictment: Branch v. State, 20 T. Cr. R., 599; Elehash v. State, 35 Id., 599, 34 S. W. R., 928.

Bad indictment: Simco v. State, 9 T. Cr. R., 338; Timon v. State, 34 Id., 363, 30 S. W. R., 808; Williams v. State, Id., 433, 30 S. W. R., 1063; Jackson v. State, 37 Id., 128, 38 S. W. R., 1002.

Pendency of other indictments for same offense as jeopardy: Pierce v. State, 50 T. Cr. R., 507, 98 S. W. R., 861, overruling Bonner v. State, 29 Id., 223, 15 S. W. R., 821, and cases therein cited.

Discharge of jury: Post, Art. 759; Powell v. State, 17 T. Cr. R., 345, overruling Moseley v. State, 33 T., 671, and Taylor v. State, 35 Id., 97; Schindler v. State, 17 Id., 408; Penn v. State, 36 Id., 140, 35 S. W. R., 973; Clark v. State, 28 Id., 189, 12 S. W. R., 729; Woodward v. State, 42 Id., 188, 58 S. W. R., 135; Bland v. State, Id., 286, 59 S. W. R., 1119; Usher v. State, Id., 461, 60 S. W. R., 555; and see generally, Selman v. State, 33 Id., 631, 28 S. W. R., 541; Rudder v. State, 29 Id., 262, 15 S. W. R., 717; Upchurch v. State, 36 Id., 624, 38 S. W. R., 206; Wright v. State, 35 Id., 158, 32 S. W. R., 701; Crofford v. State, 39 Id., 547, 47 S. W. R., 533.

Art. 10. [10] **Trial by jury shall remain inviolate.**—The right of trial by jury shall remain inviolate. [Bill of Rights; O. C. 10.]

Const. United States, Amend VI; post, Art. 745; McCampbell v. State, 37 T. Cr. R., 607, 40 S. W. R., 496.

Jury and jury trials: Marks v. State, 10 T. Cr. R., 334; Stell v. State, 14 Id., 59; Short v. State, 16 Id., 44; Lott v. State, 18 Id., 627; English v. State, 28 Id., 500, 13 S. W. R., 775; Floeck v. State, 34 Id., 314, 30 S. W. R., 794; La Grange v. State, 17 T., 415.

Art. 11. [11] **Liberty of speech and of the press.**—Every person shall be at liberty to speak, write or publish his opinion on any subject, being liable for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers investigating the conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And, in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases. [Bill of Rights, § 8; O. C. 11.]

For statutory provisions arising under this section of the Bill of Rights, see Penal Code, Arts. 1172 to 1200 inclusive, and notes.

Libel and liberty of speech and freedom of the press. See Morton v. State, 3 T. Cr. R., 510; Ex parte Neill, 32 Id., 275, 22 S. W. R., 923.

Art. 12. [12] **Person shall not be disqualified as a witness for religious opinion or want of religious belief.**—No person shall be disqualified to give evidence in any of the courts of this state on account of his religious opinions, or for the want of any religious belief; but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury. [Bill of Rights, § 5.]

See post, Art. 796 and notes.

Art. 13. [13] **Outlawry and transportation prohibited.**—No citizen shall be outlawed, nor shall any person be transported out of the state for any offense committed within the same. [Bill of Rights, § 20.]

Art. 14. [14] **Conviction shall not work corruption of blood, etc.**—No conviction shall work corruption of blood or forfeiture of estate. [Bill of Rights, § 21.]

Art. 15. [15] **No conviction of treason, except, etc.**—No person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or on confession in open court. [Bill of Rights, § 22.]

Penal Code, Arts. 92-95; post, Arts. 803-804.

Art. 16. [16] **Privilege of senators and representatives.**—Senators and representatives shall, except in cases of treason, felony or breach of the peace, be privileged from arrest during the session of the legislature, and in going to and returning from the same, allowing one day for every twenty miles such member may reside from the place at which the legislature is convened. [Const., art 3, § 14; O. C. 12.]

Art. 17. [17] **Privilege of voters.**—Voters shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning therefrom. [Const., Art. 6, § 5; O. C. 11.]

Penal Code, Art. 270.

Art. 18. [18] **Change of venue.**—The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law. [Const., Art. 3, § 45.]

Post, Arts. 626-641, and notes.

Constitutional law. The power vested in the district judge to change the venue for good cause, on his own motion, is constitutional. Cox v. State, 8 T. Cr. R., 254.

He may transfer the case to any county in his own or an adjoining district. Frizzell v. State, 39 T. Cr. R., 42, 16 S. W. R., 751, and cases cited.

Jurisdiction of the new tribunal cannot be challenged on appeal in the absence of a proper bill of exceptions. Gibson v. State, 53 T. Cr. R., 349, 110 S. W. R., 41. And see Underwood v. State, 38 Id., 193, 41 S. W. R., 618, following Blackwell v. State, 29 Id., 194, 15 S. W. R., 597.

Change of venue is not authorized in misdemeanor cases. Fox v. State, 53 T. Cr. R., 150, 109 S. W. R., 370, following Halsell v. State, 29 Id., 22, 18 S. W. R., 418

Art. 19. [19] **Conservators of the peaec; style of process.**—All judges of the supreme court, courts of appeals and district courts, shall, by virtue of their offices, be conservators of the peace throughout the state. The style of all writs and process shall be "The State of Texas." All prosecutions shall be carried on in the name and by the authority of "The State of Texas," and conclude, "against the peace and dignity of the state." [Const., Art. 5, § 12; O. C. 15.]

Writs and process: Brown v. State, 28 T. Cr. R., 65, 11 S. W. R., 1022, citing Werbiski v. State, 20 Id., 131.

All writs and process, including those of city or municipal courts, must conform to this article. Leach v. State, 36 T. Cr. R., 248, 36 S. W. R., 471; Ex parte Fagg, 38 Id., 573, 44 S. W. R., 294.

Quo warranto proceedings are covered by this article. Wright v. Allen, 2 T., 158; Banton v. Wilson, 4 Id., 400.

Commencement and conclusion of prosecution: Post, Art. 415.

Art. 20. [21] **In what cases accused may be tried, etc., after conviction.**—By the provisions of the constitution, an acquittal of the defendant exempts him from a second trial or a second prosecution for the same offense, however irregular the proceedings may have been; but, if the defendant shall have been acquitted upon trial in a court having no jurisdiction of the offense, he may, nevertheless, be prosecuted again in a court having jurisdiction. [O. C. 20.]

Post. Art. 572.

Construed. Conviction for manslaughter under a defective indictment for murder is acquittal of latter offense if had in court of competent jurisdiction. Mixon v. State, 35 T. Cr. R., 458, 34 S. W. R., 290, and cases cited.

Conviction of the lower grade of assault is, however, no bar to a subsequent prosecution for aggravated assault. Warriner v. State, 3 T. Cr. R., 104, citing Norton v. State, 14 T., 387, and Wilson v. State, 16 Id., 247; Watson v. State, 5 T. Cr. R., 271.

Conviction in a city court under an invalid city ordinance is not a bar to prosecution in a state court. McLain v. State, 31 T. Cr. R., 558, 21 S. W. R., 365.

Conviction in a city court for an "affray," though a statutory offense, is a bar to prosecution in a state court. Ex parte Freeland, 38 T. Cr. R., 321, 42 S. W. R., 295.

Art. 21. [22] **No conviction of felony except by verdict of jury.**—No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded. [O. C. 22.]

Post, Art. 763, et seq.

Art. 22. [23] **Defendant may waive any right, except, etc.**—The defendant in a criminal prosecution for any offense may waive any right secured to him by law, except the right of trial by jury in a felony case. [O. C. 26.]

Post, Art. 582.

Waiver in misdemeanor. Defendant in misdemeanor may waive his right of trial by jury. Rasberry v. State, 1 T. Cr. R., 664.

But the record on appeal must show the waiver; and this rule applies if, as he is authorized to do, he consents to a jury of less than six. Stell v. State, 14 T. Cr. R., 59, citing Marks v. State, 10 Id., 334.

Consent trial on appearance bond in the absence of defendant, will not authorize judgment against the sureties on the bond. Huffman v. State, 23 T. Cr. R., 491, 5 S. W. R., 134.

By attorney. Attorney cannot bind his client in a felony case, by agreeing to any material alteration of indictment. Calvin v. State, 25 T., 789.

There is, really, no manner in which an attorney can absolutely bind his defendant client to his prejudice and against the general principles of law. Bell v. State, 2 T. Cr. R., 216; McDuff v. State, 4 Id., 58.

Only the defendant can waive his right of personal presence at any stage of the trial. Shipp v. State, 11 T. Cr. R., 46; Granger v. State, Id., 454; Mapes v. State, 13 Id., 85.

Attorney, without defendant's consent, cannot, prior to verdict, admit any inculpatory fact. Simco v. State, 9 T. Cr. R., 338.

And see Allen v. State, 16 T. Cr. R., 237; Escareno v. State, Id., 85.

But defendant and attorney acting together may waive special venire and accept the week's regular panel from which to select trial jury. Collins v. State, 47 T. Cr. R., 303, 83 S. W. R., 806.

Acceptance of jury by defendant is waiver of right of objection to its organization on motion for new trial or in arrest. McMahan v. State, 17 T. Cr. R., 321, citing Buie v. State, 1 Id., 452; Caldwell v. State, 12 Id., 302.

Presumption of waiver obtains when the record fails to show that the matter was not called to the attention of the trial court. Castenado v. State, 7 T. Cr. R., 582.

Art. 23. [24] **Trial shall be public.**—The proceedings and trials in all courts shall be public. [O. C. 23.]

Ante, Art. 4 and notes; Massey v. State, 31 T. Cr. R., 371, 19 S. W. R., 908; Kugadt v. State, 38 Id., 681, 44 S. W. R., 989.

Art. 24. [25] **Defendant shall be confronted by witnesses, except.**—The defendant, upon a trial, shall be confronted with the witnesses, except in certain cases provided for in this Code where depositions have been taken. [O. C. 24.]

See in extenso Hobbs v. State, 53 T. Cr. R., 71, 112 S. W. R., 308, following Porch v. State, 51 Id., 7, 99 S. W. R., 1199, overruling Cline v. State, 36 Id., 329, 36 S. W. R., 1099, and Childers v. State, 30 Id., 160, 16 S. W. R., 903.

Art. 25. [26] **Construction of this Code.**—The provisions of this Code shall be liberally construed, so as to attain the objects intended by the legislature: The prevention, suppression and punishment of crime. [O. C. 25.]

Penal Code, Arts. 5, 9 and 10 and notes.

Art. 26. [27] **When rules of common law shall govern.**—Whenever it is found that this Code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern. [O. C. 27.]

Penal Code, Art. 9 and notes.

Construed. This article expressly emasculates the common law in all particulars covered by these Codes. Neither statute nor common law can, in any event, supplant a constitutional provision. Cline v. State, 36 T. Cr. R., 320, 36 S. W. R., 1099; Loakman v. State, 32 Id., 563, 25 S. W. R., 22. But note that on question of the competency, on final trial, of evidence taken and reduced to writing on examining trial, the Cline case cited, and the Childers case, 30 Id., 160, 16 S. W. R., 903, are overruled by Hobbs v. State, 53 T. Cr. R., 71, 112 S. W. R., 308, following Porch v. State, 51 Id., 7, 99 S. W. R., 1122.

Common law rules as applied to evidence, see post, Arts. 794 and 795, and notes. And see Bluman v. State, 33 T. Cr. R., 60, 21 S. W. R., 1027; McKenzie v. State, 32 Id., 568, 25 S. W. R., 426; May v. State, 15 Id., 430.

Constitutional law; rules of construction. See Combs v. State, 38 T. Cr. R., 648, 44 S. W. R., 854; Holley v. State, 14 Id., 505; Hunt v. State, 7 Id., 213; Thomas v. State, 40 T., 36; Huntsman v. State, 12 T. Cr. R., 620; Trigg v. State, 49 T., 645; Gordon v. State, 43 Id., 330; Hobbs v. State, 53 T. Cr. R., 71, 112 S. W. R., 308, following Porch v. State, 51 Id., 7, 99 S. W. R., 1122, overruling the Cline and Childers cases, supra; Cordova v. State, 6 Id., 207; Cox v. State, 8 Id., 254; State v. Sims, 43 T., 521; Holley v. State, 14 T. Cr. R., 105; Hunt v. State, 22 Id., 396; S. W. R.; Ex parte Brown, 38 Id., 295, 42 S. W. R., 554; Baldwin v. State, 21 Id., 591, 3 S. W. R., 109; Smisson v. State, 71 T., 222, 9 S. W. R., 112, R'y v. Gross, 47 Id., 428; Powell v. State, 17 T. Cr. R., 345; Holmes v. State, 20 Id., 509; Leach v. State, 36 Id., 248, 36 S. W. R., 471.

As to the Constitution of the United States. The limitations upon the powers of government imposed by the Constitution of the United States apply as limitations upon the government of the Union only, except when the states are expressly mentioned. The power to prosecute crime by information as well as indictment, was

never surrendered by the states to the Union. Pitner v. State, 23 T. Cr. R., 366, 5 S. W. R., 210.

Legislative journals. R'y v. Hearne, 32 T., 547; Blessing v. Galveston, 42 Id., 641; Usener v. State, 8 T. Cr. R., 177; Williams v. Taylor, 83 T., 667, 19 S. W. R., 156; Ewing v. Duncan, 81 Id., 230, 16 S. W. R., 1000; Hunt v. State, 22 T. Cr. R., 396, 3 S. W. R., 233.

Legislative enactments; subjects in titles: Nobles v. State, 38 T. Cr. R., 330, 42 S. W. R., 978; Fehr v. State, 36 Id. 93, 35 S. W. R., 381; Floeck v. State, 34 Id., 314, 30 S. W. R., 794; Tabor v. State, Id., 631, 31 S. W. R., 662; Ex parte Fagg, 38 Id., 573, 44 S. W. R., 294. Gunter v. Mfg. Co., 82 T., 496, 17 S. W. R., 840; Day Co. v. State, 68 Id., 526, 4 S. W. R., 865; R'y v. Smith, 54 Id., 1.

Same. Titles construed. Must be liberally construed. Ex parte Segars, 32 T. Cr. R., 553, 25 S. W. R., 26; Nichols v. State, 32 Id., 391, 23 S. W. R., 680; Tabor v. State, 34 Id., 631, 31 S. W. R., 662.

Emergency clause. See Const. Art. III, Sec. 39; Ex parte Murphy, 27 T. Cr. R., 492, 11 S. W. R., 487; Giebel v. State, 28 Id., 151, 12 S. W. R., 591; Kenyon v. State, 31 Id., 13, 23 S. W. R., 191; Williams v. Taylor, 83 T., 667, 19 S. W. R., 156; Ewing v. Duncan, 81 Id., 230, 16 S. W. R., 1000.

Municipal ordinances: Ex parte Combs, 38 T. Cr. R., 648, 44 S. W. R., 854; Ex parte Freeland, Id., 321, 42 S. W. R., 295; Ex parte Fagg, Id., 44 S. W. R., 294; Harris County v. Stewart, 91 T., 41 S. W. R., 650; Leach v. State, 36 T. Cr. R., 248, 36 S. W. R., 471; Ex parte Bell, 32 Id., 308, 22 S. W. R., 1040.

Ex post facto: McInturff v. State, 20 T. Cr. R., 335, and cases cited; Dawson v. State, 6 Id., 347; Velasco v. State, 9 Id., 76; Johnson v. State, 16 Id., 402; Martin v. State, 22 T., 214; Baker v. State, 11 T. Cr. R., 262.

Special session laws: Baldwin v. State, 21 T. Cr. R., 591, 3 S. W. R., 109; Brown v. State, 32 Id., 119, 22 S. W. R., 596.

Practice. Art. 3, sec. 40 of the constitution limiting the legislature, in called or special session, to the consideration of subjects included in the governor's proclamation convening such special session, is mandatory. That certain legislation in violation of this constitutional provision was enacted at a special session may be shown. Long v. State, 127 S. W. R., 208.

In this case, the governor's proclamation included "changing, amending, etc., court procedure, both civil and criminal." Held broad enough to authorize the legislature, at that session, to rearrange the terms of the criminal district court of Harris and Galveston counties. Id.

CHAPTER TWO.

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

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I. THE ATTORNEY GENERAL.

Article 27. [28] **Attorney general shall represent the state.**—It is the duty of the attorney general to represent the state in all criminal cases in the courts of appeals, except in cases where he may have been employed adversely to the state, previously to his election; and he shall not appear as counsel against the state in any court. [O. C. 28.]

Art. 28. [29] **Shall report to governor biennially.**—He shall report to the governor biennially on the first Monday in December next preceding the expiration of his official term, and at such other times as the governor may require, the number of indictments which have been found by grand juries in this state for the two preceding years; the number of informations filed in this state during the same period; the offenses charged in such indictments or informations; the number of trials, convictions and acquittals for each offense; the number of indictments and informations which have been disposed of without the intervention of a petit jury, with the cause and manner of such disposition; and also a summary of the judgments rendered on conviction, specifying the offense, the nature and amount of penalties imposed, and the amount of fines collected. This report shall also give a general summary of all the business, civil and criminal, disposed of by the supreme court and courts of appeals, so far as the state of Texas may be a party to such litigation, and of all civil causes to which the state is a party prosecuted or defended by him in any other courts, state or federal. [Act May 11, 1846, p. 206, amended by Act March 28, 1885, pp. 61-62.]

Art. 29. [30] **May require certain officers to report to him.**—He may require the several district and county attorneys, clerks of the district and county courts in the state, to communicate to him at such times as he may designate, and in such form as he may prescribe, all the information necessary for his compliance with the requirements of the preceding article. And whenever the clerk of the district court of any county neglects or fails, within thirty days after the adjournment of a term of his court, to report

to the attorney general the proceedings thereof, the comptroller shall thereafter, if notified of such failure, audit no more claims in favor of such clerk, until receipt of such report by the attorney general. [O. C. 944, amended by Act March 28, 1885, p. 62.]

2. DISTRICT AND COUNTY ATTORNEYS.

Art. 30. [31] **Duties of district attorneys.**—It is the duty of each district attorney to represent the state in all criminal cases in the district courts of his district, except in cases where he has been, before his election, employed adversely; and he shall not appear as counsel against the state in any court; and he shall not, after the expiration of his term of office, appear as counsel against the state in any case in which he may have appeared for the state. [O. C. 30.]

Construed. Though the district judge was yet district attorney when the homicide was committed, yet, having been elected to the former position, he had no part in the proceedings pending indictment, having resigned and procured the appointment of a district attorney pro tem. who had charge of the case from inception. Held, that he was not disqualified to preside at the trial. Utzman v. State, 34 T. Cr. R., 426, 24 S. W. R., 412.

The district attorney cannot discuss testimony not before the jury. Miller v. State, 45 T. Cr. R., 517, 78 S. W. R., 511.

Art. 31. [32] **Same subject.**—When any criminal proceeding is had before an examining court in his district, or before a judge upon habeas corpus, and he is notified of the same, and is at the time within the county where such proceeding is had, he shall represent the state therein, unless prevented by other official duties. [O. C. 31.]

Art. 32. [33] **Duties of county attorneys.**—It shall be the duty of the county attorney to attend the terms of the county and inferior courts of his county, and to represent the state in all criminal cases under examination or prosecution in said courts. He shall attend all criminal prosecutions before justices of the peace in his county when notified of the pendency of such prosecutions and when not prevented by other official duties. He shall conduct all prosecutions for crimes and offenses cognizable in such county and inferior courts of his county, and shall prosecute and defend all other actions in such courts in which the state or the county is interested. He shall also attend the terms of the district court in his county; and, if there be a district attorney of the district including such county, and such district attorney be in attendance upon such court, the county attorney shall aid him when so requested; and when there is no such district attorney, or when he is absent, the county attorney shall represent the state in such court and perform the duties required by law of district attorneys.

A county attorney cannot accept or approve a county convict bond. Ex parte Price, 37 T. Cr. R., 275, 39 S. W. R., 369.

The appointment of a county attorney pro tem. by the county judge is without authority, and an information filed by such is void. Moore v. State, 56 T. Cr. R., 300, 119 S. W. R., 858.

The Court of Criminal Appeals is without jurisdiction, on appeal, to direct mandamus to the county attorney to institute a misdemeanor prosecution. Murphy v. Sumners, 54 T. Cr. R., 369, 112 S. W. R., 1070.

Art. 33. [34] **Duty to present officer for neglect of duty.**—It shall be the duty of the district or county attorney to present to the court having jurisdiction, any officer, by information, for neglect or failure of any duty enjoined upon such officer, when such neglect or failure can be presented by information, whenever it shall come to the knowledge of said attorney that

there has been a neglect or failure of duty upon the part of said officer; and it shall be his duty to bring to the notice of the grand jury all acts of violation of law or neglect or failure of duty upon the part of any officer, when such violation, neglect or failure are not presented by information, and whenever the same may come to his knowledge. [Act Aug. 7, 1876, p. 86.]

Art. 34. [35] **Shall hear complaints, and what the same shall contain.**—Upon complaint being made before a district or county attorney that an offense has been committed in his district or county, he shall reduce the complaint to writing and cause the same to be signed and sworn to by the complainant, and it shall be duly attested by said attorney. Said complaint shall state the name of the accused, if his name is known; and, if his name is not known, it shall describe him as fully as possible; and the offense with which he is charged shall be stated in plain and intelligible words; and it must appear that the offense was committed in the county where the complaint is filed, and within a time not barred by limitation. [Id., p. 87; § 13.]

Complaint must be made by a credible person, though it need not aver that the affiant is such a person. Wilson v. State, 27 T. Cr. R., 47, 10 S. W. R., 749; Dodson v. State, 35 Id., 571, 34 S. W. R., 754; Thomas v. State, 14 Id., 70.

A credible person is one who, being competent to testify, is worthy of belief. Authorities supra.

A county attorney cannot make complaint unless he was the only witness to the defense. Daniels v. State, 2 T. Cr. R., 353.

Affiant's name need not appear in body of complaint signed and sworn to. Upton v. State, 33 T. Cr. R., 231, 26 S. W. R., 197.

Complaint must show the offense anterior to its date and correspond with the affidavit. Huff v. State, 23 T. Cr. R., 291, 4 S. W. R., 890, and cases cited; Womack v. State, 31 Id., 41, 19 S. W. R., 605, citing Lanham's case, 9 Id., 232; Williams v. State, 17 Id., 521.

And the date must not be an impossible one. Hefner v. State, 16 T. Cr. R., 573; Jennings v. State, 30 Id., 428, 18 S. W. R., 90.

Can be based on knowledge and belief. Dodson v. State, 35 T. Cr. R., 571, 34 S. W. R., 754; Hall v. State, 32 Id., 594, 25 S. W. R., 292, and cases cited.

Must be authenticated by jurat of officer before whom made. Jennings v. State, 30 T. Cr. R., 428, 18 S. W. R., 90, and cases cited.

Convicted felon is not competent to make complaint. Perez v. State, 10 T. Cr. R., 327.

Husband not competent to make complaint against wife for adultery. Thomas v. State, 14 T. Cr. R., 70.

Complaint taken by the county attorney of one county will not support information filed by county attorney of another county. Thomas v. State, 37 T. Cr. R., 142, 38 S. W. R., 1011.

County attorney cannot, under this article, take the affidavit of a complainant under Art. 976 of this Code. Williams v. State, 50 T. Cr. R., 269, 96 S. W. R., 47.

Habeas corpus cannot be resorted to in order to test the sufficiency of a criminal complaint. Ex parte Cain, 56 T. Cr. R., 538, 120 S. W. R., 997; Ex parte Cox, 53 Id., 240, 109 S. W. R., 369.

Art. 35. [36] **Duty when complaint has been made.**—If the offense be a misdemeanor, the attorney shall forthwith prepare an information, and file the same, together with the complaint, in the court having jurisdiction of the offense. If the offense charged be a felony, he shall forthwith file the complaint with a magistrate of the county, and cause the necessary process to be issued for the arrest of the accused. [Id., § 15.]

A complaint is an essential prerequisite to an information. Wilson v. State, 27 T. Cr. R., 47, 10 S. W. R., 749; Kinley v. State, 29 Id., 532, 16 S. W. R., 339.

Complaint charging a misdemeanor information must be filed in the county court; charging a felony, it must be filed with the magistrate, who must proceed in accordance with the law governing examining courts. Kinley v. State, supra.

It will be presumed, in the absence of contrary proof, that the assistant county attorney possessed all the qualifications of that officer. Kelly v. State, 36 T. Cr. R., 480, 38 S. W. R., 39; and see Dane v. State, Id., 84, 35 S. W. R., 661, to the effect that a de facto deputy county attorney is qualified to administer the complainant's oath.

A "deputy county attorney" is an "assistant county attorney." Wilkins v. State, 33 T. Cr. R., 320, 26 S. W. R., 409.

Art. 36. [37] **May administer oaths.**—For the purpose mentioned in the two preceding articles, district and county attorneys are authorized to administer oaths. [Id., § 14.]

Post, Art. 479; Thomas v. State, 37 T. Cr. R., 142, 38 S. W. R., 1011.

Art. 37. [38] **Shall not dismiss case, unless.**—The district or county attorney shall not dismiss a case unless he shall file a written statement with the papers in the case, setting out his reasons for such dismissal, which reasons shall be incorporated in the judgment of dismissal; and no case shall be dismissed without the permission of the presiding judge, who shall be satisfied that the reasons so stated are good and sufficient to authorize such dismissal. [Id., p. 88, § 20.]

Dismissal of prosecution. A plea in bar setting up a contract or agreement with the prosecuting attorney to dismiss is worthless unless it shows a substantial compliance with statutary requirements. Kelly v. State, 36 T. Cr. R., 480, 38 S. W. R., 39.

This article controls, and the prosecuting officer cannot bind the state without first fully conforming to it. Fleming v. State, 28 T. Cr. R., 234, 12 S. W. R., 605; Diserin v. State, 127 S. W. R., 1038.

A bona fide, executed contract to turn state's evidence is a good plea in bar, and, invoked and proved by a defendant arraigned for trial, should have been sustained and prosecution dismissed. Camron v. State, 32 T. Cr. R., 180, 22 S. W. R., 682, disapproving the contrary dictum in Holmes' case, 20 Id., 509; Hardin v. State, 186; and see Nicks v. State, 40 Id., 1, on the repudiation of the contract by the defendant.

The dismissal by the district court of the appeal because of defendant's failure to appear, was tantamount to dismissal of prosecution and case. The proper procedure was to forfeit bail bond and order defendant's rearrest. Ex parte McNamara, 33 T. Cr. R., 363, 26 S. W. R., 506.

Art. 38. [39] **Attorney pro tem. may be appointed.**—Whenever any district or county attorney shall fail to attend any term of the district, county or justice's court, the judge of said court or such justice may appoint some competent attorney to perform the duties of such district or county attorney, who shall be allowed the same compensation for his services as are allowed the district or county attorney. Said appointment shall not extend beyond the term of the court at which it is made, and shall be vacated upon the appearance of the district or county attorney. [Id., p. 87, § 12.]

Appointed counsel. Attorneys appointed under this article are qualified to draft and present indictments to the grand jury. State v. Johnson, 12 T., 231; State v. Gonzales, 26 Id., 197.

The district court has the power to require an attorney at the bar to prepare such indictments as the grand jury may require, except in such cases wherein he may have been previously retained in defense. Bennett v. State, 27 T., 701.

An attorney pro tem. appointed by the court has all the powers and duties of the regular prosecuting attorney. State v. Lackey, 35 T., 357; but his appointment cannot extend beyond the term of court. State v. Manlove, 33 Id., 798.

In the absence of contrary showing, the presumption obtains that the person who acted and was recognized by the trial court in prosecuting the case, was duly authorized and qualified. Eppes v. State, 10 T., 474.

Status of the person acting as district attorney cannot be questioned by motion to quash indictment. State v. Gonzales, 26 T., 197. See Harris County v. Stewart, 91 T., 133, 41 S. W. R., 650.

Art. 39. [40] **Shall report to attorney general when required.**—District and county attorneys shall, when required by the attorney general, report to him at such time, and in accordance with such forms, as he may direct, such information as he may desire in relation to criminal matters and the interests of the state, in their districts and counties.

Art. 40. [41] **Shall not be of counsel adverse to the state.**—District and county attorneys shall not be of counsel adversely to the state in any case, in any court, nor shall they, after they cease to be such officers, be of counsel adversely to the state in any case in which they have been of counsel for the state. [O. C. 30.]

Utzman v. State, 32 T. Cr. R., 426, 24 S. W. R., 412.

3. MAGISTRATES.

Art. 41. [42] **Who are magistrates.**—Either of the following officers is a "magistrate" within the meaning of this Code: The judges of the supreme court, the judges of the courts of appeals, the judges of the district court, the county judges of the county, either of the county commissioners, the justices of the peace, the mayor or recorder of an incorporated city or town. [O. C. 52.]

Magistrates. A justice of the peace sitting as an examining court is a magistrate. Hart v. State, 15 T. Cr. R., 202.

A county judge is a magistrate. Graham v. State, 29 T. Cr. R., 31, 13 S. W. R., 1013; and see in extenso opinions in Childers v. State, 30 Id., 160, 16 S. W. R., 903.

Art. 42. [43] **Duty of magistrates.**—It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime; to cause the arrest of offenders, by the use of lawful means, in order that they may be brought to punishment. [O. C., 32.]

Penal Code, Arts. 42, 297, 351, 432, 991, 1093 and 1094, and post, title 3, chapters 2, 3 and 4.

4. PEACE OFFICERS.

Art. 43. [44] **Who are peace officers.**—The following are "peace officers:" The sheriff and his deputies, constable, the marshal, constable or policeman of an incorporated town or city, and any private person specially appointed to execute criminal process. [O. C. 53.]

Post, Arts. 137, 278, 279; Penal Code, Art. 478, and notes.

Peace officers; who are: Policemen of an incorporated city or town. Sanner v. State, 2 T. Cr. R., 458.

A deputy sheriff. Clayton v. State, 21 T. Cr. R., 343, 17 S. W. R., 261.

A de facto town marshal. Rainey v. State, 8 T. Cr. R., 62.

A private person who undertakes to execute process. Post., Art. 278.

A special constable. Post, Art. 146.

Who are not: Deputy marshal of incorporated city or town, unless made so by the charter. Alford v. State, 8 T. Cr. R., 545.

A quandom bailiff of the grand jury. Alford v. State, supra.

Art. 44. [45] **Duties and powers of peace officers.**—It is the duty of every peace officer to preserve the peace within his jurisdiction. To effect this purpose, he shall use all lawful means. He shall, in every case where he is author-

ized by the provisions of this Code, interfere without warrant to prevent or suppress crime. He shall execute all lawful process issued to him by any magistrate or court. He shall give notice to some magistrate of all offenses committed within his jurisdiction, where he has good reason to believe there has been a violation of the penal law. He shall arrest offenders without warrant in every case where he is authorized by law, in order that they may be taken before the proper magistrate or court and be brought to punishment. [O. C. 34.]

As to special duties imposed by statutes, see Penal Code, Arts. 468 and 584, and post, title 3, chapters 2, 3 and 4.

Arrest without warrant. A peace officer may arrest without warrant: **1, when** a felony or offense against the public peace is committed in his presence; 2, on verbal order of magistrate when felony or breach of peace is committed in presence or view of the magistrate; 3, in certain cases prescribed by municipal authorities; 4, upon sufficient information by a credible person that a felony has been committed and there is no time to procure a warrant. Staples v. State, 14 T. Cr. R., 136.

A person unlawfully carrying arms may be arrested without warrant by a peace officer on his own knowledge or information from a credible person. Jacobs v. State, 28 T. Cr. R., 79, 12 S. W. R., 408; Ex parte Sherwood, 29 Id., 334, 15 S. W. R., 812; Miller v. State, 32 Id., 319, 20 S. W. R., 1103. And see Earles v. State, 52 Id., 140, 196 S. W. R., 138.

A recognized de facto officer has authority, and it is his duty, to prevent violations of law in his presence. Weatherford v. State, 31 T. Cr. R., 530, 21 S. W. R., 251.

Art. 45. [46] **May summon aid when resisted.**—Whenever a peace officer meets with resistance in discharging any duty imposed upon him by law, he shall summon a sufficient number of citizens of his county to overcome the resistance; and all persons summoned are bound to obey; and, if they refuse, are guilty of the offense prescribed in article 229 of the Penal Code. [O. C. 44.]

Penal Code, Art. 351; post, Arts. 139 to 144 inclusive.

One acting as posse comitatus, summoned by a de facto officer, does not do so at his own peril because of any irregularity in the officer's status as such. Weatherford v. State, 31 T. Cr. R., 530, 21 S. W. R., 251.

Art. 46. [47] **Person refusing to obey liable to prosecution.**—The peace officer who has summoned any person to assist him in performing any duty shall report such person, if he refuse to obey, to the district or county attorney of the proper district or county, in order that he may be prosecuted for the offense. [O. C. 45.]

Penal Code, Art, 351.

Art. 47. [48] **Officer neglecting to execute process may be fined for contempt.**—If any sheriff or other officer shall wilfully refuse or fail from neglect to execute any summons, subpoena or attachment for a witness, or any other legal process which it is made his duty by law to execute, he shall be liable to a fine for contempt not less than ten nor more than two hundred dollars, at the discretion of the court having cognizance of the same; and the payment of said fine shall be enforced in the same manner as fines for contempt in civil cases. [Act Feb. 11, 1860.]

Penal Code, Arts. 388 and 431.

Proceedings under this article are in the nature contempts. Crow v. State, 24 T., 12. And for rules in such cases, see Ex parte Ireland, 38 T., 344; Ex parte Kilgore, 3 T. Cr. R., 137; Ex parte Kearby, 35 Id., 531, 34 S. W. R., 635; s. c., Id., 634, 34 S. W. R., 962.

A vacation proceeding for contempt is void. Ex parte Ellis, 37 T. Cr. R., 539, 40 S. W. R., 275.

5. SHERIFFS.

Art. 48. [49] **Shall be conservator of the peace and arrest offenders.**—Each sheriff shall be a conservator of the peace in his county, and shall arrest all offenders against the laws of the state, in his view or hearing, and take them before the proper court for examination or trial. He shall quell and suppress all assaults and batteries, affrays, insurrections and unlawful assemblies. He shall apprehend and commit to jail all felons and other offenders, until an examination or trial can be had. [Act May 12, 1846, p. 265; P. D. 5115.]

Ante, Arts. 43, et seq.

Art. 49. [50] **Keeper of jail.**—Each sheriff is the keeper of the jail of his county, and responsible for the safe keeping of all prisoners committed to his custody. [O. C. 37.]

Gordon v. State, 2 T. Cr. R., 154.

Art. 50. [51] **Shall place in jail every person committed by lawful authority.**—When a prisoner is committed to jail by lawful warrant from a magistrate or court, he shall be placed in jail by the sheriff; and it is a violation of duty on the part of any sheriff to permit a defendant so committed to remain out of jail, except that he may, when a defendant is committed for want of bail, or when he arrests after indictment or information in a bailable case, give the person arrested a reasonable time to procure bail; but, in the meanwhile he shall so guard the accused as to prevent escape. [O. C. 38.]

Penal Code, Arts. 320-351, and notes; post, Art. 909. And see Luckey v. State, 14 T., 400; Ex parte Wyatt, 29 T. Cr. R., 398, 16 S. W. R., 301.

Art. 51. [52] **Shall notify district and county attorneys of prisoners, etc.**—The sheriff shall, at each term of the district or county court, give notice to the district or county attorney as to all prisoners in his custody, and of the authority under which he detains them. [O. C. 39.]

Art. 52. [53] **May appoint a jailer, who shall be responsible.**—The sheriff may appoint a jailer to take charge of the jail, and supply the wants of those therein confined; and the person so appointed is responsible for the safety of the prisoners, and liable to punishment as provided by law for negligently or wilfully permitting a rescue or escape. But the sheriff shall, in all cases, exercise a supervision and control over the jail. [O. C. 40.]

Penal Code, Arts. 320-351 and notes.

Art. 53. [54] **May rent room and employ guard, when.**—When there is no jail in a county, the sheriff may rent a suitable house and employ guards, all of which expenses shall be paid by the proper county. [O. C. 43.]

Art. 54. [55] **Deputy may perform duties of sheriff.**—Wherever a duty is imposed by this Code upon the sheriff, the same duty may lawfully be performed by his deputy; and when there is no sheriff in a county, the duties of that office, as to all proceedings under the criminal law, devolve upon the officer who, under the law, is empowered to discharge the duties of sheriff, in case of vacancy in the office. [O. C. 46.]

Sheley v. State, 35 T. Cr. R., 190, 32 S. W. R., 901.

6. CLERKS OF THE DISTRICT AND COUNTY COURTS.

Art. 55. [56] **Shall file all papers, issue process, etc.**—It is the duty of every clerk of the district or county court to receive and file all papers in re-

spect to criminal proceedings, to issue all process in such cases, and to perform all other duties imposed upon them by this Code or the penal laws of this state, and a wilful failure to perform any such duties renders them liable to prosecution for an offense, in accordance with the provisions of the Penal Code. [O. C. 47.]

Penal Code, Arts. 430 and 432.

Art. 56. [57] **Power of deputy clerks.**—Whenever a duty is imposed upon the clerk of the district or county court the same may be lawfully performed by his deputy. [O. C. 48.]

Art. 57. [58] **Shall report to attorney general.**—The clerks of the district and county courts shall, when required by the attorney general, report to him at such times, and in accordance with such forms as he may direct, such information in relation to criminal matters as may be shown by the records in their respective offices.

Ante, Art. 29.

CHAPTER THREE.

CONTAINING DEFINITIONS.

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Same subject	59	"Examining court" defined	62
Criminal action—how prosecuted	60		

Article 58. [59] **Words and phrases, how understood.**—All words and phrases used in this Code are to be taken and understood in their usual acceptation in common language, except where their meaning is particularly defined by law. [O. C. 49.]

Penal Code, Arts. 9 and 10 and notes; Peterson v. State, 25 T. Cr. R., 70, 7 S. W. R., 530.

Art. 59. [60] **Same subject.**—The words and terms made use of in this Code, unless herein specially excepted, have the meaning which is given to them in the Penal Code, and are to be construed and interpreted as therein declared. [O. C. 50.]

Penal Code, Art. 10 and notes, and Arts. 21 to 31 inclusive and notes.

Art. 60. [61] **Criminal action, how prosecuted.**—A criminal action is prosecuted in the name of the state of Texas against the person accused, and is conducted by some officer or person acting under the authority of the state, in accordance with its laws. [O. C. 51.]

Penal Code, Art. 26; Bautsch v. Galveston, 27 T. Cr. R., 342, 11 S. W. R., 414.

Art. 61. [62] **"Officers" includes what.**—The general term "officers" includes both magistrates and peace officers. [O. C. 54.]

Ante, Arts. 41-47; Sanner v. State, 2 T. Cr. R., 458.

Art. 62. [63] **"Examining court" defined.**—When the magistrate sits for the purpose of inquiring into a criminal accusation against any person, this is called an "examining court." [O. C. 55.]

Jurisdiction. Sitting as an examining court, the justice of the peace has jurisdiction coextensive with his county. Hart v. State, 15 T. Cr. R., 202; Kerry v. State, 17 Id., 178.

As to evidence taken before an examining court and in habeas corpus cases, see Hobbs v. State, 53 T. Cr. R., 71, 112 S. W. R., 308, following Porch v. State, 51 Id., 7, 99 S. W. R., 1122, and overruling Cline v. State, 36 Id., 320, 36 S. W. R., 1099, and Childers v. State, 30 Id., 160, 16 S. W. R., 903.

TITLE 2.

OF THE JURISDICTION OF COURTS IN CRIMINAL ACTIONS.

Chapter
1. What Courts have Criminal Jurisdiction.
2. Of the Court of Criminal Appeals.
3. Of the District and Criminal District Courts.
4. Of County Courts.
5. Of Justices' and Other Inferior Courts.

CHAPTER ONE.

WHAT COURTS HAVE CRIMINAL JURISDICTION.

What courts have criminal jurisdiction..... Article 63

Article 63. [64] **What courts have criminal jurisdiction.**—The following courts have jurisdiction in criminal actions: (1) The court of criminal appeals. (2) The district courts, and the criminal district courts of Galveston and Harris and Dallas counties. (3) The county courts. (4) The justice courts and the mayor's and other courts of incorporated cities and towns; provided, that when two or more courts have concurrent jurisdiction of any offense against the penal laws of this state, the court in which an indictment or a complaint shall first be filed shall retain jurisdiction of said offense to the exclusion of all other courts. [Const., Art. 5, § 6; O. C. 57; amended Act 1903, p. 194.]

Note.—As to the criminal district court of Galveston and Harris counties, see Constitution, Art. 5, Sec. 1, and post, Art. 91. As to the criminal district court of Dallas county, see Acts of 1893, page 118, and post Art. 91.

CHAPTER TWO.

OF THE COURT OF CRIMINAL APPEALS.

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Article 64. [64] **Court to consist of three judges, their qualifications, salaries.**—The court of criminal appeals shall consist of three judges, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to a decision of said court. Said judges shall have the same qualifications and receive the same salaries as judges of the supreme court. [Act 22d Leg., S. S., ch. 16.]

Art. 65. [65] **Election of judges; term of office.**—The judges of said court shall be elected by the qualified voters of the state at a general election, and shall hold their offices for a term of six years. [Id.]

Art. 66. [66] **Classification of judges.**—At the first session of said court after the first election of the judges thereof under this act, the terms of office of said judges shall be divided into three classes, and the justices thereof shall draw for the different classes. The judge who shall draw class number one shall hold his office two years from the date of his election and until the election and qualification of his successor; the judge drawing class number two shall hold his office for four years from the date of his election and until the election and qualification of his successor; and the judge who may draw class number three shall hold his office six years from the date of his election and until the election and qualification of his successor; and thereafter each of the judges of said court shall hold his office for six years, as provided in the constitution of this state. [Id.]

Art. 67. [67] **Vacancies, how filled.**—In a case of a vacancy in the office of a judge of said court, the governor shall fill the vacancy by appointment for the unexpired term. The judges of the court of appeals who may be in office at the time when this law takes effect shall continue in office as judges of the court of criminal appeals until the expiration of their term of office. [Id.]

Art. 68. [68] **Appellate jurisdiction.**—Said court shall have appellate jurisdiction co-extensive with the limits of the state in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law. [Id.]

Const. Art. 5, Sec. 5; post, Arts. 86 and 894 to 962 and notes.

Final judgment. For requisites of a final judgment, see post, Art. 853 and notes.

Final judgment below is essential to appellate jurisdiction. Rep. v. Laughlin, Dallam, 412; Nash v. Rep., Id., 631; Estes v. State, 38 T. Cr. R., 506, 43 S. W. R., 982; Cox v. State, 34 Id., 94, 29 S. W. R., 273, and cases cited.

A judgment is final, whether on the merits or not, if it terminates the rights of the parties and puts the case out of court. And, though it fails to order execution, a judgment in a misdemeanor case imposing a fine, is final—overruling on this point Heatherly v. State, 14 T. Cr. R., 21, Braden v. State, Id., 22, and Want v. State, Id.,

24. Terry v. State, 30 Id., 408, 17 S. W. R., 1075; Ex parte Dickerson, Id., 448, 17 S. W. R., 1076.

Judgment against sureties on a forfeited bail bond, without disposition of the case as to the principal, is not a final judgment that will confer jurisdiction on the appellate court. Cox v. State, 34 T. Cr. R., 94, 29 S. W. R., 273, and cases cited.

The court of Criminal Appeals acquires no jurisdiction where the district court properly dismissed appeal from justice court for want of final judgment. McHowell v. State, 41 T. Cr. R., 227, 53 S. W. R., 630.

Final sentence in non-capital cases is a part of the final judgment and is essential to confer jurisdiction on the appellate court. Jones v. State, 43 T. Cr. R., 419, 66 S. W. R., 559.

Record. A judgment by a court of record can be evidenced only by the records of the court. Gustie v. State, 44 T. Cr. R., 272, 70 S. W. R., 751.

Jurisdiction. In non-capital cases, the sentence must be pronounced before the right of appeal attaches. Jones v. State, 43 T. Cr. R., 419, 66 S. W. R., 559; Heinzman v. State, 34 Id., 76, 29 S. W. R., 156; Pate v. State, 21 Id., 191, 17 S. W. R., 461.

Notice of appeal essential: Lawrence v. State, 14 T., 432; Fairchild v. State, 23 Id., 176; Hughes v. State, 33 Id., 683; Truss v. State 38 T. Cr. R., 291, 43 S. W. R., 92, and cases cited.

Notice of appeal should be given on the overruling of motion for new trial, though appeal can be perfected at any time during the term at which conviction was had. Wilson v. State, 12 T. Cr. R., 481; Bozier v. State, 5 Id., 220; post, Art. 925.

And see generally, Ball v. State, 31 T. Cr. R., 214, 20 S. W. R., 363; Nelson v. State, 21 Id., 351, 17 S. W. R., 466; Ex parte Lee, 34 Id., 511, 31 S. W. R., 391. But note that, under post, Art. 933, no appeal will now be dismissed on account of the failure of defendant to give notice of appeal in open court, nor on account of any defect in transcript.

Art. 69. [69] **Power to issue writs.**—Said court and the judges thereof shall have the power to issue the writ of habeas corpus, and, under such regulations as may be prescribed by law, issue such writs as may be necessary to enforce its own jurisdiction. [Id.]

Post, Arts. 168, 169 and 164, 165 and 183.

Habeas corpus. While clothed with the power, this court will not, except in extraordinary cases, grant original writs of habeas corpus. Ex parte Lambert, 37 T. Cr. R., 435, 36 S. W. R., 81.

Mandamus. This court can issue the writ of mandamus to enforce its own jurisdiction, but not to compel a district judge to try an issue of insanity in a case after a defendant has been convicted. Ex parte Quesada, 34 T. Cr. R., 116, 29 S. W. R., 473.

Art. 70. [70] **Power to ascertain facts.**—Said court shall have power, upon affidavit or otherwise, to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction. [Id.]

Const. Art. 5, Sec. 6.

Practice. See Vance v. State, 34 T. Cr. R., 395, 30 S. W. R., 792, in extenso to the effect that the court of criminal appeals is authorized to resort to such methods it may deem necessary, independent of the record on appeal, to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction. And see Ex parte Cole, 14 T. Cr. R., 579; Craddock v. State, 15 Id., 641; Simmons v. Fisher, 46 T., 126.

Art. 71. [71] **Presiding judge; process, how tested.**—The judges of said court shall choose a presiding judge for said court from their number at such times as they shall think proper, and all writs and process issuing from said court shall bear test in the name of said presiding judge and the seal of the court. [Id.]

Art. 72. [72] **When judge is disqualified.**—When said court or any member thereof shall be disqualified, under the constitution and laws of this state, to hear and determine any case or cases in said court, the same shall be certified to the governor of the state, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. [Id.]

Art. 73. [73] **Term of court.**—Said court shall hold one term each year at the city of Austin, commencing on the first Monday in October of each year, and shall continue until the last Saturday in June next succeeding; and all cases pending shall be returnable to said court at Austin; and appeals in criminal cases shall be filed with the clerk of said court at Austin upon the same conditions and same rules as now obtain. [Id., amended Act 1909, p. 51.]

Art. 74. [74] **Appeals.**—Appeals from the several counties shall be returnable to said court, and shall be determined by said court, under the rules thereof. [Act 22d Leg., S. S., ch. 16.]

Art. 75. [75] **Clerk to be appointed.**—Said court shall appoint a clerk, who shall hold his office for four years, unless sooner removed by the court for good cause entered of record in the minutes of said court.

Art. 76. [76] **Oath and bond of clerk.**—Said clerk shall, before entering upon the duties of his office, take and subscribe the oath of office prescribed by the constitution, and shall give the same bond, to be approved by the court of criminal appeals, as is now or may be hereafter required of the clerk of the supreme court. [Id.]

Art. 77. [77] **Duties of clerk.**—Said clerk shall perform as clerk of the court of criminal appeals the like duties as are now or may hereafter be required by law of the clerk of the supreme court, and shall be subject to the same liabilities as are now or may hereafter be prescribed for the clerk of the supreme court. [Id.]

Art. 78. [78] **Deputy clerk.**—Said clerk may appoint a deputy, who shall perform all the duties of said clerk, and who shall be responsible to said clerk for the faithful discharge of the duties of his office. [Id.]

Art. 79. [79] **Seal of court.**—It shall be the duty of the court of criminal appeals to procure a seal for said court; said seal to have a star with five points, with the words "Court of Criminal Appeals of Texas" engraved on it. [Id.]

Art. 80. [80] **Court reporter and reports.**—Said court is hereby authorized and required to appoint a reporter of its decisions as may be required by law to be published; said reporter may be removed by the court for inefficiency or neglect of duty; said reporter shall receive an annual salary of three thousand dollars, payable monthly, upon the certificate of the presiding judge of said court. The volumes of the decisions of said court shall be styled "Texas Criminal Reports," and shall be numbered in continuation of the present number of the court of appeals reports. Said volume shall be printed and disposed of as is now or may hereafter be provided by law for the printing and distribution of the reports of the supreme court. [Id.]

Art. 81. [81] **Reporter to return opinions.**—As soon as the opinions are recorded, the originals, together with the records and papers in each case to be reported, shall be delivered to the reporter by the clerk of said court, who shall take the reporter's receipt for the same; but the reporter shall return to said clerk the said opinions, records and papers when he shall have finished using them. [Id.]

Art. 82. [82] **Transfer of cases.**—All criminal cases pending on appeal when this act takes effect shall be transferred to the court of criminal appeals, to be determined by said court as provided by law. [Id.]

Art. 83. [83] **Mandate.**—When the court from which an appeal has been, or may hereafter be, taken, has been or shall be deprived of jurisdiction over

any case pending such appeal; and when such case shall have been, or may hereafter be, determined by the court of criminal appeals, the mandate of said court of criminal appeals shall be directed to the court to which jurisdiction has been, or may hereafter be, given over such case. [Id.]

Miller v. State, 34 T. Cr. R., 392, 30 S. W. R., 809.

Art. 84. [84] **Writ of habeas corpus.**—The court of criminal appeals, or either of the judges thereof, shall have original jurisdiction to inquire into the cause of the detention of persons imprisoned or detained in custody, and for this purpose may issue the writ of habeas corpus, and upon the return thereof may remand such person to custody, admit to bail or discharge the person imprisoned or detained, as the law and the nature of the case may require. [Id.]

Art. 85. **Supreme court or any one of the justices may issue writ.**—The supreme court of Texas, or any one of the justices thereof, shall have power, either in term time or vacation, to issue writs of habeas corpus in all cases where any person is restrained in his liberty by virtue of any order, process or commitment, issued by any court or judge, on account of the violation of any order, judgment or decree, theretofore made, rendered or entered by such court or judge in any civil cause; and said supreme court, or any one of the justices thereof, shall have power, either in term time or vacation, pending the hearing of the application for such writ, to admit to bail any person to whom the writ of habeas corpus may be so granted. [Act 1905, p. 20.]

Art. 86. [85] **Appellate jurisdiction.**—The court of criminal appeals shall have appellate jurisdiction co-extensive with the limits of the state in all criminal cases of whatever grade. [Act 22d Leg., S. S., ch 16.]

Ante Art, 68 and notes.

Art. 87. [86] **Article 86 construed.**—The preceding section shall not be so construed as to embrace cases which have been appealed from justices', mayors' or other inferior courts, to the county court, and in which the judgment rendered or fine imposed by the county court shall not exceed one hundred dollars, exclusive of cost. In such cases, the judgment of the county court shall be final. [Id.]

Construed. If the judgment de novo in the county court, on appeal from an inferior court, is a fine not exceeding $100, that judgment is conclusive, and no appeal lies to this court. Tiaon v. State, 35 T. Cr. R., 360, 33 S. W. R., 872, citing Nelson v. State, 33 Id., 379, 26 S. W. R., 623.

But if the appeal to the county court was from a judgment in excess of twenty dollars, and such appeal was dismissed by the county court without a trial de novo, an appeal will lie to this court from that judgment though the same was for a sum less than $100. Pevito v. Rogers, 52 T., 581; Taylor v. State, 16 T. Cr. R., 514.

CHAPTER THREE.

OF THE DISTRICT COURTS.

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Person indicted by such grand jury may be placed on trial	96
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Article 88. [87] **Have exclusive jurisdiction of felonies.**—The district courts shall have exclusive original jurisdiction in criminal cases of the grade of felony. [Const., Art. 5, § 8.]

Felony defined. Penal Code, Arts. 55 and 56.

Venue of prosecutions. Post, Arts. 234, et seq., and notes.

Change of venue. Post, Arts. 626-628, and notes.

Forgery, by non-residents, of titles to lands, or instruments affecting land titles in this state, is cognizable by the courts of this state. Hanks v. State, 13 T. Cr. R., 289; Ex parte Rogers, 10 Id., 655, Rogers v. State, 11 Id., 608.

Extradition. The jurisdiction of our courts, in extradition cases from foreign countries, is confined to offenses arising under extradition treaty; and an accused cannot be extradited for one offense and tried for another. Blanford v. State, 10 T. Cr. R., 627; Kelly v. State., 13 Id., 158; Cordway v. State, 25 Id., 405, 8 S. W. R., 670. Compare with Underwood v. State, 38 T. Cr. R., 193, 41 S. W. R., 618.

Prosecutions. See Bill of Rights, section 10, and ante, Art. 4, and notes.

Art. 89. [88] **Shall determine grades of offenses.**—Upon the trial of a felony case, whether the proof develop a felony or a misdemeanor, the court shall hear and determine the case as to any degree of offense included in the charge. [Act June 16, 1876, p. 18, § 3.]

Jurisdiction. Under indictment for a felony that includes a misdemeanor, the district court has jurisdiction to adjudge the felony on any lower grade of the offense the proof may develop. This article is constitutional. Nance v. State, 21 T. Cr. R., 457, 1 S. W. R., 448, and cases cited, Robles v. State, 38 Id., 81, 41 S. W. R., 620.

In such case, it is the averments of the felony alone which confer the jurisdiction. Robles v. State, supra.

But when the indictment charges a felony and a separate misdemeanor in separate counts, the acquittal of the felony ends the jurisdiction of the district court. Robles v. State, supra.

Art. 90. [89] **Misdemeanors involving official misconduct.**—The district court shall have exclusive original jurisdiction in cases of misdemeanor involving official misconduct. [Const., Art. 5, § 9.]

Official misconduct. Negligently permitting the escape of prisoners is official misconduct, and triable in the district court. Gordon v. State, 2 T. Cr. R., 154. But contra as to jurisdiction, see Watson v. State, 9 Id., 212.

A county attorney conniving at the acquittal of one charged with an offense is guilty of official misconduct. Trigg v. State, 49 T., 645.

Demanding official fees not allowed by law is official misconduct. Brackenridge v. State, 27 T. Cr. R., 513, 11 S. W. R., 630.

Drunkenness in office is not official misconduct within the jurisdiction of the district court, but is triable in the county court. Craig v. State, 31 T. Cr. R., 29, 19 S. W. R., 504.

Art. 91. **Original jurisdiction; Dallas criminal district court created, jurisdiction.** — The criminal district courts shall have original and exclusive jurisdiction of all cases of felony and misdemeanor in the counties

of Galveston and Harris and Dallas, of which the district courts have original and exclusive jurisdiction under the law. All appeals from the judgments of said courts shall be to the court of criminal appeals, under the same regulations as are now or may hereafter be provided by law for appeals in criminal cases from district courts. [Const., Art. 5, §§ 1, 16, Act July 23, 1870; P. D. 6135; amended Act of 1893, p. 118.]

Criminal district courts. The creation of these courts deprived other district courts of the counties involved of all criminal jurisdiction. Long v. State, 1 T. Cr. R., 709; March v. State, 44 T., 64. And see Watson v. State, 5 T. Cr. R., 11.

When Galveston is the county of the forum, the proper designation of the Criminal District Court of Galveston and Harris Counties, is "The Criminal District Court of Galveston County," and vice versa, the "The Criminal District Court of Harris County," when Harris the county of the forum. Giebel v. State, 28 T. Cr. R., 151, 12 S. W. R., 591.

Under that clause of the governor's proclamation convening the legislature in special session to "enact adequate laws simplifying procedure in both civil and criminal courts of the state, and amending and changing the existing laws governing court procedure," the legislature, in special session, had the power to rearrange the terms of the criminal district court of Harris and Galveston counties. Long v. State, 127 S. W. R., 208.

Art. 92. [90] **Power to issue writs of habeas corpus.**—The district courts and the judges thereof shall have power to issue writs of habeas corpus in felony cases, and upon the return thereof, may remand to custody, admit to bail, or discharge the person imprisoned or detained, as the law and nature of the case may require. [Const., Art. 5, § 8.]

Art. 93. **Special terms of district court may be held.**—Where it may become advisable, in the opinion of the judge of the district in which any county in the state of Texas may be situated, to hold a special term or terms of the district courts therein, such special term or terms may be held. [Act 1905, p. 116.]

Art. 94. **How and when special terms may be convened.**—The judge of the district in which a county may be situated, in which it is deemed advisable by such judge that a special term of the courts should be held, may convene such special term of the courts at any time which may be fixed by him. The said judge may appoint jury commissioners, who may select and draw grand and petit jurors in accordance with the law; said jurors may be summoned to appear before said courts at such time as may be designated by the judge thereof; provided, that, in the discretion of the judge, a grand jury need not be drawn or impaneled. [Id., p. 116.]

Art. 95. **Grand jury when selected shall discharge its duties as at a regular meeting.**—The grand jury selected, as provided for in the preceding section, shall be duly impaneled and proceed to the discharge of its duties as at a regular term of the court. [Id., p. 116.]

Art. 96. **Person indicted by such grand jury may be placed on trial.**—Any person indicted by the grand jury impaneled at a special term of the courts may be placed upon trial at said special term. [Id., p. 116.]

Art. 97. **Not to repeal provision of Revised Civil Statutes.**—Nothing herein contained shall be held to repeal any part of the provisions of the Revised Civil Statutes of Texas as to the terms of the district court, except so far as the same may be inconsistent with the provisions of this law. [Id., p. 116.]

CHAPTER FOUR.

OF COUNTY COURTS.

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Article 98. [91] **Have exclusive jurisdiction of misdemeanors, except, etc.**—The county courts shall have exclusive original jurisdiction of all misdemeanors, except misdemeanors involving official misconduct, and except cases in which the highest penalty or fine that may be imposed under the law may not exceed two hundred dollars, and except in counties where there is established a criminal district court. [Const., Art. 5, § 16; Act June 16, 1876, p. 13, § 3.]

Const., Art. V, Sec. 16; post, Art. 106.

Concurrent with the justice of the peace when the imposable fine does not exceed two hundred dollars. Ballew v. State, 26 T., Cr. R., 483, 9 S. W. R., 765, and cases cited.

Only in the manner prescribed in Section 22 of Article V of the Constitution can the district courts supersede the county courts in jurisdiction. Chapman v. State, 16 T. Cr., 76, citing Mora v. State, 9 Id., 406.

See generally: Reddick v. State, 4 T. Cr. R., 22; Ex parte Fagg, 38 Id. 573, 44 S. W. R., 294; Ex parte Phillips, 33 Id., 126, 25 S. W. R., 629; Hefner v. State, 16 Id., 573; Blunt v. State, 9 Id., 234.

The common jurisdiction of a superior and an inferior court is a concurrent and not an inconsistent jurisdiction. Johnson v. Happell, 4 T., 96.

And see Ex parte Coombs, 38 T. Cr. R., 648, 44 S. W. R., 854; Crutchfield v. State, 1 Id., 445; Handley v. State, 16 Id., 444; Ex parte Wilson, 14 Id., 592; Chapman v. State, 16 Id. 76; Galloway v. State, 23 Id., 398, 5 S. W. R., 246.

Art. 99. [92] **Power to forfeit bail bonds.**—County courts shall have jurisdiction in the forfeiture and final judgment of all bonds and recognizances taken in criminal cases, of which criminal cases said courts have jurisdiction. [Act June 16, 1876, p. 18, § 3.]

Recognizance. An instrument in the form of a recognizance, unless taken in open court, is merely a bond, and is unauthorized and of no force to support appeal in a criminal case. Jones v. State, 1 T. Cr. R., 485.

Under the Revised Statutes, scire facias cases may be heard and determined at the civil term of the county court. Hart v. State, 13 T. Cr. R., 555; Houston v. State, Id., 558. See Hutchings v. State, 24 Id., 242, 6 S. W. R., 34.

To be authorized to forfeit a bail bond the court a quo must have had jurisdiction of the principal and the offense. McGee v. State, 11 T. Cr. R., 520.

Forfeiture against sureties without contemporaneous judgment against the principal is erroneous. Cox v. State, 34 T. Cr. R., 94, 29 S. W. R., 273, and cases cited. And same authorities to the effect that the scire facias must comprise the substantial requisites of both petition and citation, showing the character of the obligation, etc.

Distinction between appeal and bail bonds: See in extenso Johnson v. State, 32 T. Cr. R., 353, 22 S. W. R., 406, and cases cited.

Judgment final against all cognizors, without discontinuance or abatement as to those not served with scire facias, is void. Cox v. State, 34 T. Cr. R., 94, 29 S. W. R., 273. And see Ray v. State, 16 Id., 268; Thompson v. State, 17 Id., 318.

Death of the principal or his disqualifying sickness, exonerates sureties. Post, Art. 500; Blalock v. State, 3 T. Cr. R., 376; Price v. State, 4 Id., 73; Thompson v. State, 17 Id., 318; Markham v. State, 33 Id., 91, 25 S. W. R., 127.

Art. 100. [93] **Power to issue writs of habeas corpus.**—The county courts, or judges thereof, shall have the power to issue writs of habeas corpus in all cases in which the constitution has not conferred the power on the district courts or judges thereof; and, upon the return of such writ, may remand to custody, admit to bail or discharge the person imprisoned or detained, as the law and nature of the case may require. [Const., Art. 5, § 16; Act June 16, 1876, p. 19, § 5.]

Const., Art. V, Sec. 16; post, Arts. 160-224. And see Japan v. State, 36 T. Cr. R., 482, 38 S. W. R., 43, and cases cited; Ex parte Lynn, 19 Id., 120.

Art. 101. [94] **Appellate jurisdiction.**—The county courts shall have appellate jurisdiction in criminal cases of which justices of the peace and other inferior tribunals have original jurisdiction. [Const., Art. 5, § 16; Act June 16, 1876, p. 18, § 3.]

Art. 102. **County court of Dallas county at law, jurisdiction of defined.**—The county court of Dallas county at law shall have jurisdiction in all matters and causes, civil and criminal, original and appellate, over which, by the general laws of the state, the county court of said county would have jurisdiction, except as provided in article 102; and all cases other than probate matters, and such as are provided in article 102, be, and the same are hereby, transferred to the county court of Dallas county at law; and all writs and process, civil and criminal, heretofore issued by or out of said county court, other than pertaining to matters over which, by article 102, jurisdiction remains in the county court of Dallas county, be and the same are hereby made returnable to the county court of Dallas county at law. The jurisdiction of the county court of Dallas county at law, and of the judge thereof, shall extend to all matters of eminent domain, of which jurisdiction has been heretofore vested in the county court or in the county judge; but this provision shall not affect the jurisdiction of the commissioners' court, or of the county judge of Dallas county as the presiding officer of such commissioners' court, as to roads, bridges and public highways, and matters of eminent domain which are now within the jurisdiction of the commissioners' court or the judge thereof. [Act 1907, p. 115.]

Art. 103. **Jurisdiction retained by the county court of Dallas county.**—The county court of Dallas county shall retain, as heretofore, the general jurisdiction of a probate court; it shall probate wills, appoint guardians of minors, idiots, lunatics, person non compos mentis, and common drunkards, grant letters testamentary and of administration, settle accounts of executors, administrators and guardians, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the settlement, partition and distribution of estates of deceased persons, and to apprentice minors as provided by law; and the said court, or the judge thereof, shall have the power to issue writs of injunction, mandamus, and all writs necessary to the enforcement of the jurisdiction of said court; and also to punish contempts under such provisions as are or may be provided by general law governing county courts throughout the state; but said county court of Dallas county shall have no other jurisdiction, civil or criminal. The county judge of Dallas county shall be the judge of the county court of Dallas county. All ex officio duties of the county judge shall be exercised by the said judge of the county court of Dallas county, except in so far as the same shall, by this act, be committed to the judge of the county court of Dallas county at law. [Id., p. 115.]

Art. 104. **Power of the county court of Dallas county at law, of the judge thereof.**—The county court of Dallas county at law, or the judges thereof, shall have power to issue writs of injunction, mandamus, sequestration, attachment, garnishment, certiorari and supersedeas, and all writs necessary to

the enforcement of the jurisdiction of said court, and to issue writs of habeas corpus in cases where the offense charged is within the jurisdiction of said court, or of any other court or tribunal inferior to said court. [Id., p. 115.]

Art. 105. [95] **Appeal, etc., to district court, when.**—In all counties in which the civil and criminal jurisdiction, or either, of county courts has been transferred to the district courts, appeals and writs of certiorari may be prosecuted to remove a case tried before a justice of the peace to the district court in the same manner and under the same circumstances under which appeals and writs of certiorari are allowed by general law to remove causes to the county court. [Act April 21, 1879, p. 125.]

CHAPTER FIVE.

OF JUSTICES' AND OTHER INFERIOR COURTS.

	Article		Article
Original concurrent jurisdiction	106	Mayors' and other inferior courts	108
Power to forfeit bail bonds	107	May sit at any time to try causes	109

Article 106. [96] **Original concurrent jurisdiction.**—Justices of the peace shall have and exercise original concurrent jurisdiction with other courts in all cases arising under the criminal laws of this state in which the punishment is by fine only, and where the maximum of such fine may not exceed two hundred dollars, except in cases involving official misconduct. [Const., Art. 5, § 19; Act Aug. 17, 1876, p. 155, § 3.]

Const., Art. V, Sec. 19.

Limitation. No jurisdiction of misdemeanors punishable by imprisonment. Jacobs v. State, 35 T. Cr. R., 410, 34 S. W. R., 110, citing Tuttle v. State, 1 Id., 384.

Justice may imprison for non-payment of fine. Tuttle v. State, supra.

A penalty involving a fine not to exceed two hundred dollars limits the criminal jurisdiction of the justice of the peace. Ex parte Phillips, 33 T. Cr. R., 126, 25 S. W. R., 629.

His precinct bounds the ordinary jurisdiction of the justice of the peace, but as an examining court it extends over his country. Hart v. State, 15 T. Cr. R., 202; Kerry v. State, 17 Id., 178; Childers v. State, 30 Id., 160, 16 S. W. R., 903.

The legislature can not divest the justice court of jurisdiction and vest the same in city courts. Ex parte Coombs, 38 T. Cr. R., 648, 44 S. W. R., 854, and cases cited. But compare Corey v. State, 28 Id., 490, 13 S. W. R., 778; Harris county v. Stewart, 91 T., 133, 41 S. W. R., 650.

A city court has no jurisdiction to try violations of the Penal Code. Ballard v. Dallas, 44 S. W. R., 364, citing Ex parte Coombs, 38 T. Cr. R., 648, 44 S. W. R., 854; Ex parte Fagg, Id., 573, 44 S. W. R., 294, and cases cited.

Justice of the peace disqualified: Ex parte Ambrose, 32 T. Cr. R., 468, 24 S. W. R., 291; Tolliver v. State, Id., 444, 24 S. W. R., 286; Arrington v. State, 13 Id., 551.

Art. 107. [97] **Power to forfeit bail bonds.**—They shall also have the power to take forfeitures of all bail bonds given for the appearance of any parties at their courts, regardless of the amount, where the conditions of said bonds have not been complied with. [Act Aug. 17, 1876, p. 155, § 3.]

Art. 108. [98] **Mayors' and other inferior courts.**—Mayors and recorders of incorporated cities or towns shall have and exercise the same jurisdiction as justices of the peace within the limits of their respective corporations, and the provisions of this Code governing justices' courts shall apply to mayors' and recorders' courts. [O. C. 65.]

Post., Arts. 963, et seq.

Art. 109 [99] **May sit at any time to try causes.**—Justices of the peace, mayors and recorders may sit at any time to try criminal causes over which they have jurisdiction. [O. C. 65.]

Post., Art. 833; Ex parte Lee, 34 T. Cr. R., 511, 31 S. W. R., 667. And see Peacock v. State, 37 Id., 418, 35 S. W. R., 964.

TITLE 3.

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

Chapter
1. Of Preventing Offenses by the Act of a Private Person.
2. Of Preventing Offenses by the Act of Magistrates and Other Officers.
3. Proceedings before Magistrates for the Purpose of Preventing Offenses.
4. Of the Suppression of Riots, Unlawful Assemblies and Other Disturbances.
5. Of Suppression of Offenses Injurious to Public Health.
6. Of the Suppression of Obstructions of Public Highways.
7. Of the Suppression of Offenses Affecting Reputation.
8. Of the Suppression of Offenses Against Personal Liberty.
   1. Definition and Object of the Writ.
   2. By Whom and When Granted.
   3. Service and Return of the Writ and Proceedings Thereon.
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CHAPTER ONE.

OF PREVENTING OFFENSES BY THE ACT OF A PRIVATE PERSON.

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Rules as to prevention of by resistance... 111
Same subject..... 112
Resistance may be in proportion to, etc.. 113
Same subject..... 114
When other person, etc., may prevent.... 115
Same rules shall govern in such cases as, etc..... 116

Article 110. [100] **May be prevented, how.**—The commission of offenses may be prevented, either—

1. By lawful resistance; or,
2. By the intervention of the officers of the law.

Resistance to the offender may be made as hereinafter pointed out, either by the person about to be injured, or by the person in his behalf. [O. C. 66.]

Art. 111. [101] **Rules as to prevention of by resistance.**—Resistance by the party about to be injured may be used to prevent the commission of any offense which, in the Penal Code, is classed as an "offense against the person." [O. C. 67.]

Right of self-defense: See Penal Code, Art. 1105, and notes.

Defense of another: Penal Code, Arts. 1014, subd. 6, and notes, 1085, subd. 4, and notes, 1107, 1108 and 1109, and notes. And see Mundine v. State, 37 T. Cr. R., 5, 38 S. W. R., 619; Carter v. State, Id., 403, 35 S. W. R., 378; Russell v. State, Id., 314, 36 S. W. R., 1070.

Art. 112. [102] **Same subject.**—Resistance may also in like manner be made by the person about to be injured, to prevent any illegal attempt by force to take or injure property in his lawful possession. [O. C. 68.]

Defense of property. Penal Code, Art. 1110, subd. 4, and notes; Mundine v. State, 37 T. Cr. R., 5, 38 S. W. R., 619; McCray v. State, 38 Id., 609, 44 S. W. R., 170.

A "legal" possession of the property, without reference to "rightful" possession, is sufficient. Sims v. State, 36 T. Cr. R., 154, 36 S. W. R., 256; s. c., 38 Id., 637, 44 S. W. R., 522.

Art. 113. [103] **Resistance may be in proportion to, etc.**—The resistance which the person about to be injured may make to prevent the commission of

the offense must be proportioned to the injury about to be inflicted. It must be only such as is necessary to repel the aggression. [O. C. 69.]

Right of self-defense arises and ceases with the necessity. Lander v. State, 12 T., 462; Weaver v. State, 19 Id., 567; Hobbs v. State, 16 Id., 517.

Beyond the point of necessity, the self-defender will himself become the aggressor. Cotton v. State, 4 T., 260; Mundine v. State, 37 T. Cr. R., 5, 38 S. W. R., 619; Russel v. State, Id., 314, 36 S. W. R., 1070; Miers v. State, 34 Id., 161, 29 S. W. R., 1074; Miller v. State, 31 Id., 609, 21 S. W. R., 925.

"Reasonable force" is a question for the jury. Johnson v. State, 19 T. Cr. R., 545; Souther v. State, 18 Id., 545.

And on evidence, see Sims v. State, 38 T. Cr. R., 637, 44 S. W. R., 522; s. c., 36 Id., 152, 36 S. W. R., 256; Law v. State, 34 Id., 79, 29 S. W. R., 160; Penal Code, Art. 1094, subd. 9.

Art. 114 [104] **Same subject.**—If the person about to be injured, in respect either to his person or property, uses a greater amount of force to resist such injury than is necessary to repel the aggressor and protect his own person or property, he is himself guilty of an illegal act, according to the nature and degree of the force which he has used. [O. C. 70.]

Art. 115. [105] **When other person, etc., may prevent.**—Any person other than the party about to be injured may also, by the use of necessary means, prevent the commission of the offense. [O. C. 71.]

Art. 116. [106] **Same rules shall govern in such case, as, etc.**—The same rules which regulate the conduct of the person about to be injured, in repeling the aggression, are also applicable to the conduct of him who interferes in behalf of such person. He may use a degree of force proportioned to the injury about to be inflicted, and no greater. [O. C. 72.]

Defense of another. Homicide in defense of another is justifiable: 1, when deceased is in the act of murdering such other person; 2, when it reasonably appears that deceased is in the act of committing murder upon such other person; 3, where deceased would have been guilty of murder when in the act of killing upon an insufficient provocation, or his passion had not in fact been aroused by such provocation. Glover v. State, 33 T. Cr. R., 224, 26 S. W. R., 204; and see also Shumate v. State, 38 Id., 266, 42 S. W. R., 600; Mitchell v. State, Id., 170, 41 S. W. R., 816; McGrath v. State, 35 Id., 413, 34 S. W. R., 941.

Defense of another's property. To justify this defense, the peril must be not merely to the property, but to the person of the other involved in the assault, and then all reasonable means to avert killing must be resorted to. Horbach v. State, 43 T., 242; Weaver v. State, 19 T. Cr. R., 547; Ledbetter v. State, 26 Id., 22, 9 S. W. R., 60; Risby v. State, 17 Id., 517; Kendall v. State, 8 Id., 569.

CHAPTER TWO.

OF PREVENTING OFFENSES BY THE ACT OF MAGISTRATES AND OTHER OFFICERS.

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Same subject	119	Conduct of, etc., how regulated	123
May compel offender to give security	120		

Article 117. [107] **Duty of magistrate to prevent.**—It is the duty of every magistrate, when he may have heard, in any manner, that a threat has been made by one person to do some injury to the person or property of another, immediately to give notice to some peace officer, in order that such peace officer may use lawful means to prevent the injury. [O. C. 73.]

Art. 118. [108] **Same subject.**—Whenever, in the presence or within the observation of a magistrate, an attempt is made by one person to inflict an injury upon the person or property of another, it is his duty to use all lawful means to prevent the injury. This may be done, either by verbal order to a peace officer to interfere and prevent the injury, or by the issuance of an order of arrest against the offender, or by arresting the offender; for which purpose he may call upon all persons present to assist in making the arrest. [O. C. 74.]

Arrest under warrant, post, 257-262; arrest without warrant, post, Arts. 263-289.

Art. 119. [109] **Same subject.**—If, within the hearing of a magistrate, one person shall threaten to take the life of another, he shall issue a warrant for the arrest of the person making the threat, or, in case of emergency, he may himself immediately arrest such person. [O. C. 75.]

Post, Arts. 259-264, 265-267; and as to threats, Penal Code, Arts. 1442, 1446.

Art. 120. [110] **May compel offender to give security.**—When the person making such threat is brought before a magistrate, he may compel him to give security to keep the peace, or commit him to custody in the manner hereinafter provided. [O. C. 76.]

Art. 121. [111] **Duty of peace officer to prevent.**—It is the duty of every peace officer, when he may have been informed in any manner that a threat has been made by one person to do some injury to the person or property of another, to prevent the threatened injury, if within his power; and, in order to do this, he may call in aid any number of citizens in his county. He may take such measures as the person about to be injured might for the prevention of the offense. [O. C. 77.]

Peace officers: Ante, Art. 43, and notes; post, Art. 136.

Art. 122. [112] **Same subject.**—Whenever, in the presence of a peace officer, or within his view, one person is about to commit an offense against the person or property of another, it is his duty to prevent it; and, for this purpose, he may summon any number of the citizens of his county to his aid. He must use the amount of force necessary to prevent the commission of the offense, and no greater. [O. C. 92.]

Art. 123. [113] **Conduct of, etc., how regulated.**—The conduct of peace officers, in preventing offenses about to be committed in their presence, or within their view, is to be regulated by the same rules as are prescribed to the action of the person about to be injured. They may use all force necessary to repel the aggression. [O. C. 79.]

Penal Code, Arts. 1094-1101, and notes.

CHAPTER THREE.

PROCEEDINGS BEFORE MAGISTRATES FOR THE PURPOSE OF PREVENTING OFFENSES.

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May require bond of person charged with libel	133
Where defendant has committed a crime	134
Accused shall pay costs, when	135
May direct that person or property threatened shall be protected	136
Suit on bond	137
Same subject	138

Article 124. [114] **Magistrate shall issue warrant to prevent, when.**—Whenever a magistrate is informed upon oath that an offense is about to be committed against the person or property of the informant, or of another, or that any person has threatened to commit an offense, it is his duty immediately to issue a warrant for the arrest of the accused, that he may be brought before such magistrate, or before some other named in the warrant. [O. C. 80.]

Art. 125. [115] **Proceedings when accused is brought before a magistrate.**—When the person accused has been brought before the magistrate, he shall hear proof as to the accusation, and, if he be satisfied that there is just reason to apprehend that the offense was intended to be committed, or that the threat was seriously made, he shall make an order that the accused enter into bond in such sum as he may in his discretion require, conditioned that he will not commit such offense, and that he will keep the peace toward the person threatened or about to be injured, and toward all others for one year from the date of such bond. [O. C. 81.]

Art. 126. [116] **What shall be a sufficient peace bond.**—The bond provided for in the preceding article shall be sufficient if it be payable to the state of Texas, recite plainly the nature of the accusation against the defendant, be for some certain sum, and be signed by the defendant and his surety, and dated. No error of form shall vitiate such bond, and no error in the proceedings prior to the execution of the bond shall be available as a defense in an action thereupon. [O. C. 84.]

Art. 127. [117] **Oath required of surety, and bond to be filed.**—The officer taking such bond shall require the sureties of the defendant to make oath as to the value of their property in the manner pointed out with regard to recognizances and bail bonds; and such officer shall forthwith deposit such bond and oaths in the office of the clerk of the county court of the county where such bond is taken, to be filed and safely kept by said clerk in his office. [O. C. 90.]

Art. 128. [118] **Amount of bail, how fixed.**—Magistrates, in fixing the amount of such bonds, shall be governed by the pecuniary circumstances of the accused and the nature of the offense threatened or about to be committed. [O. C. 90.]

Art. 129. [119] **How surety may exonerate himself.**—A surety upon any such bond may, at any time before a breach thereof, exonerate himself from the obligations of the same by delivering to any magistrate of the county where such bond was taken the person of the defendant; and such magistrate shall in that case again require of the defendant bond, with other security in the same amount as the first bond; and the same proceeding shall be had as in the first instance, but the one year's time shall commence to run from the date of the first order. [O. C. 89.]

Art. 130. [120] **Defendant failing or refusing to give bond shall be committed.**—If the defendant fail or refuse to give bond, he shall be committed to the jail of the county, or if there be no jail, to the custody of the sheriff, for the period of one year from the date of the first order requiring such bond. [O. C. 82.]

Art. 131. [121] **Defendant shall be discharged, when.**—If the defendant has been committed for failing or refusing to give bond, he shall be discharged by the officer having him in custody, upon giving the required bond, or at the expiration of the time for which he has been committed. [O. C. 86.]

Art. 132. [122] **May discharge defendant, when.**—If the magistrate be of opinion from the evidence that there is no good reason to apprehend that the offense was intended or will be committed, or that no serious threat was made by the defendant, he shall discharge the person so accused, and may, in his discretion, tax the cost of the proceeding against the party making the complaint. [O. C. 85.]

Art. 133. [123] **May require bond of person charged with libel.**—If any person shall make oath, and shall convince the magistrate that he has good reason to believe that another is about to publish, sell or circulate, or is continuing to sell, publish or circulate any libel against him, or any such publication as is made an offense by the penal law of the state, the person accused of such intended publication may be required to enter into bond with security not to sell, publish or circulate such libelous publication, and the same proceedings be had as in the cases before enumerated in this chapter. [O. C. 95.]

Art. 134. [124] **When defendant has committed a crime.**—When, from the evidence before the magistrate, it appears that the defendant has committed an offense against the penal law, the same proceedings shall be had as in other cases where parties are charged with crime. [O. C. 91.]

Art. 135. [125] **Accused shall pay costs, when.**—In cases where accused parties are found subject to the charge, and required to give bond, the costs of the proceeding shall be adjudged against them. [O. C. 95.]

A magistrate can not, under this article, imprison a party to enforce collection of costs adjudged against him. Landa v. State, 45 S. W. R., 713.

Art. 136. [126] **May direct that person or property threatened shall be protected.**—When, from the nature of the case and the proof offered to the magistrate, it may appear necessary and proper, he shall have a right to order any peace officer to protect the person or property of any individual threatened; and such peace officer shall have the right to summon aid by requiring any number of citizens of his county to assist in giving the protection. [O. C. 92.]

Art. 137. [127] **Suit on bond.**—If the condition of a bond, such as is provided for in this chapter, be forfeited, it shall be sued upon in the name of "The State of Texas," in the court having jurisdiction of the amount thereof, and in the county where such bond was taken. The suit shall be instituted and prosecuted by the district or county attorney, and the full amount of such bond may be recovered against the principal and sureties. [O. C. 87.]

Art. 138. [128] **Same subject.**—Suits upon such bonds shall be commenced within two years from the breach of the same, and not thereafter, and shall be governed by the rules applicable to civil actions, except that the sureties may be sued without joining the principal. It shall only be necessary in order to entitle the state to recover to prove that the defendant did commit the offense which he bound himself not to commit or failed to keep the peace according to his undertaking. [O. C. 88.]

CHAPTER FOUR.

OF THE SUPPRESSION OF RIOTS, UNLAWFUL ASSEMBLIES AND OTHER DISTURBANCES.

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Article 139. [129] **Officer may require aid of citizens and military when he apprehends resistance.**—When any officer authorized to execute process is resisted, or when he has sufficient reason to believe that he will meet with resistance in executing the same, he may command as many of the citizens of his county as he may think proper; and the sheriff may call any military company in the county to aid him in overcoming the resistance, and, if necessary, in seizing and arresting the persons engaged in such resistance, so that they may be brought to trial. [O. C. 95.]

Ante, Arts. 45, 46.

Construed. A killing by a posse comitatus in a bona fide attempt to make an illegal arrest, may be a homicide of no higher degree than manslaughter. Carter v. State, 30 T. Cr. R., 551, 17 S. W. R., 1102.

A posse comitatus summoned by a de facto officer does not act upon his own peril in making an arrest because of the defective or the non-record of the officer's right to his office. Weatherford v. State, 31 T. Cr. R., 530, 21 S. W. R., 251.

Art. 140. [130] **Governor may order military to aid in executing process.**—If it be represented to the governor in such manner as to satisfy him that the power of the county is not sufficient to enable the sheriff to execute process, he may, on application, order any military company of volunteers or militia company from another county to aid in overcoming such resistance. [O. C. 98.]

Art. 141. [131] **Conduct of military in suppressing riots.**—Whenever, for the purpose of suppressing riots or unlawful assemblies, the aid of military or militia companies is called, they shall obey the orders of the civil officer who is engaged in suppressing the same. [O. C. 104.]

Const., Art. 1, Sec. 24.

Art. 142. [132] **Duty of magistrates and peace officers to suppress, etc.**—Whenever a number of persons are assembled together in such a manner as to constitute a riot, according to the penal law of the state, it is the duty of every magistrate or peace officer to cause such persons to disperse. This may either be done by commanding them to disperse or by arresting the persons engaged, if necessary, either with or without warrant. [O. C. 99.]

Riots. Penal Code, Arts. 265, 451-468; unlawful assemblies, Penal Code, Arts, 435-450.

Art. 143. [133] **Officer may call to his aid the power of the county.**—In order to enable the officer to disperse a riot, he may call to his aid the power of the county in the same manner as is provided where it is necessary for the execution of process. [O. C. 100.]

Art. 144. [134] **What means may be adopted to suppress.**—The officer engaged in suppressing a riot, and those who aid him, are authorized and

justified in adopting such measures as are necessary to suppress the riot, but are not authorized to use any greater degree of force than is requisite to accomplish that object. [O. C. 102.]

Ante, Art. 139, and also ante, Art. 122.

Art. 145. [135] **Unlawful assembly.**—All the articles of this chapter relating to the suppression of riots apply equally to an unlawful assembly and other unlawful disturbances, as defined by the Penal Code. [O. C. 103.]

Penal Code, Art. 266.

Unlawful assemblies, Penal Code, Arts. 435, et seq.; same to prevent election,

Art. 146. [136] **Suppression of riot, unlawful assembly, etc., at election.**—For the purpose of suppressing riots, unlawful assemblies and other disturbances at elections, any magistrate may appoint a sufficient number of special constables. Such appointments shall be made to each special constable, shall be in writing, dated and signed by the magistrate, and shall recite the purposes for which such appointment is made, and the length of time it is to continue; and, before the same is delivered to such special constable, he shall take an oath before the magistrate to suppress, by lawful means, all riots, unlawful assemblies and breaches of the peace of which he may receive information, and to act impartially between all parties and persons interested in the result of the election. [O. C. 106.]

Art. 147. [137] **Power of special constable in such cases.**—Special constables so appointed shall, during the time for which they are appointed, exercise the powers and perform the duties properly belonging to peace officers. [O. C. 117.]

Ante, Arts. 44, 45, 121, 122 and 123.

CHAPTER FIVE.

OF SUPPRESSION OF OFFENSES INJURIOUS TO PUBLIC HEALTH.

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Article 148. [138] **Court may restrain a person from carrying on a trade, etc.**—After an indictment or information has been presented against any person for carrying on a trade, business or occupation injurious to the health of those in the neighborhood, the court shall have power, on the application of any one interested, and after hearing proof both for and against the accused, to restrain the defendant, in such penalty as may be deemed proper, from carrying on such trade, business or occupation, or may make such order respecting the manner and place of carrying on the same as may be deemed advisable; and, if, upon trial, the defendant be convicted, the restraint shall be made perpetual, and the party shall be required to enter into bond, with security, not to continue such trade, business or occupation to the detriment of the health of such neighborhood, or of any other neighborhood within the county. [O. C. 108.]

Art. 149. [139] **Proceeding when party refuses to give bond.**—If the party refuses to give bond when required under the provisions of the preceding article, the court may either commit him to jail, or make an order requiring the sheriff to seize upon the implements of such trade, business or occupation, or the goods and property used in conducting such trade, business or occupation, and destroy the same. [O. C. 108.]

Art. 150. [140] **Requisites of bond.**—Such bond shall be payable to the state of Texas, in a reasonable amount to fixed by the court, conditioned that the defendant will not carry on such trade, business or occupation, naming the same, at such place, naming the place, or at any other place in the county, to the detriment of the health of the neighborhood. Said bond shall be signed by the defendant and his sureties and dated, and shall be approved by the court taking the same, and filed in such court. [O. C. 109.]

Art. 151. [141] **Suit upon bond.**—Any such bond, upon the breach thereof, may be sued upon by the district or county attorney, in the name of the state of Texas, in any court having jurisdiction of the amount thereof, within two years after such breach, and not afterwards; and such suits shall be governed by the same rules as civil actions. [O. C. 109.]

Art. 152. [142] **Same subject.**—It shall be sufficient proof of the breach of any such bond to show that the party continued, after executing the same, to carry on the trade, business or occupation which he bound himself to discontinue; and the full amount of such bond may be recovered of the defendant and his sureties. [O. C. 110.]

Art. 153. [143] **Unwholesome food, etc., may be seized and destroyed.**—After conviction for selling unwholesome food or liquor, or adulterated medicine, the court shall enter and issue an order to the sheriff, or other proper officer, to seize and destroy such as remains in the hands of the defendant, which order shall forthwith be executed. [O. C. 108.]

CHAPTER SIX.

OF THE SUPPRESSION OF OBSTRUCTIONS OF PUBLIC HIGHWAYS.

	Article		Article
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Article 154. [144] **Public highway shall not be obstructed, except, etc.**—Whenever any road, bridge, or the crossing of any stream is made, by the proper authority, a public highway, no person shall place an obstruction across such highway, or in any manner prevent the free use of the same by the public, except when expressly authorized by law. [O. C. 112.]

This article, carrying no penalty, is inoperative. Rankin v. State, 25 T. Cr. R., 699, 8 S. W. R., 932.

Art. 155. [145] **Order to remove obstructions, etc.**—After indictment or information presented against any person for violating the preceding article, any one, in behalf of the public, may apply to the county judge of the county in which such highway is situated; and, upon hearing proof, such judge, either in term time or in vacation, may issue his written order to the sheriff or other proper officer of the county, directing him to remove the obstruction; but, before the issuance of such order, the applicant therefor shall give bond with security in an amount to be fixed by the judge, to indemnify the accused, in case of his acquittal, for the loss he sustains. Such bond shall be approved by the county judge and filed among the papers in the cause. [O. C. 113.]

Art. 156. [146] **Suit upon bond of applicant.**—If the defendant in such indictment or information be acquitted after a trial upon the merits of the case, he may maintain a civil action against the applicant and his sureties upon such bond, and may recover the full amount of the bond, or such damages, less than the full amount thereof, as may be assessed by a jury; provided, he shows on the trial that the place was not in fact, at the time he placed the obstruction or impediment thereupon, a public highway established by proper authority, but was in fact his own property or in his lawful possession. [O. C. 114.]

Art. 157. [147] **No defect of form, etc.**—No mere defect of form shall vitiate any order or proceeding of the commissioners' court in establishing a highway. [O. C. 115.]

Penal Code, Art. 836 and notes.

Art. 158. [148] **When defendant is convicted, obstructions shall be removed at his costs.**—Upon the conviction of a defendant for obstructing the free use of any public highway, if such obstruction still exists, the court shall order the sheriff or other proper officer to forthwith remove the same at the costs of the defendant, which costs shall be taxed and collected as other costs in the case.

CHAPTER SEVEN.

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Article 159. [149] **On conviction for libel, court may order copies destroyed.**—On conviction for making, writing, printing, publishing, selling or circulating a libel, the court may, if it be shown that there are in the hands of defendant, or other person, copies of such libel intended for publication, sale or distribution, order all such copies to be seized by the sheriff, or other proper officer, and destroyed. [O. C. 116.]

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CHAPTER EIGHT.

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Article 160. [150] **Writ of habeas corpus.**—The writ of habeas corpus is the remedy to be used when any person is restrained of his liberty. [O. C. 117.]

As to constitutional law. The writ may be resorted to on testing the constitutionality of the law under which an accused is held, and not only after indictment but after conviction; and if the law be held unconstitutional the relator will be discharged, no matter what the status of the case. Ex parte Brown, 38 T. Cr. R., 295, 42 S. W. R., 554; Ex parte Mato, 19 Id., 112, overruling on this point Ex parte Parker, 5 Id., 579; Ex parte Rodriguez, 39 T., 705.

Habeas corpus is available in all cases for the enlargement of persons in any way illegally restrained of liberty, and for bail or reduction of excessive bail. Post, Arts. 184 and 224; Ex parte Wilson, 20 T. Cr. R., 498; Hernandez v. State, 4 Id., 425; Ex parte Snodgrass, 43 Id., 359, 65 S. W. R., 1061; Ex parte Foster, 44 Id., 423, 71 S. W. R., 593.

For the rule to determine whether or not an accused is bailable, see in extenso Ex parte Evers, 29 T. Cr. R., 539, 16 S. W. R., 343, and cases cited, the Smith case, 23 Id., 100, 5 S. W. R., 99, overruling Foster's case, 5 Id., 625; Ex parte Jones, 31 Id., 422, 20 S. W. R., 983; McConnell v. State, 13 Id., 390.

Habeas corpus is not available merely to revise irregularities. Ex parte Beeler, 41 T. Cr. R., 240, 53 S. W. R., 857.

Is available to challenge judgment and proceedings in a contempt case. Ex parte Duncan, 42 T. Cr. R., 661, 62 S. W. R., 758; Ex parte Snodgrass, 43 Id., 359, 65 S. W. R., 1061; Ex parte Foster, 44 Id., 423, 71 S. W. R., 793; Ex parte Ireland, 38 T., 351; Ex parte Degener, 30 T. Cr. R., 566, 17 S. W. R., 1111.

Bail once granted after indictment, is res adjudicata, and is final as to the State, and even the accused, unless he seeks to reduce the bail by appeal or otherwise. Ex parte Augustine, 33 T. Cr. R., 1, 23 S. W. R., 689.

A case being bailable the amount of bail must be fixed by the nature of the offense and the circumstances under which it was committed. Ex parte Campbell, 28 T. Cr. R., 376, 13 S. W. R., 141.

Proof in abortion failing to show a killing by express malice, bail should have been awarded. Ex parte Fatheree, 34 T. Cr. R., 594, 31 S. W. R., 403.

Habeas corpus available to review injustice on an examining trial. Butler v. State, 36 T. Cr. R., 483, 38 S. W. R., 787.

Available to one confined in the penitentiary on conviction under a void indictment. Ex parte Reynolds, 35 T. Cr. R., 437, 34 S. W. R., 120, and cases cited, and overruling Fuller's case, 19 Id., 241. And see Ex parte Swaim, 19 Id., 323.

Not available to test the sufficiency of a criminal complaint. Ex parte Cain, 56 T. Cr. R., 538, 120 S. W. R., 999, following Ex parte Cox, 53 Id., 240, 109 S. W. R., 369.

Nor to test the validity of an indictment, unless the same is void. Ex parte Wolf, 55 T. Cr. R., 231, 115 S. W. R., 1192.

Jurisdiction. Available as remedy against the judgment of a court without jurisdiction of the subject-matter, or when the court has exceeded its jurisdiction. Ex parte Tinsley, 37 T. Cr. R., 517, 40 S. W. R., 306; Ex parte Phillips, 33 Id., 126, 25 S. W. R., 629.

But it is only when the judgment is absolutely void for want of jurisdiction in the court that the writ can be resorted to after judgment. Ex parte Branch, 36 T. Cr. R., 384, 37 S. W. R., 421. And see Ex parte Dickenson, 30 Id., 448, 17 S. W. R., 1076.

Judgments. Available as remedy against a void judgment or any order of court, which, for any reason, is an absolute nullity. Ex parte Lake, 37 T. Cr. R., 656, 40 S. W. R., 727; Ex parte Ellis, Id., 539, 40 S. W. R., 275; Ex parte Tinsley, Id., 517, 40 S W. R., 306; Ex parte Reynolds, 35 Id., 437, 34 S. W. R., 120.

The writ attacking the validity of the judgment, the appellate court, notwithstanding the recitals of the judgment, may go behind it to ascertain whether the judgment is void, and whether or not it was rendered in term time. Ex parte Parker, 35 T. Cr. R., 12, 29 S. W. R., 480; Ex parte Juneman, 28 Id., 486, 13 S. W. R., 783.

Not available if the judgment is merely voidable. Ex parte Crawford, 36 T. Cr. R., 180, 36 S. W. R., 92; Ex parte White, 52 Id., 541, 107 S. W. R., 839.

When an accused has been denied, for an unreasonable time, his constitutional right of trial by due course of law, he may resort to habeas corpus. Rutherford v. State, 16 T. Cr. R., 649; compare Hernandez v. State, 4 Id., 425.

County convicts. Available to county convict claiming right to release from judgment. Ex parte Hunt, 28 T. Cr. R., 361, 13 S. W. R., 145; Ex parte Cox, 29 Id., 84, 14 S. W. R., 396; Ex parte Dampier, 24 Id., 561, 7 S. W. R., 330; Ex parte Clayton, 51 Id., 553, 103 S. W. R., 630.

Municipal ordinance. Available to test the validity of an ordinance of an incorporated city or town. Millican v. City Council, 54 T., 392; Ex parte Fagg, 38 T. Cr. R., 573, 44 S. W. R., 294; Ex parte Smith, 51 Id., 456, 102 S. W. R., 1124; Ex parte Robinson, 30 Id., 493, 17 S. W. R., 1057; Ex parte Ginnochio, Id., 584, 18 S. W. R., 82.

Local option law. Available to test validity of local option elections and laws. Ex parte Kramer, 19 T. Cr. R., 123; Ex parte Lynn, Id., 293; Ex parte Schilling, 38 Id., 287, 42 S. W. R., 553; Ex parte Williams, 35 Id., 75, 31 S. W. R., 653.

Extradition cases. The right of bail does not extend to extradition cases. Ex parte Erwin, 7 T. Cr. R., 288; and see Ex parte Lake, 37 Id., 656, 40 S. W. R., 727.

Writ of right, and should be denied only in cases that are clear. Ex parte Ainsworth, 27 T., 731.

Not available as appeal, writ of error, certiorari or supersedeas. Perry v. State, 41 T., 488; Ex parte Schwartz, 2 T. Cr. R., 74; Ex parte Dickerson, 30 Id., 448, 17 S. W. R., 1076, and cases cited.

Nor to discharge a prisoner on ground of former jeopardy. Ex parte Crofford, 39 T. Cr. R., 547, 47 S. W. R., 533.

Nor to invoke former acquittal or conviction. Perry v. State, 41 T., 488; Ex parte Rogers, 10 T. Cr. R., 655.

1. DEFINITION AND OBJECT OF THE WRIT.

Art. 161. [151] **What a writ of habeas corpus is, etc.**—A writ of habeas corpus is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint. [O. C. 118.]

Art. 162. [152] **To whom directed, etc.**—The writ, as all other process, runs in the name of "The State of Texas." It is to be addressed to a person having another under restraint, or in his custody, describing, as near as may be, the name of the office, if any, of the person to whom it is directed, and the name of the person said to be detained. It shall fix the time and place of return, and be signed by the judge or by the clerk, with his seal, where issued by a court. [O. C. 119.]

Art. 163. [153] **Not invalid for want of form.**—The writ of habeas corpus is not invalid, nor shall it be disobeyed for any want of form, if it substantially appear that it is issued by competent authority, and the writ sufficiently show the object and design of its issuance. [O. C. 120.]

Art. 164. [154] **Provisions relating to, how construed.**—Every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it. [O. C. 121.]

See Ex parte Degener, 30 T. Cr. R., 566, 17 S. W. R., 1111; Ex parte Trader, 24 Id., 393, 6 S. W. R., 533; Ex parte Kearby, 35 Id., 531, 34 S. W. R., 962.

2. BY WHOM AND WHEN GRANTED.

Art. 165. [155] **By whom writ may be granted.**—The court of appeals or either of the judges, the district courts or any judge thereof, the county courts or any judge thereof, have power to issue the writ of habeas corpus; and it is their duty, upon proper application, to grant the writ under the rules herein prescribed. [O. C. 122.]

Court of Criminal Appeals has, practically, unrestricted authority to inquire into the restraint of personal liberty. Cases cited, preceding article.

It has, however, the discretion to refuse to issue the writ in the first instance, and will do so when sufficient cause for not applying to the local court has not been shown. Ex parte Lynn, 19 T. Cr. R., 120; Ex parte Lambert, 37 Id., 435, 36 S. W. R., 81.

District courts have the power to issue the writ of habeas corpus in felony cases; and the power carries the jurisdiction to hear and determine the rights involved in the writ. Ex parte Angus, 28 T. Cr. R., 293, 12 S. W. R., 1099.

The writ should be denied when it is apparent that relator is not entitled to relief. Ex parte Ainsworth, 27 T., 731; Ex parte Branch, 37 T. Cr. R., 318, 39 S. W. R., 932.

But the denial of the writ by one judge does not conclude the relator, and he may apply to another. Ex parte Strong, 34 T. Cr. R., 309, 30 S. W. R., 666, citing Ex parte Ainsworth, supra.

Refusal to grant the writ is not a final judgment, and will not support appeal. Ex parte Aainsworth, supra; Ex parte Coopwood, 44 T., 467.

No appeal lies from the dismissal of the writ, which is tantamount to refusing it in the first instance. Ex parte Strong, 34 T. Cr. R., 309, 30 S. W. R., 666.

Art. 166. [156] **Before indictment, writ returnable, where, etc.**—Before indictment found, the writ may be made returnable to any county in the state. [O. C. 123.]

Art. 167. [157] **After indictment, returnable, where, etc.**—After indictment found, the writ must be made returnable in the county where the offense has been committed, on acount of which the applicant stands indicted. [O. C. 124.]

Venue. Writ sued out after indictment must be made returnable to the county where the offense is laid. Ex parte Ainsworth, 27 T., 731; Ex parte Trader, 24 T. Cr. R., 393, 6 S. W. R., 533.

The court to which venue is changed acquires plenary jurisdiction of the entire case, and is authorized to entertain an application for bail based upon article 625, post. However, a motion in the court below would suffice. Ex parte Walker, 3 T. Cr. R., 668. For case distinguished, see Ex parte Springfield, 28 Id., 27, 11 S. W. R., 667.

This article does not apply, when, by consent of relator, for the purpose of hearing the application for bail, the judges of the two district courts of the county exchanged. Ex parte Angus, 28 T. Cr. R., 293, 12 S. W. R., 1099.

Art. 168. [158] **When the applicant is charged with felony.**—In all cases where a person is confined on a charge of felony, and indictment has been found against him, he may apply to the judge of the district court for the district in which he is indicted; or, if there be no judge within the district, then to the judge of any district whose residence is nearest to the court house of the county in which the applicant is held in custody. [O. C. 125.]

After indictment. This article is but directory, and the writ can be awarded by the judge of another district, but must be made returnable for hearing in the county of the offense. Ex parte Trader, 24 T. Cr. R., 393, 6 S. W. R., 533; Ex parte Springfield, 28 Id., 27, 11 S. W. R., 677.

The party's right to the writ does not depend upon the legality or illegality of the original caption, but upon the legality or illegality of the accused's present detention. Ex parte Coupland, 26 T., 386.

Art 169. [159] **When the applicant is charged with misdemeanor.**—In all cases where a person is confined on a charge of misdemeanor, he may apply to the county judge of the county in which the misdemeanor is charged to have been committed, or, if there be no county judge in said county, then to the county judge whose residence is nearest to the court house of the county in which the applicant is held in custody.

Misdemeanor. In misdemeanors the application should, in the first instance, be made to the county judge of the county of the forum, or, if none, then to the nearest judge or court competent to grant the writ. Ex parte Lynn, 19 T. Cr. R., 120.

Art. 170. [160] **Proceedings under the writ.**—When application has been made to a judge under the circumstances set forth in the two preceding ar-

ticles, it shall be his duty to appoint a time when he will examine the cause of the applicant, and issue the writ returnable at that time, in the county where the offense is charged in the indictment or information to have been committed. He shall also specify some place in the county where he will hear the application. [O. C. 129.]

Art. 171. [161] **The time appointed for hearing.**—The time so appointed shall be the earliest day which the judge can devote to hearing the cause of the applicant, consistently with other duties. [O. C. 127.]

Art. 172. [162] **Who may present petition for relief.**—Either the party for whose relief the writ is intended, or any person for him, may present a petition to the proper authority for the purpose of obtaining relief. [O. C. 128.]

Art. 173. [163] **The word "applicant" refers to.**—The word "applicant," as used in this chapter, refers to the person for whose relief the writ is asked, though, as above provided, the petition may be signed and presented by any other person. [O. C. 129.]

Art. 174. [164] **Requisites of petition.**—The petition must state substantially—

1. That the person for whose benefit the application is made is illegally restrained in his liberty, and by whom—naming both parties, if their names are known, or, if unknown, designating and describing them.

2. When the party is confined or restrained by virtue of any writ, order or process, or under color of either, a copy shall be annexed to the petition, or it shall be stated that a copy can not be obtained.

3. When the confinement or restraint is not by virtue of any writ, order or process, the petition may state only that the party is illegally confined or restrained of his liberty.

4. There must be a prayer in the petition for the writ of habeas corpus.

5. Oath must be made that the allegations of the petition are true, according to the belief of the petitioner. [O. C. 130.]

Art. 175. [165] **The writ shall be granted without delay, unless, etc.**—The writ of habeas corpus shall be granted without delay by the judge or court receiving the petition, unless it be manifest by the statements of the petition itself, or some documents annexed to it, that the party is entitled to no relief whatever. [O. C. 131.]

Ante, Art. 165, and notes.

Art. 176. [166] **Writ may be issued without application.**—A judge of the district or county court who has knowledge that any person is illegally confined or restrained in his liberty within his district or county may, if the case be one within his jurisdiction, issue the writ of habeas corpus, without any application being made for the same. [O. C. 132.]

Art. 177. [167] **Judge may issue a warrant of arrest, when.**—Whenever it shall be made to appear, by satisfactory evidence, to a judge of the court of appeals, or a judge of the district or county court, that any one is held in illegal confinement or custody, and there is good reason to believe that he will be carried out of the state, or suffer some irreparable injury before he can obtain relief in the usual course of law, or whenever the writ of habeas corpus has been issued and disregarded, the said judges, or either of them, if the case be one in which they have power to grant the writ of habeas corpus, may issue a warrant to any peace officer, or to any person specially named by said judge, directing him to take and bring such person before such judge, to be dealt with according to law. [O. C. 133.]

Restraint. Not only actual custody, but any kind of illegal restraint that precludes absolute freedom of action entitles the relator to an application for the writ. Ex parte Snodgrass, 43 T. Cr. R., 359, 65 S. W. R., 1061.

The writ, though one of right, is not awardable as a matter of course, but before refusal, it should be made manifest that the relator is entitled to no relief whatever. Ex parte Ainsworth, 27 T., 731; post, Art. 160, and notes.

Extradition. A requisition from the governor of another state for the arrest of a fugitive from justice to this state is sufficient to authorize the governor of Texas to issue order of arrest, and, in such case, habeas corpus only is available to the prisoner to show that the presumption upon which the governor of Texas acted was unfounded in fact. Hibler v. State, 43 T., 197.

The warrant of arrest in this state should show on its face that it was issued on the requisition of the governor of the demanding state. And, quere, whether the warrant should not set out the information or indictment? Ex parte Thornton, 9 T., 636.

The validity of the indictment, as found in the demanding state, will not be inquired into by the trial or the appellate court. Ex parte Pearce, 32 T. Gr. R., 301, 23 S. W. R., 15.

Complaint on information and belief and not on personal knowledge is wholly insufficient to support a warrant of extradition, and relator should be discharged. Ex parte Rowland, 35 T. Cr. R., 108, 31 S. W. R., 651.

See in extenso on the essentials of an extradition warrant, Ex parte Stanley, 25 T. Cr. R., 372, 8 S. W. R., 645; Hobbs v. State, 32 Id., 312, 22 S. W. R., 1035.

Art. 178. [168] **The person having custody of the prisoner may be arrested, when.**—Where it appears by the proof offered, under circumstances mentioned in the preceding article, that the person charged with having illegal custody of the prisoner is, by such act, guilty of an offense against the law, the judge may, in the warrant, order that he be arrested and brought before him; and, upon examination, he may be committed, discharged, or held to bail, as the law and the nature of the case may require. [O. C. 134.]

Art. 179. [169] **Proceedings under the warrant.**—The officer charged with the execution of the warrant shall bring the persons therein mentioned before the judge or court issuing the same, who shall inquire into the cause of the imprisonment or restraint, and make an order thereon, as in cases of habeas corpus, according to the rules laid down in this chapter, either remanding into custody, discharging or admitting to bail the party so imprisoned or restrained. [O. C. 135.]

Return. In answer to the writ, the respondent must actually produce the body of the alleged restrained person, if in his custody or under his control, the only exception being that prescribed by post, Art. 191, of disqualifying sickness, in which case, the verity of such return will be critically inquired into. Ex parte Coupland, 26 T., 386.

Art. 180. [170] **Officer executing warrant may exercise same power, etc.**—The same power may be exercised by the officer executing the warant (and in like manner) in cases arising under the foregoing articles as is exercised in the execution of warrants of arrest according to the provisions of this Code. [O. C. 136.]

Post, Arts. 265, et seq., and notes.

Art. 181. [171] **The words "confined," "imprisoned," etc., refer to, etc.**—The words, "confined," "imprisoned," "in custody," "confinement," "imprisonment," refer, not only to the actual, corporeal and forcible detention of a person, but likewise to any and all coercive measures by threats, menaces or the fear of injury, whereby one person exercises a control over the person of another, and detains him within certain limits. [O. C. 137.]

"Imprisonment," etc., construed: Luckey v. State, 14 T., 400; Ex parte Wyatt, 29 T. Cr. R., 398, 16 S. W. R., 301; Ex parte Branch, 37 Id., 318, 39 S. W. R., 982; Ex parte Snodgrass, 43 Id., 359, 65 S. W. R., 1061; Ex parte Foster, 44 Id., 423, 71 S. W. R., 971.

Minor child. Habeas corpus to recover custody of a minor child is a civil and not a criminal proceeding, and pertains to the civil courts. Legate v. Legate, 87 T., 248, 28 S. W. R., 281; Telschek v. Fritsch, 38 T. Cr. R., 43, 40 S. W. R., 988, and cases cited.

Art 182. [172] **By restraint, is meant, etc.**—By "restraint," is meant the kind of control which one person exercises over another, not to confine him within certain limits, but to subject him to the general authority and power of the person claiming such right. [O. C. 138.]

Ex parte Snodgrass, 43 T. Cr. R., 359, 65 S. W. R., 1061; Ex parte Foster, 44 Id., 423, 71 S. W. R., 971.

Art. 183. [173] **The writ of habeas corpus is intended to be applicable, when.**—The writ of habeas corpus is intended to be applicable to all such cases of confinement and restraint, where there is no lawful right in the person exercising the power, or where, though the power in fact exists, it is exercised in a manner or degree not sanctioned by law. [O. C. 139.]

See, as cited under preceding articles: Ex parte Degener, 30 T. Cr. R., 566, 17 S. W. R., 1111; Ex parte Taylor, 34 Id., 591, 31 S. W. R., 641; Ex parte Coupland, 26 T., 386; McFarland v. Johnson, 27 Id., 105; Ex parte Kearby, 35 T. Cr. R., 531, 34 S. W. R., 635.

Art. 184. [174] **Person committed in default of bail is entitled to the writ, when.**—Where a person has been committed to custody for failing to enter into bond, he is entitled to the writ of habeas corpus, if it be stated in the petition that there was no sufficient cause for requiring bail, or that the bail required is excessive; and, if the proof sustains the petition, it will entitle the party to be discharged, or have the amount of the bail reduced, according to the facts of the case. [O. C. 141.]

Reduction of bail. To secure hearing, the petition should allege that the amount required is excessive. Ex parte Wilson, 20 T. Cr. R., 498; Hernandez v. State, 4 Id., 425; Ex parte Tittle, 37 Id., 597, 40 S. W. R., 598.

Art. 185. [175] **Person afflicted with disease may be removed, when.**—When a judge or court authorized to grant writs of habeas corpus shall be satisfied, upon investigation, that a person in legal custody is afflicted with a disease which will render a removal necessary for the preservation of life, an order may be made for the removal of the prisoner to some other place where his health will not be likely to suffer; or he may be admitted to bail, when it appears that any species of confinement will endanger his life. [O. C. 141.]

3. SERVICE AND RETURN OF THE WRIT, AND PROCEEDINGS THEREON.

Art. 186. [176] **Who may serve writ.**—The service of the writ may be made by any person competent to testify. [O. C. 143.]

Art. 187. [177] **How writ may be served and returned.**—The writ may be served by delivering a copy of the original to the person who is charged with having the party under restraint or in custody, and exhibiting the original, if demanded; if he refuse to receive it, he shall be informed verbally of the purport of the writ. If he refuses admittance to the person wishing to make the service, or conceals himself, a copy of the writ may be fixed upon some conspicuous part of the house where such person resides or conceals

himself, or of the place where the prisoner is confined; and the person serving the writ of habeas corpus shall, in all cases, state fully, in making the return, the manner and the time of the service of the writ. [O. C. 144.]

Art. 188. [178] **The return shall be under oath, if made by a person other than an officer.**—The return of a writ of habeas corpus, under the provisions of the preceding article, if made by any person other than an officer, shall be under oath. [O. C. 145.]

Art. 189. [179] **The person on whom the writ is served shall obey same, etc.**—The person on whom the writ of habeas corpus is served shall immediately obey the same, and make the return required by law upon the copy of the original writ served on him, and this, whether the writ be directed to him or not. [O. C. 146.]

Art. 190. [180] **How the returns shall be made.**—The return is made by stating in plain language upon the copy of the writ or some paper connected with it—

1. Whether it is true or not, according to the statement of the petition, that he has in his custody, or under his restraint, the person named or described in such petition.

2. By virtue of what authority, or for what cause, he took and detains such person.

3. If he had such person in his custody, or under restraint at any time before the service of the writ, and has transferred him to the custody of another, he shall state particularly to whom, at what time, for what reason or by what authority he made such transfer.

4. He shall annex to his return the writ or warrant by virtue of which he holds the person in custody, if any writ or warrant there be.

5. The return must be signed and sworn to by the person making it. [O. C. 147, 148.]

Art. 191. [181] **The person in custody shall be brought before the judge, etc.**—The person on whom the writ is served shall bring also before the judge the person in his custody, or under his restraint, unless it be made to appear that, by reason of sickness, he can not be removed; in which case, another day may be appointed by the judge or court for hearing the cause, and for the production of the person confined; or the application may be heard and decided without the production of the person detained, by the consent of his counsel. [O. C. 149.]

Art. 192. [182] **Custody of prisoner pending examination on habeas corpus.**—When the return of the writ has been made, and the applicant brought before the court, he is no longer detained on the original warrant or process, but under the authority of the habeas corpus; and the safe keeping of the prisoner, pending the examination or hearing, is entirely under the direction and authority of the judge or court issuing the writ, or to which the return is made. He may be bailed from day to day, or be remanded to the same jail whence he came, or to any other place of safe keeping under the control of the judge or court, till the case is finally determined.

The person of the relator being produced by the respondent, the court acquires absolute jurisdiction of the applicant; and the original cause of commitment is suspended until the case is disposed of. State v. Sparks, 27 T., 705; Ex parte Kearby, 35 T. Cr. R., 531, 34 S. W. R., 635; s. c., Id., 634, 33 S. W. R., 962.

Pending hearing of the writ, the court may bail the relator from day to day only. Pending appeal from judgment, the relator is not entitled to go at large. Ex parte Branch, 36 T. Cr. R., 384, 37 S. W. R., 421; s. c., 37 Id., 318, 39 S. W. R., 932.

Art. 193. [183] **The court shall allow reasonable time.**—The court or judge granting the writ of habeas corpus shall allow reasonable time for the production of the person detained in custody. [O. C. 150.]

Art. 194. [184] **Person having the illegal custody of another who refuses to obey the writ, etc., shall be punished, how.**—When service has been made upon a person charged with the illegal custody of another, if he refuses to obey the writ and make the return required by law, or, if he refuses to receive the writ, or conceals himself, the court or judge issuing the writ shall issue a warrant directed to any officer or other suitable person willing to execute the same, commanding him to arrest the person charged with the illegal custody or detention of another, and bring him before such court or judge; and, when such person shall have been arrested and brought before the court or judge, if he still refuses to return the writ, or do not produce the person in his custody, he shall be committed to prison, and remain there until he is willing to obey the writ of habeas corpus, and until he pays all the costs of the proceeding. [O. C. 151.]

Punishments for contempt. One being adjudged in contempt, can not be imprisoned until judgment finding the factum of the contempt has been entered, and a commitment issued. Ex parte Kennedy, 35 T. Cr. R., 531, 34 S. W. R., 635; Ex parte Robertson, 27 Id., 628, 11 S. W. R., 669.

Independent of the power to fine and imprison by commitment for contempt, the courts have the power to enforce their orders, and may require what is within their jurisdiction, and not beyond the power of the adjudged to perform. Ex parte Tinsley, 37 T. Cr. R., 517, 40 S. W. R., 306.

Interference with the officer charged with the execution of the order is an offense, irrespective of the intention of the party committing it, and a plea of ignorance is not admissible. State v. Sparks, 27 T., 705. And see Ex parte Lake, 37 T. Cr. R., 656, 40 S. W. R., 727.

Imprisonment for fine imposed for contempt is not imprisonment for debt. Ex parte Robertson, 27 T. Cr. R., 628, 11 S. W. R., 669; Dickson v. State, 2 T., 481.

Art. 195. [185] **Further penalty, etc., for disobeying writ.**—Any person disobeying the writ of habeas corpus shall also be liable to a civil action at the suit of the party detained, and shall pay in such suit fifty dollars for each day of illegal detention and restraint, after service of the writ, to be recovered in any court of competent jurisdiction; and it shall be deemed that a person has disobeyed the writ who detains a prisoner a longer time than three days after service thereof, and one additional day for every twenty miles he must necessarily travel in carrying the person held from the place of his detention to the place where the application is to be heard, unless where further time is allowed in the writ for making the return thereto. [O. C. 152.]

Art. 196. [186] **Applicant for writ may be brought before court.**—In case of the disobedience of the writ of habeas corpus, the person for whose relief it is intended may also be brought before the court or judge having competent authority, by an order for that purpose, issued to any peace officer or other proper person specially named. [O. C. 153.]

Art. 197. [187] **Death, etc., of applicant sufficient return of writ.**—It is a sufficient return of the writ of habeas corpus that the person, once detained, has died or escaped, or that by some superior force he has been taken from the custody of the person making the return; but where any such cause shall be assigned for not producing the applicant, the court or judge shall proceed to hear testimony; and the facts so stated in the return shall be proved by satisfactory evidence. [O. C. 154.]

Art. 198. [188] **Proceedings when a prisoner dies.**—When a prisoner confined in jail, or who is in legal custody, shall die, the officer having charge of him shall forthwith report the same to a justice of the peace of the county, who shall hold an inquest to ascertain the cause of his death, which may be done by calling any number of physicians and surgeons. All the proceedings had in such cases shall be reduced to writing, certified and returned

as in other cases of inquest; a certified copy of which proceedings shall be sufficient proof of the death of the prisoner at the hearing of an application under habeas corpus. [O. C. 158.]

Art. 199. [189] **Who shall represent the state in habeas corpus cases.**—In felony cases, it shall be the duty of the district attorney of the district where the case is pending, if there be one and he be present, to represent the state in the proceeding by habeas corpus. If no district attorney be present, the county attorney, if present, shall represent the state; if neither of said officers be present, the court or judge may appoint some well qualified practicing attorney to represent the state, who shall be paid the same fee as is allowed district attorneys for like services. [O. C. 156.]

Art. 200. [190] **Prisoner shall be discharged, when.**—The judge or court before whom a person is brought by writ of habeas corpus shall examine the writ and the papers attached to it; and, if no legal cause be shown for the imprisonment or restraint, or, if it appear that the imprisonment or restraint, though at first legal, can not for any cause be lawfully prolonged, the applicant shall be discharged. [O. C. 157.]

Art. 201. [191] **Where party is indicted for capital offense.**—If it appear by the return and papers attached that the party stands indicted for a capital offense, the judge or court having jurisdiction of the case shall, nevertheless, proceed to hear such testimony as may be offered on the part, both of the applicant and the state, and may either remand the defendant or admit him to bail, as the law and the facts of the case may justify. [O. C. 158.]

Right to bail. For rule to determine relator's right to bail, see Ex parte Evers, 29 T. Cr. R., 539, 16 S. W. R., 343. And see Miller v. State, 41 T., 213.

Art. 202. [192] **When court has no jurisdiction.**—If it appear by the return and papers attached that the case is one over which the judge or court has no jurisdiction, such court or judge shall at once remand the applicant to the person from whose custody he has been taken.

Ante, Art. 160 and notes.

District judge may grant and hear a writ of habeas corpus, notwithstanding an indictment is pending in the county court for the offense. Ex parte Strong, 34 T. Cr. R., 309, 30 S. W. R., 666.

Art. 203. [193] **Where no indictment has been found, etc.**—In all cases where no indictment has been found, it shall not be deemed that any presumption of guilt has arisen from the mere fact that a criminal accusation has been made before a competent authority. [O. C. 159.]

Presumption. As a matter of fact, presumption of guilt can not arise upon an indictment. Ex parte Newman, 38 T. Cr. R., 164, 41 S. W. R., 628.

Art. 204. [194] **Action of court upon examination.**—The judge or court, after having examined the return and all documents attached, and heard the testimony offered on both sides, shall, according to the facts and circumstances of the case, proceed either to remand the party into custody, admit him to bail or discharge him; provided, that no defendant shall be discharged after indictment without bail. [O. C. 160.]

Practice. The judge proceeds without the intervention of a jury and determines both law and fact, whether in chambers or in open court. McFarland v. Johnson, 27 T., 105.

Art. 205. [195] **If the commitment be informal or void, etc.**—If it shall appear that the applicant is detained or held under a warrant of commitment which is informal, or void; yet, if from the document on which the

warrant was based, or from the proof on the hearing of the habeas corpus, it appears that there is probable cause to believe that an offense has been committed by the prisoner, he shall not be discharged, but shall be committed or held to bail by the court or judge trying the application under habeas corpus. [O. C. 161.]

Complaint. Merely that the complaint on which he was arrested was defective, will not entitle a relator to discharge. Ex parte Beverly, 34 T. Cr. R., 644, 31 S. W. R., 651. But compare Ex parte Rowland, 35 Id., 108, 31 S. W. R., 651.

Art. 206. [196] **If there be probable cause to believe an offense has been committed.**—Where, upon an examination under habeas corpus, it shall appear to the court or judge that there is probable cause to believe that an offense has been committed by the prisoner, he shall not be discharged, but shall be committed or admitted to bail, according to the facts and circumstances of the case. [O. C. 162.]

Practice. Though the indictment be invalid, if the facts established sustain the charge, the court will not discharge the relator, but will bail him to the next term of the district court to answer any indictment that may be returned against him. Ex parte Swain, 19 T. Cr. R., 323; Ex parte Welck, 25 Id., 168, 7 S. W. R., 665.

Art. 207. [197] **The court may summon the magistrate who issued the warrant.**—For the purpose of ascertaining the grounds on which an informal or void warrant has been issued, the judge or court may cause to be summoned the magistrate who issued the warrant, and may, by an order, require him to bring with him all the papers and proceedings touching the matter. The attendance of such magistrate and the production of such papers may be enforced by warrant of arrest, if necessary. [O. C. 163.]

Art. 208. [198] **A written issue in case under habeas corpus not necessary.**—It shall not be necessary, on the trial of any cause arising under habeas corpus, to make up a written issue, though it may be done by the applicant for the writ. He may except to the sufficiency of, or controvert the return of any part thereof, or allege any new matter in avoidance. If written denial on his part be not made, it shall be considered, for the purpose of investigation, that the statements of said return are contested by a denial of the same; and the proof shall be heard accordingly, both for and against the applicant for relief. [O. C. 164.]

Art. 209. [199] **The applicant shall open and conclude the argument.**—The applicant shall have the right to open and conclude, by himself or counsel, the argument upon the trial under habeas corpus. [O. C. 165.]

Burden of proof is on the state, and this rule is not affected by the fact that the relator has the opening and conclusion of argument. Ex parte Newman, 38 T. Cr. R., 164, 41 S. W. R., 628, overruling on this point Smith v. State, 23 Id., 100, 5 S. W. R., 99.

Art. 210. [200] **Costs of the proceedings, how disposed of.**—The court or judge trying the cause under habeas corpus may make such order as is deemed advisable or right concerning the cost of bringing the defendant before him, and all other costs of the proceeding, awarding the same either against the person to whom the writ was directed, the person seeking relief, or may award no costs at all. [O. C. 166.]

Art. 211. [201] **If the court be in session, the clerk shall record the proceedings.**—If a writ of habeas corpus be made returnable before a court in session, all the proceedings had shall be entered of record by the clerk thereof, as would be done in any other case pending in such court; and, when the application is heard out of the county where the offense was committed, or in the court of appeals, the clerk shall transmit a certified copy

of all the proceedings upon the application to the clerk of the court which has jurisdiction of the offense. [O. C. 167.]

Statement of facts, to be available on appeal, must be authenticated as in other criminal cases. Ex parte Williams, 39 T. Cr. R., 524, 47 S. W. R., 365; Ex parte Calvin, 40 Id., 84, 48 S. W. R., 518. And see also Ex parte Malone, 35 Id., 297, 31 S. W. R., 665; Ex parte Overstreet, 39 Id., 468, 46 S. W. R., 929.

Art. 212. [202] **If the proceedings be had before a judge in vacation, etc.**—If the return is made and the proceedings had before a judge of a court in vacation, he shall cause all of the proceedings to be written, shall certify to the same, and cause them to be filed with the clerk of the court which has jurisdiction of the offense, whose duty it shall be to keep them safely. [O. C. 168.]

Art. 213. [203] **Provisions of the two preceding articles refer to, etc.**—The provisions of the two preceding articles refer only to cases where an applicant is held under accusation for some offense; in all other cases the proceedings had before the judge shall be filed and kept by the clerk of the court hearing the case. [O. C. 169.]

Art. 214. [204] **Court may grant all necessary orders, etc.**—The court or judge granting a writ of habeas corpus may grant all necessary orders to bring before him the testimony taken before the examining court, and may issue all process for enforcing the attendance of witnesses which is allowed in any other proceedings in a criminal action. [O. C. 171.]

Ex parte Ambrose, 32 T. Cr. R., 468, 24 S. W. R., 291.

Art. 215. [205] **Meaning of "return."**—The word "return," as used in this chapter, refers to and means the report made by the officer or person charged with serving the writ of habeas corpus, and also the answer made by the person served with such writ.

4. GENERAL PROVISIONS.

Art. 216. [206] **A person discharged before the indictment shall not be again imprisoned, unless, etc.**—Where a person, before indictment found against him, has been discharged or held to bail on habeas corpus by order of a court or judge of competent jurisdiction, he shall not be again imprisoned or detained in custody on an accusation for the same offense, until after he shall have been indicted, unless delivered up by his bail in order to release themselves from their liability. [O. C. 172.]

Contempt. Re-arrest of one discharged by the district judge under habeas corpus because of non-indictment by grand jury to which he was held, constitutes contempt. Ex parte Haubelt, 57 T. Cr. R., 512, 123 S. W. R., 607.

Art. 217. [207] **A person once discharged, or admitted to bail, may be committed, when.**—Where a person once discharged or admitted to bail is afterward indicted for the same offense for which he has been once arrested, he may be committed on the indictment, but shall be again entitled to the writ of habeas corpus, and may, notwithstanding the indictment, be admitted to bail, if the facts of the case render it proper; but in cases where, after indictment is found, the cause of the defendant has been investigated on habeas corpus, and an order made, either remanding him to custody, or admitting him to bail, he shall neither be subject to be again placed in custody, unless when surrendered by his bail, or when the trial of his cause commences before a petit jury, nor shall he be again entitled to the writ of habeas corpus, except in the special cases mentioned in articles 185 and 219. [O. C. 173.]

Construed. An accused who, prior to indictment, has been awarded the writ, is, nevertheless, entitled to a second writ after indictment, and to bail, if the facts in proof warrant it; but the original proceedings, being had after indictment, the second writ is available only in the special circumstances covered by Arts. 185, ante, and 219, post. Ex parte Wilson, 20 T. Cr. R., 498.

The dismissal of the indictment under which bail was awarded entitles the accused to bail ipso facto. Ex parte Augustine, 33 T. Cr. R., 1, 23 S. W. R., 689.

Reversal of conviction on appeal entitles the accused to go at large on his original bail bond. Ex parte Guffee, 8 T. Cr. R., 409.

Art. 218. [208] **A person committed for a capital offense shall not be entitled to the writ, unless, etc.**—If the accusation against the defendant for a capital offense has been heard on habeas corpus before indictment found, and he shall have been committed after such examination, he shall not be entitled to the writ, unless in the special cases mentioned in articles 185 and 219. [O. C. 174.]

Art. 219. [209] **A party may obtain the writ a second time, when, etc.**—A party may obtain the writ of habeas corpus a second time by stating in application therefor that, since the hearing of his first application, important testimony has been obtained which it was not in his power to produce at the former hearing. He shall also set forth the testimony so newly discovered; and, if it be that of a witness, the affidavit of the witness shall also accompany such second application. [O. C. 175.]

Second application. The right of second application applies in two classes of cases: 1. When the applicant has obtained important evidence which, though not newly discovered, was out of his power to produce on the first hearing. 2. When the evidence is newly discovered, and, in such cases, the application must conform to all the rules governing applications for new trial based on newly discovered evidence. Ex parte Rosson, 24 T. Cr. R., 226, 5 S. W. R., 666; Ex parte Foster, 5 Id., 625.

Having failed to prosecute his first application, relator is not entitled to a second not based on newly discovered evidence. Hibler v. State, 43 T., 197.

Though the decision of the appellate court on habeas corpus is final, it will not preclude the district court from later entertaining a motion to reduce bail. Miller v. State, 43 T., 579.

Art. 220. [210] **Officer refusing to execute writ, etc., shall be punished, etc.**—Any officer to whom a writ of habeas corpus, or other writ, warrant or process authorized by this chapter shall be directed, delivered or tendered, who shall refuse to execute the same according to his directions, or who shall wantonly delay the service or execution of the same, is guilty of an offense, and shall be punished according to the provisions of the Penal Code; he shall also be liable to fine as for contempt of court. [O. C. 178.]

Penal Code, Art. 388.

Art. 221. [211] **Any one having the custody of another who refuses to obey the writ, etc., shall be punished, how.**—Any one having another in his custody, or under his power, control or restraint who refuses to obey a writ of habeas corpus, or who evades the service of the same, or places the person illegally detained under the control of another, removes him, or in any other manner attempts to evade the operation of the writ, is guilty of a penal offense, and shall be punished as provided in the Penal Code, and shall also be dealt with as provided in article 193 of this Code. [O. C. 178.]

Ante, arts. 194 and 195, and notes.

Art. 222. [212] **Any jailer, etc., who refuses to furnish a copy of process under, etc.**—Any jailer, sheriff or other officer who has a prisoner in his

custody and refuses, upon demand, to furnish a copy of the process under which he holds the person, is guilty of an offense. [O. C. 179.]

Art. 223. [213] **Persons shall not be discharged under writ of habeas corpus, when.**—No person shall be discharged under the writ of habeas corpus who is in custody by virtue of a commitment for any offense exclusively cognizable by the courts of the United States, or by order or process issuing out of such courts in cases where they have jurisdiction, or who is held by virtue of any legal engagement or enlistment in the army, or who, being rightfully subject to the rules and articles of war, is confined by any one legally acting under the authority thereof, or who is held as a prisoner of war under the authority of the United States. [O. C. 180.]

Art. 224. [214] **This chapter applies to what cases.**—This chapter applies to all cases of habeas corpus for the enlargement of persons illegally held in custody, or in any manner restrained of their personal liberty, for the admission of prisoners to bail, and for the discharge of prisoners before indictment, upon a hearing of the testimony. Instead of the writ of habeas corpus in other cases where heretofore used, a simple order shall be substituted. [O. C. 181.]

Practice when writ is invoked against other than illegal restraint. See McFarland v. Johnson, 27 T., 105.

District judges now have the power to issue the writ in all cases. **Ex parte** Strong, 34 T. Cr. R., 309, 30 S. W. R., 666.

Rules on appeal: See post, Arts. 950-959, inclusive.

TITLE 4.

THE TIME AND PLACE OF COMMENCING AND PROSECUTING CRIMINAL ACTIONS.

Chapter
1. The Time Within Which Criminal Actions May Be Commenced.
Chapter
2. Of the County Within Which Offenses May Be Prosecuted.

CHAPTER ONE.

THE TIME WITHIN WHICH CRIMINAL ACTIONS MAY BE COMMENCED.

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Article 225. [215] **For treason and forgery.**—An indictment for treason may be presented within twenty years, and for forgery or the uttering, using or passing of forged instruments, within ten years from the time of the commission of the offense, and not afterward. [O. C. 182.]

Art. 226. [216] **For rape, one year.**—An indictment for the offense of rape may be presented within one year, and not afterward. [O. C. 184.]

Limitation applies only when the indictment has not been returned within the period prescribed. Indictment for rape must be presented within one year from the date of the offense. Carr v. State, 36 T. Cr. R., 390, 37 S. W. R., 426.

Assault to rape. Period of limitation in assault to rape is three years. Moore v. State, 20 T. Cr. R., 275.

Art. 227. [217] **For theft, etc., five years.**—An indictment for theft punishable as a felony, arson, burglary, robbery and counterfeiting may be presented within five years, and not afterward. [O. C. 183.]

Felony theft, arson, burglary, robbery and counterfeiting, the period of limitation is five years. Wimberly v. State, 22 T. Cr. R., 506, 3 S. W. R., 717; Wolfe v. State, 25 Id., 698, 9 S. W. R., 44.

Art. 228. [218] **Other felonies.**—An indictment for all other felonies may be presented within three years from the commission of the offense, and not afterward; except murder, for which an indictment may be presented at any time. [O. C. 185.]

Other felonies three years, except murder, for which indictment may be presented at any time.

Manslaughter can not be sustained under an indictment for murder returned after three years subsequent to the homicide. White v. State, 4 T. Cr. R., 488; Temple v. State, 15 Id., 304.

And so, it seems, to authorize a conviction of a lower grade of offense under an indictment for murder, that indictment must have been presented within the limitation of the lower offense, assault to murder, for instance. Moore v. State, 20 T. Cr. R., 275.

Same. Though an indictment for murder is never barred yet it should show that death occurred within a year and a day after the injury. Strickland v. State, 19 T. Cr. R., 518; Cudd v. State, 28 Id., 124, 12 S. W. R., 1010.

Art. 229. [219] **Misdemeanors, two years.**—For all misdemeanors, an indictment or information may be presented within two years from the commission of the offense, and not afteward. [O. C. 186.]

Misdemeanors are barred in two years. Negligent homicide is a misdemeanor. Whitaker v. State, 12 T. Cr. R., 436.

Adultery is barred in two years. Mitten v. State, 24 T. Cr. R., 346, 6 S. W. R., 196.

In adultery the period of limitation runs from the commission of the offense and the filing of the complaint, and not from the subsequent filing of the information. Proctor v. State, 37 T. Cr. R., 366, 35 S. W. R., 172.

Unlawful sale of liquors. Two years is the limitation period for the offense of selling liquors without an occupation license. Monford v. State, 35 T. Cr. R., 237, 33 S. W. R., 351.

Art. 230. [220] **Days to be excluded from computation of time.**—The day on which the offense was committed and the day on which the indictment or information is presented shall be excluded from the computation of time.

Art. 231. [221] **Absence from the state not computed.**—The time during which a person accused of an offense is absent from the state shall not be computed in the period of limitation. [O. C. 187.]

Limitation is suspended during the time a defendant is in the penitentiary under conviction for crime. Carr v. State, 36 T. Cr. R., 390, 37 S. W. R., 426.

Art. 232. [222] **An indictment is "presented," when.**—An indictment is to be considered as "presented," when it has been duly acted upon by the grand jury and received by the court. [O. C. 188.]

See Rather v. State, 25 T. Cr. R., 623, 9 S. W. R., 69; Rowlett v. State, 23 Id., 191, 4 S. W. R., 582; De Olles v. State, 20 Id., 145.

Art. 233. [223] **An information is "presented," when.**—An information is to be considered as "presented" when it has been filed by the proper officer in the proper court. [O. C. 189.]

Construed. Statutes of limitation are to be construed liberally in favor of accused. White v. State, 4 T. Cr. R., 488.

Such statutes are without retrospective operation. Martin v. State, 24 T., 61.

An offense being barred when the Code took effect the extension of the period of such offenses would not revive the cause of action in the state. State v. Sneed, 25 T. Supp., 66.

Practice. Defendant need not plead the statute; the state must show the offense within the period. White v. State, 4 T. Cr. R., 488; Temple v. State, 15 Id., 304; Shoefercater v. State, 5 Id., 207; Lucas v. State, 27 Id., 322, 11 S. W. R., 443.

CHAPTER TWO.

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Article 234. [224] **For offenses committed wholly or in part without the state.**—Prosecutions for offenses committed wholly or in part without, and made punishable by law within, this state, may be commenced and carried on in any county in which the offender is found. [O. C. 190.]

Penal Code, Arts. 966 and 967, and notes.

Removing mortgaged property. The venue for fraudulently removing mortgaged property is in the county where the mortgage was executed and the property situated. Williams v. State, 27 T. Cr. R., 258, 11 S. W. R., 114.

Introducing stolen property. The venue in this offense is the county in this state in which the accused is found. McKenzie v. State, 32 T. Cr. R., 568, 25 S. W. R., 426.

Art. 235. [225] **Forgery and uttering forged papers may be prosecuted where.**—The offense of forgery may be prosecuted in any county where the written instrument was forged, or where the same was used or passed, or attempted to be used or passed; all forgeries and uttering, using or passing, of forged instruments in writing, which concern or affect the title to land in this state, may also be prosecuted in the county in which the seat of government is located, or in the county in which the land, or a part thereof concerning or affecting the title to which the forgery has been committed, is situated. [O. C. 190a.]

Penal Code, Arts. 966 and 967, and notes.

Forgery and uttering. Venue is in any county in which the instrument was forged (or fraudulently altered) or used or passed, or attempted to be passed or used. Mason v. State, 32 T. Cr. R., 195, 22 S. W. R., 144; Hocker v. State, 34 Id., 359, 30 S. W. R., 783.

The original forger, who has parted with the forged instrument, can not be prosecuted for the forgery in another county in which a subsequent holder passed it. Thulemeyer v. State, 34 T. Cr. R., 619, 31 S. W. R., 659.

Art. 236. [226] **Counterfeiting, where.**—The offense of counterfeiting may be prosecuted in any county where the offense was committed, or where the counterfeit coin was passed, or attempted to be passed. [O. C. 207.]

Penal Code, Art. 973.

Jurisdiction. Our state courts have jurisdiction to prosecute for the counterfeiting of the coins and currency of the United States. Martin v. State, 18 T. Cr. R., 224.

Art. 237. [227] **Perjury and false swearing, where.**—The offense of perjury and false swearing may be prosecuted in the county where committed, or in the county where the false statement is used or attempted to be used. [O. C. 190a.]

As to perjury: Penal Code, Arts. 304, et seq., and notes; as to false swearing, Penal Code, Arts. 312, et seq., and notes.

Art. 238. [228] **Offenses committed on the boundary of two counties.**—An offense committed on the boundary of any two counties, or within four hundred yards thereof, may be prosecuted and punished in either county; and the indictment or information may allege the offense to have been committed in the county where it is prosecuted. [O. C. 191.]

Post, Art. 244.

Venue. Indictment. Though the accused, committing the offense in an unorganized county, is properly prosecuted in the organized county to which the unorganized county is attached for judicial purposes, yet, the state is not absolved from charging that the offense was committed in the unorganized county so attached for judicial purposes. Chivarrio v. State, 15 T. Cr. R., 330.

An offense committed within 400 yards of a county boundary line may be alleged and prosecuted in either of the contiguous counties. Willis v. State, 10 T. Cr. R., 493; Chivarria v. State, supra; Abrigo v. State, 29 Id., 143, 15 S. W. R., 408. And see Cox v. State, 41 T., 1; Cameron v. State, 9 T. Cr. R., 332; McElroy v. State, 53 Id., 57, 111 S. W. R., 948.

Art. 239. [229] **Person dying out of the state of an injury inflicted in the state, etc.**—If any person, being at the time within this state, shall inflict upon another, also within this state, an injury of which such person afterward dies without the limits of this state, the person so offending shall be liable to prosecution in the county where the injury was inflicted. [O. C. 192.]

Art. 240. [230] **Person within the state inflicting injury on another out of the state, where prosecuted.**—If a person, being at the time within this state, shall inflict upon another out of this state, an injury, by reason of which, the injured person dies without the limits of this state, he may be prosecuted in the county where he was when the injury was inflicted. [O. C. 193.]

Art. 241. [231] **Person without the state inflicting an injury on one within the state, where prosecuted.**—If a person, being at the time without the limits of this state, shall inflict upon another who is at the time within this state, an injury causing death, he may be prosecuted in the county where the person injured dies. [O. C. 194.]

Art. 242. [232] **An offense committed on a stream, the boundary of this state, where prosecuted.**—If an offense be committed upon any river or stream, the boundary of this state, it may be prosecuted in the county the boundary of which is upon such stream or river, and the county seat of which is nearest the place where the offense was committed. [O. C. 195.]

Art. 243. [233] **Person receiving an injury in one county and dying in another, offender, where prosecuted.**—If a person receive an injury in one county and dies in another by reason of such injury, the offender may be prosecuted in the county where the injury was received, or where the death occurred. [O. C. 196.]

Principle and accomplice. The acts constituting the accused an accomplice were all committed in one county, but the actual crime, murder, was committed by the

principal in another county. Held, that the latter county had jurisdiction to try the accomplice. Carlisle v. State, 31 T. Cr. R., 537, 21 S. W. R., 358.

Abortion. The means of producing an abortion were applied in one county, but the miscarriage occurred in another. Held, that the venue was in the latter county. Moore v. State, 37 T. Cr. R., 552, 40 S. W. R., 287.

Art. 244. [234] **An offense committed on a stream, etc., the boundary between two counties, punishable, where.**—Where a river or other stream or highway is the boundary between two counties, any offense committd on such river, stream or highway at a place where it is such boundary, is punishable in either county; and it may be alleged in the indictment or information that the offense was committed in the county where it is prosecuted. [O. C. 197.]

Boundaries as affected by changes in channel of a stream: See Collins v. State, 3 T. Cr. R., 323.

The boundary line between a "wet" and a "dry" county traversed a town. Prosecuted for selling liquor in violation of the local option law of the "dry" county, the accused proved that though the street of the town on which he made the sales had been regarded for election and tax-paying purposes as in the local option county, it was, in fact, situated in the other or "wet" county. The conviction was set aside. Hutchins v. State, 40 S. W. R., 996.

Art. 245. [235] **Property stolen in one county and carried to another, offender prosecuted where.**—Where property is stolen in one county and carried off by the offender to another, he may be prosecuted either in the county where he took the property or in any other county through or into which he may have carried the same. [O. C. 198.]

Venue lies either in the county of the theft or in any other county through or into which the thief may have carried the stolen property. And this applies to all species of theft except theft from the person. Clark v. State, 23 T. Cr. R., 612, 5 S. W. R., 178, and cases cited; Pierce v. State, 50 Id., 507, 98 S. W. R., 861.

But prosecuted in another than the county of the taking, a complete offense must be made out in the county of the prosecution. Thus, if the original theft was a felony, but the thief transported only a portion of the stolen property, less in value than to constitute felony, he could be convicted in that county only of misdemeanor. Roth v. State, 10 T. Cr. R., 27; Clark v. State, 23 Id., 612, 5 S. W. R., 178, and cases cited; West v. State, 28 Id., 1, 11 S. W. R., 635.

That a new theft is committed in the county into which the stolen property is taken, is but a legal fiction to settle the question of venue, and where different animals were stolen in different counties at different times, and all driven together into another county, a conviction in that county for the theft of one cannot be pleaded in bar to prosecution for the theft of the others. Harrington v. State, 31 T. Cr. R., 577, 21 S. W. R., 356.

Swindling is not included in this article. Sims v. State, 28 T. Cr. R., 447, 13 S. W. R., 653.

Art. 246. **Mortgaged property taken from one county and unlawfully disposed of in another, offender prosecuted where.**—When mortgaged property is taken from one county and unlawfully disposed of in another county, the offender may be prosecuted, either in the county in which such property was disposed of, or in the county from which it was removed, or in which the lien on it is registered. [Act 1899, p. 8.]

Art. 247. [236] **Accomplices and accessories may be prosecuted where.**—Accomplices and accessories to the crime of theft may be prosecuted in any county where the theft was committed, or in any other county through or into which the property may be carried by either the principal, accomplice or accessory to the offense. [Act April 4, 1889.]

Penal Code, Arts. 86 and 89 et seq. and notes.

Venue is in that county of this state into which the thief brings the property he stole in another State, and he who aids the thief in such county after the property is brought into it, is an accessory to the theft. West v. State, 27 T. Cr. R., 473, 11 S. W. R., 482. And see West v. State, 28 Id., 1, 11 S. W. R., 635, to the effect that this rule has applied to accomplice only since the enactment of this article.

Art. 248. [237] **Receiving and concealing stolen property may be prosecuted where.**—The offense of receiving and concealing stolen property may by prosecuted in the county where the theft was committed, or in any other county through or into which the property may have been carried by the person stealing the same, or in any county where the same may have been received or concealed by the offender. [Id.]

Venue: 1. In the county of the theft; 2, in any county into or through which the property was carried by the thief; 3, in the county where the stolen property was received. One who receives stolen property in one county and himself transports it into another county cannot be prosecuted in the latter county. Thurman v. State, 37 T. Cr. R., 646, 40 S. W. R., 795. But see Moseley v. State, 36 Id., 478, 38 S. W. R., 197, to the effect that when property is received, the receiver knowing it to have been stolen, in one county, and the receiver carries it into another county, either county would have jurisdiction.

Art. 249. [238] **Offenses committed out of the state by commissioner of deeds prosecuted where.**—Offenses committed out of this state by a commissioner of deeds, or other officer acting under the authority of this state, may be prosecuted in any county of this state. [O. C. 200.]

Penal Code, Art 352.

Art. 250. [239] **Offenses committed on vessels within the state prosecuted where.**—Where an offense is committed on board a vessel which is at the time upon any navigable water within the boundaries of this state, the offense may be prosecuted in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage commences or terminates. [O. C. 201.]

But see Jenkins v. State, 36 T., 345.

Art. 251. [240] **Offense of embezzlement prosecuted where.**—The offense of embezzlement may be prosecuted in any county in which the offender may have taken or received the property, or through or into which he may have undertaken to transport it. [O. C. 203.]

Penal Code, Art. 1437 and notes.

Construed. It is not meant by this article that a person may, or shall be, indicted in every county where he has been in possession of the property. The venue or jurisdiction attaches in the county where the prosecution is first begun, and the pendency of that indictment can be successfully pleaded to any subsequent indictment for the same offense in any other county—overruling Vaughan v. State, 32 T. Cr. R., 407, 24 S. W. R., 26, and Schindler v. State, 15 Id., 394, Williams v. State, 20 Id., 359, and Bonner v. State, 29 Id., 223, 15 S. W. R., 821, and Pearce v. State, 50 Id., 507, 98 S. W. R., 861.

Art. 252. [241] **False imprisonment, kidnaping and abduction prosecuted where.**—The jurisdiction for the trial of the offenses of false imprisonment, kidnaping and abduction, belongs either to the county in which the offense was committed, or to any county through, into or out of which the person falsely imprisoned, kidnaped or taken in such manner as to constitute abduction may have been carried. [O. C. 204.]

False imprisonment, Penal Code, Art. 1058; abduction, Id., Arts. 1078, 1079, 1080, 1081; kidnaping, Id., Art. 1075.

Art. 253. [242] **Conspiracy, where prosecuted.**—The offense of conspiracy may be prosecuted in the county where the conspiracy was entered into, or in the county where the same was agreed to be executed; and, when the conspiracy is entered into in another state, territory or county, to commit an offense in this state, the offense may be prosecuted in the county where such offense was agreed to be committed, or in any county where any one of the conspirators may be found, or in the county where the seat of government is located.

Kutch v. State, 32 T. Cr. R., 184, 22 S. W. R., 594; Dawson v. State, 38 Id., 9, 43 S. W. R., 731.

Art. 254. **Prosecution for rape commenced and carried on where, takes precedence of other cases.**—Prosecutions for rape may be commenced and carried on in the county in which the offense is committed, or in any county of the judicial district in which the offense is committed, or in any county of the judicial district the judge of which resides nearest the county seat of the county in which the offense is committed. When the judicial district comprises only one county, prosecutions may be commenced and carried on in that county, if the offense be committed there, or in any adjoining county. When it shall come to the knowledge of any district judge, whose court has jurisdiction under this act, that the offense of rape has probably been committed, it shall be his duty, immediately, if his court be in session, and, if not in session, then, at the first term thereafter in any county of the district, to call the attention of the grand jury thereto; and, if his court be in session, but the grand jury shall have been discharged, he shall immediately recall said grand jury for the consideration of the accusation. Prosecutions for rape shall take precedence of all cases in all courts; and the district courts are hereby authorized and directed to change the venue in such cases whenever it shall be necessary to secure a speedy trial. [Act 1897, 1st S. S., p. 16.]

Venue. This article is constitutional, there being no provision in our constitution inhibiting the legislature from authorizing a prosecution in a county other than that in which the offense was committed. Mischer v. State, 41 T. Cr. R., 212, 53 S. W. R., 627; Dies v. State, 56 Id., 32. And see Brown v. State, 122 S. W. R., 565.

Art. 255. [243] **Conviction or acquittal in another state bar to prosecution in this state.**—When an act has been committed out of this state by an inhabitant thereof, and such act is an offense by the laws of this state, and is also an offense by the laws of the place where the same was done, a conviction or acquittal of the offender, under the laws of the place where the offense was committed, is a bar to the prosecution in this state. [O. C. 205.]

Ante, Art. 9, and notes; post, Art. 601, and notes.

Art. 256. [244] **Conviction, etc., in one county, bar to prosecution in another, when.**—Where different counties have jurisdiction of the same offense, conviction or acquittal of the offense in one county is a bar to any further prosecution in any other county. [O. C. 206.]

Ante Art. 9 and notes; post., Art. 601 and notes.

Art. 257. [245] **Proof of jurisdiction sufficient to sustain allegation of venue, when.**—In all cases mentioned in the foregoing articles of this chapter, the indictment or information, or any proceeding in the case, may allege that the offense was committed in the county where the prosecution is carried on; and, to sustain the allegation of venue, it shall only be necessary to prove that

by reason of the facts existing in the case, the county where such prosecution is carried on has jurisdiction. [O. C. 207.]

Post, 451, subd. 5; post, Art. 478, subd. 5, and post, Art. 455.

Indictment, information or complaint must allege the venue. Smith v. State, 25 T. Cr. R., 454, 8 S. W. R., 645; Orr v. State, Id., 453, 8 S. W. R., 644.

And it must appear that the venue alleged is within the jurisdiction of the court. Robins v. State, 9 T. Cr. R., 666.

Sufficient to state the county without identifying the particular locality in the county. State v. Odum, 11 T., 12; Corley v. State, 3 T. Cr. R., 412.

When the locus of the crime is in a new county created since the commission of the offense, and the new county is attached to a third county for judicial purposes, the indictment should be presented in the latter county, but the venue must be alleged in the old county in accordance with the facts at the time it was committed. Weller v. State, 16 T. Cr. R., 210; Hernandez v. State, 19 Id., 408.

And when the county of the offense is attached for judicial purposes to an organized one, the venue must be alleged in the former. Miles v. State, 23 T. Cr. R., 410, 5 S. W. R., 250, citing Chivarria v. State, 15 Id., 330.

"At," instead of "in," the county is sufficient. Blackwell v. State, 30 T. Cr. R., 416, 17 S. W. R., 1061; Augustine v. State, 20 T., 451. But for exception see Pederson v. State., 21 T. Cr. R., 485, 1 S. W. R., 521.

The allegation of venue cannot be supplied by amendment. Robins v. State, 9 T. Cr. R., 666; Collins v. State, 6 Id., 647.

Complaint must allege venue, else the information, though it embraces venue, is not sufficient. Strickland v. State, 7 T. Cr. R., 34; Smith v. State, 3 Id., 549.

But the quashal of the information for omitting venue will not vitiate a complaint embracing venue. Orr v. State, 24 T. Cr. R., 453, 8 S. W. R., 644, citing Johnson v. State, 19 Id., 545; Lawson v. State, 13 Id., 83.

Judicial cognizance of venue: Harrison v. State, 558; Boston v. State, 5 Id., 383; Huffman v. State, 12 Id., 406; Vivian v. State, 16 Id., 262; Lasher v. State, 30 Id., 387, 17 S. W. R., 1064; Stewart v. State, 31 Id., 153, 19 S. W. R., 908; Monford v. State, 35 Id., 237, 33 S. W. R., 351; Jordan v. State, 12 Id., 205; Terrell v. State, 41 T., 464.

Pleading and proof. The plea of not guilty puts the allegation of venue in issue. Field v. State, 34 T., 39, overruling Myers v. State, 33 Id., 525.

Proof of venue indispensable to conviction. West v. State, 21 T. Cr. R., 427, 2 S. W. R., 810; Miles v. State, 23 Id., 410, 5 S. W. R., 250.

But sufficient if, as against inference, the jury may reasonably conclude that the offense was committed in the county alleged. Deggs v. State, 7 T. Cr. R., 359, explaining Higbee v. State, 2 Id., 407; Bowman v. State, 38 Id., 14, 41 S. W. R., 635; Huffman v. State, 406.

Burden is on the state to prove, and not on the accused to disprove venue. Winn v. State, 15 T. Cr. R., 169, citing Williamson v. State, 13 Id., 587; Bowling v. State, Id., 338.

Circumstantial evidence is as potential as direct evidence on venue. McGill v. State, 25 T. Cr. R., 499, 8 S. W. R., 661, and cases cited; McGlasson v. State, 38 Id., 351, 43 S. W. R., 93; Kugadt v. State, Id., 681, 44 S. W. R., 989.

Reasonable doubt does not apply to the issue of venue. McGill v. State, supra; Steadham v. State, 40 T. Cr. R., 43, 48 S. W. R., 177.

On appeal. Under the amendment of 1897, Article 938, post, this court, on appeal, will presume the venue to have been proved, unless the contrary is conclusively shown by the record. McGlasson v. State, 38 T. Cr. R., 351, 43 S. W. R., 93.

Art. 258. [246] **Offenses not enumerated, prosecuted where.**—In all cases, except those enumerated in previous articles of this chapter, the proper county for the prosecution of offenses is that in which the offense was committed. [O. C. 208.]

Offenses not enumerated; venue: Misapplication of public funds under Penal Code, Art. 97, subdivisions 5 and 6; Travis County.

Unlawfully disposing of estray; county in which the animal was disposed of. Tharp v. State, 28 T., 696.

Fraudulent disposition of mortgaged property: county in which it was fraudulently disposed of. Robberson v. State, 3 T. Cr. R., 502.

Purchasing and receiving cattle without bill of sale: county of purchase. Brockman v. State, 16 T. Cr. R., 54.

Unlawfully fencing and using public lands: Travis County.

Theft from the person: county of the taking. Nichols v. State, 28 T. Cr. R., 105, 12 S. W. R., 505, and cases cited.

Swindling: county in which the property was acquired. Sims v. State, 28 T. Cr. R., 447, 13 S. W. R., 653, and cases cited.

Sending threatening letter: county from which letter was sent. Landa v. State, 26 T. Cr. R., 580, 10 S. W. R., 218.

Conversion by bailee: county in which the conversion was consummated. Lopez v. State, 37 T. Cr. R., 649, 40 S. W. R., 972.

Renting house to be used for gaming: county in which the house is situated. Eylar v. State, 37 T. Cr. R., 257, 39 S. W. R., 665.

Abortion: county in which the means were used or taken. Moore v. State, 37 T. Cr. R., 552, 40 S. W. R., 287.

Charge of the court on venue need not comprehend reasonable doubt. Abrigo v. State, 29 T. Cr. R., 143, 15 S. W. R., 408; McGill v. State, 25 Id., 499, 8 S. W. R., 661, and cases cited.

Not error for the charge of the court to begin by advising the jury that the case was before them on change of venue. Kemp v. State, 11 T. Cr. R., 174.

The court charged that, if the horses when last seen before the theft were in the county of the alleged theft, the law presumed they were stolen in that county. Held, error as matter of law, and as on the weight of evidence. Williams v. State, 11 T. Cr. R., 275.

Charge was error that instructed that, if accused received the stolen property in one county and carried it into another, the latter would have jurisdiction. Thurman v. State, 37 T. Cr. R., 646, 40 S. W. R., 795. But see Moseley v. State, 36 Id., 578, 38 S. W. R., 197.

TITLE 5.

OF ARREST, COMMITMENT AND BAIL.

Chapter
1. Of Arrest without Warrant.
2. Of Arrest under Warrant.
3. Of the Commitment or Discharge of the Accused.
4. Of Bail.
   1. General Rules Applicable to All Cases of Bail.

Chapter 4. Of Bail—Continued.
   2. Recognizance and Bail Bond.
   3. Surrender of the Principal by his Bail.
   4. Bail before the Examining Court.
   5. Bail by Witnesses.

CHAPTER ONE.

OF ARREST WITHOUT WARRANT.

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Article 259. [247] **Arrest without warrant, when.**—A peace officer or any other person may, without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony, or as an "offense against the public peace." [O. C. 209.]

Art. 260. [248] **Same subject.**—A peace officer may arrest, without warrant, when a felony or breach of the peace has been committed in the presence or within the view of a magistrate; and such magistrate shall verbally order the arrest of the offender. [O. C. 210.]

Ante, Arts. 43, 44 and notes, and post, Arts. 121, 122 and 123.

Construed. Out statutes on this subject must be construed in subordination to the constitutional guaranty against searches and seizures. Bill of Rights, Sec. 9.

To authorize an arrest without warrant, two things must concur: 1, the offense must be a felony; and, 2, it must be committed in the presence or view of the arresting officer or person. Johnson v. State, 5 T. Cr. R., 43; Weaver v. State, 19 Id., 547; Lynch v. State, 41 Id., 510, 57 S. W. R., 1130.

No person but an officer can make an arrest except for a felony committed in his presence, or within his view, unless specially appointed by a magistrate to execute a particular warrant, or is summoned as a posse comitatus. Alford v. State, 8 T. Cr. R., 545.

A de facto officer, known to be such, has the authority of a de jure officer, and may summon the posse comitatus. Weatherford v. State, 31 T. Cr. R., 530, 21 S. W. R., 251.

Arrest without warrant, for mere injury to property, unless it amounted to a breach of the peace, cannot be made. Mundine v. State, 37 T. Cr. R., 5, 38 S. W. R., 619.

Warrant is not required for the arrest of an escaped convict. Ex parte Sherwood, 29 T. Cr. R., 334, 15 S. W. R., 821.

Nor for the arrest of a person for unlawfully carrying arms. Penal Code, Art. 479, and notes; Miller v. State, 32 T. Cr. R., 319, 20 S. W. R., 1103; Ex parte Sherwood, supra.

"Presence" and "view": Lacy v. State, 7 T. Cr. R., 403; Russell v. State, 37 Id., 314, 39 S. W. R., 674.

Art. 261. [249] **Municipal authorities may authorize arrest without warrant, when.**—The municipal authorities of towns and cities may establish rules

authorizing the arrest, without warrant, of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws. [O. C. 211.]

By municipal authority. The ordinances of an incorporated town making drunkenness and breaches of the peace offenses, the town marshal or his deputy was authorized to arrest an offender without a warrant. Beville v. State, 16 T. Cr. R., 70.

An ordinance authoried by charter prohibiting hackdrivers, etc., from soliciting traffic at a certain place, and authorizing policemen to arrest without warrant for violations committed in their view, is valid. Vann v. State, 45 T. Cr. R., 434, 77 S. W. R., 813.

Art. 262. [250] **May arrest without warrant when felony has been committed.**—Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the person accused. [O. C. 212.]

Ante, Art. 44, and notes.

Construed. Under this article not only the fact that a felony has been committed, but the indentity of the accused, should be disclosed to the officer. Morris v. Kasling, 79 T., 141, 15 S. W. R., 226.

It is the duty of the sheriff, on being informed of a felony, to pursue and capture the offender if possible, and in order to do so, to seek all possible information. Hill v. State, 37 T. Cr. R., 415, 35 S. W. R., 660.

Art. 263. [251] **In all such cases the officer may adopt the same measures as, etc.**—In all the cases enumerated where arrests may be lawfully made without warrant, the officer or other person making the arrest is justified in adopting all the measures which he might adopt in cases of arrest under warrant, as provided in this Code. [O. C. 213.]

Post, Arts. 280-291, and notes; Penal Code, Arts. 1113-1118.

Construed. A peace officer can arrest only within the limits of his own county. Jones v. State, 26 T. Cr. R., 9 S. W. R., 53; Ledbetter v. State, 23 Id., 247, 5 S. W. R., 226; Peter v. State, Id., 684, 5 S. W. R., 228.

Art. 264. [252] **In such cases, must take the offender before the nearest magistrate.**—In all the cases enumerated in this chapter, the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made, without an order. [O. C. 214]

Short v. State, 16 T. Cr. R., 44, and cases cited.

CHAPTER TWO.

OF ARREST UNDER WARRANT.

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Article 265. [253] **Definition of "warrant of arrest."**—A "warrant of arrest" is a written order from a magistrate, directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law. [O. C. 215.]

Post, Art. 980.

Extra-territorial warrant. A justice of the peace cannot issue a warrant of arrest to be executed in another county. It must be directed to some proper officer of his own county. Tolliver v. State, 32 T. Cr. R., 444, 24 S. W. R., 286.

Art. 266. [254] **Is sufficient if it have, etc.**—It issues in the name of "The State of Texas," and shall be deemed sufficient, without regard to form, if it have these substantial requisites:

1. It must specify the name of the person whose arrest is ordered, if it be known; if not known, then some reasonably definite description must be given of him.

2. It must state that the person is accused of some offense against the laws of the state, naming the offense.

3. It must be signed by the magistrate, and his office be named in the body of the warrant, or in connection with his signature. [O. C. 216.]

Warrant of arrest, and also the complaint on which it issues, must specify the accused's name, or, if that is unknown, give a reasonably definite description of him. Alford v. State, 8 T. Cr. R., 545.

A fictitious name cannot be assigned, nor can the officer interpolate into the warrant the true name. Nor will the warrant be violated because the person arrested under it, not described by name or otherwise, proved to be the person against whom the complaint was intended. Alford v. State, supra.

Warrant stated only the surname of the accused and that his Christian name was unknown, giving no other description. Held, sufficient, under the peculiar facts of this case. Graham v. State, 29 T. Cr. R., 31, 13 S. W. R., 1013.

Not a valid objection that the warrant issued by the county judge, who is a "magistrate," did not show on its face to have been issued by him as a "committing magistrate." Graham v. State, supra. And see Pierce v. State, 17 T. Cr. R., 232.

Art. 267. [255] **Magistrate may issue warrant of arrest, in what cases.**—Magistrates may issue warrants of arrest in the following cases:

1. In all cases in which they are by law authorized to order verbally the arrest of an offender.

2. When any person shall make oath before such magistrate that another has committed some offense against the laws of the state.

3. In all cases named in this Code where they are specially authorized to issue such warrants. [O. C. 217, 218.]

Post, Arts. 971, et seq.; Pierce v. State, 17 T. Cr. R., 232.

Art. 268. [256] **"Complaint" is what.**—The affidavit made before the magistrate, which charges the commission of an offense, is called a complaint. [O. C. 219.]

Complaints before prosecuting attorneys, see ante Art. 34, and notes, and post, Art. 479 and notes.

Complaints before magistrates, see post, Arts. 972 and 973, and notes.

Complaint charging a misdemeanor, the information upon it must be presented in the county court. Charging a felony, it must be filed with a magistrate, who shall proceed in accordance with the law governing examining courts. Kinley v. State, 29 T. Cr. R., 532, 16 S. W. R., 339. And see Mitchell v. State, 46 Id., 258, 79 S. W. R., 26.

Complaint, without reference to form, is sufficient if it substanially complies with the terms of the statute. Brown v. State, 11 T. Cr. R., 451.

Need not observe the same particularity in setting out the offense as required of indictment or information. Bell v. State, 18 T. Cr. R., 53, and cases cited.

Need not commence "in the name and by the authority of the State of Texas." Johnson v. State, 31 T. Cr. R., 464, 20 S. W. R., 980, citing Jefferson v. State, 24 Id., 535, 7 S. W. R., 244.

Record on appeal showing no complaint as the basis of the information, appeal will be dismissed. Diltz v. State, 56 T. Cr. R., 127, 119 S. W. R., 92.

As to the necessary predicate to the issuance of a warrant based upon a complaint before a magistrate, see Pierce v. State, 17 T. Cr. R., 232.

Art. 269. [257] **Requisites of complaint.**—The complaint shall be deemed sufficient, without regard to form, if it have these substantial requisites:

1. It must state the name of the accused, if known, and if not known, must give some reasonably definite description of him.

Naming accused as "Mrs. Beaumont" is not sufficient. Beaumont v. Dallas, 34 T. Cr. R., 68, 29 S. W. R., 157.

"George" and "Georg" as given name, are idem sonans, and sufficient. Hale v. State, 32 T. Cr. R., 594, 25 S. W. R., 292.

Complaint omitted name of accused, and information misstated it. The prosecutor inserted proper name in the one, and substituted it in the other, Held to vitiate conviction. Patillo v. State, 3 T. Cr. R., 442.

The defendant suggesting his proper name, its insertion in the information, though not in the complaint, was proper practice. Wilson v. State, 6 T. Cr.R.,154.

Complaint charging "Bill" (or W. H.) Gaines, and the information "W. H. Gaines," the former is not objectionable as being in the alternative. Gaines v. State, 46 T. Cr. R., 212, 78 S. W. R., 1076.

2. It must state that the accused has committed some offense against the laws of the state, naming the offense, or that the affiant has good reason to believe, and does believe, that the accused has committed such offense.

Affirmative allegation. Complaint must state affirmatively and positively that accused committed the offense, or that affiant had good reason to believe, and did believe, he committed such offense; not sufficient to allege merely good reason to believe. Justice v. State, 45 T. Cr. R., 462, 76 S. W. R., 437; Smith v. State, Id., 411, 76 S. W. R., 436; Fricks v. State, 124 S. W. R., 922.

Omitting the word "good" preceding "reason" does not vitiate the complaint. Dodson v. State, 35 T. Cr. R., 571, 34 S. W. R., 754.

Sufficient to charge the commission of the offense on the affiant's "best knowledge and belief." Anderson v. State, 34 T. Cr. R., 96, 29 S. W. R., 389, and cases cited.

3. It must state the time and place of the commission of the offense, as definitely as can be done by the affiant.

Time and place. Complaint must charge the commission of the offense at a time anterior to the filing of the same. Womack v. State, 41, 19 S. W. R., 695, citing Lanham's case, 9 Id., 232. But see Williams v. State, 17 Id., 521.

Date of the offense being matter of substance, complaint cannot be amended in that respect. Huff v. State, 23 T. Cr. R., 291, 4 S. W. R., 890, and cases cited.

But a mistake in the jurat to the complaint may be amended to conform to the facts and the date set out in the complaint. Sanders v. State, 52 T. Cr. R., 156, 105 S. W. R., 803; Flournoy v. State, 51 Id., 29, 100 S. W. R., 151.

A complaint alleging an impossible date is a nullity, and will not support an information. Jennings v. State, 30 T. Cr. R., 428, 18 S. W. R., 90, and cases cited.

4. It must be in writing, and signed by the affiant, if he is able to write his name; otherwise he must place his mark at the foot of the complaint. [O. C. 220.]

Name and signature. Complaint being signed and sworn to by affiant, it is not essential that his name appear in the body of the instrument. Upton v. State, 33 T. Cr. R., 231, 26 S. W. R., 197; Malz v. State, 36 Id., 447, 34 S. W. R., 267.

The name being signed at the foot of the complaint as required by this article, a wrong name inserted in the body of the instrument by mistake, may be stricken out or treated as surplusage. Malz v. State, supra.

Complaint not being sworn to when the information was filed, and no new information being filed after the complaint was sworn to, motion in arrest should have been sustained. Abbey v. State, 55 T. Cr. R., 232, 115 S. W. R., 1191.

That the affiant could have signed his name to the complaint, but instead made his mark, comes too late in motion to arrest judgment. Lewis v. State, 50 T. Cr. R., 331, 97 S. W. R., 481.

The affiant must be a credible person (post, Art. 479), and a credible person is one who, being competent to testify, is worthy of belief. Wilson v. State, 27 T. Cr. R., 47, 10 S. W. R., 749, citing Smith v. State, 22 Id., 196, 2 S. W. R., 542; Thomas v. State, 14 Id., 70.

Jurat of the officer before whom it was made is essential to the sufficiency of the complaint. Post, Art. 972. It must be his official certificate that the affiant subscribed and swore to the complaint before him. An illegible pen and ink scrawl will not suffice. Robertson v. State, 25 T. Cr. R., 529, 8 S. W. R., 659.

The recitals of the jurat, when in conflict with those of the complaint, will control. Lanham v. State, 9 T. Cr. R., 232.

Inferences cannot be indulged in criminal pleading, and, accordingly, in a jurat signed "Win Greer, J. P." the letters "J. P." cannot be inferred to mean "justice of the peace." Neiman v. State, 29 T. Cr. R., 360, 16 S. W. R., 253.

Jurat cannot be affixed after trial. Neiman v. State, supra; Scott v. State, 9 T. Cr. R., 434.

Complaint as to matter of substance cannot be amended after announcement for trial. Williams v. State, 34 T. Cr. R., 100, 29 S. W. R., 472. Date is matter of substance. Huff v. State, 23 Id., 291, 4 S. W. R., 890, and cases cited. But see Sanders v. State, 52 Id., 156, 150 S. W. R., to the effect that mistake of date appearing in jurat, it may be amended to comport with the facts and date set out in the complaint.

And likewise, to correct mistake, in the name of affiant, and conform it to the complaint, the jurat may be amended. Flournoy v. State, 51 T. Cr. R., 29, 100 S. W. R., 151.

Art. 270. [258] **Warrant issued by magistrates, etc., extends to every part of the state.**—That a warrant of arrest, issued by any county or district clerk, or by any magistrate (except county commissioners or commissioners' courts, mayors or recorders of an incorporated city or town), shall extend to any part of the state; and any peace officer to whom said warrant is

directed, or into whose hands the same has been transferred, shall be authorized to execute the same in any county in this state. [O. C. 221; amended Act 1905, p. 385.]

Art. 271. [259] **Warrant issued by other magistrate does not extend, etc., except, etc.**—When a warrant of arrest is issued by any county commissioner or commissioners' court, mayor or recorder of an incorporated city or town, it can not be executed in another county than the one in which it issues, except:

1. It be indorsed by a judge of a court of record, in which case it may be executed anywhere in the state, or

2. If it be indorsed by any magistrate in the county in which the accused is found, it may be executed in such county. The indorsement may be: "Let this warrant be executed in the county of....." Or, if the indorsement is made by a judge of a court of record, then the indorsement may be: "Let this warrant be executed in any county of the state of Texas." Any other words expressing the same meaning will be sufficient. The indorsement shall be dated, and signed officially by the magistrate making it. [O. C. 222; amended, Act 1905, p. 385.]

Jurisdiction of the justice of the peace is limited to his precinct, except when he sits as an examining court, when it is co-extensive with his county. Childers v. State, 30 T. Cr. R., 160, 16 S. W. R., 903, citing Hart v. State, 15 Id. 202.

Extra-territorial process. Process issued by the justice of the peace to be executed in another county must first be indorsed as required by this or the preceding article, as the case may be, and then must be executed by an officer of the proper county. Peter v. State, 23 T. Cr. R., 684, 5 S. W. R., 228, citing Ledbetter v. State, Id., 247, 5 S. W. R., 226.

A sheriff cannot execute process beyond the limits of his county. Jones v. State, 26 T. Cr. R., 1, 9 S. W. R., 53.

Art. 272. [260] **Warrant of arrest may be forwarded by telegraph, etc.**—A warrant of arrest may be forwarded by telegraph from any telegraph office to another in this state. If it be issued by any magistrate named in article 270, the peace officer receiving the same shall execute it without delay. If it be issued by any other magistrate than is named in article 270, the peace officer receiving the same shall forthwith proceed with it to the nearest magistrate of his county, who shall indorse thereon, in substance, these words: "Let this warrant be executed in the county of ———," which indorsement shall be dated and signed officially by the magistrate making the same. [Act April 17, 1871, p. 39.]

See Cabell v. Arnold, 86 T., 102, 23 S. W. R., 645.

Art. 273. [261] **Complaint by telegraph, and proceedings thereon.**—A complaint in writing, in accordance with article 257, may be telegraphed, as provided in the preceding article, to any magistrate in the state; and the magistrate who receives the same shall forthwith issue a warrant for the arrest of the accused; and the accused, when arrested, shall be dealt with as provided in this chapter in similar cases. [Act April 17, 1871, p. 39.]

Art. 274. [262] **Certified copy of warrant or complaint to be deposited with telegraph manager, etc.**—A certified copy of the original warrant or complaint, certified to by the magistrate issuing or taking the same, shall be deposited with the manager of the telegraph office from which the same is to be forwarded; and it shall be at once forwarded, taking precedence over other business to the place of its destination or to the telegraph office nearest thereto, precisely as it is written, including the certificate of the seal attached. [Id.]

Art. 275. [263] **Duty of telegraph manager at the office of delivery.**—When a warrant or complaint is received at a telegraph office for delivery, it

shall be delivered to the party to whom it is addressed as soon as practicable, written on the proper blanks of the telegraph company, and certified to by the manager of the telegraph office as being a true and correct copy of the warrant or complaint received at his office. [Id.]

Penal Code, Art. 335.

Art. 276. [264] **Warrant or complaint must be under official seal, etc.**—No manager of a telegraph office shall receive and forward a warrant or complaint, as herein provided, unless the same shall be certified to under the seal of a court of record or by a justice of the peace, with the certificate under seal of the clerk of the district or county court of his county, that he is a legally qualified justice of the peace of such county; nor shall it be lawful for any magistrate to indorse a warrant received by telegraph, or issue a warrant upon a complaint received by telegraph, unless all the requirements of the law in relation thereto have been fully complied with. [Id.]

Art. 277. [265] **Telegram to be prepaid, unless, etc.**—The party presenting a warrant or complaint to the manager of a telegraph office, to be forwarded by telegraph, shall pay for the same in advance, unless, by the rules of the company, it may be sent "collect." [Id.]

Art. 278. [266] **Warrant may be directed to any suitable person, when.**—In cases where it is made known by satisfactory proof to the magistrate that a peace officer can not be procured to execute a warrant of arrest, or that so much delay will be occasioned in procuring the services of a peace officer that a person accused will probably escape, the warrant of arrest may be directed to any suitable person who is willing to execute the same; and, in such case, his name shall be set forth in the warrant. [O. C. 223.]

Special officer. A citizen specially appointed under this and Art. 990, post, to execute process, is, so far as the particular case is concerned, clothed with the same authority as a peace officer; but the authority terminates when the purpose of the appointment has been attained. O'Neal v. State, 32 T. Cr. R., 42, 22 S. W. R., 25.

Art. 279. [267] **Can not be compelled to execute warrant, etc.; has same right as peace officer.**—No person other than a peace officer can be compelled to execute a warrant of arrest; but, if any person shall undertake the execution of the warrant, he shall be bound to do so under all the penalties to which a peace officer would be liable. He has the same rights, and is governed by the same rules as are prescribed to peace officers. [O. C. 224.]

Power and liability. One undertaking to exercise the right of arrest under this article is, for the time being, a de facto officer, and his acts, while he sustains that relation to the defendant, will confer upon him the same rights, and subject him to the same penalties that appertain to an officer de jure. Smith v. State, 13 T. Cr. R., 507.

Art. 280. [268] **How warrant is executed, etc.**—The officer, or person executing a warrant of arrest, shall take the person whom he is directed to arrest forthwith before the magistrate who issued the warrant, or before the magistrate named in the warrant. [O. C. 225.]

Ante, Art, 262; post., Art. 336.

Art. 281. [269] **Arrest in one county for felony committed in another.**—If any person be arrested in one county for felony committed in another, he shall, in all cases, be taken before some magistrate of the county where it was alleged the offense was committed. [O. C. 226.]

Robertson v. State, 36 T. 346; Arrington v. State, 13 T. Cr. R., 531.

Art. 282. [270] **Arrest in one county for misdemeanor committed in another.**—If the arrest be for a misdemeanor, he shall be taken before a magistrate of the county where the arrest takes place, who shall be authorized to take bail, and whose duty it shall be to transmit immediately the bond so taken to the court having jurisdiction of the offense. [O. C. 226.]

Post, Arts. 292, 293, 308, 324.

Art. 283. [271] **Proceedings when party arrested for misdemeanor, etc., fails to give bail.**—If the accused fails or refuses to give bail, as provided in the preceding article, he shall be committed to the jail of the county where he was arrested; and the magistrate committing him shall forthwith notify the sheriff of the county in which the offense is alleged to have been committed of the arrest and commitment, which notice may be given by telegraph, by mail or by other written notice.

Art. 284. [272] **Duty of sheriff receiving notice, etc.**—It shall be the duty of the sheriff receiving the notice provided for in the preceding article, forthwith to go or send for the prisoner, and have him brought before the proper court or magistrate.

Art. 285. [273] **Prisoner shall be discharged if not demanded in thirty days.**—Should the sheriff or other proper officer of the county where the offense is alleged to have been committed not demand the prisoner and take charge of him within thirty days from the day he is committed, such prisoner shall be discharged from custody.

Art. 286. [274] **A person is said to be arrested, when.**—A person is said to be arrested when he has been actually placed under restraint or taken into custody by the officer or person executing the warrant of arrest. [O. C. 227.]

See Holmes v. State, 32 T. Cr. R., 361, 23 S. W. R., 687; Craig v. State, 30 Id., 619, 18 S. W. R., 297; Bennett v. State, 25 Id., 695, 8 S. W. R., 933; Nolen v. State, 9 Id., 419.

Art. 287. [275] **An arrest may be made, when.**—An arrest may be made on any day, or at any time of the day or night. [O. C. 228.]

Art. 288. [276] **What force may be used.**—In making an arrest, all reasonable means are permitted to be used to effect it. No greater force, however, shall be resorted to than is necessary to secure the arrest and detention of the accused. [O. C. 229.]

Force. While authorized to use necessary force to accomplish arrest, an officer cannot exceed it. Beaverts v. State, 4 T. Cr. R., 175, and cases cited; Giroux v. State., 40 T., 97.

He can use violence only in his necessary self-defense. Skidmore v. State, 43 T., 93; s. c., 2 T. Cr. R., 20; English v. State, 34 Id., 190, 30 S. W. R., 233; Jones v. State, 26 Id., 1, 9 S. W. R., 53; Miller v. State, 32 Id., 319, 20 S. W. R., 1103. And see Tiner v. State, 44 T., 128; Geibel v. State, 28 T. Cr. R., 153, 12 S. W. R., 591; Caldwell v. State, 41 T., 86; James v. State, 44 Id., 314; Carter v. State, 30 T. Cr. R., 551, 17 S. W. R., 1102.

Art. 289. [277] **In case of felony, may break door.**—In case of felony, the officer may break down the door of any house for the purpose of effecting an arrest, if he be refused admittance, after giving notice of his authority and purpose. [O. C. 230.]

Art. 290. [278] **Authority to arrest must be made known.**—In executing a warrant of arrest, it shall always be made known to the person accused under what authority the arrest is made; and, if requested, the warrant shall be exhibited to him. [O. C. 231.]

Authority of officer to arrest should be declared at the time, though if his purpose and official capacity are known to the party sought to be arrested, resistance thereto cannot be justified. Plasters v. State, 1 T. Cr. R., 673.

However, a party yielding to illegal arrest without resistance or protest, does not thereby forfeit his right to regain his liberty by all necessary force, nor does his acquiescence convert the illegal arrest into a legal one. Miers v. State, 34 T. Cr. R., 161, 29 S. W. R., 1074.

The arresting officer should have his warrant in possession when attempting the arrest, as the party whose arrest is sought has the right to demand its profert. Cabell v. Arnold, 86 T., 102, 23 S. W. R., 645.

Art. 291. [279] **Prisoner escaping, etc., may be retaken without warrant.** —If a person arrested shall escape, or be rescued, he may be retaken without any other warrant; and, for this purpose, all the means may be used which are authorized in making the arrest in the first instance. [O. C. 232.]

Preventing escape, etc. The right of an officer, holding a prisoner convicted of felony, to kill to prevent escape does not extend to an officer attempting to recapture an escaped convict. A penitentiary guard, in attempting the recapture of an escaped convict, has only the authority of an ordinary officer in making an arrest. Wright v. State, 44 T., 645.

But a convict guard may kill to prevent the escape of a convict, if absolutely the only means to that end. Washington v. State, 1 T. Cr. R., 647.

Either an officer or private citizen may arrest an escaped convict without warrant. **Ex** parte Sherwood, 29 T. Cr. R., 234, 15 S. W. R., 812.

An extradited prisoner making his escape after removal from this state and returning to this state, the governor of this state may issue his second warrant of arrest, without awaiting a second requisition. Ex parte Hobbs, 32 T. Cr. R., 312, 22 S. W. R., 1035.

It is not even extenuation of murder that it was committed by an escaped convict resisting re-arrest. Wallace v. State, 20 T. Cr. R., 360, and cases cited.

For decision on sheriff's authority to resort to force in preventing escape of prisoner, see Jones v. State, 44 T., 314.

CHAPTER THREE.

OF THE COMMITMENT OR DISCHARGE OF THE ACCUSED.

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Article 292. [280] **Proceeding when brought before a magistrate.**—When a person accused of an offense has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure the aid of counsel. [O. C. 233.]

Art. 293. [281] **When examination postponed for reasonable time; custody and disposition of the accused during that time.**—The magistrate may, at the request of the prosecutor or person representing the state, or of the defendant, postpone, for a reasonable time, the examination, so as to afford an opportunity to procure testimony; but the accused shall in the meanwhile be detained in the custody of the sheriff or other duly authorized officer, unless he give bail to be present from day to day before the magistrate until the examination is concluded, which he may do in all cases except murder and treason. [O. C. 234.]

Waiver of examination by accused in bailable cases: Post, Art. 350.

Art. 294. [282] **Defendant shall be informed of his right to make statement, etc.**—Before the examination of the witnesses, the magistrate shall inform the defendant that it is his right to make a statement relative to the accusation brought against him, but shall, at the same time, also inform him that he can not be compelled to make any statement whatever, and, that if he does make such statement, it may be used in evidence against him. [O. C. 235-241.]

Defendant's rights in premises. Post, Art. 810, and notes; Kirby v. State, 23 T. Cr. R., 13, 5 S. W. R., 165; Shaw v. State, 32 Id., 155, 22 S. W. R., 588; Salos v. State, 31 Id., 485, 21 S. W. R., 44; Powell v. State, 37 T., 348; Brez v. State, 39 Id., 95; Alston v. State, 41 Id., 39; Guy v. State, 9 T. Cr. R., 161; Rice v. State, 22 Id., 654, 3 S. W. R., 791; Jackson v. State, 29 Id., 458, 16 S. W. R., 247; Walker v. State, 28 Id., 112, 12 S. W. R., 503; Tabor v. State, 34 Id., 631, 31 S. W. R., 662.

Art. 295. [283] **Voluntary statement of accused.**—If the accused shall desire to make a voluntary statement, he may do so before the examination of any of the witnesses, but not afterward. His statement shall be reduced to writing by the magistrate, or by some one under his direction, or by the accused or his counsel, and shall be signed by the accused, but shall not be sworn to by him. If the accused be unable to write his name, he shall sign the statement by making his mark at the foot of the same; and the magistrate shall, in every case, attest by his own certificate and signature to the execution and signing of the statement. [O. C. 235, 242, 243.]

Voluntary statements before examining courts: See authorities cited under preceding article.

Art. 296. [284] **Witness may be placed under rule.**—The magistrate shall, if requested by the accused or his counsel, or by the person prosecuting, have all the witnesses placed in charge of an officer, except the witness who is testifying, so that the testimony given by any one witness shall not be heard by any of the others. [O. C. 235.]

Post, Arts. 719-723, and notes.

Art. 297. [285] **Right of counsel to examine witness.**—If any person appear to prosecute as counsel for the state, he shall have the right to put the questions to the witnesses on the direct or cross-examination; and the accused or his counsel has the same right. Should no counsel appear, either for the state or for the defendant, the magistrate may examine the witnesses; and the accused has the same right. [O. C. 236.]

Art. 298. [286] **Same rules of evidence govern as on final trial.**—The same rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial.

Art. 299. [287] **Witnesses shall be examined in presence of the accused.**—The examination of each witness shall be in the presence of the accused. [O. C. 240.]

Art. 300. [288] **Testimony shall be reduced to writing, signed and certified.**—The testimony of each witness examined shall be reduced to writing by the magistrate, or some one under his direction, and shall then be read over to the witness, or he may read it over himself; and such corrections shall be made in the same as the witness may direct; and he shall then sign the same by affixing thereto his name or mark. All the testimony thus taken shall be certified to by the magistrate taking the same. [O. C. 238.]

Depositions before examining courts. See post, Arts. 817-834, and notes.

Testimony and certificate. The testimony of each witness must be reduced to writing, signed by the witness, and all of it certified to by the officer taking it. Kirby v. State, 23 T. Cr. R., 13, 5 S. W. R., 165; O'Connell v. State, 10 Id., 567.

But this rule does not require a separate certificate to the testimony of each witness; a general certificate, covering and embracing all the testimony, is sufficient. Evans v. State, 13 T. Cr. R., 225.

Form of certificate, so that it certifies the testimony, is immaterial. McFadden v. State, 28 T. Cr. R., 241, 14 S. W. R., 128, and cases cited; Timbrook v. State, 18 Id., 1; Kerry v. State, 17 Id., 179.

Evidence. Testimony taken before an examining court is admissible on final trial, on proper predicate. Hobbs v. State, 53 T. Cr. R., 71, 112 S. W. R., 308, following Porch v. State, 51 Id., 7, 99 S. W. R., 1122, and overruling Cline v. State, 36 Id., 320, 36 S. W. R., 1099, and other cases on this point.

Art. 301. [289] **Magistrate may issue attachment for witnesses.**—The magistrate has the power in all cases, where a witness resides or is in the county where the prosecution is pending, to issue an attachment for the purpose of enforcing the attendance of such witness; this he may do without having previously issued a subpoena for that purpose. [O. C. 244.]

Art. 302. [290] **May issue attachment to another county, when.**—The magistrate may issue an attachment for a witness to any county in the state, when affidavit is made by the party applying therefor that the testimony of the witness is material to the prosecution, or the defense, as the case may be; and the affidavit shall further state the facts which it is expected will be proved by the witness; and, if the facts set forth are not considered

material by the magistrate, or, if they be admitted to be true by the adverse party, the attachment shall not issue. [O. C. 246.]

Art. 303. [291] **Witness need not be tendered fees, etc.**—It shall not be necessary where a witness is attached to tender his witness fees or expenses to him. [O. C. 246.]

Art. 304. [292] **Attachment shall be executed forthwith.**—The officer receiving the attachment shall execute it forthwith by bringing before the magistrate the witness named therein, unless such witness shall give bail for his appearance before the magistrate at the time and place required by the writ. [O. C. 245.]

Art. 305. [293] **Manner of postponing examination to procure testimony.**—After examining the witnesses in attendance, if it satisfactorily appear to the magistrate that there is other important testimony which may be had by a postponement of the examination, he shall, at the request of the prosecutor or of the defendant, postpone the further examination for a reasonable time to enable such testimony to be procured; but in such case the accused shall remain in the custody of the proper officer until the day fixed for such further examination. No postponement shall take place, unless a statement, on oath, be made by the defendant, or the person prosecuting, setting forth the name and residence of the witness, and the facts which it is expected will be proved; or, if it be testimony other than that of a witness, the statement made shall set forth the nature of the evidence. If the magistrate is satisfied that the testimony is not material, or, if the same be admitted to be true by the adverse party, the postponement shall be refused. [O. C. 239.]

Art. 306. [294] **Capital offense; who may discharge.**—Upon examination of a person accused of a capital offense, no magistrate other than a judge of the supreme court, a judge of a court of appeals, a judge of the district court or a judge of the county court, shall have power to discharge the defendant. Any magistrate may admit to bail, except in capital cases, where the proof is evident. [O. C. 248.]

Capital offenses and "proof evident." See ante, Art. 6 and notes; Thomas v. State, 12 T. Cr. R., 416.

Art. 307. [295] **Proceedings when insufficient bail has been taken.**—Where it is made to appear by complaint, on oath, to a judge of the supreme court, court of appeals, district or county court, that the bail taken in any case is insufficient in amount, or that the sureties are not good for the amount, or that the bond is for any reason defective or insufficient, such judge shall issue a warrant of arrest, and require of the defendant sufficient bond and security, according to the nature of the case. [O. C. 249.]

Increase of bail cannot be directed by the court without the preliminary filing of the affidavit required by this article. Ex parte Wasson, 50 T. Cr. R., 361, 97 S. W. R., 103.

Art. 308. [296] **When committed, discharged, or admitted to bail.**—After the voluntary statement of the accused, if any, and the examination of the witnesses has been fully completed, the magistrate shall proceed to make an order committing the defendant to the jail of the proper county, if there be one, discharging him or admitting him to bail, as the law and facts of the case may require. [O. C. 250.]

See Kinley v. State, 29 T. Cr. R., 532, 16 S. W. R., 339; Thomas v. State, 12 Id., 416.

Bailing accused. Quaere. A magistrate can bind the accused to the current term of the district court, if in session, or if not in session, to the next term. But quaere,

can the magistrate bind to the next term, if the court is then in session? Ex parte Hays v. State, 43 T. Cr. R., 268, 64 S. W. R., 1049.

Rehearing cannot be had from an examining court, and one complaining of injustice from such court must seek relief by habeas corpus. Butler v. State, 36 T. Cr. R., 483, 38 S. W. R., 787.

Art. 309. [297] **When no safe jail, etc.**—Where there is no safe jail in the county in which the prosecution is carried on, the magistrate may commit to the nearest safe jail in any other county. [O. C. 251.]

Art. 310. [298] **To whom warrant is directed in such case.**—The warrant of commitment in the case mentioned in the preceding article shall be directed to the sheriff of the county to which the defendant is sent, but the sheriff of the county from which the defendant is taken shall be required to deliver the prisoner into the hands of the sheriff of the county to which he is sent. [O. C. 252.]

For requisites of warrant, see next article.

Art. 311. [299] **Warrant of commitment; its requisites.**—A warrant of commitment is an order signed by the proper magistrate directing a sheriff to receive and place in jail the person so committed. It will be sufficient if it have the following requisites:

1. That it run in the name of "The State of Texas."
2. That it be addressed to the sheriff of the county to the jail of which the defendant is committed.
3. That it state in plain language the offense for which the defendant is committed, and give his name, if it be known, or, if unknown, contain an accurate description of the defendant.
4. That it state to what court and at what time the defendant is to be held to answer.
5. When the prisoner is sent out of the county where the prosecution arose, the warrant shall state that there is no safe jail in the proper county.
6. If it be a case in which bail has been granted, the amount of bail shall be stated in the warrant. [O. C. 253.]

Approval of bond. The magistrate having committed the accused to jail in default of bond, it then became the duty of the sheriff to take and approve bond in such amount as prescribed by the magistrate. Shrader v. State, 30 T., 386.

A bail bond taken and approved by a deputy sheriff while the examining court was in session, and by order of the magistrate, is as valid as though taken and approved by the magistrate himself. Arrington v. State, 13 T. Cr. R., 551.

Art. 312. [300] **When prisoner sent to jail of another county, etc.**—In every case where, for want of a safe jail in the proper county, a prisoner is committed to the jail of another county, the last named county shall have the right to recover by civil action, in a court of competent jurisdiction, of the county from which the prisoner was sent, an amount of money not exceeding seventy-five cents per day, on account of the expenses attending the custody and safe keeping of a prisoner. [O. C. 254.]

Post, Arts. 1149, 1150.

Art. 313. [301] **Duty of sheriff in reference to prisoners.**—It is the duty of every sheriff to keep safely a person committed to his custody. He shall use no cruel or unusual means to secure this end, but shall adopt all necessary measures to prevent the escape of a prisoner. He may summon a guard of sufficient number, in case it becomes necessary to prevent an escape from jail, or the rescue of a prisoner. [O. C. 255.]

Ante, Arts. 49, 50, 52, 53 and notes.

Art. 314. [302] **Discharge shall not prevent, etc.**—A discharge by a magistrate, upon an examination of any person accused of an offense, shall not prevent a second arrest of the same person for the same offense. [O. C. 256.]

Practice. Res adjudicata, jeopardy or secondary proceedings of any kind do not apply to examining courts. Ex parte Porter, 16 T. Cr. R., 321; Butler v. State, 36 Id., 483, 38 S. W. R., 787.

Depositions before examining courts as evidence on subsequent trial, see Kerry v. State, 17 T. Cr. R., 178; Hobbs v. State, 53 Id., 71, 112 S. W. R., 308, following Porch v. State, 51 Id., 7, 99 S. W. R., 1122, and overruling Cline v. State, 36 Id., 320, 36 S. W. R., 1099.

Jurisdiction of the justice of the peace, sitting as an examining court, is that of a magistrate, and not a justice of the peace; and, as such magistrate, his jurisdiction and process is co-extensive with his county. Hart v. State, 15 T. Cr. R., 202; Kerry v. State, 17 Id., 178; Childers v. State, 30 Id., 160, 16 S. W. R., 903.

But he cannot, as an examining court, discharge one accused of a capital felony. Ante, Art. 306.

CHAPTER FOUR.

OF BAIL.

Article

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1. GENERAL RULES APPLICABLE TO ALL CASES OF BAIL.

Article 315. [303] **Definition of "bail."**—"Bail" is the security given by a person accused of an offense that he will appear and answer before the proper court the accusation brought against him. This security is given by means of a recognizance or a bail bond. [O. C. 257, 258.]

"Bail" interpreted, etc. Appearance bonds and recognizances are intended to secure the presence and trial of the offender. Jackson v. State, 13 T. Cr. R., 218.

"Bail" and "surety" distinguished. The bail is construed to have the custody of his principal; the surety no control over him. The bailor is the manucaptor or jailer of the principal, who is constantly in commitment to him, subject to his surrender. Gay v. State, 20 T., 504.

Bail bonds and like obligations bind the makers for the principal's appearance not only in the designated court, but in any other court to which his case may be transferred by operation of law. Pearson v. State, 7 T. Cr. R., 279.

Art. 316. [304] **Definition of "recognizance."**—A "recognizance" is an undertaking entered into, before a court of record in session, by the defendant in a criminal action, and his sureties, by which they bind themselves, respectively, in a sum fixed by the court, that the defendant will appear for trial before such court upon the accusation preferred against him. The undertaking of the parties in such case is not signed, but is made a matter of record in the court where the same is entered into. [O. C. 259.]

"Recognizance" defined. Recognizance is an obligation of record, in which the granting court can make no material alteration without the consent of all the cognizors. Grant v. State, 8 T. Cr. R., 432; Gay v. State, 20 T., 504.

For requisites of recognizance see Smith v. State, 35 T. Cr. R., 9, 29 S. W. R., 158.

Recognizance on appeal, see post, Art. 320.

Art. 317. [305] **Definition of "bail bond."**—A "bail bond" is an undertaking entered into by the defendant and his sureties for the appearance of the principal therein before some court or magistrate to answer a criminal accusation; it is written out and signed by the defendant and his sureties. [O. C. 260.]

Bail bond. For requisites see post, Art. 321, and notes.

When returned into court a bail bond becomes an obligation of record. Gragg v. State, 18 T. Cr. R., 295, citing Lawton v. State, 5 Id., 270; Costley v. State, 14 Id., 156.

That it was executed on Sunday will not invalidate a bail bond. Lindsey v. State, 39 T. Cr. R., 468, 46 S. W. R., 1045.

Art. 318. [306] **When a bail bond is given.**—A bail bond is entered into either before a magistrate, upon an examination of a criminal accusation against a defendant, or before a judge upon an application under habeas corpus; or it is taken from the defendant by a peace officer who has a warrant of arrest or commitment, as hereafter provided. [O. C. 261.]

Authority of peace officer to take bail bond in misdemeanor cases exists at all times, term time or vacation. Post, Art. 336; Ellis v. State, 10 T. Cr. R., 324.

But arresting a party under warrant for felony, he cannot take bail, but must take his prisoner before the issuing magistrate, or the one before whom the warrant is made returnable. Ante, Art., 280; Short v. State, 16 T. Cr R., 44, and cases cited, and note distinction from Patillo v. State, 9 Id., 456.

Arresting on capias after indictment for felony, the officer cannot take bail if the court is in session (post, Art. 337), but he may if court is not in session. Post, Art. 338; Kiser v. State., 13 T. Cr. R., 201; Patillo v. State, supra.

The mere fact that the order of court and the bail bond bore the same date, would not, of itself, prove that the court was in session when the bond was taken. Lindsey v. State, 39 T. Cr. R., 468, 46 S. W. R., 1045.

May fix the amount of bail when not fixed by the court. Gragg v. State, 18 T. Cr. R., 296.

May take and approve bond in vacation or after adjournment of court for the term. La Rose v. State, 29 T. Cr. R., 215, 15 S. W. R., 33.

Examining court: See Moore v. State, 37 T., 133; Doughty v. State, 33 Id., 1; Arrington v. State, 15 T. Cr. R., 551; Shrader v. State, 30 T., 386; Thomas v. State, 12 T. Cr. R., 416; State v. Russell, 24 T., 505.

Art. 319. [307] **What the word "bail" includes.**—Wherever the word "bail" is used with reference to the security given by the defendant, it is intended to apply as well to recognizances as to bail bonds. When a defendant is said to be "on bail," or to have "given bail," it is intended to apply as well to recognizances as to bail bonds. [O. C. 262.]

2. RECOGNIZANCE AND BAIL BOND.

Art. 320. [308] **Requisites of a recognizance.**—A recognizance shall be sufficient to bind the principal and sureties if it contain the following requisites:

1. If it be acknowledged that the defendant is indebted to the state of Texas in such sum as is fixed by the court, and the sureties are, in like manner, indebted in such sum as is fixed by the court.

Recognizance must show who is principal and who sureties, and bind principal and sureties for the appearance of the former. Smith v. State, 35 T. Cr. R., 9, 29 S. W. R., 158; Hand v. State, 28 Id., 28, 11 S. W. R., 679.

2. If the defendant is charged with an offense that is a felony, that it state that he is charged with a felony. If the defendant is charged with a misdemeanor, that it state that he is charged with a misdemeanor.

Designation of offense. Since the amendment of 1899 (present article), it is sufficient for the recognizance to state that the cognizor is "charged with a felony" or a "misdemeanor," as the case may be. Nichols v. State, 47 T. Cr. R., 406, 83 S. W. R., 1113; Hannon v. State, 48 Id., 199, 87 S. W. R., 152; Davis v. State, 56 Id., 131, 119 S. W. R., 95, following Horton v. State, 43 Id., 600, 68 S. W. R., 172. And see Davis v. State, 47 Id., 148, 82 S. W. R., 512; Parish v. State, Id., 148, 82 S. W. R., 517.

3. That the time and place when the defendant is bound to appear be stated, and the court before which he is bound to appear. [O. C. 263; amended, Act 1899, p. 111.]

Appearance. Recognizance must require the appearance of the cognizor at a certain time, at a certain place and before a certain court, naming each. Horton v. State, 30 T., 191; Maxwell v. State, 38 Id., 171; Barnes v. State, 36 Id., 332; State v. Casey, 27 Id., 111; Williamson v. State, 12 T. Cr. R., 169; and see Carroll v. State, 6 Id., 463; Ray v. State, 16 Id., 268; Thrash v. State, Id., 271; Camp v. State, 39 Id., 142, 45 S. W. R., 490; Wright v. State, 22 Id., 670, 3 S. W. R., 346.

As to defects or omissions: Carroll v. State, 6 T. Cr. R., 463, Blalack v. State, 3 Id., 376; Gragg v. State, 18 Id., 295; Grant v. State, 8 Id., 432; Hand v. State, 28 Id., 28, 11 S. W. R., 679.

Indictment found by an illegal grand jury will not support a recognizance. Wells v. State, 21 T. Cr. R., 594, 2 S. W. R., 806; Harrell v. State, 22 Id., 692, 3 S. W. R., 479, and cases cited.

Need not recite that it was entered into in open court. Pleasants v. State, 29 T. Cr. R., 214, 15 S. W. R., 43.

Not allowable pending motion for new trial. Thompson v. State, 33 T. Cr. R., 352, 33 S. W. R., 871.

Art. 321. [309] **Requisites of a bail bond.**—A bail bond shall be sufficient if it contain the following requisites:

1. That it be made payable to the state of Texas.

Bail bond must conform in every particular to the statute. Wegner v. State, 24 T. Cr. R., 419, 13 S. W. R., 608, and cases cited.

If it binds the recognizor to appear at a term of court not authorized by law, it is void. Wegner v. State, supra.

2. That the obligors thereto bind themselves that the defendant will appear before the proper court or magistrate to answer the accusation against him.

Proper court, etc. It must bind the principal to appear before the proper court, failing which condition, the bond is of no force. Phelps v. State, 38 T., 555; Crouch v. State, 36 Id., 333; Littlefield v. State, 1 T. Cr. R., 722; Wallen v. State, 18 Id., 414; Mackey v. State, 38 Id., 24, 40 S. W. R., 982, and cases cited.

It is void if it names a court not known to law, or an impossible date. Smith v. State, 7 T. Cr. R., 160; Downs v. State, Id., 483; Mackey v. State, supra, and cases cited; Butler v. State, 31 Id., 64, 19 S. W. R., 676, and cases cited.

3. If the defendant is charged with an offense that is a felony, that it state that he is charged with a felony. If the defendant is charged with a misdemeanor, that it state that he is charged with a misdemeanor.

"Accusation." Sufficient now for the bond to state that the principal is "charged with a felony" (or "misdemeanor" as the case may be). Nichols v. State, 47 T. Cr. R., 406, 83 S. W. R., 1113; Hannon v. State, 48 Id., 199, 87 S. W. R., 152; Davis v. State, 56 Id., 131, 119 S. W. R., 95, following Horton v. State, 43 Id., 600, 68 S. W. R., 172.

4. That the bond be signed by the principal and sureties, or in case all or either of them can not write, then that they affix thereto their marks.

Execution of bond. Must be signed by the principal and sureties. Tierney v. State, 31 T., 40; Holt v. State, 20 T. Cr. R., 271; Nelson v. State, 44 Id., 595, 73 S. W. R., 398.

Must be executed or signed by the principal himself, or for him by some one duly authorized by him. Price v. State, 12 T. Cr. R., 235.

A bond which does not appear to have been executed by the person indicted, will not support forfeiture. Lowe v. State, 15 T., 141; Weaver v. State, 13 T. Cr. R., 191, and cases cited. And see Hutchings v. State, 24 Id., 242, 6 S. W. R., 34.

Unless the bond binds the surety as well as "his heirs and legal representatives," it is of no force. Grier v. State, 29 T., 95.

The state must explain the erasure of the name of a surety and show that it affected no right of the obligors in the bond. Kiser v. State, 13 T. Cr. R., 201, citing Davis v. State, 5 Id., 4.

Bond binding sureties in ..... dollars, is nugatory as to them. Townsend v. State, 7 T. Cr. R., 74.

A surety signing a bail bond in blank, knowing its purpose, is bound by the amount afterwards fixed and inserted by the magistrate. Gary v. State., 11 T. Cr. R., 527.

Nor can he avoid liability on the ground that he signed the bond on agreement with the sheriff that he was to be liable only for a certain sum, which sum was less than the face of the bond. Snowden v. State, 53 T. Cr. R., 439, 110 S. W. R., 442.

Writing his name in any part of the bond so as to identify the agreement and operate as his signature, binds the surety. Taylor v. State, 16 T. Cr. R., 514, citing Fulshear v. Randon, 18 T., 275.

Variance in the name of the principal: Whitener v. State, 38 T. Cr. R., 146, 41 S. W. R., 595.

5. That the bond state the time and place, when and where the accused binds himself to appear, and the court or magistrate before whom he is to appear. In stating the time, it is sufficient to specify the term of the court; and in stating the place, it is sufficient to specify the name of the court or magistrate, and of the county. [O. C. 264; amended, Act 1899, p. 111.]

Time, place and court before which the principal is bound to appear must be stated. "Before" refers to the place of the court and not to the time, and does not require appearance anterior to the term. Willifred v. State, 17 T., 653.

Bond is void which does not specifically bind the appearance at a particular time and place, and before the particular court. State v. Angell, 37 T., 357; State v. Ward, 38 Id., 302; State v. Phelps, Id., 555.

And see Littlefield v. State, 1 T. Cr. R., 722; Teel v. State, 3 Id., 326; Smith v. State, 7 Id., 160; Crowder v. State, Id., 484; Thomas v. State, 13 Id., 496; Fentress v. State, 16 Id., 79; Vivian v. State, Id., 262; Turner v. State, 18 Id., 168; Waller v. State, Id., 414; Wegner v. State, 28 Id., 419, 13 S. W. R., 608; Butler v. State, 31 Id., 63, 19 S. W. R., 676; Moseley v. State, 37 Id., 18, 38 S. W. R., 800; Mackey v. State, 38 Id., 24, 40 S. W R., 982.

Bail bond failing to state which of two district courts of the county to which the principal was bound, was defective in failing to designate the particular court. Granberry v. State, 55 T. Cr. R., 350, citing Moseley v. State, 37 Id., 18, 38 S. W. R., 800.

Onerous conditions. None of the articles of this chapter require the personal appearance of the principal, and such a condition in the bond is more onerous then required by Arts. 656 and 657, post. Williams v. State, 51 T. Cr. R., 252, 103 S. W. R., 929.

An onerous condition not prescribed by the Code cannot be treated as surplusage, and nullifies a bond. Turner v. State, 14 T. Cr. R., 168, and case cited; Watson v. State, 20 Id., 382.

And see Wilcox v. State, 24 T., 544; Barringer v. State, 27 Id., 553; Fulton v. State, 14 T. Cr. R., 32; Mathena v. State, 15 Id., 460; Anderson v. State, 19 Id., 290; Brown v. State, 28 Id., 65, 11 S. W. R., 1022; Pickett v. State, 16 Id., 643; Wright v. State, 22 Id., 670; Thompson v. State, 34 Id., 29 S. W. R., 789.

Art. 322. [310] **Rules laid down in this chapter applicable to all cases where bail is taken.**—The rules laid down in this chapter respecting recognizances and bail bonds are applicable to all such undertakings when entered into in the course of a criminal action, whether before or after an indictment or information, in every case where authority is given to any court, judge, magistrate or other officer, to require bail of a person accused of an offense, or of a witness in a criminal action. [O. C. 265.]

Date, approval and filing. A bond when taken by proper officer, returned into court and filed, is an obligation of record. Lawton v. St., 5 T. Cr. R., 270.

Failure of clerk to file returned bond does not affects its validity. Turner v. State, 41 T., 549; Eggenberger v. Brandenberger, 74 Id., 274, 11 S. W. R., 1099.

As to time, it is sufficient if the bond is in court and on file at any time before the trial. Cundiff v. State, 38 T., 641.

Bond takes effect from delivery and acceptance. Stafford v. State, 10 T. Cr. R., 46. And see Williamson v. State, 32 Id., 213, 22 S. W. R., 686.

Bail bond is not affected by the failure of the officer taking it to formally approve it. See on the subject, Dyches v. State, 24 T., 266; Evans v. State, 25 Id., 80; Doughty v. State, 33 Id., 1; Cundiff v. State, 38 Id., 61; Brown v. State, 40 Id., 49; Taylor v. State, 16 T. Cr. R., 514; Holt v. State, 20 Id., 271.

Unless the contrary is shown, the bond will be presumed to have been executed on the date of its approval. Mills v. State, 36 T. Cr. R., 71, 35 S. W. R., 370.

The date of the execution and approval of the bond differing, the former controls. Moseley v. State, 37 T. Cr. R., 18, 38 S. W. R., 800, citing Holt v. State, 20 Id., 271; Williamson v. State, 32 Id., 213, 22 S. W. R., 686.

If taken by the court in session, approval is not necessary. Arrington v. State, 13 T., 554.

Proceedings nunc pro tunc. Bond may be filed nunc pro tunc to correspond with the fact of filing. Slocumb v. State, 11 T., 15.

It may be so filed after judgment, nisi. Haverty v. State, 32 T., 602.

As to intrinsic matter, bail bond cannot be amended nunc pro tunc without notice to both principal and sureties. Hand v. State, 28 T. Cr. R., 28, and cases cited.

Effect of alteration. Any material alteration changing the purport of the obligation, vitiates the bond, if made without the consent of the sureties. Heath v. State, 14 T. Cr. R., 213, and cases cited; Gragg v. State, 18 Id., 295; Grant v. State, 8 Id., 432. And see Wegner v. State, 28 Id., 419, 13 S. W. R., 698; Butler v. State, 31 Id., 63, 19 S. W. R., 676; Collins v. State, 16 Id., 274, and cases cited.

Release of surety. Second arrest and bail of principal on the same indictment releases the sureties on the first bond. Peacock v. State, 44 T., 11; Lindley v. State, 17 T. Cr. R., 120; Roberts v. State, 22 Id., 64, 2 S. W. R., 622.

But surrender or arrest of principal after judgment, nisi, will not release sureties. Lee v. State, 25 T. Cr. R., 331, 8 S. W. R., 277. But see Hughes v. State, 28 Id., 499.

Bail once granted, the right to it is res adjudicata, and cannot be refused under a new indictment for the same offense. Ex parte Augustine, 33 T. Cr. R., 1, 23 S. W. R., 689.

Art. 323. [311] **Bail bond and recognizance.**—A recognizance or bail bond, entered into by a defendant, and which binds him to appear at a particular term of the district court, shall be construed to bind him and his sureties for his attendance upon the court from term to term, and from day to day, until discharged from further liability thereon, according to law. [O. C. 267.]

"Bail" construed. The obligation of a bail bond subsists until the obligors "are discharged from liability thereon, according to law." Wells v. State, 21 T. Cr. R., 594, 2 S. W. R., 806, citing Ex parte Guffey, 8 Id., 409.

It binds the obligors for the appearance of the principal from day to day and term to term, until discharged. Pickett v. State, 16 T. Cr. R., 648.

A bail bond is a statutory bond, and must, to entitle the state to recover, contain all statutory requisites. Wallen v. State, 18 T. Cr. R., 414.

An objectionable condition in a bond cannot be treated as surplusage. Wegner v. State, 28 T. Cr. R., 419, 13 S. W. R., 608; Turner v. State, 14 Id., 168; Townsend v. State, 7 Id., 74.

The liability is both joint and several, and this status is not affected by failure to bind the sureties severally in terms. Allee v. State, 28 T. Cr. R., 531, 13 S. W. R., 991; Kiser v. State, 13 Id., 291; Mathena v. State, 15 Id., 460; Thompson v. State, 34 Id., 135, 29 S. W. R., 789, overruling Ishmael v. State, 41 T., 245. But compare Thomas v. State, 13 T. Cr. R., 496, Fulton v. State, 14 Id., 32 and Barringer v. State, 27 T., 553. And see Johnson v. State, 32 T. Cr. R., 353, 22 S. W. R., 406.

Art. 324. [312] **Minor or married woman can not be security.**—A minor or married woman can not be surety on a recognizance or bail bond, but, if either of these classes of persons be the accused party, the undertaking shall be binding both upon principal and surety. [O. C. 268.]

Disqualified surety. Bail bond, signed by a married woman as surety, is invalid only as to her; not as to the principal and other sureties. Pickett v. State, 16 T. Cr. R., 648.

Art. 325. [313] **In what manner bail shall be taken.**—It is the duty of every court, judge, magistrate or other officer taking bail, to require evidence of the sufficiency of the security offered; but, in every case, one surety shall be sufficient, if it be made to appear that such surety is worth at least double the amount of the sum for which he is bound, exclusive of all property exempted by law from execution, and of debts or other incumbrances; that he is a resident of this state, and has property therein liable to execution worth the sum for which he is bound. [O. C. 269.]

Pierce v. State, 39 T. Cr. R., 342, 45 S. W. R., 1019.

Art. 326. [314] **Property exempt from sale shall not be liable for, etc.**—The property secured by the constitution and laws from forced sale shall not, in any case, be held liable for the satisfaction of a recognizance or bail bond, either as to the principal or sureties. [O. C. 270.]

Art. 327. [315] **How sufficiency of sureties shall be ascertained.**—In order to test the sufficiency of the security offered to any recognizance or bail bond, unless the court or officer taking the same is fully satisfied as to the sufficiency of the security, the following oath shall be made in writing and subscribed by the surety: "I, A B, do swear (or affirm, as the case may be) that I am worth, in my own right, at least the sum of [here insert the amount in which the surety is bound], after deducting from my property all that which is

exempt by the constitution and laws of the state from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances upon my property which are known to me; that I reside in———— county, and have property in this state liable to execution worth [amount for which he offers to be bound] or more."

[Signed by the surety.]

[Dated ————, and attest by the judge of the court, clerk, magistrate or sheriff.]

Which affidavit shall be filed with the papers of the cause, or criminal proceedings.

Construed. Bond executed by a single surety is not invalid because he is not shown to be worth double the amount of the bond. The taking of the bond without such oath is discretionary with the approving officer. Pierce v. State, 39 T. Cr. R., 342, 45 S. W. R., 1019.

Art. 328. [316] **Affidavit not conclusive, but further evidence required, when.**—The affidavit provided for in the preceding article shall not be deemed conclusive as to the sufficiency of the security; and, if the court or officer taking the recognizance or bail bond is not fully satisfied as to the sufficiency of the security offered, further evidence shall be required before approving the same.

Art. 329. [317] **Rules for fixing amount of bail.**—The amount of bail to be required in any case is to be regulated by the court, judge, magistrate or officer taking the bail; they are to be governed in the exercise of this discretion by the constitution of this state, and by the following rules:

1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.

2. The power to require bail is not to be used in such manner as to make it an instrument of oppression.

Excessive bail cannot be exacted under the Bill of Rights, Sec. 3; and a trivial sum to a rich man might be onerous and oppressive to a poor one. Ex parte Hutchings, 11 T. Cr. R., 28.

Ordinarily, five hundred dollars would not be excessive in a felony case. Id.

Bail held excessive: Ex parte Wilson, 20 T. Cr. R., 498; Ex parte Tittle, 37 Id., 597, 40 S. W. R., 598; Ex parte Harris, 49 Id., 232, 91 S. W. R., 794; Ex parte Finn, 48 Id., 606, 90 S. W. R., 29.

3. The nature of the offense and the circumstances under which it was committed are to be considered.

4. The pecuniary circumstances of the accused are to be regarded, and proof may be taken upon this point. [O. C. 272.]

Circumstances to be considered. Fixing the amount of bail, the court should consider, among other things, the nature of the offense and the circumstances under which it was committed. Ex parte Campbell, 28 T. Cr. R., 376, 13 S. W. R., 141.

The pecuniary condition of the accused is a matter to be considered. Ex parte Hutchings, 11 T. Cr. R., 28.

On appeal the record should always show the pecuniary condition of the accused. Ex parte Hutchings, supra; Ex parte Coldiron, 15 Id., 464, Miller v. State, 42 T., 309; Ex parte Catney, 17 T. Cr. R., 332.

3. SURRENDER OF THE PRINCIPAL BY HIS BAIL.

Art. 330. [318] **Surety may surrender his principal, when.**—Those who have become bail for the accused, or either of them, may at any time relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of the county where he is prosecuted. [O. C. 273.]

Surrender of principal This article refers to the manual surrender of the principal by the sureties. Such surrender relegates him to the custody of the sheriff under the original capias, and a new one is not necessary. Whitener v. State, 38 T. Cr. R., 146, 41 S. W. R., 595, citing Patillo v. State, 9 Id., 456.

The only two modes provided are: 1, surrender of the accused to the sheriff of the county of the prosecution; 2, by making affidavit of desire to surrender, and thereby obtaining an order of arrest. The sheriff of the proper county is the only officer authorized to receive surrender. Kiser v. State, 13 T. Cr. R., 201; Roberts v. State, 4 Id., 129.

Surrender of principal before forfeiture is a good defense for the sureties. Hughes v. State, 28 T. Cr. R., 499, 13 S. W. R., 777.

Art. 331. [319] **When surrender is made during term of court.**—Should a surrender of the accused be made during a term of the court to which he has bound himself to appear, the sheriff shall take him before the court; and, if he is willing to give other bail, the court shall forthwith require him to do so, as in other cases. [O. C. 274.]

New bond. This article relates to surrender during term time, and the bail must be taken in open court. Whitener v. State, 38 T. Cr. R., 146, 41 S. W. R., 595. And see Roberts v. State, 4 Id., 129.

The sheriff has no option under this article to fix the amount of bail. Ex parte Wasson, 50 T. Cr. R., 361, 97 S. W. R., 103.

Art. 332. [320] **When court is not in session.**—If the surrender be made while the court is not in session, the sheriff may take himself the necessary bail bond. [O. C. 275.]

New bond. This article refers to surrender out of term time, when the sheriff is authorized to take the necessary bail bond. Whitener v. State, 38 T. Cr. R., 146, 41 S. W. R., 595. And see State v. Russell, 24 T., 505.

Art. 333. [321] **Surety may obtain a warrant of arrest for principal, when.**—Any surety, desiring to surrender his principal, may, upon making a written affidavit of such intention before the court or magistrate before which the prosecution is pending, obtain from such court or magistrate a warrant of arrest for such principal, which shall be executed as in other cases. [O. C. 274.]

Construed. This article is not restricted in its application to the the county of prosecution, but authorizes process to any county in the state. Whitener v. State, 38 T. Cr. R., 146, 41 S. W. R., 595.

Art. 334. [322] **Proceedings when surrender is in term time and accused fails to give bond.**—If the accused fails or refuses to give bail in case of a surrender during a term of court, the court shall make an order that he be committed to jail until the bail be given; and this shall be a sufficient commitment without any written order or warrant to the sheriff. [O. C. 275.]

Surrender and failure of bond. This article applies to a surrender in the county of the prosecution. Whitener v. State, 38 T. Cr. R., 146, 41 S. W. R., 595.

Art. 335. [323] **When surrender is made in vacation and accused fails, etc.**—When the surrender is made at any other time than during the session of the court, and the defendant fails or refuses to give other bail, the sheriff shall take him before the nearest magistrate; and such magistrate shall issue a warrant of commitment, reciting the fact that the accused has been once admitted to bail, has been surrendered, and now fails or refuses to give other bail. [O. C. 276.]

Construed. Under this, and Art. 332, the affidavit required by Art. 321 can be made when the court it not in session, and the writ, whether called a warrant or

capias, may issue for the arrest of the principal. Whitener v. State, 38 T. Cr. R., 146, 41 S. W. R., 595.

In taking subsequent bail bonds, the officer is governed by the same rules which governed him in the first instance, and is not bound by the amount of the original bond taken on his own authority. Patillo v. State, 9 T. Cr. R., 457, citing Neblett v. State, 6 Id., 316; Barringer v. State, 27 T., 553.

Art. 336. [324] **Sheriff, etc., may take bail bond, when.**—The sheriff, or other peace officer, in cases of misdemeanor, has authority at all times, whether during the term of the court or in vacation, where he has a defendant in custody under a warrant of commitment, warrant of arrest, or capias, or where the accused has been surrendered by his bail, to take of the defendant a bail bond. [O. C. 279.]

Misdemeanor. Arresting for misdemeanor under a capias, the sheriff is authorized to take bail either in term time or vacation. Ellis v. State, 10 T. Cr. R., 324.

But arresting a party for an offense committed in another county, the sheriff has no authority to take bail. Ante, Arts. 281, 282.

Art. 337. [325] **Sheriff, etc., not authorized to take bail in felony case when court is in session.**—In cases of felony, when the accused is in custody of the sheriff or other peace officer, and the court before which the prosecution is pending is in session in the county where the accused is in custody, the court shall fix the amount of bail, if it is a bailable case; and the sheriff, or other peace officer, unless it be the police of a city, is authorized to take a bail bond of the accused, if executed with good and sufficient sureties, in the amount as fixed by the court, to be approved by such officer taking the same, and will thereupon discharge the accused from custody; and it shall not be necessary for the defendant or his sureties to appear in court, but such bail bond may be taken as if court was not in session, except for the fixing of the amount of bail as aforesaid. [O. C. 280; amended, Act 1907, p. 148.]

Practice. The district court being in session, but the proceeding being before an examining court, on charge of felony, which court bailed the accused to the next term of the district court, the sheriff had the right to take bond, the prosecution not then being pending before the district court. Peters v. State, 10 T. Cr. R., 302.

The sheriff can take bail of one arrested for felony, only when the court in which the case is pending is not in session. Kiser v. State, 13 T. Cr. R., 201; Gragg v. State, 18 Id., 295; La Rose v. State, 29 Id., 215, 15 S. W. R., 33.

Bond taken by the officer in open court is presumed to have been taken with the knowledge and sanction of the court. Arrington v. State, 13 T. Cr. R., 551; Arrington v. State, Id., 554.

Bail bond is not invalidated because taken on Sunday. Lindsey v. State, 39 T. Cr. R., 468, 46 S. W. R., 1045.

That the order of court allowing bail and the bail bond bore the same date is not sufficient proof that the court was in session at the exact time the bond was taken. Presumption would obtain that, being taken on a judgment day, it was taken on that day, after final adjournment for the term. Lindsey v. State, 39 T. Cr., 468, 46 S. W. R., 1045.

Art. 338. [326] **May take bail in felony cases, when.**—In a felony case, if the court before which the same is pending is not in session in the county where the defendant is in custody, the sheriff, or other peace officer having him in custody, may take his bail bond in such amount as may have been fixed by the court or magistrate, or, if no amount has been fixed, then in such amount as such sheriff or other peace officer may consider reasonable. [O. C. 281.]

Sheriff's authority. The sheriff of one county arresting one accused of bailable felony on a capias from another county, the sheriff of the latter county had authority, not only to demand the prisoner from the sheriff of the former county, but

to take bail for his appearance to answer the indictment in the county of the prosecution. Hill v. State, 15 T. Cr. R., 530.

Art. 339. [327] **Sureties are severally bound, etc.**—In all recognizances, bail bonds or other bonds, taken under the provisions of this Code, the sureties shall be severally bound; and, where a surrender of the principal is made by one or more of them, all the sureties shall be considered discharged, and the principal shall be required to give new bail, as in the first instance. [O. C. 281-283.]

Liability of sureties is joint and several, each bound for the entire amount, and no surety can limit his liability in any degree. Mathena v. State, 15 T. Cr. R., 460, citing Fulton v. State, 14 Id., 32, and Rainbolt v. State, 34 T., 286; Allee v. State, 28 T. Cr. R., 531, 13 S. W. R., 991; Avant v. State, 33 Id., 312, 26 S. W. R., 411; Thompson v. State, 34 Id., 29 S. W. R., 789; Ray v. State, 16 Id., 268.

4. BAIL BEFORE THE EXAMINING COURT.

Art. 340. [328] **Rules in relation to bail, and of a general nature, applicable in this court.**—The rules laid down in the preceding articles of this chapter, relating to the amount of the bail, the number of sureties, the person who may be surety, the property which is exempt from liability, the form of bail bonds, the responsibility of parties to the same, and all other rules in this chapter of a general nature, are applicable to bail taken before an examining court. [O. C. 284.]

Ante, Arts. 325, 327, 337, 338.

Art. 341. [329.] **Proceedings when bail is granted.**—After a full examination of the testimony, the magistrate shall, if the case be one where bail may properly be granted and ought to be required, proceed to make an order that the accused execute a bail bond with sufficient security, conditioned for his appearance before the proper court. [O. C. 285.]

Art. 342. [330] **When bail can not be allowed, and when it shall be allowed.**—In capital cases, where the guilt of the accused is evident, bail can not be allowed. In all other cases, the accused is entitled to bail as a matter of right. [O. C. 286-287.]

Ante, Art. 6, and notes.

Bail is not available to an accused of a capital offense when the proof is evident. **Ex** parte King, 56 T. Cr. R., 68, 118 S. W. R., 1032; Ex parte Cabrera, 53 Id., 466, 110 S. W. R., 898.

Art. 343. [331] **Reasonable time given to procure bail.**—Reasonable time shall be given the accused to procure security. [O. C. 289.]

Art. 344. [332] **When bail is not given, magistrate shall commit accused, etc.**—If, after the allowance of a reasonable time, the security be not given, the magistrate shall make an order committing the accused to jail to be kept safely until legally discharged; and he shall issue a warrant of commitment accordingly. [O. C. 290.]

Art. 345. [333] **When accused is ready to give bail, a bond shall be prepared, etc.**—If the party be ready to give bail, the magistrate shall prepare, or cause to be prepared, a bail bond, which shall be signed by the accused and his surety or sureties, the magistrate first being satisfied as to the sufficiency of the security. [O. C. 291.]

Ante, Arts. 327, 328; Arrington v. State, 15 T. Cr. R., 551, 554.

Art. 346. [334] **Accused shall be liberated upon giving bond.**—In all cases when the accused has given the required bond, either to the magistrate, or the officer having him in custody, he shall at once be set at liberty. [O. C. 293-294.]

Art. 347. [335] **Magistrate shall certify proceedings to proper court.**—The magistrate, before whom an examination has taken place upon a criminal accusation, shall certify to all the proceedings had before him, and transmit them, sealed up, to the court, before which the defendant is subject to be tried upon indictment or information, writing his name across the seals of the envelope containing the proceedings. The voluntary statement of the defendant, the testimony of the witnesses, bail bonds of the defendant and of witnesses, and all and every other proceeding in the case, shall be thus delivered to the clerk of the proper court, without delay. [O. C. 295.]

Procedure. Examining courts are required to certify all proceedings; and omissions from the record can not be supplied by oral testimony. Foat v. State, 28 T. Cr. R., 527, 13 S. W. R., 867.

Bail bond is one of the papers required to be certified. Kimbrough v. State, 28 T. Cr. R., 367, 13 S. W. R., 218.

Art. 348. [336] **Duty of clerks who receive such proceedings.**—If the proceedings be delivered to a clerk of the district court, he shall keep the same safely, and deliver the same to the foreman of the next grand jury, as soon as said grand jury is organized. If the proceedings are delivered to a clerk of the county court, he shall keep the same safely, and, without delay, deliver them to the district or county attorney of his county.

See Kerry v. State, 17 T. Cr. R., 179; Kimbrough v. State, 28 Id., 367, 13 S. W. R., 218; Byrd v. State, 26 Id., 374, 9 S. W. R., 759.

Art. 349. [337] **Duty of magistrate in all cases to certify and deliver proceedings.**—It is the duty of a magistrate, as well where a party has been discharged as where he has been held to bail or committed, to certify and deliver the proceedings in the case, as provided in article 347; and he shall likewise, when a complaint has been made to him of the commission of an offense, and there has been a failure from any cause to arrest the accused, file with the proper clerk the complaint and warrant of arrest, together with a list of the witnesses and their residences, if known. [O. C. 296.]

Art. 350. [338] **Accused may waive an examination; proceedings in such case.**—In all bailable cases before an examining court, the accused may waive a trial of the accusation, and consent for the magistrate to require bail of him; but, in such case, the prosecutor or magistrate may cause the witnesses for the state to be examined as in other cases; and the magistrate shall transmit, with the other proceedings in the case, to the clerk of the proper court, a list of the witnesses for the state, whether examined or not, and their residence, if known.

5. BAIL BY WITNESSES.

Art. 351. [339] **Witnesses required to give bond, when.**—Witnesses on behalf of the state or defendant may be required by the magistrate, upon the examination of any criminal accusation before him, to give bail for their appearance to testify before the proper court; and, if a witness make oath that he is unable to give security or deposit a sufficient amount of money in lieu thereof, then his individual bond shall be taken. [O. C. 297.]

Art. 352. [340] **Of amount of security required of a witness.**—The amount of security to be required of a witness is to be regulated by his pe-

cuniary condition, and the nature of the offense, with respect to which he is a witness. [O. C. 298.]

Art. 353. [341] **Force and effect of witnesses' bonds.**—The bonds given by witnesses for their appearance shall have the same force and effect of bail bonds, and may be forfeited and recovered upon in the same manner. [O. C. 299.]

Record showing that the bond was not executed until four days after the examining trial, and after that court had adjourned, and failing to show an order of the magistrate, requiring such bond, it was invalid and not enforceable. Foat v. State, 28 T. Cr. R., 527, 13 S. W. R., 867.

Art. 354. [342] **Witness who fails, etc., to give bond when required may be committed.**—When a witness who has been required to give bail, fails or refuses to do so, and fails or refuses to make the affidavit provided for in article 351, he shall be committed to jail as in other cases of a failure or refusal to give bail when required; but he shall be released from custody, upon giving such bail, or upon making the affidavit provided for in article 351, and giving his individual bond.

TITLE 6.

SEARCH WARRANTS.

Chapter
1. General Rules.
2. When and How a Search Warrant May Be Issued.
3. Of the Execution of a Search Warrant.
4. Proceedings on the Return of a Search Warrant.

CHAPTER ONE.

GENERAL RULES.

Article
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Article 355. [343] **Definition of "search warrant."**—A "search warrant" is a written order, issued by a magistrate, and directed to a peace officer, commanding him to search for personal property, and to seize the same, and bring it before such magistrate; or it is a like written order, commanding a peace officer to search a suspected place where it is alleged stolen property is commonly concealed, or implements kept for the purpose of being used in the commission of any designated offense. [O. C. 300.]

Art. 356. [344] **For what purposes it may be issued.**—A search warrant may be issued for the following purposes, and no others:

1. To discover property acquired by theft, or in any other manner which makes its acquisition a penal offense.

2. To search suspected places where it is alleged property so illegally acquired is commonly kept or concealed.

3. To search places where it is alleged implements are kept for the purpose of being used in forging or counterfeiting.

4. To search places where it is alleged arms or munitions are kept or prepared for the purpose of insurrection or riot.

5. To seize and bring before a magistrate any such property, implements, arms and munitions.

See Penal Code, Art. 601.

6. Any place, room or building in any county, justice precinct, town, city or such subdivision of the county, as may be designated by the commissioners court of said county, in which the sale of intoxicating liquor has been prohibited under the laws of this state, kept, maintained or used for the purpose of selling intoxicating liquor in violation of law, and any intoxicating liquor kept or possessed for such purpose, whether kept or possessed in any such place, room or building or elsewhere, and any signs, screens, bars, bottles, glasses and any other furniture, tools, appliances or other articles or things used as aids in keeping and maintaining any such place, room or building or any such liquor, are each and all hereby declared to be a common nuisance, and subject to search warrant. [O. C. 301; add. S. S. 1910, p. 27.]

Art. 357. [345] **Its object.**—A warrant to search for and seize stolen property is designed as a means of obtaining possession of the property for the

purpose of restoring it to the true owner, and detecting any person guilty of the theft or concealment of the same. [O. C. 302.]

Art. 358. [346] **Definition of word "stolen."**—The word "stolen," as used in this title, is intended to embrace also the acquisition of property by any means forbidden and made penal by the law of the state.

Art. 359. [347] **When asked for in reference to property not stolen.**—When it is alleged that the property, to search for which a warrant is asked, was acquired in any other manner than by theft, the particular manner of its acquisition must be set forth in the complaint and in the warrant. [O. C. 304.]

Art. 360. [348] **These rules applicable to all cases.**—The mode of proceeding, directed to be pursued in applying for a warrant to search for and seize stolen property, and the rules prescribed for officers in issuing such warrants and executing the same, the disposition of the property seized, and all other rules herein prescribed on the subject, shall apply and be pursued, when the property to be searched for was acquired, in any manner, in violation of the provisions of the Penal Code.

CHAPTER TWO.

WHEN AND HOW A SEARCH WARRANT MAY BE ISSUED.

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Article 361. [349] **Contents of application for a search warrant.**—A warrant to search for and seize property alleged to have been stolen and concealed at a particular place may be issued by a magistrate, whenever complaint in writing and on oath is made to such magistrate, setting forth—

1. The name of the person accused of having stolen or concealed the property; or, if his name be unknown, giving a description of the accused, or stating that the person who stole or concealed the property is unknown.
2. The kind of property, and its probable value, alleged to be stolen or concealed.
3. The place where the property is alleged to be concealed.
4. The time, as near as may be, when the property is alleged to have been stolen. [O. C. 307.]

Art. 362. [350] **Contents of application for warrant to discover and seize.**—A warrant to discover and seize property alleged to have been stolen, or otherwise acquired in violation of the penal law, but not alleged to be concealed at any particular place, may be issued whenever complaint is made in writing and on oath, setting forth—

1. The name of the person suspected of being the thief, or an accurate description of him, if his name be unknown, or that the thief is unknown.
2. An accurate description of the property, and its probable value.
3. The time, as near as may be, when the property is supposed to have been stolen.
4. That the person complaining has good ground to believe that the property was stolen by the person alleged to be the thief. [O. C. 306.]

Art. 363. [351] **Contents of application for warrant to search suspected place.**—A warrant to search any place suspected to be one where stolen goods are commonly concealed or where implements are kept for the purpose of aiding in the commission of offenses may be issued by a magistrate, when complaint is made in writing and on oath, setting forth—

1. A description of the place suspected.
2. A description of the kind of property alleged to be commonly concealed at such place, or the kind of implements kept.
3. The name, if known, of the person supposed to have charge of such place, when it is alleged that it is under the charge of any one.
4. When it is alleged that implements are kept at a place for the purpose of aiding in the commission of offenses, the particular offense for which such implements are designed must be set forth; and, upon affidavit being made by any credible person of the county where the proceeding is begun, before the county judge or a justice of the peace of said county, describing the place, room or building, as near as may be, where it is believed by the affiant that intoxicating liquor is being sold in violation of law, or is being kept or possessed for the purpose of being sold in violation of law, or shall name or describe, if the name is unknown, any person who has, keeps or possesses any intoxicating liquor for the purpose of sale, in violation of law, or has, keeps or possesses any signs, screens, bars, bottles, glasses, furniture, tools, appliances or other articles or things, describing them, as near as may be, for the purpose of using such articles in the sale, or in any manner, as an aid to the unlawful sale of intoxicating liquor, then, and, in either event, it shall be the duty of such county judge, or justice of the peace, as the case may be, to issue a warrant, commanding the sheriff, or any constable of the county to immediately search such place, room or building, describing the same, as near as may be, or such person, giving name or description; and it shall be the duty of said officer to whom said warrant is delivered by the county judge, or justice of the peace, to immediately search such place, room or building, or such person; and, if refused admission into any such place, room or building, then, and in such event, the officer executing such warrant shall be, and is hereby authorized to force an entrance to any such place, room or building, using such force as may be necessary for that purpose; and he shall search for, and seize the intoxicating liquor described in such warrant, which may be found in such place, room or building, or in the possession, or under the control, of such person named or described in said warrant, that is being kept or possessed for the purpose of being sold in violation of law, and shall also seize all signs, screens, bars, bottles, glasses, furniture, tools, appliances or other articles or things which may have been described in said warrant as being used in keeping or maintaining such place, or used in any manner as an aid to the unlawful sale of intoxicating liquor; and, after seizure, he shall make an accurate inventory of everything seized, stating therein the reasonable market value of each item, and shall securely keep the same until replevied or otherwise disposed of under the provisions of this law. [O. C. 308; add. S. S. 1910, p. 27.]

Art. 364. [352] **Warrant to arrest may issue with the search warrant in certain cases.**—The magistrate, at the time of issuing a search warrant, may also issue a warrant for the arrest of the person accused of having stolen the property, or of having concealed the same, or of having in his possession or charge property concealed at a suspected place, or of having possession of implements designed for use in the commission of the offense of forgery, counterfeiting or burglary, or of having the charge of arms or munitions prepared for the purpose of insurrection, or of having prepared such arms or munitions, or who may be, in any legal manner, accused of be-

ing accomplice or accessory to any of the offenses above enumerated. [O. C. 309.]

Art. 365. [353] **Search warrant may command officer to bring party accused before the magistrate.**—The search warrant may, in addition to commanding the peace officer to seize property, also require him to bring before the magistrate the person accused of having stolen or concealed the property.

Art. 366. [354] **Requisites of a search warrant.**—A search warrant to seize property stolen and concealed shall be deemed sufficient if it contains the following requisites:

1. That it run in the name of "The State of Texas."
2. That it be directed to the sheriff or other peace officer of the proper county.
3. That it describe the property alleged to be stolen or concealed, and the place where it is alleged to be concealed, and order the same to be brought before the magistrate.
4. That it name the person accused of having stolen or concealed the property; or, if his name be unknown, that it describe him with accuracy, and direct the officer to bring such person before the magistrate, or state that the person who stole or concealed the property is unknown.
5. That it be dated and signed by the magistrate. [O. C. 311.]

Post, Arts. 368, 375.

Private person's right to arrest in all cases in which stolen property is found in the possession of the thief, is clearly given by this article. Morris v. Kassling, 79 T., 141, 15 S. W. R., 226.

But this right does not authorize the owner to pursue and take the thief, dead or alive, nor is the thief deprived of all right of resistance if attacked under such circumstances. Perez v. State, 29 T. Cr. R., 618, 16 S. W. R., 750, citing Luera v. State, 12 Id., 257.

A private person acting under this article is, for the time being, an officer de facto, with all the privileges, and subject to all the penalties, of an officer de jure. Smith v. State, 13 T. Cr. R., 507.

A killing upon malice and not to prevent theft, though the thief was attempting to commit theft, can not be justified under this article. Laws v. State, 26 T. Cr. R., 643, 10 S. W. R., 220.

Art. 367. [355] **Requisites of a warrant to search suspected place.**—A warrant to search a suspected place shall be deemed sufficient if it contain the following requisites:

1. That it run in the name of "The State of Texas."
2. That it describe with accuracy the place suspected.
3. That it describe, as near as may be, the property supposed to be commonly concealed in such suspected place, or the implements alleged to be there kept for the purpose of aiding in the commission of offenses, and state the particular offense for which such implements are designed.
4. That it name the person accused of having charge of the suspected place, if there be any such person, or, if his name is unknown, that it describe him with accuracy, and direct him to be brought before the magistrate.
5. That it be dated and signed by the magistrate, and directed to the sheriff or other peace officer of the proper county.
6. The search warrant provided for the search for intoxicating liquors, etc., shall, in substance, conform to the following requisites: It shall run in the name of the state of Texas, and be directed to the sheriff or any constable of the county; it shall name the owner of the intoxicating liquor to be seized, if his name shall be known; it shall command him to search the place, room, premises, building, or any part thereof, or the person named in the complaint, and shall specify, as near as may be, the things to be searched

for and seized, and the owner thereof, when known, if not, the same shall allege that the owner is unknown, and shall be signed officially by the magistrate issuing the same; provided, an immaterial variance between the complaint and warrant shall not render the latter void. [O. C. 312; add. S. S. 1910, p. 28.]

CHAPTER THREE.

OF THE EXECUTION OF A SEARCH WARRANT.

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Article 368. [356] **Warrant shall be executed without delay.**—Any peace officer to whom a search warrant is delivered shall execute the same without delay, and forthwith return the same to the proper magistrate. It must be executed within three days from the time of its issuance, and shall be executed within a shorter period if so directed in the warrant by the magistrate.

The officer executing the search warrant for the search of premises for intoxicating liquors, etc., shall, within fifteen days, make due return thereof, to the county judge or the justice of the peace, issuing the same; and, when a seizure has been made thereunder, he shall, within five days after said seizure, make said return, showing therein a list of the intoxicating liquor and other articles seized, the reasonable market value thereof, as fixed by him, and the replevy bond or bonds, if any given, and if not replevied, the name and residence of owner or owners of any such property seized and not replevied; and if no one is known to be the owner, then the name or names and residence of the person, firm or corporation, in whose possession, or under whose control said liquor or other property was when seized; on return being made to said county judge or justice of the peace, he shall file said cause in the district court of said county.

At any time before the trial of the issues as provided herein, the owner of said property seized, or any part thereof, or the person in whose possession, or under whose control, the same was at the time of seizure, may replevy the same by giving bond with two or more good and sufficient sureties, or a solvent guaranty or surety company, chartered or authorized to do business under the laws of this state, to be approved by the officer making the seizure, or his successor in office, payable to the state of Texas, in an amount equal to the reasonable market value of the property replevied, as fixed on the inventory, conditioned that should said property in said action be condemned as a nuisance, the obligors in such bond will pay to the state of Texas the reasonable cash market value of the property replevied at the time it was seized, and all costs, including fifteen per cent addition on said amount as a fee to the county or district attorney who discharges such duty for the state, and ten per cent on the amount thereof for the sheriff or constable.

The property, when not replevied, shall remain in the custody of the officer seizing, or in that of his successor in office, until final judgment, subject

to such orders for the preservation of same as the judge of the district court of said county may make, either in term time or vacation, as shall appear to be to the best interest of all parties concerned; provided, that the defendant in said suit may replevy the property at any time prior to final trial. [O. C. 313, 319; add. S. S. 1910, pp. 28, 29.]

Art. 369. [357] **Three and fifteen whole days allowed for warrant to run.**—The three, and the fifteen days' time allowed for the execution of a search warrant shall be three and fifteen whole days, exclusive of the day of its issuance and of the day of its execution.

Art. 370. [358] **Officer shall give notice of purpose to execute warrant.**—The officer shall, upon going to the place ordered to be searched, or before seizing any property for which he is ordered to make search, give notice of his purpose to the person who has charge of, or is an inmate of, the place, or who has possession of the property described in the warrant. [O. C. 315.]

Art. 371. [359] **Power of officer executing warrant.**—In the execution of a search warrant, the officer may call to his aid any number of citizens in his county, who shall be bound to aid in the execution of the same. If he is resisted in the execution of the warrant, he may use such force as is necessary to overcome the resistance, but no greater. [O. C. 314, 316.]

Art. 372. [360] **When an officer may enter house by force.**—In the execution of a search warrant, the officer may break down a door or a window of any house which he is ordered to search, if he can not effect an entrance by other less violent means; but, when the warrant issues only for the purpose of discovering property stolen, or otherwise obtained in violation of the penal law, without designating any particular place where it is supposed to be concealed, no such authority is given to the officer executing the same. [O. C. 317.]

Art. 373. [361] **Shall seize persons accused and property, and take them before magistrate.**—When the property, implements, arms or munitions which the officer is directed to search for and seize are found, he shall take possession of the same, and carry them before the magistrate. He shall also arrest any person whom he is directed to arrest by the warrant, and forthwith take such person before the magistrate. [O. C. 318.]

Art. 374. [362] **Officer shall receipt for property.**—An officer taking any property, implements, arms or munitions, shall receipt therefor to the person from whose possession the same may have been taken. [O. C. 320.]

Art. 375. [363] **How return made.**—Upon returning the search warrant, the officer shall state on the back of the same, or on some paper attached to it, the manner in which it has been executed, and shall likewise deliver to the magistrate an inventory of the property, implements, arms or munitions taken in his possession under the warrant. [O. C. 321.]

Art. 376. [364] **All persons have the right to prevent the consequences of theft, etc.**—All persons have a right to prevent the consequences of theft by seizing any personal property which has been stolen, and bringing it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the property to be stolen, and the seizure must be openly made and the proceedings had without delay. [O. C. 94.]

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Article 377. [365] **Disposition of stolen property, etc.**—When property is taken under the provisions of this title, and delivered to a magistrate, he shall, if it appear that the same was stolen or otherwise acquired in violation of the penal law, dispose of it according to the rules prescribed in this Code with reference to the disposition of stolen property. [O. C. 322.]

Art. 378. [366] **Officer seizing implements, etc., shall keep same subject, etc., procedure on.**—When a warrant has been issued for the purpose of searching a suspected place, and there be found any such implements, arms, munitions or intoxicating liquors, etc., as are alleged to have been there kept or concealed, the same shall be safely kept by the officer seizing the same, subject to the further order of the magistrate.

The clerk of the district court of the county in which the warrant to search for intoxicating liquors, etc., was issued, when said cause is filed, shall docket the same in the name of the state of Texas, as plaintiff, and the principal in the replevy bond, and, if not replevied, the name of the owner or person found in possession as defendant; provided, that when two or more replevy bonds are given, or where there are two or more owners or claimants to the property, or parts thereof, seized, urging distinct and separate claims, then, and, in such event, each case shall be filed and docketed separately in the district court of said county; and, in such event, said county judge or justice of the peace shall make and certify to as many copies of the original papers as there are cases, all of which shall be considered and treated as originals.

The clerk of the district court of said county shall immediately issue notice, which shall be served upon the defendant in the manner required for service of citation in civil suits; provided, the defendant shall be required to answer, if served, ten days before the first day of the return term, excluding the day of service and return; and provided, further, the defendant shall have the right to expedite a trial of the issue by waiving service and time. Said cause, if tried by a jury, shall be submitted on a special issue, which shall be, in substance, whether or not the intoxicating liquors and other property seized constituted a nuisance, within the meaning of this law, when seized. If no jury has been demanded by either side, then said issue shall be determined by the court. Said cause shall have precedence over all other cases, except cases of like kind, or cases to which the state is a party; the same shall be tried and prosecuted under the rules of evidence, practice and procedure, and, in all other respects, as other civil cases; and, in case of appeal, the transcript shall, without delay, be made up and forwarded by the clerk to the proper appellate court; provided, that the state shall not be required to pay or give security for costs, nor bond on appeal, and the same shall be perfected by notice thereof given in open court.

The notice provided for in this law, shall briefly recite the record upon which it is based; provided, that any immaterial variance between the writ and former proceedings will not be fatal thereto. It shall require the defendant to show cause, by a day named, why the liquor and other articles

seized should not be declared a nuisance; but the burden of proof shall be upon the state to show, by a preponderance of the evidence, that the allegations of the complaint are substantially true.

Should the state prevail in the suit, the court shall enter a judgment condemning the property seized to be destroyed and against the defendant for all costs, and shall issue a proper writ directing the sheriff, or any constable of the county, to execute the same. The said writ shall conform, in all material respects, to the writ of execution, except that it shall command said officer, in addition to making levy sufficient to collect the amount of costs, to destroy said property in the manner most suited to its nature. If the property, prior to the entry of said judgment, has been replevied, then judgment shall be entered against the principal and the sureties on such bond for an amount equal to the reasonable cash market value of the property at the time the same was seized, including fifteen per cent thereof as attorney's fees and ten per cent fee to the sheriff or constable; and the judgment, when collected, less the costs, shall be paid into the county treasury, and shall become a part of the jury fund of the county. Should the defendant prevail, judgment shall be entered restoring said property seized to the defendant, or discharging the principal and sureties on the replevy bond, as the case may be.

It shall be the duty of the county attorney to represent the state in said cases; and, in all counties where there is a district attorney, he shall assist the county attorney in the prosecution of all such suits. In all cases where the state recovers judgment, there shall be taxed against the defendant, as costs, the usual fees allowed in civil cases, in addition to fifteen per cent of the value of the property for the county or district attorney's fee, and ten per cent of the value thereof for the sheriff and constable; which fees and costs shall not be accounted for by said officers under any provisions of law relating to fees of office; provided, however, that the state shall, in no event, be liable for, or be required to pay, any costs. Where the county attorney represents the state, he shall be entitled to the fee of fifteen per cent above provided; and, where he is assisted in said civil case by the district attorney, said fee shall be equally divided between them. [O. C. 323; added S. S. 1910, pp. 29, 30.]

Art. 379. [367] **Magistrate shall proceed to investigate, etc.**—The magistrate, upon the return of a search warrant, shall proceed to try the questions arising upon the same, and shall take testimony as in other examinations before him, and be governed by like rules. [O. C. 330.]

Art. 380. [368] **Shall discharge defendant, when.**—If the magistrate be not satisfied, upon investigation, that there was good ground for the issuance of the warrant, he shall discharge the defendant, and order restitution of the property or articles taken from him, except implements which appear to be designed for forging, counterfeiting or burglary; and, in such case, the implements shall be kept by the sheriff, or officer who seized the same, subject to the order of the proper court. [O. C. 332.]

Art. 381. [369] **Sheriff, etc., shall furnish magistrate schedule of property seized.**—The sheriff, or other officer who seizes any property under a search warrant, shall furnish the magistrate to whom he returns the warrant with a certified schedule of the articles of property so seized. [O. C. 324.]

Art. 382. [370] **Proceedings when magistrate is satisfied that warrant was issued upon good ground.**—If the magistrate be satisfied there was good ground for issuing the warrant, he shall proceed to deal with the accused in accordance with the rules prescribed in this Code for other criminal cases before an examining court. [O. C. 331.]

Art. 383. [371] **Magistrate shall certify record, etc., of proceedings to proper court.**—The magistrate shall keep a record of all the proceedings had before him in cases of search warrants, and shall certify the same and deliver them to the clerk of the court having jurisdiction of the case, before the next term of said court, and accompany the same with all the original papers relating thereto, including the certified schedule of the property seized, required by article 381. [O. C. 334.]

TITLE 7.

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

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3. Of Indictments and Information.
4. Of Proceedings Preliminary to Trial.
   1. Of Enforcing the Attendance of Defendant and of Forfeiture of Bail.
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Chapter 4—Of Proceedings Preliminary to Trial—continued.
4. Service of a Copy of the Indictment.
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CHAPTER ONE.

THE ORGANIZATION OF THE GRAND JURY.

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Article 384. [372] **Jury commissioners shall be appointed, and their qualifications.**—The district judge shall, at each term of the district court, appoint three persons to perform the duties of jury commissioners, who shall possess the following qualifications:

1. They shall be intelligent citizens of the county, and able to read and write.

2. They shall be freeholders in the county, and qualified jurors in the county.

3. They shall be residents of different portions of the county.

4. They shall have no suit in the district court of such county, which requires the intervention of a jury. [Act Aug. 1, 1877, p. 79, § 4.]

Art. 385. [373] **Commissioners shall be notified of appointment, etc.**—The judge shall cause the persons appointed as jury commissioners to be notified by the sheriff or other proper officer of such appointment, and of the time and place, when and where they are to appear before the judge. [Id.]

Art. 386. [374] **Oath of jury commissioners.**—When the persons appointed appear before the judge, he shall administer to them the following oath: "You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you, and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged. [Id.]

Art. 387. [375] **Shall be instructed in their duties, furnished with room, stationery, etc.**—The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in their duties and shall then retire, in charge of the sheriff or a deputy sheriff, to a suitable room or apartment, to be secured by the sheriff for that purpose. They shall be furnished by the clerk with the necessary stationery, and with the names of the persons appearing from the records of the court to be exempt or disqualified from serving on the jury at each term; and they shall also be furnished with the last assessment roll of the county. [Id., § 6.]

Art. 388. [376] **Shall be kept free from intrusion; shall not separate, etc.**—The jury commissioners shall be kept free from the intrusion of any person during their session, and shall not separate, without leave of the court, until they shall have completed the duties required of them. [Id.]

Art. 389. [377] **Shall select grand jurors.**—The jury commissioners shall select, from the citizens of the different portions of the county, sixteen persons, to be summoned as grand jurors for the next term of the district court. [Id., p. 83, § 28.]

A constitutional and legal grand jury comprises twelve members, neither more nor less. Trevinio v. State, 27 T. Cr. R., 372, 11 S. W. R., 447, citing Lott v. State, 18 Id., 627; McNeese v. State, 19 Id., 48. And see ante, Art. 3, and notes; Ex parte Love, 49 T. Cr. R., 475, 93 S. W. R., 551, and cases cited.

The grand jury is to be selected from the sixteen persons drawn by the jury commissioners. Smith v. State, 19 T. Cr. R., 95; Rainey v. State, Id., 479.

Neither the grand jury nor the court can excuse a grand juror after the body has been legally organized, and the district court can only, in discharging, discharge the entire grand jury. Ex parte Love, 49 T. Cr. R., 475, 93 S. W. R., 551.

While twelve is the exact quota of the grand jury, nine of that twelve can return a true bill. Ex parte Love, supra; Watts v. State, 22 Id., 572; Drake v. State, 25 Id., 293, 7 S. W. R., 868.

Art. 390. [378] **Qualifications of grand jurors.**—No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the state, and of the county in which he is to serve, and qualified under the constitution and laws to vote in said county; but, whenever it shall be made to appear to the court the requisite number of jurors who have paid their poll taxes can not be found within the county, the court may dispense with the requirement of the payment of poll taxes as a qualification for service as a juror.

2. He must be a freeholder within the state, or a householder within the county.
3. He must be of sound mind and good moral character.
4. He must be able to read and write.
5. He must not have been convicted of any felony.
6. He must not be under indictment or other legal accusation of theft or of any felony. [Id., p. 78, §§ 1-3; O. C. 389; Const., art. 16, § 19; amended Act 1903, 1st S. S., p. 16.]

Exemption from grand jury service of certain officials is a personal privilege to be claimed or waived by them only. Owens v. State, 25 T. Cr. R., 552, 8 S. W. R., 658; Edgar v. State, 127 S. W. R., 1053.

Challenge is the only means of presenting an objection to the qualifications of a person as a grand juror. Doss v. State, 28 T. Cr. R., 506, 13 S. W. R., 788, overruling Wood's case, 26 Id., 490, 10 S. W. R., 108; Lacy v. State, 31 Id., 78, 19 S. W. R., 896.

Art. 391. [379] **Names of grand jurors shall be returned, how.**—The names of the persons selected as grand jurors by the commsisioners shall be written upon a paper; and the fact that they were so selected shall be certified and signed by the jury commissioners, who shall place said paper, so certified and signed, in an envelope, and seal the same, and indorse thereon the words, "The list of grand jurors selected at.....term of the district court," the blank to be filled by stating the month and year in which the term of the court began its session. The commissioners shall write their names across the seal of said envelope, and direct the same to the district judge, and deliver it to him in open court. [Id., § 28.]

Practice. The same rule obtains with reference to the return of petit jurors. Giebel v. State, 28 T. Cr. R., 151, 12 S. W. R., 591.

Art. 392. [380] **Judge shall deliver list to clerk.**—The judge shall deliver the envelope containing the list of grand jurors, as provided for in the preceding article, to the clerk, or one of his deputies, in open court, and without opening the same. [Id., § 8.]

Art. 393. [381] **Oath shall be administered to clerk, etc., by judge.**—Before the list of grand jurors is delivered to the clerk, as provided in the preceding article, the judge shall administer to the clerk, and each of his deputies, in open court, the following oath: "You do swear that you will not open the jury lists now delivered by you, nor permit them to be opened until the time prescribed by law; that you will not, directly or indirectly, converse with any one selected as a juror concerning any case or proceeding which may come before such juror for trial in this court at its next term." [Id.]

Art. 394. [382] **Deputy clerk shall take same oath.**—Should the clerk subsequently appoint a deputy, such clerk shall administer to him the same oath, at the time of such appointment. [Id.]

Art. 395. [383] **When clerk shall open lists, etc.**—Within thirty days of the next term of the district court, and not before, the clerk, or one of his deputies, shall open the envelope containing the list of grand jurors, and make out a fair copy of the names of the persons selected as grand jurors, and certify to the same under his official seal, and deliver it to the sheriff, or his deputy. [Id., § 9.]

Art. 396. [384] **Mode of summoning grand jurors.**—It shall be the duty of the sheriff, or his deputy, to summon the persons named in the list, at least three days, exclusive of the day of service, prior to the first day of the term of court at which they are to serve, by giving personal notice to each juror of the time and place, when and where he is to attend as a grand juror, or by leaving at his place of residence, with a member of his family over sixteen

years old, a written notice to such juror that he has been selected as a grand juror, and the time and place, when and where he is to attend. [Id.]

Art. 397. [385] **Return of officer.**—The sheriff or officer, executing such summons, shall return the list on the first day of the term of court at which such jurors are to serve, with a certificate thereon of the date and manner of service upon each juror; and, if any of said jurors have not been summoned, he shall also state in his certificate the reason why they have not been summoned. [Id.]

Art. 398. [386] **Juror may be fined for not attending.**—A jury legally summoned, failing to attend without a resonable excuse, may, by order of the court entered on the record, be fined not less than ten nor more than one hundred dollars. [Id., § 10.]

Art. 399. [387] **Failure to select, etc., grand jury; duty of court.**—If, for any cause, there should be a failure to select and summon a grand jury, as herein directed, or, when none of those summoned shall attend, the district court shall, on the first day of the organization thereof, direct a writ to be issued to the sheriff, commanding him to summon any number of persons, not less than twelve nor more than sixteen persons, to serve as grand jurors. [O. C. 347.]

Art. 400. [388] **When less than twelve attend, court shall order others summoned.**—When a number less than twelve of those summoned to serve as grand jurors are found to be in attendance and qualified to serve as grand jurors, the court shall order the sheriff to summon such additional number of persons as may be deemed necessary to constitute a grand jury of twelve men. [O. C. 354.]

Construed. This article, manifestly, has no application, after a legal grand jury of twelve has been organized. So long thereafter as a quorum of nine are present and sitting, their acts are valid. Drake v. State, 25 T., 293, 7 S. W. R., 868; Jackson v. State, Id., 314, 7 S. W. R., 872; Smith v. State, 19 Id., 95.

Art. 401. [389] **When jurors shall be required to attend forthwith.**—The jurors provided for in the two preceding articles shall be summoned to attend before the court forthwith, and shall be summoned in person, but shall not be entitled to service three days before the time they are to attend, as provided in the case of jurors selected by jury commissioners.

Art. 402. [390] **Sheriff not to summon disqualified persons.**—The court, upon directing the sheriff to summon grand jurors not selected by the jury commissioners, shall instruct him that he must summon no person to serve as a grand juror who does not possess the qualifications prescribed in article 390.

Art. 403. [391] **Court shall test qualifications of jurors, when.**—When as many as twelve persons summoned to serve as grand jurors are in attendance upon the court, it shall proceed to test their qualifications as such. [O. C. 345.]

Practice. The court has no power to test the qualifications of grand jurors, until at least twelve of the sixteen summoned have appeared. Const., Art. 5, Sec. 13.

Same on appeal. When the record on appeal is challenged with regard to the verity of its recitals of the number organized into a grand jury, the appellate court will resort to the records of the original tribunal in order to ascertain the facts. Vance v. State, 34 T. Cr. R., 395, 30 S. W. R., 792, citing Simmons v. Fisher, 46 T., 127.

Art. 404. [392] **Shall be interrogated touching qualifications.**—Each person who is presented to serve as a grand juror shall, before being impaneled, be interrogated on oath by the district judge, or under his direction, touching his qualifications. [O. C. 349.]

Art. 405. [393] **Mode of testing juror's qualifications.**—In trying the qualifications of any person to serve as a grand juror, he shall be asked these questions:

1. Are you a citizen of this state and county, and qualified to vote in this county, under the constitution and laws of this state? But whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court may dispense with the requirement of the payment of poll taxes as a qualification for service as a juror.

2. Are you a freeholder in this state, or a householder in this county?

3. Are you able to read and write? [O. C. 350; amended, Act 1903, 1st S. S., p. 16.]

Art. 406. [394] **When juror is qualified, shall be accepted, etc.**—When, by the answer of the person, it appears to the court that he is a qualified juror, he shall be accepted as such, unless it be shown that he is not of sound mind or of good moral character, or unless it be shown that he is in fact not qualified to serve as a grand juror. [O. C. 351; amended, Act 1903, 1st S. S., p. 16.]

Art. 407. [395] **When not qualified, shall be excused.**—Any person summoned who does not possess the requisite qualifications shall be excused by the court from serving. [O. C. 352.]

Art. 408. [396] **Jury shall be impaneled when, unless, etc.**—When twelve qualified jurors are found to be present, the court shall proceed to impanel them as a grand jury, unless a challenge is made, which may be to the array or to any particular individual presented to serve as a grand juror. [O. C. 353.]

Art. 409. [397] **Any person may challenge, when.**—Any person, before the grand jury has been impaneled, may challenge the array of jurors or any person presented as a grand juror; and, in no other way, shall objections to the qualifications and legality of the grand jury be heard. Any person confined in jail in the county shall, upon his request, be brought into court to make such challenge. [O. C. 362.]

Challenge to the entire array is the only manner in which objection to the competency of grand juries or grand jurors can be raised, and that challenge must be in writing, though a challenge to a particular juror may be oral. Doss v. State, 28 T. Cr. R., 506, 13 S. W. R., 788, citing Owens v. State, 25 Id., 552, 8 S. W. R., 858; Hart v. State, 15 Id., 202; Kemp v. State, 11 Id., 174.

Challenge of a particular juror can not be made by plea in abatement after indictment. Doss v. State, 28 T. Cr. R., 506, 13 S. W. R., 788, overruling on contrary intimation, Woods' case, 26 Id., 490, 10 S. W. R., 108. And to same effect, Lacey v. State, 31 Id., 78, 19 S. W. R., 896.

Disqualification of grand jurors can not be raised on motion to quash indictment, nor on motion for new trial. Cubine v. State, 44 T. Cr. R., 596, 73 S. W. R., 396, and cases cited; Matkins v. State, 33 Id., 605, 28 S. W. R., 536.

The proper time to challenge the array of grand jurors is before the members have been tested as to qualification. A particular juror may be challenged after the body has been tested by their own oaths. Reed v. State, 1 T. Cr. R., 1; Grant v. State, 2 Id., 164.

It is too late after indictment to question the impanelment of the grand jury or a particular member thereof. Carter v. State, 39 T. Cr. R., 345, 46 S. W. R., 236.

A prisoner confined in jail should be accorded, on his request, the opportunity to confront and challenge the array of grand jurors at the proper time. Barkman v. State, 41 T. Cr. R., 105, 52 S. W. R., 73.

But unless he makes the request, he can not be heard to complain. Hart v. State, 15 T. Cr. R., 202, citing Kemp v. State, 11 Id., 174; Innocente v. State, 53 Id., 390, 110 S. W. R., 61.

Race discrimination. That accused was accorded no opportunity to challenge the grand jury on the ground of race discrimination in its organization is a question that can be raised either by plea in abatement or motion to quash the indictment.

Smith v. State, 220, 58 S. W. R., 97; Lewis v. State, Id., 278, 59 S. W. R., 1116; Kipper v. State, Id., 613, 62 S. W. R., 420.

And, in such case, the burden is on accused, to establish discrimination against his race in the selection of the grand jury. Whitney v. State, 43 T. Cr. R., 197, 63 S. W. R., 879. And see Hudson v. State, 40 T., 12; Newman v. State, 43 Id., 525; Williams v. State, 44 Id., 34.

Art. 410. [398] **Definition of "array."**—By the array of grand jurors is meant the whole body of persons summoned to serve as such before they have been impaneled. [O. C., 368.]

Art. 411. [399] **Meaning of "impaneled," etc.**—A grand juror is said to be "impaneled" after his qualifications have been tried, and he has been sworn. By the word "panel" is meant the whole body of grand jurors. [O. C. 360.]

Art. 412. [400] **Causes for challenge to the array.**—A challenge to the array shall be made in writing, and for these causes only:

1. That the persons summoned as grand jurors are not, in fact, the persons selected by the jury commissioners.

2. In case of grand jurors summoned by order of the court that the officer who summoned them had acted corruptly in summoning any one or more of them. [O. C. 363.]

Ante, Art. 409, and notes.

Art. 413. [401] **Causes for challenge to a particular juror.**—A challenge to a particular grand juror may be made orally, and for the following causes only:

1. That he is not a qualified grand juror.

Exemption: Owens v. State, 25 T. Cr. R., 552, 8 S. W. R., 658.
Plea in abatement: Doss v. State, 28 T. Cr. R., 506, 13 S. W. R., 788, overruling Woods' case, 26 Id., 490, 10 S. W. R., 108.

2. That he is the prosecutor upon an accusation against the person making the challenge.

3. That he is related by consanguinity or affinity to some person who has been held to bail, or who is in confinement upon a criminal accusation. [O. C. 364.]

Ante, Art. 409, and notes; Kemp v. State, 11 T. Cr. R., 174; Grant v. State, 2 Id., 163.

Art. 414. [402] **Court shall decide challenge summarily.**—When a challenge to the array, or to any individual, has been made, the court shall hear proof, and decide in a summary manner whether the challenge be well founded or not. [O. C. 365.]

Art. 415. [403] **Court shall order other jurors summoned, when.**—If the challenge to the array be sustained, or, if by challenge to any particular individual, the number of grand jurors be reduced below twelve, the court shall order another grand jury to be summoned, or shall order the panel to be completed, as the case may be, as provided in previous articles of this chapter. [O. C. 366, 367.]

Quashal of the panel as a whole would not follow the sustaining of challenge to one or more particular jurors, but the vacancies would be filled by ordering other jurors. State v. Jacobs, 6 T., 99.

Art. 416. [404] **Oath of grand jurors.**—When the grand jury is completed, the court shall appoint one of the number foreman; and the following oath shall be administered by the court, or under its direction, to each of the jurors: "You solemnly swear (or affirm, as the case may be) that you will diligently inquire into, and true presentment make, of all such matters and things as

shall be given you in charge; the state's counsel, your fellows' and your own, you shall keep secret, unless required to disclose the same in the course of a judicial proceeding in which the truth or falsity of evidence given in the grand jury room, in a criminal case, shall be under investigation. You shall present no person from envy, hatred or malice; neither shall you leave any person unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly as they come to your knowledge, according to the best of your understanding, so help you God." [O. C. 356; amended by Act March 13, 1875, p. 166.]

Oath. Recitals held sufficient to show that the grand jury was sworn according to law. Pierce v. State, 12 T., 210; State v. Loving, 16 Id., 558; Thomason v. State, 2 T. Cr. R., 550; Ferguson v. State, 6 Id., 504.

One accused of crime can not question the form of the oath or process upon which the jury was summoned. West v. State, 6 T. Cr. R., 485.

Indictment is not assailable on the ground that the minutes of the court do not show that the grand jury was sworn. McDaniel v. State, 24 T. Cr. R., 552, 7 S. W. R., 249.

Proceedings before grand jury are secret and exempt from investigation, except as provided for in this and article 570, post.

The trial court can not inquire into the evidence, or sufficiency of the evidence, on which the grand jury found the indictment. Jacobs v. State, 35 T. Cr. R., 410, 34 S. W. R., 110, following Terry v. State, 15 Id., 66; Johnson v. State, 22 Id., 206, 2 S. W. R., 609; Morrison v. State, 41 T., 516.

Construed in connection with Art. 316 of the Penal Code this article limits the testimony to matters transpiring in the grand jury room to such cases only where the same matter is under grand jury and trial court investigation. And this extends to impeaching testimony. Hines v. State, 37 T. Cr. R., 339, 39 S. W. R., 935. And see Christian v. State, 40 Id., 669, 51 S. W. R., 903.

A witness may be impeached by showing that he made statements to the grand jury in the particular case different from his evidence on the trial. Clanton v. State, 13 T. Cr. R., 139, overruling on this point, Ruby v. State, 9 Id., 353.

The testimony of the defendant as witness before the grand jury, with reference to the matter on trial, is admissible against him. Giles v. State, 43 T. Cr. R., 561, 67 S. W. R., 411, following Wisdom v. State, 42 Id., 579, 61 S. W. R., 926, which in effect overrules Gutgesell v. State, 43 S. W. R., 1016.

Entry on court minutes of the organization of the grand jury, while not expressly required by statute, is required by the general provision directing the clerk to keep a fair record of all the proceedings in court. Omission of such entry will not, however, vitiate an indictment. De Olles v. State, 20 T. Cr. R., 145.

The minutes of the court are available to prove the impanelment of the grand jury, but failure to so prove it is not ground for acquittal, if it is otherwise proved without objection. Foster v. State, 32 T. Cr. R., 39, 46 S. W. R., 231.

It is too late after trial to object that the organization of the grand jury could be properly proved only by the records of the court. Waul v. State, 33 T. Cr. R., 228, 26 S. W. R., 199.

Nunc pro tunc entry of the organization of the grand jury may be made on the minutes. De Olles v. State, 20 T. Cr. R., 145, and cases cited.

Art. 417. [405] **Court shall instruct grand jury.**—After the grand jury has been sworn, the court shall give them instruction as to their duty. [O. C. 357.]

Art. 418. [406] **Bailiffs may be appointed; their oath.**—One or more bailiffs may be appointed by the court to attend upon the grand jury, and, at the time of appointment, the following oath shall be administered to each of them by the court, or under its direction: "You solemnly swear (or affirm, as the case may be) that you will faithfully and impartially perform all the duties of bailiff of the grand jury, and that you will keep secret the proceedings of the grand jury, so help you God." [O. C. 358.]

Art. 419. [407] **Bailiff's duties.**—A bailiff is to obey the instructions of the foreman, to summon all witnesses, and, generally, to perform all such duties as are required of him by the foreman. Where two bailiffs are appointed, one of them shall be always with the grand jury. [O. C. 359.]

Art. 420. [408] **Bailiff shall take no part in discussions of grand jury; punishment.**—A bailiff shall take no part in the discussions or deliberations of the grand jury, and shall not be present when the grand jury is either discussing or voting upon a question; and any violation of duty upon the part of a bailiff shall be reported by the grand jury to the court, and, for such violation of duty, he may be punished by the court as for contempt. [O. C. 361.]

Art. 421. [409] **Another foreman appointed, when.**—In case of the absence of the foreman of the grand jury from any cause, or of his inability or disqualification to act, the court shall appoint in his place some other member of the body. [O. C. 361.]

Art. 422. [410] **Nine members constitute a quorum.**—Nine members shall be a quorum for the purpose of discharging any duty or exercising any right properly belonging to the grand jury. [Const., Art. 5, § 13; O. C. 370.]

Ante, Art. 389 and notes; Ex parte Reynolds, 35 T. Cr. R., 437, 34 S. W. R., 120; Wells v. State, 21 Id., 594, 2 S. W. R., 806; Ex parte Swain, 19 Id., 323.

Autonomy of the grand jury; quorum of nine, after legal organization, is competent to transact business. Watts v. State, 22 T. Cr. R., 572, 3 S. W. R., 769, citing Smith v. State, 19 Id., 95.

The discharge for the term by the legally organized grand jury of one of its members is a nullity. Watts v. State, supra. And see Drake v. State, 25 Id., 293, 7 S. W. R., 868; Jackson v. State, Id., 314, 7 S. W. R., 872.

Art. 423. [411] **May be reassembled after having been discharged for the term.**—When a grand jury has been discharged by the court for the term, it may be reassembled by the court at any time during the term; and, in case of failure of one or more of the members to reassemble, the court may complete the panel by impaneling other qualified persons in their stead, in accordance with the rules prescribed in this chapter for completing the grand jury in the first instance.

Construed. To reassemble the same grand jury it is only necessary for the court to set aside the order discharging them and order their reassembly. It need not formally re-impanel, re-test or re-swear the original members, though persons summoned to fill out vacancies in the original panel would have to be impaneled, tested and sworn. Gay v. State, 40 T. Cr. R., 242, 49 S. W. R., 612.

The grand jury being reassembled under this article, it developed that one member was disqualified. He was discharged and another qualified person impaneled in his stead. Held, correct practice, and not to constitute a grand jury of thirteen. Matthews v. State, 42 T. Cr. R., 31, 58 S. W. R., 86, following Trivinio v. State, 27 Id., 372, 11 S. W. R., 447.

CHAPTER TWO.

OF THE DUTIES, PRIVILEGES AND POWERS OF THE GRAND JURY.

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Article 424. [412] **Suitable place to be prepared for grand jury.**—The grand jury, after being organized, shall proceed to the discharge of their duties; and some suitable place shall be prepared by the sheriff for their sessions. [O. C. 371.]

Art. 425. [413] **Deliberations shall be secret.**—The deliberations of the grand jury shall be secret; and any member of the body or bailiff who divulges anything transpiring before them, in the course of their official duties, shall be liable to a fine, as for contempt of the court, not exceeding one hundred dollars, and to imprisonment not exceeding five days. [O. C. 372.]

Art. 426. [414] **Attorney representing the state may go before, etc.**—The attorney representing the state may go before the grand jury at any time, except when they are discussing the propriety of finding a bill of indictment or voting upon the same. [O. C. 373.]

Secrecy of deliberation. The presence of the county attorney when the grand jury is discussing or voting on the question of indictment is unauthorized, and will vitiate indictment. Rothschild v. State, 7 T. Cr. R., 519.

The presence of the assistant county attorney during the grand jury's "investigation and deliberation," though not present at the voting, will vitiate an indictment. Stuart v. State, 35 T. Cr. R., 440, 34 S. W. R., 118.

That an attorney employed by the prosecuting attorney was present for the time being, and examined witnesses, though not expressly authorized by statute, is not prohibited, and will not operate to vitiate an indictment. Wilson v. State, 41 T. Cr. R., 115, 51 S. W. R., 96.

Art. 427. [415] **Attorney may examine witnesses, etc.**—The attorney representing the state may examine the witnesses before the grand jury, and may advise as to the proper mode of interrogating them, if desired, or if he thinks it necessary. [O. C. 375.]

Art. 428. [416] **Grand jury may send for attorney representing the state, etc.**—When any question arises before a grand jury respecting the proper discharge of their duties, or any matter of law about which they may require advice, it is their right to send for the attorney representing the state, and take his advice thereon. [O. C. 374.]

Art. 429. [417] **Grand jury may seek advice from court.**—The grand jury may also seek and receive advice from the court touching any matter before them, and, for this purpose, shall go into court in a body; but they shall so guard the manner of propounding their questions as not to divulge the particular accusation that is pending before them; or they may propound their ques-

tions in writing, upon which the court may give them the desired information in writing. [O. C. 276.]

Art. 430. [418] **Foreman shall preside over grand jury, etc.**—The foreman shall preside over the sessions of the grand jury, and conduct its business and proceedings in an orderly manner. He may appoint one or more of the members of the body to act as clerks for the grand jury.

Art. 431. [419] **Grand jury shall meet and adjourn.**—The grand jury shall meet and adjourn at times agreed upon by a majority of the body; but they shall not adjourn, at any one time, for more than three days, unless by consent of the court; but, with the consent of the court, they may adjourn for a longer time, and shall, as near as may be, conform their adjournments to those of the court. [O. C. 377.]

Art. 432. [420] **Duties of grand jury.**—It is the duty of the grand jury to inquire into all offenses liable to indictment of which any of the members may have knowledge, or of which they shall be informed by the attorney representing the state, or any other credible person. [O. C. 378.]

The grand jury can not bind the state by an agreement with one accused of an offense not to indict him if he would not commit further violations of law. Doyle v. State, 126 S. W. R., 1131.

Art. 433. [421] **Foreman may issue process for witnesses.**—The foreman of the grand jury may issue a summons or attachment for any witness in the county where they are sitting; which summons or attachment may require the witness to appear before them at a time fixed, or forthwith, without stating the matter in respect to which the witness will be called upon to testify. [O. C. 379; Act Aug. 15, 1870.]

Contempt. Service in a quiet and respectful manner of a grand jury attachment upon a district judge while sitting on the bench is not contempt. Degener v. State, 30 T. Cr. R., 566, 17 S. W. R., 1111.

Art. 434. [422] **Attachment for witnesses in another county, obtained how.**—The foreman of the grand jury, or the attorney representing the state, may, upon application in writing to the district court, stating the name and residence of the witness, and that his testimony is believed to be material, cause an attachment to be issued to any county in the state for such witness, returnable to the grand jury then in session, or to the next grand jury for the county from whence the same issued, as such foreman or attorney may desire; which attachment shall command the sheriff or any constable of the county where such witness resides to arrest such witness, and have him before the grand jury at the time and place specified in the writ. [Act Aug. 15, 1870.]

Art. 435. [423] **Attachment may be obtained in vacation, etc.**—The district or county attorney may cause an attachment for a witness to be issued, as provided in the preceding article, either in term time or in vacation. [Id.]

Process for witnesses. In conforming to Art. 1568 of the Penal Code, the better practice is, where both parties desire the witness, to have the process issued for either, show that fact on its face. Mixon v. State, 36 T. Cr. R., 66, 35 S. W. R., 394.

The non-issuing party should make known his intention to use the witness. Byrd v. State, 39 T. Cr. R., 608, 47 S. W. R., 72.

Art. 436. [424] **Bailiff, etc., shall execute and return process from grand jury, etc.**—The bailiff or other officer who receives process to be served from a grand jury shall forthwith execute the same, and return it to the foreman, if the grand jury be in session; and, if the grand jury be not in session, the process shall be returned to the clerk of the district court. If the process is returned not executed, the return shall state the reason why it was not executed.

Art. 437. [425] **Evasion of service by witness may be punished by fine.**—If it be made to appear satisfactorily to the court that a witness for whom a summons of attachment has been issued to go before the grand jury is in any manner wilfully evading the service of such summons or attachment, the court may fine such witness, as for contempt, not exceeding one hundred dollars.

Art. 438. [426] **When witness refuses to testify, dealt with how.**—When a witness, brought in any manner before a grand jury, refuses to testify, such facts shall be made known to the attorney representing the state or to the court; and the court may compel the witness to answer the question, if it appear to be a proper one, by imposing a fine not exceeding one hundred dollars, and by committing the party to jail until he is willing to testify. [O. C. 381.]

Self-incrimination. Whether called to testify before grand jury or trial court, a witness can not be compelled to give testimony tending to incriminate himself. Ex parte Wilson, 39 T. Cr. R., 630, 47 S. W. R., 996; Ex parte Park, 37 Id., 590, 40 S. W. R., 300.

Art. 439. [427] **Oaths to witnesses.**—The following oath shall be administered by the foreman, or under his direction, to all witnesses before being interrogated: "You solemnly swear (or affirm, as the case may be) that you will not divulge, either by words or signs, any matter about which you may be interrogated, and that you will keep secret all proceedings of the grand jury which may be had in your presence, and that you will true answers make to such questions as may be propounded to you by the grand jury, or under its direction, so help you God." [O. C. 382; amended by Act March 15, 1875, p. 108.]

Ante, Art. 416, and notes.

Secrecy of proceedings. Article 316 of the Penal Code makes it an offense for a witness before the grand jury to in any manner divulge the proceedings in his knowledge.

A false statement before the grand jury, if material, may be prosecuted as perjury. Pipes v. State, 26 T. Cr. R., 318, 9 S. W. R., 614; Weaver v. State, 34 Id., 554, 31 S. W. R., 400; Butler v. State, 33 Id., 551, 24 S. W. R., 465; Butler v. State, 36 Id., 444, 38 S. W. R., 787; McMurtry v. State, 38 Id., 521, 43 S. W. R., 1010.

Art. 440. [428] **How witnesses shall be questioned.**—The grand jury, in propounding questions to witness, shall direct the examination to the person accused or suspected, shall state the offense with which he is charged, the county where the offense is said to have been committed, and, as nearly as may be, the time of the commission of the offense; but should the jury think it necessary, they may ask the witness in general terms whether he has knowledge of the violation of any particular law by any person, and, if so, by what person. [O. C. 383.]

Art. 441. [429] **When a felony has been committed by unknown person.**—When a felony has been committed in any county within the jurisdiction of the grand jury, and the name of the person guilty thereof is unknown, or where it is uncertain by whom the same was committed, the grand jury may ask any pertinent question relative to the transaction in such manner as to ascertain who is the guilty party. [O. C. 383a.]

Art. 442. [430] **After the testimony, grand jury shall vote.**—After all the testimony which is accessible to the grand jury shall have been given in respect to any criminal accusation, the vote shall be taken as to the presentment of a bill of indictment, and, if nine members concur in finding the bill, the foreman

shall make a memorandum of the same for the purpose of enabling the attorney who represents the state to write the indictment. [O. C. 385.]

Procedure. Courts cannot go behind a legally returned indictment to inquire into the evidence or sufficiency of the evidence on which it was found. Ante, Art. 416, and notes. And see Dockery v. State, 35 T. Cr. R., 487, 34 S. W. R., 281; Kingsbury v. State, 37 Id., 259, 39 S. W. R., 365.

Art. 443. [431] **Memorandum shall state what.**—The memorandum furnished the attorney shall state: The name of the defendant, if known, and, if unknown, shall describe him; the name of the party injured or attempted to be injured, if any one; the nature of the offense; the time and place of its commission; and the names of the witnesses on whose testimony the accusation is sustained. [O. C. 386.]

Construed in connection with the preceding article, this article is directory only, for the benefit of the prosecuting attorney, and does not require that all of the testimony or any part thereof, shall be set down by the foreman or secretary of the grand jury. Jacobs v. State, 35 T. Cr. R., 410, 34 S. W. R., 110.

Art. 444. [432] **Indictment shall be prepared by attorney and signed, etc., by foreman.**—The attorney representing the state shall prepare all indictments which have been found by a grand jury with as little delay as possible, and, when so prepared, shall deliver them to the foreman, who shall sign the same officially, and the attorney representing the state indorse thereon the names of the witnesses, upon whose testimony the same was found. [O. C. 387.]

Attorney pro tem. Ante, Art. 38.

Indorsement of the names of witnesses on back of the indictment is not an essential part of that instrument, and omission will not affect its validity. Steele v. State, 1 T., 142; Walker v. State, —, 19 T. Cr. R., 176.

Nor will the omission of such indorsement on the copy of the indictment served on him entitle the defendant to a postponement of trial. Hart v. State, 15 T. Cr. R., 202.

And see Skipworth v. State, 8 T. Cr. R., 135; Fehr v. State, 36 Id., 93, 35 S. W. R., 650; Williams v. State, 31 Id., 147, 38 S. W. R., 999; Cotton v. State, 43 T., 169.

Art. 445. [433] **Indictment shall be presented in open court.**—When the indictment is ready to be presented, the grand jury shall go in a body into open court, and, through their foreman, deliver the indictment to the judge of the court; and at least nine members of the grand jury must be present on such occasions. [O. C. 388.]

Practice on appeal. The appellate court will not entertain an objection that is dehors the record. Hasley v. State, 14 T. Cr. R., 217.

Art. 446. [434] **Presentment to be entered of record, etc.**—The fact of a presentment of indictment in open court by a grand jury shall be entered upon the minutes of the proceedings of the court, noting briefly the style of the criminal action and the file number of the indictment, but omitting the name of the defendant, unless he is in custody or under bond. [Act May 25, p. 8.]

Presentment of Indictment must be noted on the minutes of the court, and opportune exception for non-entry, if verified by the record, will be sustained. Jinks v. State, 5 T. Cr. R., 68, and cases cited.

Opportune time. Objection that record fails to show presentment of indictment must be made in limine, and such objection is ground, on a preliminary motion, to quash. Jinks v. State, supra; Estes v. State, 33 Id., 560, 28 S. W. R., 469; Murphy v. State, 29 Id., 507, 16 S. W. R., 417, and cases cited.

Defendant's name must be omitted from the entry unless he is in cusody or under bond. Bohannon v. State, 14 T. Cr. R., 271.

The entry need not state the offense. Tellison v. State, 35 T. Cr. R., 388, 33 S. W. R., 1082, and cases cited; Malloy v. State, Id., 389, 33 S. W. R., 1082.

Amendment. Such an omission in the record may be amended nunc pro tunc, even at a subsequent term. De Olles v. State, 20 T. Cr. R., 145, and cases cited.

Substitution. Record of such entry having been destroyed, it can not be supplied by proof, but must be actually substituted in the manner required in other records. Strong v. State, 18 T. Cr. R., 19.

Filing and file marks. Objection that the indictment was not indorsed "filed" comes too late after verdict. Reynolds v. State, 11 T., 120.

But the court could direct that indorsement after the trial commenced but before verdict. Caldwell v. State, 5 T., 18; De Olles v. State, 20 T. Cr. R., 145; Boren v. State, 32 Id., 637, 25 S. W. R., 775; Rippey v. State, 29 Id., 37, 14 S. W. R., 448.

Mistake in the date of the filing can not be taken advantage of after trial or in arrest of judgment. Terrell v. State, 41 T., 463.

Presentments by illegal grand juries are nullities. Trevinio v. State, 27 T. Cr. R., 372, 11 S. W. R., 447, and cases cited; Ex parte Reynolds, 35 Id., 437, 34 S. W. R., 120, and cases cited.

CHAPTER THREE.

OF INDICTMENTS AND INFORMATIONS.

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Article 447. [435] **Felonies presented by indictment only.**—All felonies shall be presented by indictment only, except in cases specially provided for. [O. C. 390; Const., Art. 1, § 10.]

Felony can be prosecuted by indictment only. Kinley v. State, 29 T. Cr. R., 532, 16 S. W. R., 339.

Art. 448. [436] **Misdemeanors presented by indictment, or, etc.**—All misdemeanors may be presented by either information or indictment. [O. C. 391.]

Misdemeanors. Garza v. State, 11 T. Cr. R., 410; Haines v. State, 7 Id., 30; Reddick v. State, 4 Id., 32.

Art. 449. [437] **All offenses must be presented by indictment or information.**—All offenses, known to the penal law of this state, must be prosecuted, either by indictment or information. This provision does not include fines and penalties for contempt of court, nor special cases in which inferior courts exercise jurisdiction. [O. C. 392.]

Jurisdiction of justices of the peace and other inferior courts: Ante, Arts. 106-109, and notes.

Art. 450. [438] **An "indictment" is what.**—An indictment is the written statement of a grand jury accusing a person therein named of some act or omission which, by law, is declared to be an offense. [O. C. 394.]

Indictment defined. The statute is self-expressive. Hewitt v. State, 25 T., 722.
"Due course of law:" Ante, Art. 3, and notes.
An indictment which charges the conclusions of law deducible from certain facts is insufficient. Williams v. State, 12 T. Cr. R., 395; Gabrielsky v. State, 13 Id., 428; Stringer v. State, 13 Id., 520, overruling Tomkins v. State, 33 T., 228; Cothran v. State, 36 T. Cr. R., 196, 36 S. W. R., 273.
Indictment must allege all the essential elements of the offense. Rice v. State, 37 T. Cr. R., 36, 38 S. W. R., 801.

Art. 451. [439] **Requisites of an indictment.**—An indictment shall be deemed sufficient if it has the following requisites:
1. It shall commence, "In the name and by the authority of the state of Texas."

Commencement: Const., Art. V, Sec. 12; Jefferson v. State, 24 T. Cr. R., 535, 7 S. W. R., 244; Owens v. State, 25 Id., 552, 8 S. W. R., 858; Saine v. State, 14 Id., 144, and cases cited.
The commencement clause applies to every county in the indictment, and does not have to be repeated seriatim. West v. State, 27 T. Cr. R., 472, 11 S. W. R., 482; Dancy v. State, 35 Id., 615, 34 S. W. R., 113, and cases cited.

2. It must appear therefrom that the same was presented in the district court of the county where the grand jury is in session.

Amendment of indictment as to matter of mere form is permissible. Matthews v. State, 44 T., 376. Compare Golden v. State, 32 T., 737; James v. State, Id., 314; Long v. State, 1 T. Cr. R., 466.
Plural courts: The county having two district courts, it was not necessary that the indictment should have particularized either. Sargeant v. State, 35 T. Cr. R., 325, 33 S. W. R., 364; Phillips v. State, Id., 480, 34 S. W. R., 272.
Failure of indictment to allege its presentation in open court is a defect which must be availed of in limine. It is not available in arrest of judgment. Jones v. State, 32 T. Cr. R., 110, 22 S. W. R., 149, and cases cited.

3. It must appear to be the act of a grand jury of the proper county.

On this subdivision see Chivarrio v. State, 17 T. Cr. R., 390; English v. State, 4 Id., 125; Garling v. State, 2 Id., 44; Harris v. State, Id., 102; Davis v. State, 6 Id., 133; Thomas v. State, 18 Id., 213; De Olles v. State, 20 Id., 145; Vanvickle v. State, 22 Id., 625, 2 S. W. R., 642; Wright v. State, 35 Id., 367, 33 S. W. R., 973; Murphy v. State, 36 Id., 24, 35 S. W. R., 174; Williams v. State, 30 T., 404; Nichols v. State, Id., 515; Golden v. State, 32 Id., 737; Hilton v. State, 41 Id., 565; Mathews v. State, 44 Id., 376.

4. It must contain the name of the accused, or state that his name is unknown, and, in case his name is unknown, give a reasonably accurate description of him.

Defendant's name. Indictment is sufficient if it states the surname and one or more initials of the christian name. Art. 456, post; McAfee v. State, 14 T. Cr. R., 668; Victor v. State, 15 Id., 90.

Not sufficient to state surname alone without further explanation. Pancho v. State, 25 T. Cr. R., 402, 8 S. W. R., 476; Victor v. State, supra.

It is only when the whole name is unknown that the indictment is required to give a reasonably accurate description of the defendant. Wilcox v. State, 35 T. Cr. R., 651, 34 S. W. R., 958.

As to Christian name: Wilcox v. State, supra; Wilcox v. State, 31 T., 586. And see Musquez v. State, 41 T., 226; Wampler v. State, 28 T. Cr. R., 352, 13 S. W. R., 144; English v. State, 30 Id., 470, 18 S. W. R., 94; Alsup v. State, 36 Id., 535, 38 S. W. R., 174; Mayo v. State, 7 Id., 342; State v. Manning, 14 T., 402; Delphino v. State, 11 T. Cr. R., 30; Spencer v. State, 34 T. Cr. R., 65, 29 S. W. R., 159.

Idem sonans. Misspelling a name, if idem sonans, is immaterial. Foster v. State, 1 T. Cr. R., 531; Williams v. State, 5 Id., 226; Nance v. State, 17 Id., 385; Rape v. State, 34 Id., 615, 31 S. W. R., 652.

Christian name being unknown, indictment should so allege, award a fictitious name and reasonably describe the accused. State v. Vandeveer, 21 T., 335; Rothschild v. State, 7 T. Cr. R., 519; Pancho v. State, 25 Id., 402, 8 S. W. R., 476; but contra, see Wilcox v. State, 35 Id., 631, 34 S. W. R., 958.

If defendant was as well known by the name assigned him as by his real name, the indictment is sufficient. Wilcox v. State, 35 T. Cr. R., 631, 34 S. W. R., 954; Elehash v. State, Id., 599, 34 S. W. R., 928; Young v. State, 30 Id., 308, 17 S. W. R., 413.

As to suggesting true name:. Post, Arts. 570, 572; Boren v. State, 32 T. Cr. R., 637, 25 S. W. R., 775.

Injured party. The same rules apply to the name of the injured party. Elehash v. State, 35 T. Cr. R., 599, 34 S. W. R., 928; Stewart v. State, 31 Id., 153, 19 S. W. R., 908; Rutherford v. State, 13 Id., 92.

Initinals of the christian name or names are sufficient. State v. Black, 31 T., 560.

Middle initials are immaterial. Stockton v. State, 25 T., 772; McAfee v. State, 14 T. Cr. R., 668.

Correctly stating the name in the first instance, subsequent misstatement in the indictment is immaterial. Cotton v. State, 4 T., 260. But compare Kinney v. State, 21 T. Cr. R., 348, 17 S. W. R., 423.

Married woman being the injured party, she should be described by her christian name and not as "Mrs." so-and-so. Bell v. State, 25 T., 574; Beaumont v. Dallas, 34 T. Cr. R., 68, 29 S. W. R., 157; Hardin v. State, 26 T., 113.

And her surname at the time of the injury is the proper one to allege. Rutherford v. State, 13 T. Cr. R., 92.

Corporation. The injured interest being a corporation, that fact should be alleged. Thurmond v. State, 30 T. Cr. R., 539, 17 S. W. R., 1098, and cases cited.

But it need not allege the charter or act of incorporation or the particular state or foreign power under whose laws incorporated. Smith v. State, 34 T. Cr. R., 265, 30 S. W. R., 236.

And see Carder v. State, 35 T. Cr. R., 105, 31 S. W. R., 678. But contra, Faulk v. State, 38 T. Cr. R., 77, 41 S. W. R., 616; Milsaps v. State, Id., 570, 43 S. W. R., 1015.

5. It must show that the place where the offense was committed is within the jurisdiction of the court in which the indictment is presented.

Venue must be alleged, and must show the offense committed within the jurisdiction of the court. Omission in this respect is a defect which can not be supplied by amendment or otherwise. Robins v. State, 9 T. Cr. R., 666; Collins v. State, 6 Id., 647, and cases cited.

Sufficient to allege the county of the venue. State v. Odum, 11 T., 12.

And see generally, State v. Jordan, 12 T., 205; Satterwhite v. State, 6 T. Cr. R., 609; Harris v. State, 2 Id., 102; Pierce v. State, 12 T., 210; Smith v. State, 36 T. Cr. R., 442, 37 S. W. R., 743; Eylar v. State, 37 Id., 257, 39 S. W. R., 665; Cain v. State, 18 Id., 392; Lasher v. State, 30 Id., 387, 17 S. W. R., 1064; Augustine v. State, 20 T., 451; Blackwell v. State, 30 T. Cr. R., 416, 17 S. W. R.,

1061; Pederson v. State, 21 Id., 485, 1 S. W. R., 521; Goldstein v. State, 36 Id., 193, 36 S. W. R., 278.

6. The time mentioned must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation.

Allegation of time and place. Indictment must allege both the time when and place where the offense was committed. State v. Slack, 30 T., 354; Johnson v. State, 32 Id., 96; State v. Eubanks, 41 Id., 291; State v. Elliott, 34 Id., 148; Keith v. State, 38 T. Cr. R., 678, 44 S. W. R., 847; Witten v. State, 4 Id., 70.

Time must be anterior to indictment: State v. Eubanks, 41 T., 291; Jennings v. State, 30 T. Cr. R., 428, 18 S. W. R., 90, and cases cited.

If the indictment charges the offense on the same day it was returned into court, it must further charge that the offense was committed before the indictment was found. Joel v. State, 28 T., 642; Kennedy v. State, 22 T. Cr. R., 693, 3 S. W. R., 480, and cases cited; Jennings v. State, 30 Id., 428, 18 S. W. R., 90, and cases cited; McJunkin v. State, 37 Id., 117, 38 S. W. R., 994; Fields v. State, 43 T., 23.

As to offenses between specified dates: State v. White, 41 T., 64.

Time as to limitation. Proof must bring the offense within the period of limitation, though it need not show the exact date charged in the indictment. Arcia v. State, 28 T. Cr. R., 198, 12 S. W. R., 599, and cases cited.

Different dates in different counts do not vitiate conviction nor require arrest of judgment. Shuman v. State, 34 T. Cr. R., 69, 29 S. W. R., 160.

7. The offense must be set forth in plain and intelligible words.

Terms defined. The charging part of the indictment must state the offense with such particularity as to fully advise the accused of the nature of the offense imputed to him, and which he will be called upon to defend. Alexander v. State, 29 T., 495; Lagrone v. State, 12 T. Cr. R., 426, and cases cited.

And see Blair v. State, 32 T., 474; Schwartz v. State, 25 Id., 764; Meshac v. State, 30 T., 518; Johnson v. State, 1 T. Cr. R., 146; Sharpe v. State, 17 Id., 511.

Conclusion. Const., Art. 5, Sec. 12; Holden v. State, 1 T. Cr. R., 225; Cox v. State, 8 Id., 254; Haun v. State, 13 Id., 383; Bird v. State, 37 Id., 408, 35 S. W. R., 382; Durst v. State, 7 T., 74; Sims v. State, 43 Id., 521.

But such conclusion need not follow the several counts seriatim. Alexander v. State, 27 T. Cr. R., 533, 11 S. W. R., 628; Dancey v. State, 35 Id., 615, 34 S. W. R., 113, and cases cited; Stebbins v. State, 31 Id., 294, 20 S. W. R., 552.

Official signature by foreman. Omission of such signature will not invalidate indictment. Robinson v. State, 24 T. Cr. R., 4, 5 S. W. R., 509; Weaver v. State, 19 Id., 547, and cases cited.

8. The indictment must conclude, "Against the peace and dignity of the state."

Const., Art. V, Sec. 12; Malton v. State, 29 T. Cr. R., 527, 16 S. W. R., 423; Haun v. State, 13 Id., 383; Wright v. State, 37 Id., 3, 35 S. W. R., 150; Bird v. State, Id., 408, 35 S. W. R., 382; Durst v. State, 7 T., 74; State v. Sims, 43 Id., 521; Dancey v. State, 35 T. Cr. R., 615, 34 S. W. R., 113; Thompson v. State, 15 Id., 39; s. c., Id., 168.

9. It shall be signed officially by the foreman of the grand jury. [O. C. 395.]

Failure to comply with this subdivision will not vitiate indictment. Robinson v. State, 24 T. Cr. R., 4, 5 S. W. R., 509, citing Weaver v. State, 19 Id., 547; Pinson v. State, 23 T., 579; State v. Powell, 24 Id., 135; Witherspoon v. State, 39 T. Cr. R., 65, 44 S. W. R., 164.

Art. 452. [440] **What should be stated in an indictment, etc.**—Everything should be stated in an indictment which it is necessary to prove, but that which is not necessary to prove need not be stated. [O. C. 396.]

Hammons v. State, 29 T. Cr. R., 445, 16 S. W. R., 99, citing Black v. State, 18 Id., 124; Brown v. State, 26 Id., 540,10 S. W. R. 112.

See Fitch vs. State, 127 S. W. R., 1040.

Art. 453. [441] **The certainty required.**—The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it, in bar of any prosecution for the same offense. [O. C. 398.]

"Certainty," such as will qualify judgment that may be given to be pleaded in bar of subsequent prosecution for same offense, is required. Hammons v. State, 29 T. Cr. R., 445, 16 S. W. R., 99; Runnels v. State, 34 Id., 431, 30 S. W. R., 1065; Earl v. State, 33 Id., 570, 28 S. W. R., 469. And see Martin v. State, 27 Id., 31, 19 S. W. R., 434; Taylor v. State, 29 Id., 466, 16 S. W. R., 302; Rice v. State, 37 Id., 36, 38 S. W. R., 801; McAfee v. State, 38 Id., 124, 41 S. W. R., 627.

Not even the legislature can provide an exception to this rule. Hewitt v. State, 25 T., 722; Phillips v. State, 29 Id., 226; Huntsman v. State, 12 T. Cr. R., 619; Horan v. State, 24 T., 161; Hamilton v. State, 26 T. Cr. R., 206, 9 S. W. R., 687.

Descriptive allegations, though they may not be necessary to an indictment, must be proved. Cronin v. State, 30 T. Cr. R., 278, 17 S. W. R., 410; Coffelt v. State, 27 Id., 608, 11 S. W. R., 639, and cases cited.

Assault to commit, etc. The offense charged being an assault to commit some other offense, the same particularity of averment is not required. State v. Croft, 15 T., 575; State v. Jennings, 35 Id., 503; Hines v. State, 3 T. Cr. R., 484, and cases cited; Bittick v. State, 48 T., 117.

Art. 454.]442] **Particular intent; intent to defraud.**—Where a particular intent is a material fact in the description of the offense, it must be stated in the indictment; but, in any case where an intent to defraud is required to constitute an offense, it shall be sufficient to allege an intent to defraud, without naming therein the particular person intended to be defrauded. [O. C. 399.]

Intent being of substance of the offense, it must be alleged and proved. Reeves v. State, 7 T. Cr. R., 276; Labbaite v. State, 6 Id., 257; Johnson v. State, 1 Id., 146; Johnston v. State, 11 T., 22; State v. West, 10 Id., 553.

And, generally, see Martin v. State, 1 T. Cr. R., 525; Coleman v. State, 2 Id., 512; Morris v. State, 13 Id., 66; Milstead v. State, 19 Id., 490; Black v. State, 18 Id., 124; Crumes v. State, 28 Id., 516, 13 S. W. R., 868; Phillips v. State, 29 T., 226; Hammons v. State, Id., 445, 16 S. W. R., 99; State v. Allen, 30 T., 59; Marshall v. State, 31 Id., 471.

Statutory terms essential to the definition of the offense, such, for instance, as "malice aforethought," must be used in the indictment. Penal Code, Art. 1141, and notes; Cravey v. State, 36 T. Cr. R., 90, 35 S. W. R., 658, and cases cited.

"Fraudulently:" Penal Code, Art. 1329, and notes.

"Knowingly:" Reynolds v. State, 32 T. Cr. R., 36, 22 S. W. R., 18; Hunter v. State, 18 Id., 445; Pressler v. State, 13 Id., 95; Barthelow v. State, 26 T., 175.

"Wilfully:" Browder v. State, 30 T. Cr. R., 614, 18 S. W. R., 197, and cases cited.

"Wantonly:" Thomas v. State, 14 T. Cr. R., 200, citing Davis v. State, 12 Id., 13; Branch v. State, 41 T., 622.

Defendant has the right to testify to his intent in committing the act charged. Berry v. State, 30 T. Cr. R., 423, 17 S. W. R., 1080, and cases cited; Lewallen v. State, 33 Id., 412, 26 S. W. R., 832.

Art. 455. [443] **Allegation of venue, etc.**—When, by law, the offense may be prosecuted in either of two or more counties, the indictment may allege the offense to have been committed in the county where the same is prosecuted, or in any county or place where the offense was actually committed. [O. C. 400.]

Ante, Art. 451, subd. 5, and notes; ante, Arts. 234-358, and notes; Harrington v. State, 31 T. Cr. R., 577, 21 S. W. R., 356; Eylar v. State, 37 Id., 257, 39 S. W. R., 665.

Art. 456. [444] **Allegation of name.**—In alleging the name of the defendant, or of any other person necessary to be stated in the indictment, it shall be sufficient to state one or more of the initials of the Christian name and the surname. When a person is known by two or more names, it shall be sufficient to state either name. When the name of the person is unknown to the grand jury, that fact shall be stated, and, if it be the person accused of the offense, a reasonably accurate description of him shall be given in the indictment.

Misnomer is an objection that can not be raised after arraignment and entry of plea of not guilty. Wilcox v. State, 31 T., 586; Henry v. State, 38 Id., 306, 42 S. W. R., 559; White v. State, 32 Id., 625, 25 S. W. R., 784.

Idem sonans. If the name alleged in the indictment and the true name can be pronounced alike without violence to orthography, misspelling is immaterial. Milontree v. State, 30 T. Cr. R., 151, 16 S. W. R., 764, and cases cited.

Abbreviations and derivations of names: Alsup v. State, 36 T. Cr. R., 535, 38 S. W. R., 174; Goode v. State, 2 Id., 520; Cerda v. State, 33 Id., 458, 26 S. W. R., 992; Young v. State, 30 Id., 308, 17 S. W. R., 413.

When name is unknown: State v. Snow, 41 T., 596; Elmore v. State, 44 Id., 102; Cock v. State, 8 T. Cr. R., 659, citing Jorasco v. State, 6 Id., 238; Wilcox v. State, 35 Id., 631, 34 S. W. R., 958, citing Negro Ben v. State, 9 Id., 107; Reed v. State, 32 Id., 139, 22 S. W. R., 403; Swink v. State, Id., 530, 24 S. W. R., 893; Gossett v. State, 57 Id., 43, 123 S. W. R., 428.

Burden of proof in such case: Shockley v. State, 38 T. Cr. R., 458, 42 S. W. R., 972.

When known by different names: Lott v. State, 24 T. Cr. R., 723, 14 S. W. R., 277; Taylor v. State, 27 Id., 44, 11 S. W. R., 35; Young v. State, 30 Id., 308, 17 S. W. R., 413; Carter v. State, 39 Id., 345, 46 S. W. R., 236. And see Pendy v. State, 34 Id., 643, 31 S. W. R., 647; Elehash v. State, 35 Id., 599, 34 S. W. R., 928.

Art. 457. [445] **Allegation of ownership.**—Where one person owns the property, and another person has the possession, charge, or control of the same, the ownership thereof may be alleged to be in either. Where property is owned in common, or jointly, by two or more persons, the ownership may be alleged to be in all or either of them. When the property belongs to the estate of a deceased person, the ownership may be alleged to be in the executor, administrator or heirs of such deceased person, or in any one of such heirs. Where it is the separate property of a married woman, the ownership may be alleged to be in her, or in her husband. Where the ownership of the property is unknown to the grand jury, it shall be sufficient to allege that fact.

Ownership. This article applies in all cases in which it is necessary to allege ownership. Phillips v. State, 17 T. Cr. R., 169, and cases cited.

Possession alone being relied upon as evidence of ownership, that possession must be combined with the actual care, control and management of the property. Ledbetter v. State, 35 T. Cr. R., 195, 32 S. W. R., 93; Smith v. State, 34 Id., 29 S. W. R., 755; Tinney v. State, 18 Id., 434, overruling Erskine v. State, 1 Id., 405.

But a bare, temporary possession is not sufficient. Daggett v. State, 39 T. Cr. R., 5, 44 S. W. R., 148.

It is not material that possession be lawful. King v. State, 43 T., 351; Moore v. State, 8 T. Cr. R., 496, citing Blackburn v. State, 44 T., 463.

Generally: Deggs v. State, 7 T. Cr. R., 359; Mackey v. State, 20 Id., 603; Tinney v. State, 24 Id., 112, 5 S. W. R., 831; Bennett v. State, 32 Id., 216, 22 S. W. R., 684; Cameron v. State, 44 T., 652; Littleton v. State, 20 T. Cr. R., 168; Conner v. State, 24 Id., 245, 6 S. W. R., 138.

Temporary possession and custody. "Possession" and "custody" are not synonymous or convertible terms. The temporary custody by a servant or ward is the actual possession of the owner. Crook v. State, 39 T. Cr. R., 252, 45 S. W. R., 720, and cases cited; Daggett v. State, Id., 5, 44 S. W. R., 148.

General and special ownership; allegation: Frazier v. State, 18 T. Cr. R., 434, overruling Erskine v. State, 1 Id., 405; Wilson v. State, 12 Id., 481; Bowling v. State, 13 Id., 338; Jackson v. State, 7 Id., 363, and Williamson v. State, 13 Id., 514; Otero v. State, 30 Id., 450, 17 S. W. R., 1081, and cases cited; Wyley v. State, 34 Id., 514, 31 S. W. R., 393; Reed v. State, Id., 597, 31 S. W. R., 404; Bailey v. State, 18 Id., 426; House v. State, 19 Id., 227; Ledbetter v. State, 35 Id., 195, 32 S. W. R., 903.

Joint or common ownership may be alleged in all or either of the joint or common owners. Atterberry v. State, 19 T. Cr. R., 401, and cases cited; Clark v. State, 26 Id., 486, 9 S. W. R., 767, and cases cited. And see Bailey v. State, 20 Id., 68; Cohen v. State, Id., 224; Aldrich v. State, 29 Id., 394, 16 S. W. R., 251.

Estate ownership. McLaurine v. State, 28 T. Cr. R., 530, 13 S. W. R., 992; Dreyer v. State, 11 Id., 503; Henry v. State, 45 T., 84; Briggs v. State, 20 T. Cr. R., 106; Crockett v. State, 5 Id., 526; Wright v. State, 35 Id., 470, 34 S. W. R., 273.

Separate ownership of married women: Ware v. State, 2 T. Cr. R., 547; Burt v. State, 7 Id., 578; Coombes v. State, 17 Id., 258; Lucas v. State, 36 Id., 397, 37 S. W. R., 427; Willis v. State, 34 Id., 148, 29 S. W. R., 787; Sinclair v. State, Id., 453, 30 S. W. R., 1070.

Unknown ownership: Penal Code, Arts. 1329 and 1346, and notes.

Corporation ownership. The indictment should not only describe the corporation by its correct corporate name, but allege in terms that it is a corporation; that the property was taken from the possession of the agent or person holding the same for the corporation, and negative the consent of such person. White v. State, 24 T. Cr. R., 231, 5 S. W. R., 857, disapproving Price v. State, 41 T., 215; Stallings v. State, 29 T. Cr. R., 220, 15 S. W. R., 716; Smith v. State, 34 Id., 265, 30 S. W. R., 236. And see Griffin v. State, 4 Id., 390; Faulk v. State, 38 Id., 77, 41 S. W. R., 616.

Receiving stolen property. Indictment must allege name of owner if known, and of the person from whom received. State v. Perkins, 45 T., 10; Brothers v. State, 22 T. Cr. R., 447, 3 S. W. R., 737, and cases cited.

Art. 458. [446] **Description of property.**—When it becomes necessary to describe property of any kind in an indictment, a general description of the same by name, kind, quality, number and ownership, if known, shall be sufficient. If the property be real estate, its general locality in the county, and the name of the owner, occupant or claimant thereof, shall be a sufficient description of the same.

Descriptive averments; property: Robinson v. State, 35 T. Cr. R., 54, 43 S. W. R., 526; Daud v. State, 34 Id., 460, 31 S. W. R., 376; Overly v. State, Id., 500, 31 S. W. R., 377; Taylor v. State, 29 Id., 466, 16 S. W. R., 302; Green v. State, 28 Id., 493, 13 S. W. R., 784; Ware v. State, 2 Id., 547; Sansbury v. State, 4 Id., 99; Odum v. State, 11 T., 12; Dignowitty v. State, 17 Id., 512; Potter v. State, 39 Id., 288.

Same; "money." "Money" is that which is, by the acts of the congress of the United State, made legal tender, whether coin or currency. Thompson v. State, 35 T. Cr. R., 511, 34 S. W. R., 629.

As to descriptive averments, see Green v. State, 28 T. Cr. R., 493, 13 S. W. R., 784; Taylor v. State, 29 Id., 466, 16 S. W. R., 302; Bryant v. State, 16 Id., 144; Wade v. State, 35 Id., 170, 32 S. W. R., 772, overruling Bravo v. State, 20 Id., 177; Lewis v. State, 28 Id., 140, 12 S. W. R., 736; Kimbrough v. State, Id., 367, 13 S. W. R., 218; Boyle v. State, 37 T., 359. And compare Kelley v. State, 34 T. Cr.R., 412, 31 S. W. R., 174.

And see Kirk v. State, 35 T. Cr. R., 224, 32 S. W. R., 1045; Minear v. State, 30 Id., 475, 17 S. W. R., 1082; Colter v. State, 37 Id., 284, 39 S. W. R., 576; Nelson v. State, 35 Id., 205, 32 S. W. R., 900; Jones v. State, 39 Id., 387, 46 S. W. R., 250.

Stolen animals: Penal Code, Art. 1353, and notes.

Art. 459. [447] **"Felonious" and "feloniously" not necessary.**—In an indictment for a felony, it is not necessary to use the words "felonious" or "feloniously."

Art. 460. [448] **Certainty; what sufficient.**—An indictment for any offense against the penal laws of this state shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment; and in no case are the words "force and arms" or "contrary to the form of the statute" necessary. [Act March 26 1881, ch. 57, p. 60, § 1.]

Art. 461. [449] **Special and general terms in statute.**—When a statute creating or defining any offense uses special or particular terms, an indictment on it may use the general term, which, in common language, embraces the special term. [Id., § 2.]

Art. 462. [450] **"Public place;" allegation of.**—When, to constitute the offense, an act must be done in a public place, it is sufficient to allege that the act was done in a "public place." [Id., § 3.]

Art. 463. [451] **Act, with intent to commit an offense.**—An indictment for an act done with intent to commit some other offense may charge in general terms the commission of such act with intent to commit such other offense, without stating the facts constituting such other offense. [Id., § 4.]

Art. 464. [452] **Selling intoxicating liquor; sufficient allegations as to.**—In an indictment for selling intoxicating liquors in violation of any law of this state, it shall be sufficient to charge that the defendant sold intoxicating liquors contrary to law, naming the person to whom sold, without stating the quantity sold; and, under such indictment, any act of selling in violation of the law may be proved. [Id., § 5].

Art. 465. [453] **Perjury; sufficient allegation for.**—An indictment for perjury or false swearing need not charge the precise language of the false statement, but may state the substance of the same; and no such indictment shall be held insufficient on account of any variance which does not affect the subject matter or general import of such false statement; and it is not necessary in such indictment to set forth the pleadings, records or proceedings with which the false statement is connected, nor the commission or the authority of the court, or person before whom the perjury was committed; but it is sufficient to state the name of the court or officer by whom the oath was administered, with the allegation of the falsity of the matter on which the perjury is assigned. [Id., § 6.]

Perjury. Indictment for perjury on the trial of a cause, must allege that the particular statement assigned for perjury was material, or set out facts that affirmatively show its materiality. It is not sufficient to allege that the main fact, the factum probandum, is material, nor, alleging a certain fact to be material, assign perjury upon another fact material to the alleged material or main fact. Buller v. State, 33 T. Cr. R., 551, 28 S. W. R., 465; Cravey v. State, Id., 557, 28 S. W. R., 472. And see Anderson v. State, 56 Id., 360, 120 S. W. R., 462.

The materiality of the false statement assigned must relate to some material issue involved in the proceeding. Brooks v. State, 29 T. Cr. R., 582, 16 S. W. R., 542; Agar v. State, Id., 605, 16 S. W. R., 761; Yardley v. State, 55 Id., 486, 117 S. W. R., 146.

Materiality is sufficiently charged in one or the other of the methods named. Buller v. State, 33 T. Cr. R., 551, 28 S. W. R., 465; Cravey v. State, Id., 557, 28 S. W. R., 472; Scott v. State, 35 Id., 11, 29 S. W. R., 274.

If the perjury is alleged to have been committed upon a prosecution under a statute containing an exemption clause, the indictment should negative the exemption. Barton v. State, 50 T. Cr. R., 161, 95 S. W. R., 110.

And see, generally, Jordan v. State, 47 T. Cr. R., 133, 83 S. W. R., 821, overruling Martinez v. State, 7 Id., 394; Foreman v. State, Id., 179, 85 S. W. R., 809; McDonough v. State, Id., 227, 84 S. W. R., 594.

Art. 466. [454] **Bribery; sufficient allegation for.**—An indictment, under the laws relating to bribery, shall be sufficient if it charges that the defendant bribed or attempted to bribe any officer or other person named in the Penal Code who may be subject to bribery, with intent to influence the action of such person; or that any such officer or other person accepted, or agreed to accept, a bribe given or promised to influence his action, stating the particular thing or advantage given, promised, accepted, or agreed to be accepted, and the particular act to be influenced thereby. [Id., § 7.]

Penal Code, Arts. 174-193, and notes.

Indictment for bribing a justice of the peace to not cause arrest of one unlawfully carrying a pistol, to be sufficient, must charge that the pistol was unlawfully carried. Morawitz v. State, 46 T. Cr. R., 436, 80 S. W. R., 997; s. c., 49 Id., 366, 91 S. W. R., 227.

Art. 467. [455] **Misapplication of public money; sufficient charge of.**—Under the laws relating to the misapplication of public money, an indictment may charge that the defendant misapplied certain public moneys in his hands by virtue of his trust, stating the amount of such public moneys and the manner in which the same was misapplied. [Id., § 8.]

Penal Code, Arts. 96-109, and notes.

Art. 468. [456] **Description of money, etc., in theft, etc.**—In indictments for theft or embezzlement of any coin or paper current as money, or of any checks, bills of exchange, or other such security, it shall be sufficient to describe the property in general terms; as, "money," "checks," "bills of exchange," or other evidence of debt, of or about a certain amount. [Id., § 9.]

Ante, Art. 458, and notes. And see also Jones v. State, 39 T. Cr. R., 387, 46 S. W. R., 250; Butler v. State, 46 Id., 287, 81 S. W. R., 743.

"Money," under our statute, has a distinctive meaning, significant of value. Speer v. State, 50 T. Cr. R., 273, 97 S. W. R., 469.

Art. 469. [457] **Carrying weapons; indictment for.**—An indictment under the laws regulating the carrying of deadly weapons may charge that the defendant carried about his person a pistol, or other deadly weapon, without authority of law, without a further averment of a want of legal excuse or authority on his part. [Id., § 10.]

Penal Code, Arts. 475-480, and notes.

Art. 470. [458] **Certain forms of indictments prescribed.**—The following forms of indictments in cases in which they are applicable are sufficient, and analogous forms may be used in other cases:

"Form No. 1—General form: In the name and by the authority of the state of Texas, the grand jury of ——— county present in the district court of said county, that about the ——— day of ———, A. D. ———, in ——— county, Texas [name or description of defendant], did [description of offense] against the peace and dignity of the state.

"———, Foreman of the grand jury."

"Form No. 2—Murder: A B did, with malice aforethought, kill C D by shooting him with a gun; or, by striking him with an iron wedge; or, by poisoning him," etc.

"Form No. 3—Assault to commit felony: A B did assault C D with intent to murder, rob, maim, disfigure or castrate him; or, did assault C D in attempting to commit burglary; or, did assault E F, a female, with intent to rape her," etc.

"Form No. 5—Simple assault: A B did assault C D."

"Form No. 6—Bribery: A B did bribe C D, a sheriff, by paying him ten dollars in money with intent that said C D should permit E F, a prisoner in his custody, to escape."

"Form No. 7—Gaming: A B and C D did play at a game with cards in a public place (or in a storehouse, etc.); or, A B and C D did bet at a game with dice; or, A B and C D did bet at a game of dominoes, crack-loo and crack-or-loo; or, A B and C D did bet at crack-loo or crack-or-loo. A B did keep a table (bank or alley) for gaming; or, A B did bet at a ten pin alley; or, did permit gaming in his house (or house under his control); or, did rent to C D a room to be used as a place for gaming; or, did bet on the result of an election."

"Form No. 8—Rape: A B, an adult male, did rape C D, a female."

"Form No. 9—Affray: A B and C D did fight together in a public place."

"Form No. 10.—Adultery and fornication: A B, a man, and C D, a woman, did have habitual carnal intercourse with each other, the said A B being lawfully married to E F."

"Form No. 11—Unlawful marriage: A B, having a wife then living, did unlawfully marry C. D; or, A B, a white person, and C D, a negro, did knowingly intermarry with each other; or, having intermarried, did continue to live together as man and wife."

"Form No. 12—Escape: A B, a sheriff, having the legal custody of C D, then accused of a murder in the first degree, did wilfully permit him to escape."

"Form No. 14—Keeping disorderly house: A B did keep a disorderly house."

"Form No. 15—Lotteries: A B did establish a lottery, or did dispose of certain property by lottery."

"Form No. 16—Unlawful practice of medicine: A B did practice medicine without authority of law."

"Form No. 17—False imprisonment: A B did wilfully and without lawful authority detain C D against his consent."

"Form No. 18—Kidnaping: A B did falsely imprison C D for the purpose of removing him from the state."

"Form No. 19—Arson: A B did wilfully burn a certain house, the property of C D."

"Form No. 22—Swindling: A B did falsely represent to C D that he had ten bales of cotton packed and ready for delivery, and by means of such false representation did obtain from C D one hundred dollars in money, with intent to appropriate it to his own use."

"Form No. 23—Fraudulent disposition of mortgaged property: A B, having given to C D a lien in writing on his crop of cotton, did dispose of the same with intent to defraud said C D."

"Form No. 24—Counterfeiting coin: A B did counterfeit a silver coin of the republic of Mexico, called a dollar, which was at the time current as money in the United States."

"Form No. 25—Conspiracy: A B and C D did conspire together to murder E F."

"Form No. 26—Robbery: A B did rob C D of twenty dollars in money."

"Form No. 27—Forgery: A B did forge a certain false instrument in writing in substance as follows:" [Setting out the forged instrument.]

"Form No. 28—Misapplication of public money: A B, a collector of taxes, did misapply one thousand dollars public moneys in his hands by virtue of his office, by converting said moneys to his own use." [Id., § 11.]

See indictment under Form No. 8, held fatally defective as embodying none of the elements of rape. Brinster v. State, 12 T. Cr. R., 612.

Information need not, under this article, aver that the acts complained of were contrary to the statute. Burk v. State, 57 T. Cr. R., 635, 124 S. W. R., 658.

Form 1. General: Ante, Art. 451, and notes.

Form 2. Murder: Penal Code, Art. 1141, et seq., and notes.

Form 3. Felony assault: Penal Code, Art. 1026, et seq., and notes.

Form 4. Aggravated assault. Held unconstitutional in Allen v. State, 13 T. Cr. R., 28. (Omitted.)

Form 5. Simple assault. Indictment must allege the name of the assaulted party or that it was unknown, and it must be proved as alleged. Hardin v. State, 26 T., 113; Rape v. State, 34 T. Cr. R., 615, 31 S. W. R., 652.

Need not allege battery, if only assault was committed. State v. Johnson, 11 T., 22.

Nor that the assault was unlawfully committed. State v. Lutterloh, 22 T., 211; State v. Hartman, 41 Id., 562.

Nor "with intent to injure." Evans v. State, 25 T. Supp., 304; Ferguson v. State, 4 T. Cr. R., 156.

Nor "coupled with ability," etc. Forrest v. State, 3 T. Cr. R., 232.

Nor the particular acts of violence. Robertson v. State, 15 T. Cr. R., 317.

Form 6. Bribery: Ante, Art. 466, and notes; Penal Code, Arts. 174-193, and notes.

Form 7. Gaming: Penal Code, Arts. 548-574, and notes, and 586, and notes.

Form 8. Rape: Held in Brinster v. State, 12 T. Cr. R., 612, invalid as not comprehending a single element of the offense.

Form 9. Affray: Penal Code, Art. 469, and notes.

Form 10. Adultery and fornication: Penal Code, Art. 490, and notes as to adultery, and Id., Art. 494, and notes as to fornication.

Form 11. Unlawful marriage: Penal Code, Art. 481, and notes.

Form 12. Escape. Penal Code, Art. 320. Indictment need not show that the arrest was legal, nor that the officer's custody was legal. State v. Hedrick, 35 T., 485.

Must charge that the escape was "wilfully" permitted. Barthelow v. State, 26 T., 175.

That defendant "did wilfully and negligently permit escape" states two offenses in one count, and is bad for duplicity.

Form 13. Perjury: Held unconstitutional in Gabrielsky v. State, 13 T. Cr. R., 428. (Omitted.)

Form 14. Keeping disorderly house: Penal Code, Art. 500, and notes.

Form 15. Lotteries: Penal Code, Art. 533, and notes.

Form 16. Unlawful practice of medicine: Penal Code, Arts. 750-758. Indictment need not allege the particular branch or department in which the defendant was engaged in practicing. Ante, 6 T. Cr. R., 202.

Nor negative the exceptions named in Penal Code, Art. 757.

Form 17. False imprisonment: Penal Code, Art. 1043, and notes. Indictment must allege the detention as unlawful. Redfield v. State, 24 T., 133.

It should allege the mode of detention, as by actual violence, force, threats, etc. Maner v. State, 8 T. Cr. R., 361.

Form 18. Kidnaping: Penal Code, Art. 1057, and notes. For essential allegations, see Clark v. State, 3 T., 282; Mason v. State, 29 T. Cr. R., 24, 14 S. W. R., 71.

Form 19. Arson: Penal Code, Art. 1200, and notes.

Form 20. Burglary: This form, as prescribed by the old Code, declared unconstitutional in Rodreguez v. State, 12 T. Cr. R., 552, and is omitted.

Form 21. Theft: Held unconstitutional in Williams v. State, 12 T. Cr. R., 395; Hodges v. State, Id., 554; Young v. State, Id., 614; and Insall v. State, 14 Id., 145, and omitted.

Form 22. Swindling: This form was held sufficient in Arnold v. State, 11 T. Cr. R., 472, but contra, see notes to Penal Code, Art. 1422; Dwyer v. State, 24 Id., 132, 5 S. W. R., 662; Hardin v. State, 25 Id., 74, 7 S. W. R., 534; Mathena v. State, 15 Id., 473.

Form 23. Fraudulent disposition of mortgaged property: Penal Code, Art. 1430, and notes.

Form 24. Counterfeiting: Penal Code, Art. 954, et seq.

Form 25. Conspiracy: Penal Code, Art. 1437, and notes.

Form 26. Robbery: Penal Code, Art. 1327, and notes. And see Barnes v. State, 9 T. Cr. R., 128; Morris v. State, 13 Id., 65; Menear v. State, 30 Id., 435, 17 S. W. R., 1082; Evans v. State, 34 Id., 110, 29 S. W. R., 266; Atkinson v. State, Id., 424, 30 S. W. R., 1064.

Form 27. Forgery: Penal Code, Art. 924, and notes.

Form 28. Misapplication of public money: Penal Code, Art. 96, and notes.

Art. 471. [459] **Proof not dispensed with.**—Nothing contained in article 470 shall be construed to dispense with the necessity for proof of all the facts constituting the offense charged in an indictment as the same is defined by law. [Id., § 12.]

Construed. The "common sense" indictment act was intended to obviate the requirement of circumstantial allegations, and not to affect the evidence necessary to establish the inculpatory facts. White v. State, 11 T. Cr. R., 476. Compare Mansfield v. State, 17 Id., 468.

Art. 472. [460] **Libel; indictment for.**—In an indictment for libel, it is not necessary to set forth any intrinsic facts for the purpose of showing the application to the libeled party of the defamatory matter on which the indictment is founded; it is sufficient to state generally that the same was published concerning him. [Id., § 13.]

Innuendo: Penal Code, Art. 1151, and notes.

Art. 473. [461] **Disjunctive allegations.**—When the offense may be committed by different means or with different intents, such means or intents may be alleged in the same count in the alternative. [Id., § 14.]

Alternative pleading. Though generally an indictment may follow the words defining the offense, yet an exception to this rule exists when the statute makes it a crime to do this "or" that, embracing several things disjunctively; in which case the indictment, if it embraces all the prohibited acts, must use the conjunction "and" wherever the disjunctive "or" is used in the statute, else it will be bad for uncertainty. Hart v. State, 2 T. Cr. R., 39; Tompkins v. State, 4 Id., 161; Berlinger v. State, 6 Id., 181; Copping v. State, 7 Id., 61. But see Day v. State, 14 Id., 26, and cases cited; Fry v. State, 36 Id., 582, 37 S. W. R., 741; Willis v. State, 34 Id., 148, 29 S. W. R., 787; Lewellen v. State, 54 Id., 640, 114 S. W. R., 1179, and cases cited.

Art. 474. [462] **Statutory words need not be strictly followed.**—Words used in a statute to define an offense need not be strictly pursued in the indictment; it is sufficient to use other words conveying the same meaning, or which include the sense of the statutory words. [Id., § 15.]

Ante, Art. 451, subd. 7.

Art. 475. [463] **Matters of judicial notice, etc., need not be stated.**—Matters of which judicial notice is taken (among which are included the authority and duties of all officers elected or appointed under the general laws of this state), and presumptions of law need not be stated in an indictment. [Id., § 16.]

Judicial notice, etc. Courts take judicial notice of the boundaries of counties. State v. Jordan, 12 T., 205; McGill v. State, 25 T. Cr. R., 499, 8 S. W. R., 661.

And of the territorial extent and the sovereignty exercised by their own governments, of the political subdivisions of their own countries and their relative positions, though not of their precise boundaries, except as defined by public statutes. McGill v. State, supra; Boston v. State, 5 Id., 383.

Of the times of meetings of the district courts of the several counties of the state. Conner v. State, 6 T. Cr. R., 455; Hudson v. State, 40 T., 12.

Of joint resolutions imposing particular duties upon state officers. State v. Delesdenier, 7 T., 76.

Of territorial cessions to the United States government and exclusive Federal jurisdiction over same. Lasher v. State, 30 T. Cr. R., 387, 17 S. W. R., 1064.

Trial courts, of all previous proceedings in the case. Foster v. State, 25 T. Cr. R., 543, 8 S. W. R., 664; Robinson v. State, 21 Id., 160, 17 S. W. R., 632; Harris v. State, Id., 478, 2 S. W. R., 830.

Of the contraction, derivation and corruption of names. Alsup v. State, 36 T. Cr. R., 535, 38 S. W. R., 174.

That "brass knuckles" may be composed of other hard substance than brass. Louis v. State, 36 T. Cr. R., 52, 35 S. W. R., 377.

The court is without judicial notice of a particular locality in a town, city or county. Bell v. State, 1 T. Cr. R., 81; Boston v. State, 5 Id., 83; Hoffman v. State, 12 Id., 406; Stewart v. State, 31 Id., 153, 19 S. W. R., 908; Terrell v. State, 41 T., 463.

Courts have no judicial knowledge of municipal corporations. Temple v. State, 15 T. Cr. R., 304.

Nor of special laws or city ordinances. Wilson v. State, 16 T. Cr., R., 497; Hailes v. State, 9 Id., 170.

Art. 476. [464] **Defects of form do not affect trial, etc.**—An indictment shall not be held insufficient, nor shall the trial, judgment or other proceedings thereon be affected, by reason of any defect or imperfection of form in such indictment which does not prejudice the substantial rights of the defendant. [Id., § 17.]

Pleading. Indictment. When the statute denouncing an offense embraces in its body or enacting clause, an exception so that one can not be read without the other, the indictment must negative such exception. Rice v. State, 37 T. Cr. R., 36 38 S. W. R., 801, and cases cited; Williams v. State, Id., 238, 39 S. W. R., 664.

But mere explanatory matter in a statute showing what would not constitute the offense, is not such an exception, and need not be negatived. Williams v. State, supra; Brown v. State, 9 Id., 171; Moseley v. State, 18 Id., 311.

The rule is that, when the definition of an offense is so entirely separable from the exceptions that its constituents may be clearly and accurately alleged without reference to the exceptions, it is not necessary to negative the latter. Moseley v. State, supra.

Joinder of defendants. Indictment against joint defendants need not allege the separate acts of each. Williams v. State, 42 T., 392; Tuller v. State, 8 T. Cr. R., 501.

All parties being charged as principals, it is not necessary to allege conspiracy between them or that they "acted together." Loggins v. State, 32 T. Cr. R., 358, 24 S. W. R., and cases cited.

And see generally: Glidden v. State, 2 T. Cr. R., 508; Woodworth v. State, 20 Id., 375; Bennett v. State, 26 Id., 671, 14 S. W. R., 336; Watson v. State, 28 Id., 34, 12 S. W. R., 404; Finney v. State, 29 Id., 184, 15 S. W. R., 175; Jenkins v. State, 30 Id., 379, 17 S. W. R., 938; Dever v. State, 37 Id., 396, 30 S. W. R., 1071; Lewellen v. State, 18 T., 539; Williams v. State, 42 Id., 392.

Verdict in joint prosecutions must assess penalties separately. Hays v. State, 30 T. Cr. R., 472, 17 S. W. R., 1073, and cases cited; Mootry v. State, 35 Id., 450, 33 S. W. R., 877; Polk v. State, Id., 495, 34 S. W. R., 633.

Objection that on the separate trials of joint defendants, one was awarded the minimum and the other the maximum penalty, will not be entertained. Taylor v. State, 38 T. Cr. R., 241, 42 S. W. R., 384.

Pleading. A written instrument entering into an offense as a part or basis thereof, or when its proper construction is material, it should, as a general rule, be set out in the indictment. Tynes v. State, 17 T. Cr. R., 123, and cases cited.

As to forgery, see Penal Code, Arts. 924, et seq., and notes.

Any variance between the purport and the tenor clauses of the instrument, as set out in the indictment, would be fatal. Thulemeyer v. State, 38 T. Cr. R., 349, 43 S. W. R., 83, and cases cited.

Innuendo. An indictment void on its face can not be made good by averment. Caffey v. State, 36 T. Cr. R., 198, 36 S. W. R., 82. And see Carder v. State, 35 Id., 105, 31 S. W. R., 678, and cases cited.

And see McKie v. State, 37 T. Cr. R., 544, 40 S. W. R., 305; Jones v. State, 38 Id., 364, 43 S. W. R., 78.

As to libel, see Penal Code, Arts. 1151 et seq., and notes.

As to fraudulent disposition of mortgaged property, see Jones v. State, 35 T. Cr. R., 565, 34 S. W. R., 631, and cases cited.

As to perjury, see Penal Code, Arts 304, et seq., and notes; Gabrielsky v. State, 13 T. Cr. R., 428; Schoenfeld v. State, 56 Id., 103, 119 S. W. R., 101; Yardley v. State, 55 Id., 486, 117 S. W. R., 146.

As to swindling: Penal Code, Arts. 1421, et seq., and notes.

Sending threatening letter: Penal Code, Art. 1446, and notes; Cohen v. State, 37 T. Cr. R., 118, 38 S. W. R., 1005.

Slander: Indictment for slander uttered in a foreign language must set out the words in the foreign language, together with the translation of the same into English. Stichtd v. State, 25 T. Cr. R., 420, 8 S. W. R., 477.

Spelling, handwriting and grammar, however incorrect or inartistic, unless such defects obscure or change or render the meaning uncertain, will not vitiate an indictment. Williams v. State, 35 T. Cr. R., 391, 33 S. W. R., 1080; Keller v. State, 25 Id., 325, 8 S. W. R., 275, and cases cited; Morris v. State, 43 T., 372; Taylor v. State, 29 T. Cr. R., 466, 16 S. W. R., 302; Parsons v. State, 33 Id., 540, 28 S. W. R., 204.

As to interlineations and erasures, see Dodd v. State, 10 T. Cr. R., 370; Rahm v. State, 30 Id., 310, 17 S. W. R., 416; Perez v. State, 10 Id., 327; Huff v. State, 23 Id., 291, 4 S. W. R., 890.

Innuendo. Held, in indictment for slander, the language being ambiguous, that the innuendo clause must be as substantially proved as the slanderous words its meaning was intended to convey. Riddle v. State, 30 T. Cr. R., 425, 17 S. W. R., 1073, which decision is overruled in Dickson v. State, 34 Id., 1, 28 S. W. R., 815, which, in turn, should be compared with Daud v. State, Id., 460, 31 S. W. R., 376. And see Hernandez v. State, 18 Id., 149.

Surplusage: See Saddler v. Rep., Dallam, 610; State v. Elliott, 14 T., 423; State v. Moreland, 27 Id., 726; Meredith v. State, 40 Id., 480; Taylor v. State, 29 T. Cr. R., 466, 16 S. W. R., 302; Lomax v. State, 38 Id., 318, 43 S. W. R., 92; Mathews v. State, 39 Id., 553, 41 S. W. R., 647, and cases cited.

Redundancy: Cases supra.

Duplicity is the joinder of two or more distinct offenses in one count, and if it be such as to produce confusion and uncertainty as to what was intended to be charged, it would vitiate the indictment as not conforming to the rule that it must state the offense in plain and intelligible words. State v. Smith, 24 T., 285; Brown v. State 38 T. Cr. R., 597, 44 S. W. R., 176; Shuman v. State, 34 Id., 69, 29 S. W. R., 160; Oxsheer v. State, 38 Id., 499, 43 S. W. R., 335; Edmondson v. State, 43 T., 162; Witherspoon v. State, 39 T. Cr. R., 65, 44 S. W. R., 164.

Repugnancy in an indictment is the embodiment of two inconsistent allegations in one count. Counts may be repugnant to each other and the good one sustained, but repugnant allegations in one count vitiates the count. Boren v. State, 23 T. Cr. R., 28, 4 S. W. R., 463; Shuman v. State, 34 Id., 69, 29 S. W. R., 160.

And see State v. Randle, 41 T., 292; Westbrook v. State, 23 T. Cr. R., 401, 5 S. W. R., 248; Owens v. State, 35 Id., 345, 33 S. W. R., 875.

Art. 477. [465] **Definition of an "information."**—An "information" is a written statement filed and presented in behalf of the state by the district or county attorney, accusing the defendant therein named of an offense which is by law subject to be prosecuted in that manner. [O. C. 402.]

Information. Hunt v. State, 9 T. Cr. R., 404; Brown v. State, 11 Id., 451; Prophit v. State, 12 Id., 223; Thomas v. State, Id. 227; Johnson v. State, 17 Id., 230; Arbuthnot v. State, 38 Id., 509, 34 S. W. R., 269, overruling Thompson v. State, 15 Id., 39.

Art. 478. [466] **Requisites of an information.**—An information is sufficient if it has the following requisites:

1. It shall commence, "In the name and by the authority of the state of Texas."

Pleading; commencement of indictment: See ante, Art. 451, and notes.

2. That it shall appear to have been presented in a court having jurisdiction of the offense set forth.

Jurisdiction. Ante, Art. 451, and notes.

The offense charged must be within the jurisdiction of the county court. Davis v. State, 2 T. Cr. R., 184, and cases cited; Bowen v. State, 28 Id., 498, 13 S. W. R., 787, citing Thomas v. State, 18 Id., 213.

Valid complaint is essential to the sufficiency of an information, and to the jurisdiction of the county court. Thornberry v. State, 3 T. Cr. R., 36.

And the complaint, independent of the information, must allege the venue. Smith v. State, 3 T. Cr. R., 549, and cases cited.

And see Dominguez v. State, 37 T. Cr. R., 425, 35 S. W. R., 973; McVea v. State, 35 Id., 1, 26 S. W. R., 834.

3. That it appear to have been presented by the proper officer.

"Proper officer." An assistant county attorney, though designated a "deputy county attorney," is a "proper" officer. Wilkins v. State, 33 T. Cr. R., 320, 26 S. W. R., 409. And see Adams v. State, 47 Id., 35, 81 S. W. R., 963.

4. That it contains the name of the person accused, or be stated that his name is unknown, and give a reasonably accurate description of him.

Name of accused: Ante, Art. 451, and notes.

Indictment must state the accused's name correctly, but an error in this respect may be corrected on suggestion, and objection of misnomer comes too late after trial. Bassett v. State, 4 T. Cr. R., 41. And see Pancho v. State, 25 Id., 402, 8 S. W. R., 476, and cases cited.

The change, however, can only be made in the information, after which the defendant will not be heard to complain of repugnancy. Wilson v. State, 6 T. Cr. R., 154.

The county attorney cannot, of his own motion, change the information as to the defendant's true name. Patillo v. State, 3 T. Cr. R., 442.

Variance between the names as stated in the complaint and information is fatal to the latter. McDevro v. State, 23 T. Cr. R., 429, 5 S. W. R., 133.

Further on variance, see Steinberger v. State, 35 T. Cr. R., 492, 36 S. W. R., 417; Harrison v. State, 6 Id., 256.

5. It must appear that the place where the offense is charged to have been committed is within the jurisdiction of the court where the information is filed.

Venue. See ante, Art. 451 and notes, and ante, Art. 451, subd. 5 and notes, and ante, subd. 4.

Venue being properly alleged in the complaint will not supply omission in the information, but will serve as basis for new information. Lawson v. State, 13 T. Cr. R., 83; Smith v. State, 25 Id., 454, 8 S. W. R., 645, and cases cited.

Variance as to venue between the complaint and the information, is fatal. Landrum v. State, 37 T. Cr. R., 666, 40 S. W. R., 737.

6. That the time of the commission of the offense be some date anterior to the filing of the information, and that the offense does not appear to be barred by limitation.

Same. Time and date: Ante, Art. 451 and notes; Kennedy v. State, 22 T. Cr. R., 693, 3 S. W. R., 480, and cases cited.

Variance as to date between complaint and information is fatal. McJunkin v. State, 37 T. Cr. R., 117, 38 S. W. R., 994; Jennings v. State, 30 Id., 428, 18

Ante, Art. 451, subd. 7, and notes.

7. That the offense be set forth in plain and intelligible words.

Ante, Art. 451, subd. 7, and notes.

Information must directly and with certainty aver the facts that constitute the offense and not leave them to be adduced from argument or inference. Hunt v. State, 9 T. Cr. R., 404; Thomas v. State, 12 Id., 227; Prophit v. State, Id., 233; Woodward v. State, 33 Id., 554, 28 S. W. R., 204.

8. That the information conclude, "Against the peace and dignity of the state."

Conclusion. "Against the peace and dignity of the state" is a constitutional requirment, and must be complied with. Ante, Art. 451, subd. 8 and notes; Wilson v. State, 38 T., 548; Wright v. State, 37 T. Cr. R., 3, 35 S. W. R., 150; Wood v. State, 27 Id., 538, 11 S. W. R., 525, citing Thompson v. State, 15 Id., 39.

Not essential that each count should so conclude. Alexander v. State, 37 T. Cr. R., 533, 11 S. W. R., 628, citing West v. State, Id., 472, 11 S. W. R., 482.

Process issued by a city court must conclude, "against the peace and dignity of the state." Leach v. State, 36 T. Cr. R., 248, 36 S. W. R., 471, and cases cited.

9. It shall be signed by the district or county attorney, officially. [O. C. 403.]

Information. Official signature of the district or county attorney is essential. But note that post, Art. 586 specifically provides that the omission of such signature will not vitiate an information. Jones v. State, 30 T. Cr. R., 426, 17 S. W. R., 1080, citing Rasberry v. State, 1 Id., 664.

Art. 479. [467] **Shall not be presented until oath has been made, etc.**—An information shall not be presented by the district or county attorney until oath has been made by some credible person, charging the defendant with an offense. The oath shall be reduced to writing and filed with the information. It may be sworn to before the district or county attorney who, for that purpose, shall have power to administer the oath, or it may be made before any officer authorized by law to administer oaths. [O. C. 404.]

Pleading. Complaint need not, though the information must, commence, "in the name and by the authority of the state." Johnson v. State, 31 T. Cr. R., 464, 20 S. W. R., 980, citing Jefferson v. State, 24 Id., 535, 7 S. W. R., 244.

The same particularity is not required as in an indictment, and a substantial compliance with the statute will suffice. Bell v. State, 18 T. Cr. R., 53, citing Arrington v. State, 13 Id., 551; Pittman v. State, 14 Id., 576; Brown v. State, 11 Id., 451.

Charging a misdemeanor, the complaint should be filed in the county court; charging felony, it should be filed with a magistrate, who shall proceed as an examining court. Kinley v. State, 29 T. Cr. R., 532, 16 S. W. R., 339.

Stating an impossible date, the complaint is wholly invalid. Jennings v. State, 30 T. Cr. R., 428, 18 S. W. R., 90, and cases cited.

Reciting that affiant "has reason to believe and does believe," etc., omitting the word "good" before "reason," the information is held sufficient. Dodson v. State, 35 T. Cr. R., 571, 34 S. W. R., 754, citing Brown v. State, 11 Id., 451; Hall v. State, 32 Id., 594, 25 S. W. R., 292, and cases cited.

Complaint properly signed at the end is not vitiated by the inclusion, by mistake, of a wrong name in the body, which may be treated as surplusage, or stricken out and the proper name substituted. Malz v. State, 36 T. Cr. R., 447, 34 S. W. R., 267.

However, this article does not require that the complaint shall be signed by the affiant. Lewis v. State, 50 T. Cr. R., 331, 97 S. W. R., 481.

The county attorney of one county cannot take a complaint upon which the county attorney of another can proceed on information. Thomas v. State, 37 T. Cr. R., 142, 38 S. W. R., 1011.

An unpardoned convict is not competent to make a valid complaint. Perez v. State, 10 T. Cr. R., 327.

Name of the accused must be correctly stated, and this requirement is not met by the omission of the given name. Beaumont v. Dallas, 34 T. Cr. R., 68, 29 S. W. R., 157, and cases cited.

Date must be charged as anterior to the filing. Womack v. State, 31 T. Cr. R., 41, 19 S. W. R., 605, citing Lanham v. State, 9 Id., 232. But see Williams v. State, 17 Id., 521, holding that it is sufficient if the information alone conforms to this rule.

Jurat of the officer is essential to sufficiency. Jennings v. State, 30 T. Cr. R., 428, 18 S. W. R., 90, and cases cited.

Filing. One file mark will do for both complaint and information written on the same sheet of paper. Schott v. State, 7 T. Cr. R., 616.

A complaint attached to a filed information will be considered filed. Stinson v. State, 5 T. Cr. R., 31.

Whether or not the information was filed at the proper time is a question of fact, and not a ground, as matter of law, for quashing a bail bond. Coleman v. State, 32 T. Cr. R., 595, 25 S. W. R., 286.

Information is not quashable on the ground that the arrest was made on the complaint prior to the filing of the information. Evans v. State, 36 T. Cr. R., 32, 35 S. W. R., 169.

Same; mutilation. The fraudulent alteration of a date in the complaint is the mutilation of both the complaint and information, and the substitution of both is the only remedy. Huff v. State, 23 T. Cr. R., 291, 4 S. W. R., 890, and cases cited.

Art. 480. [468] **Rules as to indictments applicable to informations.**—The rules laid down in this chapter with respect to the allegations in indictments and the certainty required are applicable also to informations. [O. C. 406.]

Ante, Arts. 451 to 460 inclusive and notes; Elliott v. State, 41 T., 224.

Art. 481. [469] **Indictment, etc., may contain several counts.**—An indictment or information may contain as many counts, charging the same offense, as the attorney who prepares it may think necessary to insert; and an indictment or information shall be sufficient if any one of its counts be sufficient.

Felony. That the distinct offenses charged in the separate counts are felonies is not a good objection to an indictment, provided they are of the same character, differing only in degree. Mason v. State, 29 T. Cr. R., 24, 14 S. W. R., 71, and cases cited.

Theft and illegally marking and branding, if the same transaction, though different offenses, may be charged in the same indictment. Wilhousen v. State, 30 T. Cr. R., 623, 18 S. W. R., 300. And see McKenzie v. State, 32 Id., 568, 25 S. W. R., 426.

An indictment is neither repugnant nor duplicitous because it sets out distinct offenses of horse theft in different counts, the different counts alleging different ownerships. Pisano v. State, 34 T. Cr. R., 63, 29 S. W. R., 42, citing Boren v. State, 23 Id., 28, 4 S. W. R., 463. And see Shuman v. State, 34 Id., 69, 29 S. W. R., 160.

Misdemeanor. Information may contain plural counts charging different misdemeanors. Alexander v. State, 27 T. Cr. R., 533, 11 S. W. R., 628, and cases cited.

Each day of the keeping of a disorderly house may be charged in different counts as a separate offense. Hall v. State, 474, 24 S. W. R., 407.

Joinder of felony and misdemeanor. The district court of a county in which the county court was not divested of criminal jurisdiction has no jurisdiction over a misdemeanor count included in an indicement which also charged a felony. Robles v. State, 38 T. Cr. R., 81, 41 S. W. R., 620.

Quashal of one or more counts does not necessarily affect other counts in an indictment. West v. State, 27 T. Cr. R., 472, 11 S. W. R., 482; Boren v. State, 23 Id., 28, 4 S. W. R., 463.

Charge of the court must respond to all the counts upon which the trial was had. Pollard v. State, 33 T. Cr. R., 197, 26 S. W. R., 70; Cullum v. State, 37 Id., 211, 39 S. W. R., 300.

But the proof responding to but one count, the charge of the court should be confined to that one. Carr v. State, 36 T. Cr. R., 3, 34 S. W. R., 949, citing Parks v. State, 29 Id., 597, 16 S. W. R., 532. And see Shuman v. State, 34 Id., 69, 29 S. W. R., 160.

Conviction being had on but one of two counts, an incorrect charge on the other count is immaterial error. Rosson v. State, 37 T. Cr. R., 87, 38 S. W. R., 788; Tigerina v. State, 35 Id., 302, 33 S. W. R., 353.

Same; practice. The trial court may recall its charge at any time before its final delivery to, and the retirement of the jury, and change it as to the submission of counts. Holt v. State, 39 T. Cr. R., 282, 45 S. W. R., 1016.

Verdict generally. A verdict of conviction under an indictment of plural counts, some good and some bad, will be applied to and be upheld under the good ones. Pitner v. State, 37 T. Cr. R., 268, 39 S. W. R., 662; Southern v. State, 34 T. Cr. R., 144, 29 S. W. R., 780.

A general verdict which does not specify which of plural counts will be applied to the one sustained by the proof. Isaacs v. State, 36 T. Cr. R., 505, 38 S. W. R., 40; Fry v. State, Id., 582, 37 S. W. R., 741, and cases cited.

The evidence sustaining both the count for forgery and for uttering a general verdict, will be applied to either. Carr v. State, 36 T. Cr. R., 3, 34 S. W. R., 949, distinguishing Parks v. State, 29 Id., 597, 16 S. W. R., 532.

But a double conviction—that is for both offenses—cannot be had under such an indictment. Crawford v. State, 31 T. Cr. R., 51, 19 S. W. R., 766, and cases cited.

Election between counts. The doctrine of compulsory election by the state between counts explained. Keeler v. State, 15 T. Cr. R., 111.

See Moore v. State, 37 T. Cr. R., 552, 40 S. W. R., 287, in extenso, and cases cited, for conditions of indictment under which the state cannot be required to elect between counts. And see Dill v. State, 35 Id., 240, 33 S. W. R., 126; Thompson v. State, Id., 472, 26 S. W. R., 987; Wilhousen v. State, 30 Id., 623, 18 S. W. R., 300. But compare More v. State, supra, with McKenzie v. State, 32 Id., 568, 25 S. W. R., 426, and Masterson v. State, 20 Id., 574, to the effect that, if the indictment charges in separate counts, one or more distinct felonies pertaining to the same transaction, and the evidence develops distinct transactions, the state should, at defendant's request, be compelled to elect between the counts.

Misdemeanor. The state cannot be required to elect between counts in a misdemeanor case. Brown v. State, 38 T. Cr. R., 597, 44 S. W. R., 176; Stebbins v. State, 31 Id., 294, 20 S. W. R., 552, and cases cited; Thompson v. State, 32 Id., 265, 22 S. W. R., 979.

Charge of court submitting but one of plural counts is tantamount to an election by the state on that count. Moore v. State, 37 T. Cr. R., 552, 40 S. W. R., 287; Smith v. State, 34 Id., 123, 29 S. W. R., 774; and cases cited.

Art. 482. [470] **When indictment or information has been lost, mislaid, etc.** —When an indictment or information has been lost, mislaid, mutilated or obliterated, the district or county attorney may suggest the fact to the court; and the same shall be entered upon the minutes of the court; and, in such case, another indictment or information may be substituted, upon the written statement of the district or county attorney that it is substantially the same as that which has been lost, mislaid, mutilated or obliterated. Or another indictment may be presented, as in the first instance; and, in such case, the period for the commencement of the prosecution shall be dated from the time of making such entry. [O. C. 406a.]

Constitutional law. This article held constitutional. Waters v. State, 21 T. Cr. R., 213, 17 S. W. R., 725.

Substitution. This article contemplates plea to the indictment before its loss as a predicate to its substitution. Quaere: Can an indictment for felony, lost before plea by defendant, be substituted otherwise than by a new presentment by the grand jury? See in extenso Schultz v. State, 15 T. Cr. R., 258; Gillespie v. State, 16 Id., 641.

An order of the court is indispensable to the substitution of a record or filed paper. See Burrage 44 S. W. R., 169, in extenso on the rule, and Strong v. State, 18 T. Cr. R., 19; Rogers v. State, 11 Id., 608.

It must be shown that the substitution was actually made. Turner v. State, 7 T. Cr. R., 596, and cases cited; Rogers v. State, supra and Strong v. State, supra.

An indictment lost after trial may be substituted as provided in this article or by a second indictment. Schultz v. State, 15 T. Cr. R., 258; Harwood v. State, 16 Id., 416; Turner v. State, Id., 318.

The defendant is not charged with the duty of supplying the lost indictment. Beardall v. State, 4 T. Cr. R., 631.

Indictment or information cannot be substituted pending appeal. Turner v. State, 16 T. Cr. R., 318.

An original indictment on file in the office of the clerk of the Court of Criminal Appeals, that fact being within the knowledge of the parties, is not a lost or mislaid paper in the sense to authorize its substitution. Shehane v. State, 13 T. Cr. R., 533.

Mutilation: See Huff v. State, 23 T. Cr. R., 291, 4 S. W. R., 890; Perez v. State, 10 Id., 327; State v. Ivy, 33 T., 646.

Complaint. A lost complaint, though not enumerated by this article, may be substituted. Bradburn v. State, 43 T. Cr. R., 309, 65 S. W. R., 519.

Same. The substituted complaint or information must be substantially the reproduction of the lost original. This requirement is not met by substituting a complaint made by C for the lost original made by D. Morrison v. State, 43 T. Cr. R., 437, 66 S. W. R., 779.

This article applies as a statute of limitation only when a new indictment has been returned, and not when another indictment has been substituted for a lost one. Brown v. State, 57 T. Cr. R., 570, 124 S. W. R., 101.

The changing of date in a complaint and information by the county attorney is mutilation, and renders the same nugatory. Kelly v. State, 127 S. W. R., 544.

An order to substitute a lost information does not authorize the substitution of the complaint as well. Id.

Art. 483. [471] **Order transferring cases.**—Upon the filing of an indictment in the district court of each county in this state, which charges an offense, over which such court has no jurisdiction, the judge of such court shall immediately, or as soon as convenient, make an order transferring the same to such inferior court as may have jurisdiction to try the offense therein charged, stating in such order the cause transferred and to what court transferred. [Const., Art. 5, § 17; Act Aug. 12, 1876, p. 135; Act 1879, ch. 65, p. 71; Act Feb. 5, 1881, ch. 3, p. 2.]

Practice. Only substantial compliance with this article is required. Lynn v. State, 28 T. Cr. R., 515, 13 S. W. R., 867, and cases cited.

Though the district court has no jurisdiction over misdemeanors not involving official misconduct, yet if the indictment is for a felony which includes lesser degrees that are misdemeanors, it has jurisdiction over such and should not transfer them to the county court. Cassady v. State, 4 T. Cr. R., 96; Ingle v. State, Id., 91.

The district court cannot transfer a felony case to the county court, and an order which does not divest the district court of jurisdiction is a nullity. Fossett v. State, 11 T. Cr. R., 40.

The district court had jurisdiction when the information was filed, but the act conferring jurisdiction on the county court took effect before trial. Held, that transfer of the case was proper practice. Hildreth v. State, 19 T. Cr. R., 195.

Omission in the order of transfer of the word "county" before "court," is immaterial error, the presumption obtaining that the district court intended to transfer to the proper jurisdiction, which was the county court. Johnson v. State, 28 T. Cr. R., 562, 13 S. W. R., 1005.

Not necessary that the order state the name and nature of the offense. Malloy v. State, 35 T. Cr. R., 389, 33 S. W. R., 1082, citing Tellison v. State, Id., 388, 33 S. W. R., 1082.

Not necessary that each case transferred have a separate order. One order embracing all transfers is sufficient. Forbes v. State, 35 T. Cr. R., 24, 29 S.. W. R., 784.

A case cannot now be transferred from county to district courts because of the disqualification of the county judge. Const. Art. V, Sec. 16; Johnson v. State, 31 T. Cr. R., 456, 20 S. W. R., 985.

Nothing to the contrary appearing, the appellate court will presume in favor of the regularity of the selection of the special judge who ordered the transfer. Schwartk v. State, 38 T. Cr. R., 26, 40 S. W. R., 976.

A county having two district courts with but one authorized to impanel the grand jury, the transfer by that court to the other confers jurisdiction upon the other. Moore v. State, 36 T. Cr. R., 88, 35 S. W. R., 688.

It is too late after mistrial to challenge the validity of the order of transfer. Thompson v. State, 2 T. Cr. R., 82.

Such order cannot be questioned by exception to indictment or motion in arrest of judgment. Coker v. State, 7 T. Cr. R., 83; Bonner v. State, 38 Id., 599, 44 S. W. R., 172, citing Friedlander v. State, 7 Id., 204.

Jurisdiction of the new court will not attach in default of an order of transfer. Austin v. State, 38 T. Cr. R., 8, 40 S. W. R., 724.

Art. 484. [472] **What causes shall be transferred to justice of the peace at county seat.**—Causes over which justices of the peace have jurisdiction may be transferred to a justice of the peace at the county seat, or, in the discretion of the judge, to a justice of the precinct in which the same can be most conveniently tried, as may appear by memorandum indorsed by the foreman of the grand jury on the indictment or otherwise; but, if it appear to the judge that the offense has been committed in any incorporated town or city, the cause shall be transferred to a justice in said town or city, if there be one therein; and any justice, to whom any such cause may be transferred, shall have jurisdiction to try the same. [Const., Art. 5, § 16; Act April 3, 1879, ch. 65, p. 71; original Act Aug. 12, 1876, ch. 91, p. 135.]

Construing this article held, that the district judge is not charged with judicial knowledge that the offense was committed in an incorporated city or town, that fact not being alleged in the indictment, nor that a city, if named, is incorporated, nor that a justice of the peace resided in such city. The county court to which the cause was transferred having jurisdiction to try the offense named, its jurisdiction to try the particular cause cannot be impeached in any way. Koenig v. State, 33 T. Cr. R., 367, 26 S. W. R., 835, and cases cited.

Art. 485. [473] **Duty of clerk of district court when case is transferred.**—It shall be the duty of the clerk of the district court, without delay, to deliver the indictments in all cases transferred, together with all the papers relating to each case, to the proper court or justice of the peace, as directed in the order of transfer; and he shall accompany each case with a certified copy of all the proceedings taken therein in the district court, and also with a bill of the costs that have accrued therein in the district court; and the said costs shall be collected in the court in which said cause is tried, in the same manner as other costs are collected in criminal cases. [Act Aug. 12, 1876, p. 135.]

Certificate is only required to embrace the matter enumerated in this article, and form is of no consequence. Lynn v. State, 28 T. Cr. R., 515, 13 S. W. R., 867, and cases cited.

It must show that the indictment was presented in the district court by the grand jury. Estes v. State, 33 T. Cr. R., 560, 28 S. W. R., 469, and cases cited.

And contain a certified copy of all the proceedings therein in the district court. Brumley v. State, 11 T. Cr. R., 114, and cases cited.

Need not recite that the indictment was or was not signed by the foreman of the grand jury. Robinson v. State, 24 T. Cr. R., 4, 5 S. W. R., 509.

Need not allege name or nature of the offense. Malloy v. State, 35 T. Cr. R., 389, 33 S. W. R., 1082, citing Tellison v. State, Id., 388, 33 S. W. R., 1082.

Curing defects of certificate: Johnson v. State, 28 T. Cr. R., 562, 13 S. W. R., 1005, and cases cited; Hawkins v. State, 17 Id., 593; and see Donaldson v. State, 15 Id., 25; Austin v. State, 38 Id., 8, 40 S. W. R., 724.

Art. 486. [474] **Proceedings of court to which cases have been transferred.**—All cases transferred from the district court shall be entered on the docket of the court to which they are transferred; and all process thereon shall be issued, and the defendant tried, in the same manner as if the causes had originated in the court to which they have been transferred. [Id.]

Practice. The transferred indictment being opportunely filed in the county court, and the transcript from the district court being filed long subsequent but thirteen days before the cause was called for trial, plea to jurisdiction on the ground of improper transfer was properly overruled. Reynolds v. State, 32 T. Cr. R., 36; 22 S. W. R., 18.

The court acquiring jurisdiction by transfer must issue capias for the arrest of defendant. Cassady v. State, 4 T. Cr. R., 96.

Plea to the jurisdiction of the court to which the case is transferred is the proper method to attack defective transcript, Austin v. State, 38 T. Cr. R., 8, 40 S. W. R., 724; Mitten v. State, 24 Id., 346, 6 S. W. R., 196, and cases cited.

the recognizance or bond will be forthcoming to answer the charge. Default of

Art. 487. [475] **Cause improvidently transferred, shall be re-transferred.**—When a cause has been improvidently transferred to a court which has no jurisdiction of the same, the court to which it has been transferred shall order it to be re-transferrable to the proper court; and the same proceedings shall be had as in the case of the original transfer. In such case, the defendant and the witnesses shall be held bound to appear before the court to which the case has been re-transferred, the same as thy were bound to appear before the court so transferring the same.

CHAPTER FOUR.

OF PROCEEDINGS PRELIMINARY TO TRIAL.

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1. OF ENFORCING THE ATTENDANCE OF DEFENDANT AND OF FORFEITURE OF BAIL.

Article 488. [476] **Bail forfeited, when.**—Whenever a defendant is bound by recognizance or bail bond to appear at any term of a court, and fails to appear on the day set apart for taking up the criminal docket, or any subsequent day when his case comes up for trial, a forfeiture of his recognizance or bail bond shall be taken. [O. C. 407.]

Construed. Bail is the original undertaking of the surety that the principal in the recognizance or bond will be forthcoming to answer the charge. Default of the principal forfeits the obligation, and it becomes a debt of record, and the surety a principal in the judgment for the state. Gay v. State, 20 T., 504.

The principal's default is the forfeiture of bail, and the judgment nisi is the declaration of record of the fact. Taylor v. State, 21 T., 499.

Bail bond or recognizance may be judicially forfeited at any time after default within the period of limitation. Brown v. State, 18 T. Cr. R., 326, citing Hill v. State, 15 Id. 530. And see Barrera v. State, 32 T., 644.

But forfeiture cannot be taken prior to appearance day and default of the principal on that day. Crowder v. State, 7 T. Cr. R., 484.

Bail bond or recognizance is not vitiated by the setting aside of a defective judgment, nisi, and may be forfeited later. Anderson v. State, 19 T. Cr. R., 299; Burris v. State, 34 Id., 551, 31 S. W. R., 395, and cases cited.

Dismissal of scire facias without concurrently setting aside judgment nisi will defeat any subsequent forfeiture. Burris v. State, supra, and cases cited.

Bail bond or recognizance is functus officio after the principal has appeared, stood trial, been fined and committed to jail. Johnson v. State, 32 T. Cr. R., 353, 22 S. W. R., 406.

Art. 489. [477] **Manner of taking a forfeiture.**—Recognizances and bail bonds are forfeited in the following manner: The name of the defendant shall be called distinctly at the door of the court house, and, if the defendant does not appear within a reasonable time after such call is made, judgment shall be entered that the state of Texas recover of the defendant the amount of money in which he is bound, and of his sureties, the amount of money in which they are respectively bound, which judgment shall state that the same will be made final, unless good cause be shown at the next term of the court why the defendant did not appear. [O. C. 408; amended.]

Construed. Under the present law, the judgment nisi must show that the forfeiture was taken according to law, and recite that it will be made final unless good cause be shown at the next term of the court why the defendant did not appear. Lindley v. State, 17 T. Cr. R., 120, and cases cited. Thompson v. State, Id., 318, and cases cited; Ware v. State, 21 Id., 328, 17 S. W. R., 524; McIntyre v. State, 19 Id., 443, and cases cited.

Judgment nisi is not valid unless it includes both principal and all sureties, and will not support final forfeiture. Ellis v. State, 10 T. Cr. R., 324; Douglass v. State, 26 Id., 248, 9 S. W. R., 733.

Should be rendered severally against the principal and his sureties for the full amount of the obligation. Thompson v. State 34 T. Cr. R., 135, 29 S. W. R., 789 (overruling Ishmael v. State, 41 T., 244, Sass v. State, 8 T. Cr. R., 426 and Carr v. State, 9 Id., 463, and following Kiser v. State, 13 Id., 201); Mathena v. State, 15 Id., 460.

The obligation of both surety and principal is both joint and several, and therefore, it is immaterial whether the citation or judgment nisi describes it as joint "or" several, or joint "and" several. Allee v. State, 28 T. Cr. R., 531, 13 S. W. R., 991.

The judgment as against both principal and sureties must specify the amount. Galindo v. State, 15 T. Cr. R., 319, citing State v. Cox, 25 T., 404.

Variance. Judgment and bond must correspond and any variance is fatal. Werbiski v. State, 20 T. Cr. R., 132, and cases cited.

A difference in amount between judgment and bond is a material variance. Barringer v. State, 27 T., 553.

And see Cushman v. State, 38 T., 181; Addison v. State, 14 T. Cr. R., 568; Dyches v. State, 24 T., 266.

As to citation. Judgment nisi is not affected by its failure to order issuance of citations. Gragg v. State, 18 T. Cr. R., 295.

It should show, however, where the parties were obligated to appear. Moseley v. State, 37 T. Cr. R., 18, 38 S. W. R., 800.

Alias capias for defendant in a criminal case may issue coincident with judgment nisi. Slocumb v. State, 11 T., 16.

Amendment to correct clerical errors or omissions may be made to judgment nisi even after the expiration of the judgment term, but in such case the principal as well as sureties must be cited. Collins v. State, 16 T. Cr. R., 274, and cases cited.

It would devolve upon the state to have a defective judgment nisi amended or corrected before going to trial on scire facias to make it final. Robertson v. State, 14 T. Cr. R., 211.

Forfeiture or judgment nisi, being only irregular or but formerly entered, may be amended. Burris v. State, 34 T. Cr. R., 551, 31 S. W. R., 395.

Lis pendens is an untenable defense against a second scire facias when it appears that exceptions to the original judgment nisi were sustained, the judgment annulled and citation under it quashed. Anderson v. State, 19 T. Cr. R., 299.

Judgment nisi is of no force unless it embraces all statutory requirements. Watkins v. State, 16 T. Cr. R., 646; Cheatham v. State, 13 Id., 32.

An invalid judgment nisi is fundamentally erroneous. Watkins v. State, supra.

Art. 490. [478] **Citation to sureties.**—After the adjournment of the court at which the proceedings set forth in the last two articles have been had, a citation shall issue from the court, notifying the sureties of the defendant that the recognizance or bond has been forfeited, and requiring them to appear at the next term of the court and show cause why the same should not be made final; but it shall not be necessary to give notice to the defendant. [O. C. 409.]

Construed. A function of the citation or scire facias is to bring the sureties of a defaulting principal into court to show cause against a final judgment on the forfeited bail bond. The scire facias need not include the principal, nor need he be served. Hutchings v. State, 24 T. Cr. R., 242, 6 S. W. R., 34, citing Branch v. State, 25 T., 423; Vaughan v. State, 29 Id., 273; Sims v. State, 41 T. Cr. R., 55 S. W. R., 179.

Nor is it necessary to serve notice on principal of intention to move to amend the recitals of scire facias and judgment nisi. Sims v. State, supra, disapproving Collins v. State, 16 T. Cr. R., 274.

That citation issued and judgment nisi was rendered at the same term of court does not affect action on a bail bond. Jones v. State, 15 T. Cr. R., 82.

Art. 491. [479] **Requisites of citation.**—A citation shall be sufficient if it contain the following requisites:

1. It shall run, "In the name of the state of Texas."

Requisites; commencement: The caption "In the name of the state of Texas" preceding the address to the proper officer, this subdivision is sufficiently complied with. Const. Art. V, Sec. 12; Brown v. State, 28 T. Cr. R., 65, 11 S. W. R., 1022, citing Werbiski v. State, 20 Id., 131. And see Goodin v. State, 14 Id., 443.

2. It shall be directed to the sheriff or any constable of the county where the surety resides or is to be found.

Construed. Immaterial that the judgment or writ omitted to allege the residence of the party in the county to which the scire facias was issued. Dyches v. State, 24 T., 266.

Service held sufficient. Gay v. State, 20 T., 504.

3. It shall state the name of the principal in such recognizance or bail bond and the names of his sureties.

Names of parties. Any variance between names as set out in the bond or judgment nisi and the citation or scire facias, unless by proper averment the writ shows the variant names to mean same party, is fatal. Brown v. State, 28 T. Cr. R., 65, 11 S. W. R., 1022; Hutchings v. State, 24 Id., 242, 6 S. W. R., 34, and cases cited.

Same. Scire facias named "M. Larkin;" bond "Mack Larkin;" and bond was "McDuff Larkin." Held, no variance. Robinson v. State, 34, 131, 29 S. W. R., 788, cases cited. And see Wilson v. State, 24 T., 544.

Misstatement of the christian name in the body of the recognizance is not ground for objection, it being conceded that the defendant was the party who signed the bond. State v. Rhodius, 37 T., 165. And see Whitener v. State, 38 T. Cr. R., 146, 41 S. W. R., 595.

4. It shall state the date of such recognizance or bail bond, and the offense with which the principal is charged.

Dates. The citation or scire facias must; 1, state date of recognizance or bond; and, 2, state it correctly. Any variance will be fatal. Avant v. State, 33 T. Cr. R., 312, 26 S. W. R., 411, and cases cited.

Oral testimony is available to show that the apparent variance was due to a clerical error. Day v. State, 51 T. Cr. R., 324, 101 S. W. R., 806.

And see an apparent variance satisfactorily explained. Pearson v. State, 51 T. Cr. R., 325, 101 S. W. R., 802.

Bail bond dates from its signature and execution, and not from the approval. Faubion v. State, 21 T. Cr. R., 494, 2 S. W. R., 830, citing Holt v. State, 20 Id., 271.

Citation to an impossible date will not support a judgment by default. Moseley v. State, 37 T. Cr. R., 18, 38 S. W. R., 800, and cases cited; Bullard v. State, 32 Id., 518, 24 S. W. R., 898.

Recognizance not stating, and the citation stating a date on which the former was entered into is not a variance. Camp v. State, 39 T. Cr. R., 143, 45 S. W. R., 491.

Practice. Exception that citation fails to allege date of recognizance comes too late after answer to the merits. Garrison v. State, 21 T. Cr., R., 342, 17 S. W. R., 351.

Allegation of offense. Bond and writ may both state the offense by name if it be an offense eo nomine. La Rose v. State, 29 T. Cr. R., 215, 15 S. W. R., 33; Brown v. State, 28 Id., 65, 11 S. W. R., 1022; Stephens v. State, 50 Id., 531, 98 S. W. R., 859.

If the offense be one not eo nomine, then its constitutent elements must be stated, Cresap v. State, 28 T. Cr. R., 529, 13 S. W. R., 992; La Rose v. State, 29 Id., 215, 15 S. W. R., 33; Edwards v. State, Id., 452, 16 S. W. R., 98.

The bond and judgments nisi and final stating the offense only as "violating the local option law," which is not an offense eo nomine, were each insufficient. Stephens v. State, 50 T. Cr. R., 531, 98 S. W. R., 859. And see Cravey v. State, 26 Id., 84, 9 S. W. R., 62.

Recognizance described the offense as "passing as true, a forged instrument knowinging the same to be forged, with intent to injure and defraud." Held sufficient. Camp v. State, 39 T. Cr. R., 142, 45 S. W. R., 490.

As to time and place of appearance "the district court of W. county, at the court house of said county, in G. now in session," held sufficient. Camp v. State, supra.

And see Dailey v. State, 4 T., 417; Hodges v. State, 20 Id., 493; Wilson v. State, 25 Id., 169; State v. Hotchkiss, 30 Id., 162; Meredith v. State, 40 Id., 480; Hart v. State, 2 T. Cr. R., 39; Jones v. State, 15 Id., 82; Thompson v. State, 17 Id., 318; Walker v. State, 32 Id., 24 S. W. R., 909.

"Swindling" being an offense eo nomine recognizance is sufficient without stating constituent elements, and without describing it either as felony or misdemeanor. Callaghan v. State, 57 T. Cr. R., 314, 122 S. W. R., 879.

5. It shall state that such recognizance or bail bond has been declared forfeited, naming the court before which the forfeiture was taken, the time when taken, and the amount for which it was taken against each party thereto.

Material variance, in designating the court, between the bond and the judgment nisi and the scire facias disqualifies the former as evidence. Smith v. State, 7 T. Cr. R., 160; Frost v. State, 33 Id., 347, 26 S. W. R., 412, and cases cited; Downs v. State, 7 Id., 483.

Bail bond, which fails to designate the particular one of the two district courts of concurrent jurisdiction of the county to which the principal is bailed, is defective and not admissible in evidence in a scire facias proceeding. Granberry v. State, 55 T. Cr. R., 350, 116 S. W. R., 594.

Variance between judgment nisi and scire facias as to time of forfeiture of the bond is fatal. Brown v. State, 28 T. Cr. R., 65, 11 S. W. R., 1022, and cases cited.

Amount of judgment must be stated in judgment nisi and specified in the scire facias. State v. Cox, 25 T., 404.

Judgment on forfeited bail bond is properly rendered against the defendants severally. Avant v. State, 33 T. Cr. R., 312, 26 S. W. R., 411, and cases cited.

A judgment nisi or scire facias stating an amount in excess of the bond should be quashed. Barringer v. State, 27 T., 553.

6. It shall notify the surety to appear at the next term of the court and show cause why the forfeiture should not be made final.

See State v. Cox, 25 T., 404; Davidson v. State, 20 Id., 649; Lindley v. State, 17 T. Cr. R., 121. (In so far as it holds that citation must show the authority under which the principal was arrested, the Lindley case was overruled in Werbiski v. State, 20 T. Cr. R., 131.)

7. It shall be signed and attested officially by the court or clerk issuing the same.

Citation need not recite that recognizance was entered into "in open court." Pleasants v. State, 29 T. Cr. R., 214, 15 S. W. R., 43.

Nor by what authority the bond was taken, or that it was taken or approved by competent authority. Brown v. State, 18 T. Cr. R., 326; Werbiski v. State, 20 Id., 121, overruling Lindley v. State, 17 Id., 121, on this point.

Scire facias is not sufficient if it fails to state such facts as would support a final judgment by default. Brown v. State 43 T., 349.

And see Davidson v. State, 20 T., 649; State v. Cox, 25 Id., 404; Barringer v. State, 27 Id., 553; McUshman v. State, 33 Id., 181; Cowen v. State, 3 T. Cr. R., 380; Smith v. State, 7 Id., 160; Sass v. State, 8 Id., 426; Arrington v. State, 13 Id., 554; McWhorter v. State, 14 Id., 239; Hester v. State, 15 Id., 418; Short v. State, 44; Thrash v. State, Id., 271; Robertson v. State, 34 Id., 131, 29 S. W. R., 788; Brown v. State, 28 Id., 297, 12 S. W. R., 1101. But compare this last case with State v. Glaveke, 33 T., 53.

Amendment. Citation may be amended as to defects of form under direction of the court. Gregg v. State, 18 T. Cr. R., 295.

Rules as to amendment of petition in civil cases apply in scire facias cases. Hutchings v. State, 24 T. Cr. R., 242, 6 S. W. R., 34.

Notice. Quaere: Can scire facias be amended and judgment by default taken without notice of amendment? Davidson v. State, 20 T., 649.

Such notice is not necessary when the sureties are in court contesting the proceedings. Hutchings v. State, 24 T. Cr. R., 242, 6 S. W. R., 34.

Judgment nisi cannot be amended without notice to principal and sureties. Hutchings v. tSate, 24 T. Cr. R., 242, 6 S. W. R., 34, citing Branch v. State, 25 T.,

Irregular or informal entry of the forfeiture and judgment nisi may be amended. Burris v. State, 34 T. Cr. R., 551, 31 S. W. R., 395.

Art. 492. [480] **Citation shall be served and returned as in civil actions.**—Sureties shall be entitled to notice by service of citation, the length of time and in the manner required in civil actions; and the officer executing the citation shall return the same in the manner provided for the return of citations in civil actions. [O. C. 412.]

Service of citation must be had on sureties, but not necessarily on the principal. Hutchings v. State, 24 T. Cr. R., 242, 6 S. W. R., 34, citing Branch v. State, 25 T., 423; Vaughan v. State, 29 T. Cr. R., 273.

Return must show that service was had upon each of the defendants severally. Fulton v. State, 14 T. Cr. R., 32, and cases cited; Harryman v. State, 122 S. W. R., 398.

In scire facias proceedings the sureties are entitled to notice by the service of citation for the length of time and in the manner required in civil actions. Fulton v. State, supra; Couch v. State, 122 S. W. R., 24.

Return. Failure of the sheriff to note in his return the hour of the day on which the citation was received is a mere irregularity which, of itself, will not invalidate a judgment final by default. Harbolt v. State, 37 T. Cr. R., 639, 40 S. W. R., 998, following Peters v. Crittenden, 8 T., 133.

Generally on service and return, see Dyches v. State, 24 T., 266; Wilson v. State, 25 T., 169; Evans v. State, Id., 80; Winans v. State, 25 T. Supp., 175; Davis v. State., 30 Id., 352; Gragg v. State, 18 Id., 295.

Art. 493. [481] **Citation may be served by publication.**—Where the surety is a non-resident of the state, or where he is a transient person, or where his residence is unknown, the district or county attorney may, upon application in writing to the county clerk, stating the facts, obtain a citation to be served by publication; and the same shall be served by publication and returned in the same manner as in like cases in civil actions.

Art. 494. [482] **County shall pay cost of publication.**—When service of citation is made by publication, the county in which the forfeiture has

been taken shall pay the costs of such publication, and the amount shall be taxed as costs in the case.

Art. 495. [483] **Service may be made out of the state, how.**—Service of a certified copy of the citation upon any absent or non-resident surety may be made outside of the limits of this state by any person competent to make oath of the fact; and the affidavit in writing of such person, stating the facts of such service, shall be a sufficient return.

Art. 496. [484] **When surety is dead, citation to legal representatives.**—When the surety is dead at the time the forfeiture is taken, the forfeiture shall nevertheless be valid. But the final judgment shall not be rendered where a surety has died, either before or after the forfeiture has been taken, unless his executor, administrator or heirs, as the case may be, have been cited to appear and show cause why the judgment should not be made final, in the same manner as provided in the case of the surety.

As against an estate. A general judgment should not be rendered against the administrator of an estate, but should direct payment "in due course of administration." Wilcox v. State, 24 T., 544.

Art. 497. [485] **Cases shall be placed upon civil docket.**—When a forfeiture has been declared upon a recognizance or bail bond, the court or clerk shall docket the case upon the civil docket, in the name of the state of Texas, as plaintiff, and the principal and his sureties, as defendants; and the proceedings had therein shall be governed by the same rules governing other civil actions.

Practice. Scire facias cases are purely criminal, and a civil court has no jurisdiction over such cases. Jester v. State, 86 T., 555; 26 S. W. R., 49, and cases cited.

But after judgment nisi and scire facias, the proceedings are governed by the rules that obtain in civil cases. Jay v. State, 34 T. Cr. R., 29 S. W. R., 472; Cox v. State, Id., 94, 29 S. W. R., 273, and cases cited; Hollenbeck v. State, 40 Id., 584, 51 S. W. R., 373.

Suit as against an unserved surety may be dismissed and judgment taken against the principal and other sureties. Pleasants v. State, 29 T. Cr. R., 214, 15 S. W. R., 43.

Bail defined. Ante, Art. 315, and notes.

Dismissal. One of the defendants being dead at the time forfeiture was taken, subsequent dismissal of the case as to him was not error. Thompson v. State, 31 T., 166.

Continuance in scire facias proceedings is governed by rules in civil cases. Bailey v. State, 26 T. Cr. R., 341, 9 S. W. R., 758.

Sureties are not entitled to continuance for the testimony of their principal when it appears he is absent on his own private business. Markham v. State, 33 T. Cr. R., 91, 25 S. W. R., 127.

New trial, writ of error or appeal, under Arts. 927 and 928, post, are available to defendants in scire facias cases as in civil cases. The state, however, is not entitled to appeal or writ of error. Robertson v. State, 14 T. Cr. R., 211; Perry v. State, Id., 166; Arrington v. State, 13 Id., 611, and cases cited.

Statement of facts and briefs for appeal are governed by the same rules that apply in civil cases. Emmons v. State, 34 T. Cr. R., 98, 29 S. W. R., 474; Blain v. State, Id., 417, 31 S. W. R., 366; Jay v. State, Id., 98, 29 S. W. R., 472; Morse v. State, 39 Id., 566, 47 S. W. R., 645.

Art. 498. [486] **Sureties may answer at next term.**—At the next term of the court, after the forfeiture of the recognizance or bond, if the sureties have been duly notified, or at the first term of the court after the service of such notice, the sureties may answer in writing and show cause why the defendant did not appear, which answer may be filed within the time limited for answering in other civil actions. [O. C. 410.]

Construed. This article refers to the civil and not the criminal term of the county court. Houston v. State, 13 T. Cr. R., 558. Cassidy v. State, 4 Id., 96; Carter v. State, Id., 165 and Wills v. State, Id., 613, are obsolete. And see Hutchings v. State, 24 Id., 242, 6 S. W. R., 34, and cases cited.

Answer need not be sworn to, but plea of non est factum must be. Holt v. State, 20 T. Cr. R., 271; Odiorne v. State, 37 T. 122. See Farrell v. State, 37 T. Cr. R., 198, 38 S. W. R., 1017.

Plea of lis pendens on appeal must be verified by affidavit. Goodin v. State, 14 T. Cr. R., 443.

Practice. Motion of sureties to withdraw answer was denied, but they were permitted to file another in the nature of a plea in abatement, which was heard. Held, not error. Camp v. State, 39 T. Cr. R., 142, 45 S. W. R., 490.

Art. 499. [487] **Proceedings shall not be set aside for defect of form, etc.**—The recognizance or bail bond, the judgment declaring the forfeiture, the citation and the return thereupon, shall not be set aside because of any defect of form; but such defect of form may, at any time, be amended under the direction of the court.

Proceedings nunc pro tunc. The court, at a subsequent term, on proper application, may amend the record of a recognizance to supply an omitted word, and conform it to the judge's docket, but this only after notice to all parties concerned. Hand v. State, 28 T. Cr. R., 28, 11 S. W. R., 679, and cases cited.

As to amendments generally, see Gragg v. State, 18 T. Cr. R., 295.

Dismissal of the scire facias without setting aside the judgment nisi does not set aside or vacate said judgment nisi, and a second forfeiture of the bail bond and judgment nisi were void; and it was error to overrule the plea in abatement to the second scire facias. Burris v. State, 34 T. Cr. R., 551, 31 S. W. R., 395.

Mere irregular or informal entry of forfeiture and judgment nisi may be amended. Burris v. State, supra.

Art. 500. [488] **Causes which will exonerate from liability on forfeiture.**—The following causes, and no other, will exonerate the defendant and his sureties from liability upon the forfeiture taken:

1. That the recognizance or bail bond is, for any cause, not a valid and binding undertaking in law; but, if it be valid and binding as to the principal, and one or more of his sureties, they shall not be exonerated from liability because of it being invalid and not binding as to another surety or sureties. If it be invalid and not binding as to the principal, each of the sureties shall be exonerated from liability. If it be valid and binding as to the principal, but not so as to the sureties, the principal shall not be exonerated, but the sureties shall be.

Ante, Arts. 315-354, and notes.

Construed. A bail bond is strictly a statutory bond, and must comprehend all of the statutory requirements. Equitable considerations cannot enter into the construction of a bail bond. Wallen v. State, 18 T. Cr. R., 414.

An objectionable condition cannot be treated as surplusage. Wegner v. State, 28 T. Cr. R., 419, 13 S. W. R., 608, and cases cited.

The offense named in the bond must be that of which the accused is charged and no other. Langan v. State, 27 T. Cr. R., 498, 11 S. W. R., 521, and cases cited.

If the bond recites no offense against the state, it will not support scire facias proceedings. Bowen v. State, 28 T. Cr. R., 103, 13 S. W. R., 787, and cases cited.

Practice. Motion in arrest will reach a substantial defect in bail bond or recognizance. Crouch v. State, supra.

Loss of indictment will not discharge the obligations of a bail bond or recognizance. Crouch v. State, supra.

The magistrate's failure to indorse his approval on the bond will not invalidate it. Dyches v. State, 24 T., 266; Taylor v. State, 16 T. Cr. R., 514. And see Holt v. State, 20 T. Cr. R., 271; Faubion v. State, 21 Id., 494, 2 S. W. R., 830.

Bail bond is invalid unless it binds the principal as well as the sureties. Wright v. State, 22 T. Cr. R., 670, 3 S. W. R., 346, citing Barringer v. State, 27 T., 553.

A void indictment voids the bail bond or recognizance. Harrell v. State, 22 T. Cr. R., 692, 3 S. W. R., 479.

Filing of bond. Too late to object on appeal that bond shows no file mark. State v. Franklin, 35 T., 497.

Liability of obligors is not affected by the failure of the clerk to note the actual filing of the bond. Turner v. State, 41 T., 549.

Notation of filing may be made nunc pro tunc to correspond with the actual fact of filing. Slocumb v. State, 11 T., 15; Haverly v. State, 32 Id., 602.

Recognizance cannot be amended nunc pro tunc as to matter of substance without notice to all parties concerned. Hand v. State, 28 T. Cr. R., 28, 11 S. W. R., 679, and cases cited.

After amendment for intrinsic defects, the forfeiture must be as of the original recognizance and by the same proceeding. Hand v. State, supra.

An impossible date named in the bond invalidates it. Butler v. State, 31 T. Cr. R., 63, 19 S. W. R., 676, and cases cited.

Bail bond executed and filed before the filing of an information charging the offense is a nullity and will not support a forfeiture. Baker v. State, 54 T. Cr. R., 52, 111 S. W. R., 735, citing Leal v. State, 51 Id., 425, 102 S. W. R., 414.

A married woman's signature invalidates the bail bond only as to her and not as to other obligors. Pickett v. State, 16 T. Cr. R., 648.

Variance in names: See ante, Art. 491, subdivision 3, and notes.

On the award of bail and the approval of bond, the sheriff immediately arrested the principal on a capias from another county for a different offense, and turned him over to the sheriff of such other county, from whose custody he subsequently escaped. To scire facias on forfeiture of the bail bond, the sureties pleaded that the bond had never become operative, as their principal had never in fact been released under the bond, or placed in their custody. But held, that as the principal was not detained under the original mittimus from which the bond released him, but under the capias, the plea was without merit. Stafford v. State, 10 T. Cr. R., 46.

Surrender and delivery of the principal by the sureties to the sheriff who subsequently, without the knowledge or consent of the sureties, permitted him to go at large and escape, is a complete defense. State v. Rosseau, 39 T., 614.

That the principal was arrested under a capias after the forfeiture and escaped is no answer to scire facias. Chappell v. State, 30 T., 613. See Foster v. State, 38 T. Cr. R., 372, 43 S. W. R., 80.

Surrender of principal. Arts. 330, et seq., and notes.

Surrender or arrest of principal before judgment nisi will release sureties, but such surrender or arrest after such judgment will not. Lee v. State, 25 T. Cr. R., 331, 8 S. W. R., 277, and cases cited.

Misdemeanor. Appearance by council only and announcement for trial is a sufficient appearance of the principal in a misdemeanor punishable by fine only, and such was a good answer to scire facias. Neaves v. State, 4 T. Cr. R., 1; Page v. State, 9 Id., 466.

Practice. Scire facias cases being criminal and not civil cases, the state is not entitled to new trial. Robertson v. State, 14 T. Cr. R., 211, citing Perry v. State, Id., 166.

Recognizance on appeal. The judgment nisi being on a recognizance on appeal, the sureties could not question the sufficiency of the indictment or the regularity of the proceedings preliminary to conviction. Martin v. State, 16 T. Cr. R., 265, and cases cited.

Limitations. Recognizance or bail bond may be forfeited at any time before the intervention of limitations. Brown v. State, 18 T. Cr. R., 326, citing Hill v. State, 15 Id., 530.

Appeal. Proper notice of appeal is essential to the jurisdiction of the appellate court. Thomas v. State, 56 T. Cr. R., 246, 119 S. W. R., 846.

The record on appeal must contain the statement of facts. Abbott v. State, 45 T. Cr. R., 514, 78 S. W. R., 510.

2. The death of the principal before the forfeiture was taken.

Death of principal before forfeiture will exonerate the sureties, who, pleading the fact, are entitled to the opportunity to prove it. Blalock v. State, 3 T. Cr. R., 376; Conner v. State, 30 T., 94.

Pleading. Allegation of the death of the principal before forfeiture must be supported by affidavit. State v. Brown, 34 T., 146.

3. The sickness of the principal, or some uncontrollable circumstance which prevented his appearance at court, and it must, in every such case, be shown that that his failure to appear arose from no fault on his part. The causes mentioned in this subdivision shall not be deemed sufficient to exonerate the principal and his sureties, unless such principal appear before final judgment on the recognizance or bail bond to answer the accusation against him, or show sufficient cause for not so appearing.

Principal's sickness is a good defense to forfeiture. Reddick v. State, 21 T. Cr. R., 267, 17 S. W. R., 465, citing Thompson v. State, 17 Id., 318.

This defense must show that the principal's failure to appear did not result from his own fault; and further, it will not avail unless the principal appears before final judgment on the bail bond to answer the accusation, or show sufficient cause for not appearing. Markham v. State, 33 T. Cr. R., 91, 25 S. W. R., 127. And see Brown v. State, 28 Id., 65, 11 S. W. R., 1022.

That he was held in custody on a similar charge in another county at the time of forfeiture, and that he subsequently appeared and responded to the charge, was sufficient to exonerate the principal and sureties under this subdivision. Woods v. State, 51 T. Cr. R., 595, 103 S. W. R., 895.

When the order of court setting aside a forfeiture shows no ground for the action, the presumption obtains that it was taken under this subdivision. Brown v. State, 28 T. Cr. R., 65, 11 S. W. R., 1022.

Principal appearing before judgment final, it is immaterial whether he appeared voluntarily or under process, the sureties would be released, on showing of good cause. Baker v. State, 21 T. Cr. R., 359.

Same. Evidence. The principal is a competent witness as to his sickness when forfeiture is taken. Reddick v. State, 21 T. Cr. R., 267, 17 S. W. R., 465. But a physician's certificate is not admissible in evidence. Price v. State, 4 Id., 73.

4. Failure to present an indictment or information at the first term of the court which may be held after the principal has been admitted to bail, in case where the party was bound over before indictment or information, and the prosecution has not been continued by order of the court as provided in article 642. [O. C. 414.]

Failure to present indictment or file information at the first subsequent term, discharges both the principal and sureties on the bond. Jones v. State, 11 T. Cr. R., 412.

Such failure, however, does not excuse the principal or sureties for non-appearance of the former to answer any indictment or information that might be presented. McCoy v. State, 37 T., 219; State v. Cocke, Id., 155.

The mere presence of the principal to stand trial will not remit the forfeiture, but if he appears and shows either of the causes named in this article, judgment final can not be entered against him or his sureties. Thompson v. State, 17 T. Cr. R., 318, citing Barton v. State, 24 T., 250.

On the mistrial of the principal and the discharge of the jury, and before completing the regular call of the docket, the court recalled the principal's case without a previous order for its recall, and the principal failing to appear entered judgment nisi, forfeiting the bond. Held, error. Johnson v. State, 12 T. Cr. R., 414.

Practice. Motion to set aside judgment nisi should be made at the entry term, and at the earliest practicable moment. Cause of failure to file such motion should not be set up in answer to scire facias. Barton v. State, 24 T., 250; Goode v. State, 15 Id., 124.

The sufficiency of the indictment can not be questioned in a scire facias proceeding. Langan v. State, 27 T. Cr. R., 498, 11 S. W . R., 521; Wells v. State, 21 Id.,

594, 2 S. W. R., 806, and cases cited; Harrell v. State, 22 Id., 692, 3 S. W. R., 479, and cases cited.

Bond taken after indictment must state the very offense stated in the indictment, and not the class of offenses. Brown v. State, 28 T. Cr. R., 65, 11 S. W. R., 1022, and cases cited.

Liability. Surety signing a bail bond in blank, knowing the purpose, is bound for the amount subsequently inserted by the magistrate who fixed it. Gary v. State, 11 T. Cr. R., 527.

It is no answer to scire facias that the sureties signed the bond upon the condition that it would also be signed by a certain other party. Brown v. State, 18 T. Cr. R., 326.

Nor that the surety signed with the understanding with the sheriff that his liability was limited to a sum less than the face of the bond. Snowden v. State, 53 T. Cr. R., 439, 110 S. W. R., 442.

Bail bond can not be an escrow to the obligee, but can be to the principal obligor by a surety. Brown v. State, 18 T. Cr. R., 326.

Pleading that must be sworn to: Non est factum. Holt v. State, 20 T. Cr. R., 271.

Plea of misnomer in abatement. State v. Rhodius, 37 T., 165.

Former judgment nisi pending on bail bond. Goodin v. State, 14 T. Cr. R., 443.

And generally see Rutledge v. State, 36 T., 459; Camp v. State, 39 T. Cr. R., 143, 45 S. W. R., 491; Anderson v. State, 19 Id., 299; Lindsey v. State, 39 Id., 468, 46 S. W. R., 1045.

Release of the principal on the personal check of a surety which was dishonored at the bank is no defense to a subsequent forfeiture of the bond. Robinson v. State, 34 T. Cr. R., 131, 29 S. W. R., 788, and cases cited.

Appearance, fine and imprisonment of the principal renders the bond functus officio, and releases the sureties. Johnson v. State, 32 T. Cr. R., 353, 22 S. W. R., 406, and cases cited.

Other custody. Another custody under conviction for another felony, if pleaded, is an answer to scire facias. Wheeler v. State, 38 T., 173.

Incarceration in the penitentiary under conviction for crime is answer, though it may be rebutted by the state, showing escape from the penitentiary and that the principal was at large at the time of forfeiture. Allee v. State, 28 T. Cr. R., 531, 13 S. W. R., 991; Cooper v. State, 5 Id., 215.

Limitations. Recognizance or bail bond may be forfeited at any time before the intervention of the bar of limitation. Brown v. State, 18 T. Cr. R., 326, citing Hill v. State, 15 Id., 530.

Generally. Statement of facts on appeal must contain the judgment nisi. Abbott v. State, 45 T. Cr. R., 514, 78 S. W. R., 510.

Proper notice of appeal is essential to the jurisdiction of the appellate court. Thomas v. State, 56 T. Cr. R., 246, 119 S. W. R., 846.

And see Headley v. State, 125 S. W. R., 27.

Art. 501. [489] **Judgment final, when.**—When, upon a trial of the issues presented by the answers of the sureties, no sufficient cause is shown for the failure of the principal to appear, the judgment shall be made final against him and his sureties for the amount in which they are respectively bound; and the same shall be collected by execution as in civil actions. Separate executions shall issue against each party for the amount adjudged against him, and the costs be equally divided between the sureties, if there be more than one. [O. C. 417.]

Practice. Judgments final can only be rendered at criminal terms of the county court. Hutchings v. State, 242, 6 S. W. R., 34, and cases cited.

A judgment nisi omitting any of the statutory requirements will not support a judgment final. Cheatham v. State, 13 T. Cr. R., 32, and cases cited; Hart v. State, Id., 555; Watkins v. State, 16 Id., 646, and cases cited; Galindo v. State, 15 Id., 319.

Citation is both petition and citation, and the recognizance or bail bond and judgment nisi the foundation of the suit. Cowen v. State, 3 T. Cr. R., 380, and cases cited; Goodin v. State, 14 Id., 443, and cases cited.

General denial puts in issue all the material allegations of the petition. Goodin v. State, supra, and cases cited.

Trial by jury is a right which obtains in scire facias cases. Short v. State, 16 T. Cr. R., 44, citing Hart v. State, 13 Id., 555.

But submission of the whole case to the judge without demand for jury is waiver of the right by defendants. Dyches v. State, 24 T., 266.

Nor error to refuse a jury when the mooted question was one purely of law. McCoy v. State, 37 T., 219.

Variance. See Bates, 20 T., 498; Hedrick v. State, 3 T. Cr. R., 570; Smith v. State, 7 Id., 160; Arrington v. State, Id., 554; Werbiski v. State, 20 Id., 131; Holt v. State, 20 Id., 271; Faubion v. State, 21 Id., 494, 2 S. W. R., 830; Brown v. State, 28 Id., 65, 11 S. W. R., 1022; s. c., Id., 297, 12 S. W. R., 1101; Avant v. State, 33 T. Cr. R., 312, 26 S. W. R., 411; Frost v. State, Id., 347, 26 S. W. R., 412; Mills v. State, 36 T. Cr. R., 71, 35 S. W. R., 370; Mosely v. State, 37 Id., 18, 38 S. W. R., 800; Whitener, Id., 38 T. Cr. R., 146, 41 S. W. R., 595.

Evidence generally. Houston v. State, 13 T. Cr. R., 560; McWhorter v. State, 14 Id., 239; Goodin v. State, Id., 443; Hester v. State, 15 Id., 418; Martin v. State, 16 Id., 265; Gragg v. State, 18 Id., 295; Reddick v. State, 21 Id., 267, 17 S. W. R., 465; Baker v. State, Id., 359, 17 S. W. R., 256; Butler v. State, 31 T. Cr. R., 63, 19 S. W. R., 676, and cases cited. Sims v. State, 41 T. Cr. R., 63, 55 S. W. R., 179.

Judgment may be rendered against all parties without service on principal. Vaughan v. State, 29 T., 273.

Dismissal may be had as to a defendant deceased at the time of forfeiture and judgment nisi. Ray v. State, 16 T. Cr. R., 268, and cases cited; Thompson v. State, 31 T., 166; Pleasants v. State, 29 T. Cr. R., 214, 15 S. W. R., 43.

Judgment final, to be sufficient, must dispose of the matter in controversy as to all of the parties, principal as well as sureties. Blalock v. State, 35 T., 89; Cowen v. State, 3 T. Cr. R., 380; Ellis v. State, 10 Id., 324; Brown v. State, 40 T., 49; McIntyre v. State, 19 T. Cr. R., 443; Cox v. State, 34 Id., 94, 29 S. W. R., and cases cited.

Judgment by default must include principal as well as sureties. Cowen v. State, 3 T. Cr. R., 380, citing Blalock v. State, 35 T., 89.

And carries the full amount of obligation. Lawton v. State, 5 T., 272.

Art. 502. [490] **Judgment final by default, when.**—When the sureties have been duly cited and fail to answer, and the principal also fails to answer within the time limited for answering in other civil actions, the court shall enter judgment final by default as in other civil actions.

Art. 503. [491] **The court may remit, when.**—If, before final judgment is entered against the bail, the principal appear or be arrested and lodged in jail of the proper county, the court may, at its discretion, remit the whole or part of the sum specified in the bond or recognizance. [O. C. 415.]

Practice. As to judicial discretion, see State v. Warren, 17 T., 283; Chambless v. State, 20 T., 198; Haverty v. State, 32 T., 602; Barton v. State, 24 T., 250; Lee v. State, 25 T. Cr. R., 331, 8 S. W. R., 277.

Same. Under this article, the court may enter judgment against principal in a different sum from that entered against sureties; provided the judgment as a whole does not exceed the penal sum fixed by the bond. Williams v. State, 51 T. Cr. R., 252, 103 S. W. R., 929.

Art. 504. [492] **Forfeiture shall be set aside, when, etc.**—When the principal appears before the entry of final judgment, and sufficient cause is shown for his failure to appear before the forfeiture taken, and a trial is had of the criminal actions pending against him, he shall be entitled to have the forfeiture set aside, and the criminal action against him shall stand for trial; but the state shall not be forced to try the same until reasonable time has been allowed to prepare for trial, and the state shall, in such case, be entitled to a continuance of the cause. [O. C. 416.]

Post, Art. 659.

Practice. It is immaterial, under this article, whether the appearance contemplated is voluntary or compulsory. Baker v. State, 21 T. Cr. R., 359, 17 S. W. R., 256.

Facts under which judgment nisi should have been set aside and defense entertained. Jackson v. State, 13 T., 218.

However, the mere appearance in response to the scire facias of the principal will not suffice. He must show good cause for his default. State v. Warren, 17 T., 283.

New trial. The defendants in scire facias may be entitled to new trial, but the State never is. Robertson v. State, 14 T. Cr. R., 211; Perry v. State, Id., 166. And see ante, Art. 496, and notes.

2. OF THE CAPIAS.

Art. 505. [493] **Definition of a "capias."**—A "capias" is a writ issued by the court or clerk, and directed "To any sheriff of the state of Texas," commanding him to arrest a person accused of an offense and bring him before that court forthwith, or on a day or at a term stated in the writ. [O. C. 420.]

Art. 506. [494] **Its requisites.**—A capias shall be held sufficient if it have the following requisites:

1. That it run in the name of "The State of Texas."

2. That it name the person whose arrest is ordered, or, if unknown, describe him.

3. That it specify the offense of which the defendant is accused, and it appear thereby that he is accused of some offense against the penal law of the state.

4. That it name the court to which it is returnable and the time when returnable.

5. That it be dated and attested officially by the court or clerk issuing the same. [O. C. 421.]

Art. 507. [495] **Capias shall issue at once in all felony cases.**—A capias shall be immediately issued by the clerk of the district court upon each indictment for felony presented, and shall be delivered by the clerk or forwarded by mail to the sheriff of the county where the sheriff resides or is to be found.

Art. 508. [496] **In misdemeanor cases.**—In cases of misdemeanor, the capias shall be issued from the court having jurisdiction of the same; and, if the defendant be in custody or under bail, a capias need not be issued for him.

Process, in misdemeanors transferred from the district court to an inferior court, must issue from the latter. Cassady v. State, 4 T. Cr. R., 96.

Art. 509. [497] **Capias in case of forfeiture of bail.**—In all cases where a forfeiture is declared upon a recognizance or bail bond, a capias shall be immediately issued for the arrest of the defendant, and when arrested, he shall be required to enter into a new recognizance or bail bond, unless the forfeiture taken has been set aside under the third subdivision of article 488, in which case the defendant and his sureties shall remain bound under his present recognizance or bail bond.

Alias capias for arrest of defendant should issue concurrently with the judgment nisi. Slocum v. State, 11 T., 15.

Art. 510. [498] **New bail in felony case, when.**—When a defendant who has been arrested for a felony under a capias has previously given bail to answer said charge, his sureties shall be released by such arrest, and he shall be required to give new bail.

Construed. This article does not apply when the second arrest is under a second indictment, though based on the same transaction. Foster v. State, 38 T. Cr. R., 372, 43 S. W. R., 80.

Arrest of defendant on the capias on the indictment, discharges the bail. Ex parte Mosby, 31 T., 566.

The state may controvert the sheriff's return on capias that he had executed it by arresting defendant. "Executed," without showing how, does not import arrest of the party. Gary v. State, 11 T. Cr. R., 527.

Art. 511. [499] **Capias does not lose its force, etc.**—A capias shall not lose its force or virtue if not executed and returned at the time fixed in the writ, but may be executed at any time afterward, and return made; and all proceedings under such capias shall be as valid as if the same had been executed and returned within the time specified in the writ. [O. C. 423.]

Art. 512. [500] **Officer shall give reasons for retaining capias, when.**—When the capias is not returned at the time fixed in the writ, the officer holding the same shall notify the court from whence it issued, in writing, of his reasons for retaining it.

Art. 513. [501] **Capias may issue to several counties.**—Capiases for a defendant may be issued to as many counties as the district or county attorney may direct.

Art. 514. [502] **Sheriff, etc., can not take bail in felony cases, when.**—In cases of arrest for felony in the county where the prosecution is pending, during a term of the court, the sheriff, or officer making the arrest, can not take bail, but must forthwith bring the defendant before the court, that he may be dealt with according to law. [O. C. 427.]

Art. 515. [503] **Sheriff may take bail in felony cases, when.**—In cases of arrest for felony less than capital, made during vacation, or made in another county than the one in which the prosecution is pending, the sheriff may take bail. In such cases, the amount of the bail shall be the same as is indorsed upon the capias; and, if no amount be indorsed upon the capias, the sheriff shall require a reasonable amount of bail. [O. C. 426-432.]

See ante, Arts. 318 and 337, and notes.

Construed. The sheriff of the county from which the venue has been changed can not accept bail for the defendant in his custody or dispose of him otherwise than by delivery to the sheriff of the county acquiring jurisdiction. Harbolt v. State, 39 T. Cr. R., 129, 44 S. W. R., 1110.

Art. 516. [504] **Court shall fix amount of bail in felony cases, etc.**—In all felony cases which are bailable, the district court shall, before adjourning, fix the amount of the bail to be required in each case, and the same shall be entered upon the minutes, and, in issuing the capias, the clerk shall indorse thereon the amount of bail required; but in case of neglect to comply with either of the requirements of this article, the arrest of the defendant, and the bail bond taken by the sheriff, shall be as legal and valid as if there had been no such omission. [O. C. 424.]

Presumption. Though the recognizance taken in open court may not recite the fact, it will be presumed that the amount was fixed by the court. Thrash v. State, 16 T. Cr. R., 271.

Art. 517. [505] **Who may arrest under capias.**—A capias may be executed by any constable or other peace officer; but, in cases of felony, the defendant must be delivered forthwith to the sheriff of the county where the arrest is made, together with the writ under which he was taken, to be dealt with according to law. [O. C. 425.]

Art. 518. [506] **Officer making arrest may take bail in misdemeanor, etc.**—In cases of misdemeanor, any officer making an arrest under a capias may take bail of the defendant, either in term time or in vacation. [O. C. 426.]

See ante, Arts. 318 and 336 and 337, and notes, and post, Art. 989.

Art. 519. [507] **Arrest in capital case, in county where prosecution is pending.**—Where an arrest is made under a capias in a capital case, the sheriff shall confine the defendant in jail, and the capias shall, for that purpose, be a sufficient warrant of commitment. This article is applicable when the arrest is made in the county where the prosecution is pending.

Art. 520. [508] **Arrest in capital case in another county than that in which prosecution is pending.**—In every capital case where a defendant is arrested under a capias in a county other than that in which the prosecution is pending, it is the duty of the sheriff who arrests, or to whom the defendant is delivered by some other peace officer, to convey him forthwith to the county from which the capias issued and deliver him to the sheriff of such county; and, upon failure to do so, such sheriff shall be guilty of an offense. [O. C. 431.]

Ante, Arts. 270 and 271, and notes.

Art. 521. [509] **Bail bond and capias must be returned, etc.**—When an arrest has been made and a bail bond taken, the bail bond, together with the capias, shall be returned forthwith through the mail or by other safe conveyance to the proper court. [O. C. 422.]

Art. 522. [510] **Defendant placed in jail in another county, etc., shall be discharged, when.**—If a defendant be placed in jail out of the county of the prosecution, on a charge of felony, he shall be discharged from custody if not applied for and taken by the sheriff of the proper county before the end of sixty days from the day of his commitment. If the defendant be placed in jail on a charge of misdemeanor, he shall be discharged from custody if not applied for and taken by the sheriff of the proper county before the end of thirty days from the day of his commitment. [O. C. 434.]

Construed. In cases arising under this article, the prisoner is in the virtual custody of the sheriff of the county of the court a quo, and subject to his disposition for sixty days, if a felony. Hill v. State, 15 T. Cr. R., 530.

It must also be construed to require the proper sheriff to demand and receive the custody of the prisoner and release him on sufficient bail. Id.

Art. 523. [511] **Preceding article shall not apply, where.**—The preceding article shall not apply to cases where the defendant has been placed in jail out of the county of the prosecution, under the provisions of this Code, for the want of a sufficient or safe jail in the county of the prosecution. [O. C. 434.]

Art. 524. [512] **Return of the capias, and what it shall show.**—The return of the capias shall be made to the court from which it is issued, and, if it has been executed, the return shall state what disposition has been made of the defendant. If it has not been executed, the cause of the failure to execute the same shall be fully stated; and, if the defendant has not been found, the return shall further show what efforts have been made by the officer to find him, and what information, if any, he has obtained as to the defendant's whereabouts.

"Compulsory process." A subpoena is "compulsory process," within the meaning of Article 1, Section 10, of the Bill of Rights. Homan v. State, 23 T. Cr. R., 212, 4

S. W. R., 575, citing Rody's case, 16 T. Cr. R., 502; Neyland v. State, 13 Id., 536. And see Edmondson v. State, 43 T., 230; Parkerson v. State, 9 T. Cr. R., 72.

2. OF WITNESSES AND THE MANNER OF ENFORCING THEIR ATTENDANCE.

Art. 525. [513] **Definition of "subpoena."**—A "subpoena" is a writ issued to the sheriff or other proper officer commanding him to summon a person therein named to appear at a certain term of the court, or on a certain day, to testify in a criminal action, or upon any proceeding before an examining court, coroner's inquest, the grand jury, or before a judge hearing an application under habeas corpus, or in any other case in which the testimony of a witness may be required under the provisions of this Code. The writ shall be dated and signed officially by the court or clerk issuing the same, but need not be under seal. [O. C. 438.]

Art. 526. [514] **What it may contain.**—A subpoena may contain the names of any number of witnesses residing in the same county to which it is issued; and, if a witness have in his possession any instrument of writing or other thing desired as evidence, the subpoena may specify such evidence and direct that the witness bring the same with him and produce it in court.

Art. 527. [515] **Service and return of subpoena.**—A subpoena is served by reading the same in the hearing of the witness. The officer having the subpoena shall make due return thereof, showing the time and manner of service, if served, and, if not served, he shall show in his return the cause of his failure to serve it; and, if the witness could not be found, he shall state the diligence he has used to find him, and what information he has, if any, as to the whereabouts of the witness.

Officer's return, on any kind of process, must show that he performed all mandatory requirements, and, especially when particular forms are required, that they were specifically conformed to. Neyland v. State, 13 T. Cr. R., 536.

It should specifically name the witness not served, as well as those served. Tooney v. State, 5 Id., 163.

Reading a subpoena by telephone to a witness is not legal service of the same. Ex parte Terrell, 95 S. W. R., 536.

Art. 528. [516] **Penalties for refusing to obey a subpoena.**—If a witness refuse to obey a subpoena, he may be fined at the discretion of the court, as follows: In a capital case, not exceeding five hundred dollars; in a case of felony less than capital, not exceeding two hundred dollars; in a case of misdemeanor, not exceeding one hundred dollars. [O. C. 444-445.]

Art. 529. [517] **Before fine is entered against witness, it must appear, etc.**—Before a fine is entered against a witness for disobedience to a subpoena, it must be made to appear to the court by the oath of the defendant or some other credible person, or the statement of the attorney representing the state, that the testimony of such witness is believed to be material, either to the prosecution or defense. [O. C. 446.]

Construed. No part of the requirements of this article is met by the unsworn statement of the defendant's attorney. McGehee v. State, 4 T. Cr. R., 94.

Art. 530. [518] **What constitutes disobedience of a subpoena.**—It shall be understood that a witness refuses to obey a subpoena—

1. If he is not in attendance on the court on the day set apart for taking up the criminal docket or any day subsequent thereto, and before the final disposition or continuance of the particular case in which he is a witness.
2. If he is not in attendance at any other time named in a writ.

3. If he refuses without legal cause to produce evidence in his possession which he has been summoned to bring with him and produce. [O. C. 441.]

Construed. The court has no authority, under this article, to render final judgment against a defaulting witness at the defaulting term without hearing evidence or issuing citation to show cause. Ex parte Terrell, 95 S. W. R., 536.

Art. 531. [519] **Fine against witness conditional, etc.**—When a fine is entered against a witness for failure to appear and testify, the judgment shall be conditional; and a citation shall issue to him to show cause, at the term of the court at which said fine is entered, or at the first term thereafter, at the discretion of the judge of said court, why the same should not be final; provided, citation shall be served upon said witness in the manner and for the length of time prescribed for citations in civil cases. [O. C. 447; amended, 1895, p. 95.]

Art. 532. [520] **Witness may show cause, when and how.**—A witness cited to show cause, as provided in the preceding article, may do so under oath, in writing or verbally, at any time before judgment final is entered against him; but, if he fails to show cause within the time limited for answering in civil actions, a judgment final by default shall be entered against him. [O. C. 448; Id.]

Art. 533. [421] **Court may remit the whole or part of fine upon excuse made, etc.**—It shall be within the discretion of the court to judge of the sufficiency of an excuse rendered by a witness, and, upon the hearing of the case, the court shall render judgment against the witness for the whole or any part of the fine, or shall remit the fine altogether, as to the court may appear proper and right, and said fine shall be collected as fines in misdemeanor cases. [O. C. 452; Id.]

Art. 534. [522] **When witness appears and testifies, etc., fine may be remitted.**—When a fine has been entered against a witness, but no trial of the cause takes place, and such witness afterward appears and testifies upon the trial thereof, it shall be discretionary with the judge, though no good excuse be rendered, to reduce the fine or remit it altogether; but the witness, in such case, shall, nevertheless, be adjudged to pay all the costs accruing in the proceeding against him by reason of his failure to attend. [O. C. 449.]

Art. 535. [523] **Definition and requisites of an attachment.**—An "attachment" is a writ issued by a clerk of a court, or by any magistrate, or by the foreman of a grand jury, in any criminal action or proceeding authorized by law, commanding some peace officer to take the body of a witness and bring him before such court, magistrate or grand jury on a day named, or forthwith, to testify in behalf of the state or of the defendant, as the case may be. It shall be dated and signed officially by the officer issuing it, and, when issued by a clerk of a court, shall be authenticated by his official seal. [O. C. 439.]

Art. 536. [524] **When an attachment may be issued.**—When a witness who resides in the county of the prosecution has been duly served with a subpoena to appear and testify in any criminal action or proceeding fails to so appear, the state or the defendant shall be entitled to have an attachment issued forthwith for such witness. [O. C. 436-440.]

Construed. It is only when the witness, living in the county, has disobeyed a subpoena that an attachment can issue against him. Tooney v. State, 5 T. Cr. R., 163; Colbert v. State, 1 Id., 314. And see Massie v. State, 30 Id., 64, 16 S. W. R., 770, and cases cited.

The one exception to this rule is the impending removal of the witness from the county. See next article.

In the absence of a counterveiling showing, the presumption obtains that attachment was properly issued. Farrar v. State, 5 Id., 489.

Art. 537. [524a] **Witnesses residing in the county of the prosecution, attachment for may issue, when.**—When a witness resides in the county of the prosecution, whether he has disobeyed a subpoena or not, either in term time or vacation, upon the filing of an affidavit with the clerk by the defendant or state's counsel, that he has good reason to believe, and does believe, that such witness is a material witness, and is about to move out of the county, it shall be the duty of the clerk to forthwith issue an attachment for such witness; provided, that in misdemeanor cases, when the witness makes oath that he can not give surety, the officer executing the attachment shall take his personal bond. [Act 1897, p. 30.]

Construed. This article construed in pari materia with Articles 543, 544, 556 and 557, post, must be held to mean that in all cases where the witness is brought before the court, and it appears to the satisfaction of the court that such witness is unable to give security for his attendance, it is the duty of the court to take personal recognizance of said witness. Ex parte Sheppard, 43 T. Cr. R., 372, 66 S. W. R., 304.

Art. 538. [525a] **Subpoena or attachment for witness about to move out of the county to testify before grand jury, when.**—At any time before the first day of the meeting of any term of the district court in any county of this state, it shall be the duty of the clerk, upon application of the district or county attorney, to forthwith issue a subpoena for any witness who resides in the county; provided, if, at the time such application is made, the district or county attorney shall file a sworn application, that he has good reason to believe, and does believe, that such witness is about to move out of the county, then said clerk shall issue an attachment for such witness to be and appear before said district court on the first day thereof to testify as a witness before the grand jury. And any witness so summoned or attached, who shall fail or refuse to obey a subpoena or attachment, shall be punished by the court by a fine in any sum not exceeding five hundred dollars, to be collected as fines and costs in other criminal cases. [Act 1899, p. 245.]

Art. 539. **Where witness resides out of the county where prosecution is pending, defendant or state entitled to subpoena, when.**—Where a witness resides out of the county in which the prosecution is pending, the defendant shall be entitled, on application, either in term time or in vacation, to the proper clerk or magistrate, to a subpoena issued to compel the attendance of such witness. Such application shall be in writing and under oath, shall state the name and residence of the witness, and his exact location and avocation, if known, and that his testimony is believed to be material to the defense. The state shall also be entitled to subpoenas, under the provisions of this article, upon the written application of the attorney representing the state, which application shall state the name and residence of the witness, and his exact location and avocation, if known, and that his testimony is believed to be material for the state. [Act 1897, 1st S. S., p. 58.]

Art. 540. **Duty of officer receiving said subpoena.**—It shall be the duty of the officer receiving said subpoena to execute the same by delivering a copy thereof to the witness or witnesses therein named; and he shall make due return of said subpoena, showing therein the time and manner of executing the same, and, if not executed, such return shall show why not executed, the diligence used to find said witness, and such information as the officer has, if any, as to the whereabouts of said witness. [Id. p. 58.]

Art. 541. **When subpoena is returnable forthwith, duty of officer.**—When a subpoena is returnable forthwith, it shall be the duty of the officer to immediately serve the witness with copy of the same; and it shall be the duty of said witness to immediately make his appearance before the court, magistrate or other authority issuing the same; and, if said witness makes affidavit of his inability from lack of funds to appear in obedience to said subpoena, it shall be the duty of the officer executing the same to provide said witness, if said subpoena be issued in a felony case, with the necessary funds or means to appear in obedience to said subpoena, taking his receipt therefor, and showing in his return on said subpoena, under oath, the amount furnished to said witness, together with the amount of his fees for executing said subpoena; and such officer shall be entitled to receive from the state, for executing such process, the sum of fifty cents for serving each witness, and five cents per mile for each mile actually traveled in the execution of the same. [Id., p. 58.]

Art. 542. **Duty of clerk, magistrate or foreman of grand jury issuing process.**—It shall be the duty of the clerk of the court, the magistrate, or the foreman of the grand jury, issuing said process, immediately upon the return of said subpoena, if issued in a felony case, to issue to such officer a certificate for the amount furnished such witness, together with the amount of his fees for executing the same, showing the amount of each item; which certificate shall be approved by the judge of the district court, and recorded by the clerk of the district court in a well-bound book kept for that purpose; and said certificate transmitted to the officer executing such subpoena, which amount shall be paid by the state, as costs are paid in other criminal matters. [Id., p. 58.]

Art. 543. **Subpoena returnable at some future day, duty of officer.**—If the subpoena be returnable at some future date, the officer shall have authority to take a good and sufficient bail bond of such witness, for his appearance under said subponea, which bond shall be returned with such subpoena, and shall be made payable to the state of Texas, in the amount in which the witness and his surety shall be bound and conditioned for the appearance of the witness at the time and before the court, magistrate or grand jury named in said subpoena, and shall be signed by the witness and his sureties; but, if said witness refuse to give bond, he shall be kept in custody until such time as he shall start in obedience of said subpoena, when he shall be, upon affidavit being made, provided with funds necessary to appear in obedience of said subpoena. [Id., p. 59.]

Art. 544. **The court or magistrate issuing subpoena may direct therein amount of bond.**—The court or magistrate issuing said subpoena may direct therein the amount of the bond to be required, but in case the amount is not specified, the officer may fix the amount, and, in either case, shall require good and sufficient security, to be approved by himself. [Id., p. 59.]

Art. 545. **Witness disobeying subpoena may be fined and attached; what words shall be written or printed on face of subpoena.**—If a witness refuse to obey a subpoena as herein provided, he shall be fined by the court or magistrate in any sum not exceeding five hundred dollars, which fine and judgment shall be final, unless set aside after due notice, to show cause why it should not be final, which notice may immediately issue, requiring the defaulting witness to appear at once or at the next term of said court, in the discretion of the judge, to answer for such default; and the court may, in his discretion, cause to be issued at the same time an attachment for said witness, directed to the proper county, commanding the officer to whom said writ is directed, to take said witness into custody and have him before said court at the time named in said writ; in which case such witness shall receive no compensation, unless it appears to the court that such disobe-

dience is excusable, when the witness may receive the same compensation as if he had been attached; and said fine and all costs thereon shall be collected as in criminal cases; provided, that said fine and judgment may be set aside at the same or any subsequent term of the court or in vacation for good cause shown, after the witness shall have testified or been discharged.

The following words shall be written or printed on the face of such subpoena: "A disobedience of this subpoena is punishable by fine not exceeding five hundred dollars, to be collected as fines and costs in other criminal cases." [Id., p. 59.]

Atr. 546. [535] **Witness shall be released upon giving bond.**—A witness who is in custody for failing to give bond shall be at once released, upon giving the bond required.

Art. 547. [536] **Either party may have witness recognized, etc.**—Witnesses on behalf of the state or defendant may, at the request of either party, be required to enter into recognizance in an amount to be fixed by the court to appear and testify in a criminal action; but, if it shall appear to the court that any witness is unable to give security upon such recognizance, he shall be recognized without security.

Art. 548. [537] **Personal recognizance of witness may be taken, when.**—When it appears to the satisfaction of the court that personal recognizance of the witness will insure his attendance, no security need be required of him; but no bail shall be taken by any officer without security.

Ex parte Sheppard, 43 T. C. R., 66 S. W. R., 304.

Art. 549. [538] **Recognizance or bail bond of witness may be enforced, how.**—The recognizance or bail bond of a witness may be enforced against him and his sureties in the manner pointed out in this Code for enforcing the recognizance or bail bond of a defendant in a criminal action. [O. C. 437b.]

Ante, Arts. 488, et seq.

Art. 550. [539] **Sureties can not discharge themselves after a forfeiture.**—The sureties of a witness have no right, in any case, to discharge themselves by the surrender of such witness, after the forfeiture of their recognizance or bond. [O. C. 453.]

4. SERVICE OF A COPY OF THE INDICTMENT.

Art. 551. [540] **Copy of indictment delivered to defendant in case of felony.**—In every case of felony, when the accused is in custody, or as soon as he may be arrested, it shall be the duty of the clerk of the court where an indictment has been presented, immediately to make out a certified copy of the same, and delivered such copy to the sheriff, together with a writ directed to such sheriff, commanding him forthwith to deliver such certified copy to the defendant. [O. C. 458.]

Construed. Defendant in a felony case is entitled to service of copy of indictment as soon as same is presented by the grand jury, and to two days thereafter, in which to file written pleadings. Post, Art. 578; Woodall v. State, 25 T. Cr. R., 617.

Arraignment before such time has elapsed is invalid. Post, Art. 557. The rule holds good as to a second indictment to supply one dismissed for defects, unless waived by accused. Stokes v. State, 35 T. Cr. R., 279, 33 S. W. R., 350, and cases cited; Lockwood v. State, 32 T. Cr. R., 137, 22 S. W. R., 413, and cases cited.

Such waiver must be by defendant himself, and it should be in writing and made part of the record. McDuff v. State, 4 T. Cr. R., 58; Richardson v. State, 7 Id., 486.

Too late after verdict to object for non-service of copy of indictment. Richardson v. State, Id.; Roberts v. State, 5 T. Cr. R., 141.

Art. 552. [541] **Service of copy and return of writ.**—Upon receipt of such

writ and copy, the sheriff shall immediately deliver such certified copy of the indictment to the defendant, and return the writ to the clerk issuing the same, with his indorsement thereon, showing when and how the same was executed.

Construed. A clerical mistake in transcribing a word from the indictment to to the copy served is an immaterial variance. Johnson v. State, 4 T. Cr. R., 268.

That the names of the witnesses appearing on back of the indictment were not transcribed on the copy is a hypercritical objection. Walker v. State, 19 T. Cr. R., 176, and cases cited.

Art. 553. [542] **When defendant is on bail in felony.**—When the defendant, in case of felony, is on bail at the time the indictment is presented, it is not necessary to serve him with a copy, but the clerk shall deliver a copy of the same to the defendant or his counsel, when requested, at the earliest possible time. [O. C. 460.]

Same. A defendant on bail is not entitled to service of copy of the indictment. Johnson v. State, 4 T. Cr. R., 268; Abrigo, v. Sstate, 29 Id., 143, 15 S. W. R., 408, citing Barrett v. State, 9 T. Cr. R., 33.

Art. 554. [543] **May demand a copy in misdemeanors.**—In misdemeanors, it shall not be necessary before trial to furnish the defendant with a copy of the indictment or information; but he or his counsel may demand a copy, which shall be given at as early a day as possible. [O. C. 459.]

Capital offense is one for which the maximum penalty is death. Penal Code, Art. 56.

Capital offenses enumerated: Ante, Art. 6, and notes.

Practice. This article can not be construed to require that a special venire should have been summoned, or that the jury be present, when the accused is arraigned. Sims v. State, 36 T. Cr., R., 154, 36 S. W. R., 256.

5. OF ARRAIGNMENT AND OF PROCEEDINGS WHERE NO ARRAIGNMENT IS NECESSARY.

Art. 555. [544] **No arraignment of defendant, except, etc.**—There shall be no arraignment of a defendant, except upon an indictment for a capital offense. [O. C. 461.]

Art. 556. [545] **An arraignment; for what purpose.**—An arraignment takes place for the purpose of reading to the defendant the indictment against him and hearing his plea thereto. [O. C. 462.]

Arraignment is for the purpose of fixing identity, and such proof is made by the plea of "not guilty." Hendrick v. State, 341.

Arraignment and plea are essentials to a valid trial for a capital felony. Wilson v. State, 17 T. Cr. R., 525, and cases cited.

And, though the arraignment should anticipate all proceedings before the jury (Smith v. State, 1 T. Cr. R., 408), if the record shows it actually took place, though at an improper time, conviction will not be set aside for that reason. Morris v. State, 30 T. Cr. R., 95, 16 S. W. R., 757, citing Cordova v. State, 2 T. Cr. R., 207. And see Essary v. State, 53 Id., 596, 111 S. W. R., 927, and cases cited. Mays v. State, 50 T. Cr. R., 165, 96 S. W. R., 329; West v. State, 40 T. Cr. R., 148, 49 S. W. R., 95.

This rule applies only to prosecution for a capital offense. If the conviction be for felony less than capital, the record on appeal need not show arraignment. Nolen v. State, 8 T. Cr. R., 585.

Under the amendment of 1897, arraignment is one of the prerequisites of the trial that will be presumed if the record on appeal does not show it an issue below, properly presented for review. Post, Art. 938, and notes.

In like manner, it will be presumed on appeal that the accused pleaded to the indictment. Post, Art. 938, and notes.

Rearraignment, under the same indictment, is neither required nor prohibited, and, in any event, can not operate as error. Shaw v. State, 32 T. Cr. R., 155, 22 Id., 588. And see Cheek v. State, 4 Id., 444.

Failure to arraign the accused and receive his plea by the primary court will not affect the jurisdiction of the court to which the venue was changed. Caldwell v. State, 41 T., 86; Ex parte Cox, 72 T. Cr. R., 665.

A joint defendant being called to trial immediately upon the retirement of the jury in his co-defendant's case, the court recalled from that jury, the joint indictment on which to arraign the former, not informing the jury of the purpose. Held, no error in the proceeding. Rainey v. State, 20 T. Cr. R., 455.

It is only in extreme cases that arraignment of an accused in manacles is permissible. Rainey v. State, supra.

Objection to such procedure, however, should be interposed at the time. Vela v. State, 33 T. Cr. R., 322, 26 S. W. R., 396.

No objection to the entry on the minutes that it shows action on arraignment contemporaneously with action on motion to change venue. It is sufficient if recitals show that the indictment was read to defendant before he was required to plead. Bohannon v. State, 14 Id., 271; Smith v. State, 21 Id., 277, 17 S. W. R., 471.

Art. 557. [546] **No arraignment until two days after service of copy, etc.**—No arraignment shall take place until the expiration of at least two entire days after the day on which a copy of the indictment was served on the defendant, unless the right to such copy or to such delay be waived, or unless the defendant is on bail. [O. C. 463.]

Decisions: McDuff v. State, 4 T. Cr. R., 58; Woodall v. State, 25 Id., 617, 8 S. W. R., 802; Abrigo v. State, 29 T. Cr. R., 144, 15 S. W. R., 408; Reed v. State, 31 T. Cr. R., 35, 19 S. W. R., 678; Lockwood v. State, 32 T. Cr. R., 137, 22 S. W. R., 413; Abrigo v. State, 29 T. Cr. R., 144, 15 S. W. R., 408; Sims v. State, 36 T. Cr. R., 154, 36 S. W. R., 256; Essary v. State, 53 T. Cr. R., 596, 111 S. W. R., 927, and cases cited; Johnson v. State, 36 T., 202.

Waiver. McDuff v. State, 4 T. Cr. R., 58; Richardson v. State, 7 Id., 486; Lockwood v. State, 32 Id., 137, 22 S. W. R., 413.

Too late after indictment to complain of non-service of copy of indictment. White v. State, 32 T. Cr. R., 625, 25 S. W. R., 784; Bonner v. State, 29 T. Cr. R., 223, 15 S. W. R., 821; Richardson v. State, 7 T. Cr. R., 486.

Art. 558. [547] **Court shall appoint counsel, when.**—When the defendant is brought into court for the purpose of being arraigned, if it appear that he has no counsel and is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him; and the counsel so appointed shall have at least one day to prepare for trial. [O. C. 466.]

Construed. This article is mandatory only as to capital felonies; as to other offenses, discretionary with the court. Pennington v. State, 13 T. Cr. R., 44; Brown v. State, 52 Id., 267, 106 S. W. R., 368.

This article is not mandatory in the clause providing that "counsel so appointed shall have at least one day to prepare for trial." Brotherton v. State, 30 T. Cr. R., 369, 17 S. W. R., 932.

Practice. Waiver by original appointed counsel of service of copy of indictment, without the knowledge or consent of defendant, will not bar demand by succeeding counsel, nor bind defendant. McDuff v. State, 4 T. Cr. R., 58.

Art. 559. [548] **Name as stated in indictment.**—When the defendant is arraigned, his name, as stated in the indictment, shall be distinctly called; and, unless he suggest by himself or counsel that he is not indicted by his true name, it shall be taken that his name is truly set forth, and he shall not thereafter be allowed to deny the same by way of defense. [O. C. 408.]

Misnomer. Failure of an accused to suggest, at the time of his arraignment, misnomer and his correct name, estops him from subsequent objection to indictment on that ground. Henry v. State, 38 T. Cr. R., 306, 42 S. W. R., 559; Wilcox v.

State, 31 T., 586; and see White v. State, 32 T. Cr. R., 625, 25 S. W. R., 784; Carrabin v. State, 33 T., 697.

Art. 560. [549] **If defendant suggests different name.**—If the defendant, or his counsel for him, suggest that he bears some name different from that stated in the indictment, the same shall be noted upon the minutes of the court, the indictment corrected by inserting therein the name of the defendant as suggested by himself, the style of the cause changed so to give his true name, and the cause proceed as if the true name had been first recited in the indictment. [O. C. 469.]

Practice. Amendment of indictment. Defendant's suggestion of misnomer and correct name requires the court to cause the indictment to be amended to show the name as suggested. Wardlow v. State, 18 T. Cr. R., 356, and cases cited; Myatt v. State, 31 Id., 523, 21 S. W. R., 526; Sinclair v. Satte, 34 T. Cr. R., 453, 30 S. W. R., 1070.

This rule applies to defendant's suggestion, on arraignment, of his christian name, alleged in the indictment to be unknown; and the disclosure of such Christian name on the trial, without defendant's suggestion, will not necessitate inquiry as to whether the said name was unknown, or inaccessible to the grand jury. Wilcox v. State, 35 T. Cr. R., 631, 34 S. W. R., 958.

But note a quaere suggested by the court as arising upon this article. Boren v. State, 32 T. Cr. R., 637, 25 S. W. R., 775.

Art. 561. [550] **If defendant refuses to give his real name.**—If the defendant alleges that he is not indicted by his true name, and refuses to say what his real name is, the cause shall proceed as if the name stated in the indictment were true; and the defendant shall not be allowed to contradict the same by way of defense. [O. C. 470.]

Art. 562. [551] **Where name is unknown, etc.**—Where a defendant is described as a person whose name is unknown, he may have the indictment so corrected as to give therein his true name. [O. C. 471.]

Art. 563. [552] **Indictment read.**—The name of the accused having been called, if no suggestion, such as is spoken of in the four preceding articles, be made, or, being made, is disposed of as before directed, the indictment shall be read, and the defendant asked whether he is guilty or not, as therein charged. [O. C. 472.]

Arts. 653, 654; McGrew v. State, 31 T. Cr. R., 336, 20 S. W. R., 740.

Art. 564. [553] **Plea of not guilty entered upon the minutes of the court.**—If the defendant answer that he is not guilty, the same shall be entered upon the minutes of the court; if he refuses to answer, the plea of not guilty shall in like manner be entered. [O. C. 473.]

Construed. It is mandatory that the minutes show the entry of a plea to the indictment by or for defendant. Jefferson v. State, 24 T. Cr. R., 535, 7 S. W. R., 244, and cases cited. But note that under the amendment of 1897, post, Art. 938, and notes, it will now be presumed that the accused pleaded to the indictment unless the issue was raised below and properly brought up for review.

And see Stacey v. State, 3 T. Cr. R., 121; Smith v. State, 4 Id., 628; Knight v. State, 7 Id., 206; Melton v. State, 8 Id., 619; Bohannon v. State, 14 Id., 471; Wilkins v. State, 15 Id., 420; Shaw v. State, 17 Id., 225; Roe v. State, 19 Id., 89; Gordon v. State, 29 Id., 410, 16 S. W. R., 637.

Art. 565. [554] **Plea of guilty not received, unless, etc.**—If the defendant plead guilty, he shall be admonished by the court of the consequences; and no such plea shall be received unless it plainly appear that he is sane, and is uninfluenced by any consideration of fear, by any persuasion or delusive hope of pardon prompting him to confess his guilt. [O. C. 474.]

Plea of guilty in felony. For requisites of plea, see Johnson v. State, 39 T. Cr. R., 625, 48 S. W. R., 70; Giles v. State, 23 T. Cr. R., 281, 4 S. W. R., 886, and cases cited.

Unless the record shows those prerequisite conditions complied with, judgment will be reversed on appeal. Evers v. State, 32 T. Cr. R., 283, 22 S. W. R., 1019, and cases cited.

Presumption. The general rule presuming the sanity of a defendant is reversed on his plea of guilty, and until the contrary is shown he is presumed insane, or that, in pleading guilty, he has been improperly influenced. Sanders v. State, 18 T. Cr. R., 372. And see Burton v. State, 33 Id., 138, 25 S. W. R., 782; Coleman v. State, 35 T. Cr. R., 404, 33 S. W. R., 1083.

Plea of guilty on a trial for murder does not embrace confession to murder of first degree. Martin v. State, 36 T. Cr. R., 632, 36 S. W. R., 587; Johnson v. State, 39 Id., 625, 48 S. W. R., 70.

Misdemeanor. This article does not apply to misdemeanor cases so far as admonition, personal plea, etc., are concerned. Berliner v. State, 6 T. Cr. R., 181; Johnson v. State, 39 Id., 625; 48 S. W. R., 70.

A plea of guilty to the smaller of two degrees of offense charged in the information will not bar prosecution on the greater. Dancey v. State, 35 T. Cr. R., 615, 34 S. W. R., 113.

Art. 566. [555] **Jury shall be impaneled, when.**—Where a defendant in a case of felony persists in pleading guilty, if the punishment of the offense is not absolutely fixed by law, and beyond the discretion of the jury to graduate in any manner, a jury shall be impaneled to assess the punishment, and evidence submitted to enable them to decide thereupon. [O. C. 476.]

Construed. This article is mandatory, and must be circumstantially complied with, and the judgment should affirmatively show that evidence was adduced on the plea of guilty. Harwell v. State, 19 T. Cr. R., 423, citing Paul v. State, 17 Id., 583; Turner v. State, Id., 587. And see Scott v. State, 29 T. Cr. R., 217, 15 S. W. R., 814; Johnson v. State, 39 T. Cr. R., 625, 48 S. W. R., 70; Woodall v. State, 126 S. W. R., 591.

The record on appeal showing that, as a matter of fact, no evidence was adduced on the plea of guilty, conviction will be set aside. Martin v. State, 36 T. Cr. R., 632, 36 S. W. R., 587; Josef v. State, 33 Id., 251, 26 S. W. R., 213; Evers v. State, 32 T. Cr. R., 283, 22 S. W. R., 1019.

Sanity of the accused is an issue on plea of guilty which must be shown by the proof. Burton v. State, 33 T. Cr. R., 138, 25 Id., 782.

Statutory requirements being complied with, defendant, under the plea of guilty, can not afterwards, in the absence of bill of exceptions, showing the admission of illegal evidence, question the sufficiency of the evidence to support the plea. Doans v. State, — T. Cr. R., 468.

Art. 567. [556] **Same proceedings in respect to name of defendant in all cases.**—The same proceedings shall be had in all cases with respect to the name of the defendant and the correction of the indictment, as provided with respect to the same in capital offenses. [O. C. 479.]

Ante, Arts. 563, 564, and notes; post, Arts 581-584; Wardlow v. State, 18 T. Cr. R., 356.

6. OF THE PLEADINGS IN CRIMINAL ACTIONS.

Art. 568. [557] **Indictment or information.**—The primary pleading in criminal action on the part of the state is the indictment or information. [O. C. 481.]

Art. 569. [558] **Defendant's pleading.**—On the part of the defendant, the following are the only pleadings:

1. The motion to set aside the indictment or information.

Construed. There is no such thing under our system as plea in abatement to indictment. Woods v. State, 26 T. Cr. R., 490, 10 S. W. R., 108, citing Owens v.

State, 25 T. Cr. R., 165, 8 S. W. R., 658; Williams v. State, 20 T. Cr. R., 357, and cases cited.

Motion in arrest can not be based upon pendency of former indictment for same offense. Williams v. State, 20 T. Cr. R., 357, and cases cited. And see Johnson v. State, 22 Id., 256, 2 S. W. R., 609.

2. A special plea setting forth one or more facts as cause why the defendant ought not to be tried upon the indictment or information presented against him.

3. An exception to the indictment or information for some matter of form or substance.

4. A plea of guilty.

5. A plea of not guilty. [O. C. 482.]

Art. 570. [559] **Motion to set aside indictment, etc., for what causes only.**—A motion to set aside an indictment or information shall be based on one or more of the following causes, and no other:

1. That it appears by the records of the court that the indictment was not found by at least nine grand jurors, or that the information was not presented after oath made as required in article 467.

Cases cited under preceding article.

Race prejudice. That the jury commissioners did not summon persons of African descent as grand jurors will not abate an indictment. Carter v. State, 39 T. Cr. R., 345, 46 S. W. R., 236.

Such objection to the grand jury should be made by challenge to the array. Carter v. State, supra.

Construed. Neither this nor Art. 572, post, can, under the fourteenth amendment to the Constitution of the United States, be construed to exclude fundamental constitutional grounds. But a motion to quash on ground of race discrimination, supported only by defendant's affidavit, and his offer to introduce evidence, is not sufficient. Carter v. State, supra.

Indictment will not be quashed because of illegal or incompetent evidence before the grand jury. Dockery v. State, 35 T. Cr. R., 487, 34 S. W. R., 281.

2. That some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same. [O. C. 483.]

Construed: No form is prescribed for motion to set aside indictment under this subdivision, nor need it be verified, and refusal to afford defendant opportunity to prove it, even dehors the record, is error. Rothchild v. State, 7 T. Cr. R., 519.

This clause inhibits the presence of the assistant county attorney during the "investigation and deliberation" of the grand jury. Stuart v. State, 35 T. Cr. R., 440 , 34 S. W. R., 118. And see Rothschild v. State, supra.

This clause refers to persons not impaneled, and the objection to a person proposed to be impaneled can only be made by challenge. Doss v. State, 28 T. Cr. R., 506, 13 S. W. R., 788, overruling contrary doctrine in Woods v. State, 26 T. Cr. R., 490, 10 S. W. R., 108.

Same. This article is an express limitation upon the causes for which an indictment can be set aside. Spearman v. State, 34 T. Cr. R., 279, 30 S. W. R., 229, citing Williams v. State, 20 T. Cr. R., 357, and note this case to the effect that former jeopardy and want of jurisdiction may be raised by special plea independently of the statute.

Art. 571. [560] **Motion shall be tried by judge without jury.**—An issue of of fact arising upon a motion to set aside an indictment or information shall be tried by the judge without a jury. [O. C. 483.]

Post, Arts. 587, 588, 589 and 592.

Art. 572. [561] **Only special pleas for defendant.**—The only special pleas which can be heard for the defendant are:

1. That he has been convicted legally, in a court of competent jurisdiction, upon the same accusation, after having been tried upon the merits for the same offense.

Construed. A fundamental question arising under the constitution of the United States can be made by a special plea outside of our statute. This article cannot be construed to exclude other fundamental constitutional grounds. Accordingly, a motion to quash indictment on ground of race discrimination in the organization of the grand jury is permissible practice. Carter v. State, 39 T. Cr. R., 345, 46 S. W. R., 236.

Plea of former conviction must embrace the former indictment and judgment of conviction as matters of record, and the indentities of the person and the offense as matters of fact. Hefner v. State, 16 T. Cr. R., 573, which, manifestly, overrules Troy v. State, 10 Id., 319, omitting these requisites.

And see Benson v. State, 53 Id., 254, 109 S. W. R., 166, and cases cited.

The plea must be sworn to (post, Art. 573. Samuels v. State, 25 T. Cr. R., 537; 8 S. W. R., 656), and, upon the issues thus presented, the defendant is entitled to trial by jury. Quitsow v. State, 1 T. Cr. R., 49; Pritchford v. State, 2 Id., 69. And see Graham v. State, 19 Id., 504; Adams v. State, 16 Id., 162; Taylor v. State, 4 Id., 29; Robinson v. State, 21 Id., 160, 17 S. W. R., 632; Foster v. State, 25 T. Cr. R., 543, 8 S. W. R., 664; Emmons v. State, 34 T. Cr. R., 118, 29 S. W. R., 475; Washington v. State, 35 T. Cr. R., 156, 32 S. W. R., 694.

Submission to jury under Art. 770, post, the truth or falsity of special pleas must be found by the jury.

The pleas of former conviction and not guilty may be submitted together with instruction to first find upon the plea of former conviction, and proceed no further if the evidence sustains it. Failure to respond to the plea of former conviction, and convicting under the plea of not guilty, is error for which the judgment will be reversed. Burks v. State, 24 T. Cr. R., 326, 6 S. W. R., 300; Smith v. State, 18 Id., 329, and cases cited.

But the plea should not be submitted if there was no evidence to support it. Johnson v. State, 34 Id., 115, 29 S. W. R., 473.

A plea of former acquittal, bad on its face, is properly stricken out. Shubert v. State, 21 T. Cr. R., 551, 2 S. W. R., 883, approving Wright v. State, 17 Id., 152; Alexander v. State, 21 T. Cr. R., 407, 17 S. W. R., 139; Pickens v. State, 9 T. Cr. R., 270; Byas v. State, 41 T. Cr. R., 51, 51 S. W. R., 923.

It devolves upon the court to determine the legal sufficiency of special pleas, and they should not submit to the jury such as constitute no defense in law. Sims v. State, 9 T. Cr. R., 338.

And see Robinson v. State, 23 T. Cr. R., 315, 4 S. W. R., 904; Deaton v. State, 44 T., 446; Adams v. State, 16 T. Cr. R., 162; Grisham v. State, 19 Id., 504; Munch v. State, 25 Id., 30, 7 S. W. R., 341.

Carving. On the doctrine of carving, as applied to special pleas, see Sedberry v. State, 39 T. Cr. R., 466, 46 S. W. R., 639, and cases cited.

And note, that in former conviction, it is not required that the proofs in the two prosecutions should be identically the same, as is required in former acquittal; it is only essential that the offense, or the transaction out of which it grew, were the same. Sims v. State, 9 T. Cr. R., 338; Arnold v. State, Id., 435; Wright v. State, 17 Id., 152; Wilson v. State, 45 T., 76.

For application of the rules see also Hudson v. State, 9 T. Cr. R., 151; Hershfield v. State, 11 Id., 207; Willis v. State, 24 Id., 586, 6 S. W. R., 857; Wright v. State, 37 T. Cr. R., 627, 40 S. W. R., 491; Harrington v. State, 31 T. Cr. R., 577, 21 S. W. R., 356; Fleming v. State, 28 T. Cr. R., 234, 12 S. W. R., 605.

"Same offense" defined: Ante, Art. 9, and notes.

The two offenses must, in truth, be the same, though the indictments may differ in immaterial particulars. Thomas v. State, 40 T., 36.

The rule, however, is controlled by the well established doctrine of carving, and, if, as matter of fact, the transactions be the same, the plea of former conviction will be good, though the offenses be of different names. "Same offense" does not signify same offense eo nomine, but the same criminal act or omission. Hershfield v. State, 11 T. Cr. R., 207, and cases cited.

"Same offense," as used in Penal Code, Art. 1598, means another offense of like character, and it not meant to be applied to the same identical offense. Muckenfuss v. State, 55 T. Cr. R., 216, 117 S. W. R., 853.

When one offense is a necessary element in, and constitutes an essential part of, another offense, and both are, in fact, but one transaction, a conviction or acquittal for one is a bar to prosecution for the other, except in burglary and theft. Herera v. State, 35 T. Cr. R., 607, 34 S. W. R., 943.

Cases overruled: Note that Loackman v. State, 32 T. Cr. R., 563, 25 S. W. R., 22 overrules the cases of Shepard v. State, 42 T., 501; Robertson v. State, 6 T. Cr. R., 669; Struckman v. State, 7 Id., 581; Howard v. State, 8 Id., 447, and Smith v. State, 22 Id., 350, 3 S. W. R., 238, insofar as they hold that where burglary and theft are involved in the same transaction, a prosecution and conviction for one of the offenses would bar a prosecution for the other. And see also Rust v. State, 31 T. Cr. R., 175, 19 S. W. R., 763.

Conviction for unlawfully carrying a pistol will not bar prosecution for assault to murder, though involving the same act. Thomas v. State, 40 T., 36.

Nor will conviction under an indictment for assault to murder bar prosecution for murder when the injured party subsequently died. Curtis v. State, 22 T. Cr. R., 227, 3 S. W. R., 86, approving Johnson's case, 19 T. Cr. R., 453.

Conviction for manslaughter, under an invalid indictment for murder, is a complete bar to subsequent prosecution for murder. Nixon v. State, 35 Id., 458, 34 S. W. R., 290.

Conviction for one of different attempts to pass the same forged instrument will though both prosecutions were based on the same transaction. Lewis v. State, 1 T. Cr. R., 323.

Conviction for one of different attempts to pass the same forged instrument will not bar prosecution for the other attempt. Burks v. State, 24 Id., 326, 6 S. W. R., 300.

Burglary and conspiracy to commit burglary are distinct offenses, and conviction of one will not bar prosecution for the other. Whitford v. State, 24 T. Cr. R., 489, 6 S. W. R., 537.

Same as to theft and conspiracy to commit theft. Bailey v. State, 42 T. Cr. R., 289, 59 S. W. R., 900, following Whitford v. State, supra.

For other instances, see Ashton v. State, 31 T. Cr. R., 482, 21 S. W. R., 48; Coleman v. State, 35 T. Cr. R., 404, 33 S. W. R., 1083; Davis v. State, 37 T. Cr. R., 359, 38 S. W. R., 616; Nichols v. State, Id., 616, 40 S. W. R., 268; Landrum v. State, Id., 666, 40 S. W. R., 737.

Plea of former conviction cannot be based on a judgment pending on approval. Dupree v. State, 56 T. Cr. R., 387, 120 S. W. R., 71.

A second trial in the same court, on the same indictment, dispenses with the necessity of special plea of former conviction, the whole record being before the court. DeLeon v. State, 55 T. Cr. R., 39, 114 S. W. R., 828, following Roberson v. State, 21 T. Cr. R., 160, 17 S. W. R., 632; Vela v. State, 49 T. Cr. R., 588, 95 S. W. R., 529.

Information charged a sale of liquor on a certain day, and defendant was convicted for one of two sales on that day, the state failing to elect between the transactions. Plea of former conviction on second trial for same offense on identical evidence should have been sustained. Piper v. State, 53 T. Cr. R., 550, 110 S. W. R., 899; Alexander v. State, Id., 553, 111 S. W. R., 145.

The dates of sale being the same, but the sales to the same party being different, they constituted separate offenses, and plea of former conviction was not available. Robinson v. State, 53 T. Cr. R., 565, 110 S. W. R., 908.

Motion to quash indictment cannot be made to serve the purpose of a plea of former conviction. Robinson v. State, supra.

The proof showed that defendant sold to two different parties, and had been convicted of one of those sales. His plea of former conviction set up that the sales, though charged in separate complaints, were parts of the same transaction. The court submitted the plea to the jury, instructing the burden of proof on the defendant. Held, correct. Benton v. State, 52 T. Cr. R., 422, 107 S. W. R., 837.

Cursing in a manner calculated to provoke disturbance of the peace, and cursing near a private residence in a manner calculated to disturb inhabitants thereof, are distinct offenses, and conviction or acquittal of one will not bar prosecution of the other. Kellett v. State, 51 T. Cr. R., 641, 103 S. W. R., 882.

Conviction under Art. 604 of the Penal Code for permitting one person to drink on the premises will not bar prosecution for permitting another person to drink on the premises at the same time. Teague v. State, 51 T. Cr. R., 523, 102 S. W. R., 1142.

Acquittal of assault to murder cannot be pleaded in bar to carrying pistol on the occasion of the alleged assault. Woodroe v. State, 50 T. Cr. R., 212, 96 S. W. R., 30.

The state can carve but once on a single trial, and, pleading former conviction, a defendant is entitled to his chance to prove it . Taylor v. State, 50 T. Cr. R., 288, 98 S. W. R., 839. Paschal v. State, 49 T. Cr. R., 111, 90 S. W. R., 878.

A previous conviction for violating the local option laws by sale is a bar to prosecution for selling to a minor, the charges involving the same identical transaction, the local option law superseding all other laws involving the sale of intoxicating liquors and including sales to minors. Tompkins v. State, 49 T. Cr. R., 154, 90 S. W. R., 1019.

Former conviction cannot be asserted on proof that another than the accused had been convicted of the offense charged. Craig v. State, 49 T. Cr. R., 295, 92 S. W. R., 416.

Conviction for drunkenness in a public place cannot be sustained as a bar to prosecution for disturbing the peace at the same time. Mitchell v. State, 48 T. Cr. R., 533, 89 S. W. R., 645.

False swearing and illegal voting are distinct offenses, and conviction for one cannot be pleaded against the other. Arrington v. State, 48 T. Cr. R., 541, 89 S. W. R., 643.

The court did not err in sending the jury back on suggestion of state's counsel to find on the defendant's plea of former acquittal. Stone v. State, 47 T. Cr. R., 575, 85 S. W. R., 808.

Former acquittal. One who has been acquitted in one county cannot be put upon trial in another county, though the offense was actually committed in such other county; and, on plea of former acquittal in habeas corpus proceedings in the court of criminal appeals, he would be entitled to discharge. Ex parte Davis, 48 T. Cr. R., 644, 89 S. W. R., 978, approving Ex parte Moon; 10 T. Cr. R., 505, and Ex parte Mixon, 35 Id., 458, 34 S. W. R., 290; Ex parte Moore, 46 T. Cr. R., 417, 80 S. W. R., 620.

Prior cases for offenses of like character cannot be used to enhance the punishment of a subsequent offense of like character. Kinney v. State, 45 T. Cr. R., 500, 78 S. W. R., 226.

The mere fact that two offenses of identical character were committed contemporaneously does not make them any the less distinct offenses. Dunn v. State, 43 T. Cr. R., 25, 63 S. W. R., 571.

Conviction in the second degree for murder is acquittal of murder of the first degree; and, motion for new trial being granted and a new indictment returned, accused could be tried under that indictment for murder in the second degree. Former acquittal of first degree would not bar conviction in second degree. Coleman v. State, 43 T. Cr. R., 280, 65 S. W. R., 90.

Conviction of negligent homicide under an indictment for murder is acquittal of all the higher grades of culpable homicide. Flynn v. State, 43 T. Cr. R., 407, 66 S. W. R., 551.

Acquittal for attempt to commit rape will not bar prosecution for attempt at burlary to commit rape; though the same transaction they are different offenses. Byas v. State, 41 T. Cr. R., 51, 51 S. W. R., 923.

Former acquittal for the murder of one of two parties is not bar to prosecution for murder of the other, unless shown that both were killed by the same shot. Augustine v. State, 41 T. Cr. R., 59, 52 S. W. R., 77.

Former acquittal of murder will not bar prosecution for manslaughter in the same transaction. Turner v. State, 41 T. Cr. R., 329, 54 S. W. R., 579.

Assault to rob one person and the murder of another person in the same transaction are distinct offenses. Keeton v. State, 41 T. Cr. R., 621, 57 S. W. R., 1125.

Forgery and uttering a forged deed are distinct offenses. Preston v. State, 40 T. Cr. R., 72, 48 S. W. R., 581.

Burglary and theft committed in the same transaction are distinct offenses. Fielder v. State, 40 T. Cr. R., 184, 49 S. W. R., 376.

The proof showing that the different cattle were stolen at different times and places, conviction for the theft of one cannot be pleaded as bar to prosecution for theft of the others. Davidson v. State, 40 T. Cr. R., 285, 49 S. W. R., 372.

On plea of former conviction for theft, the burden of proving the plural takings were one and the same transactions, rests on the defendant. Davidson v. State, supra.

As to degrees. Generally, conviction or acquittal for the minor offense will not bar a greater, but if, on the trial of the greater, there can be a conviction for the lesser, former conviction or acquittal of such will bar the greater. Tribble v. State, 2 T. Cr. R., 424; Thomas v. State, 40 T., 36.

Under article 601, post, conviction or acquittal of the lower grade of the offense, if had under an indictment or information, and not otherwise, will bar further prosecution for the higher, though the court in which the trial was had was without jurisdiction of the higher grade. Henkel v. State, 27 T. Cr. R., 510, 11 S. W. R., 671, and cases cited; Davis v. State, 39 T. Cr. R., 681, 44 S. W. R., 1099.

While conviction for simple assault before a justice of the peace would be no bar to subsequent prosecution for aggravated assault based on same transaction, yet plea of former conviction should be submitted; and, if proof shows only simple assault, defendant acquitted. Pritchford v. State, 2 T. Cr. R., 69 and cases cited.

The degrees of homicide are not distinct offenses, but grades only of homicide. On trial for manslaughter, when defendant had been previously acquitted of the two degrees of murder, it was not improper for the state to use what is denominted murder evidence, under the original indictment for murder to convict of manslaughter; and the court did not err in refusing to instruct for acquittal if testimony did not support manslaughter. Cornelius v. State, 54 T. Cr. R., 173, 112 S. W. R., 1050.

City courts. Plea of former conviction or acquittal in a city court under an invalid ordinance is not good. McLain v. State, 31 T. Cr. R., 558, 21 S. W. R., 365, and cases cited; McNeil v. State, 29 T. Cr. R., 48, 14 S. W. R., 393. And see Leach v. State, 36 T. Cr. R., 248, 36 S. W. R., 471, and cases cited.

Otherwise, however, when the ordinance is valid. Davis v. State, 37 T. Cr. R., 359, 38 S. W. R., 616.

Justice courts: Warriner v. State, 3 T. Cr. R., 104; Watson v. State, 5 Id., 271; Wilson v. State, 16 T., 246.

Burden of proof is always on defendant to establish his special plea. Willis v. State, 24 T. Cr. R., 586, 6 S. W. R., 857, and cases cited. Benton v. State, 52 T. Cr. R., 422, 107 S. W. R., 837.

Verdict must find the special plea true or untrue as required by post, Art. 770, else conviction will be set aside. Wright v. State, 27 T. Cr. R., 447, 11 S. W. R., 458, and cases cited.

In misdemeanor, however, a jury being waived, the judge is not required to make express finding on the plea. Taylor v. State, 4 T. Cr. R., 29.

Habeas corpus. The plea is not available on habeas corpus. Pitner v. State, 44 T., 578, and cases cited.

Practice. Coon v. State, 21 T. Cr. R., 332, 17 S. W. R., 351; Rust v. State, 31 T. Cr. 75, 19 S. W. R., 763; Maines v. State, 37 T. Cr. R., 617, 40 S. W. R., 490.

Dismissal of information after one witness was examined because defendant had entered no plea could not be pleaded in bar to new information as former acquittal. Mays v. State, 51 T. Cr. R., 32, 101 S. W. R., 233.

2. That he has been before acquitted by a jury of the accusation against him, in a court of competent jurisdiction, whether the acquittal was regular or irregular. [O. C. 484.]

Ante, Art. 9, and notes; post, Art. 601.

Pleas distinguished. Autrefois acquit is when the transaction is the same, and the two indictments are susceptible of, and must be sustained by, the same proof. Autrefois convict only requires that the transaction or the facts constituting it be the same. See in extenso, Wright v. State. 17 T. Cr. R., 152, and cases cited. And also Alexander v. State, 21 Id., 406, 17 S. W. R., 139; Shubert v. State, Id., 551, 2 S. W. R., 883.

Former acquittal; requisites of plea. Quitzow v. State., 1 T. Cr. R., 47; Parchman v. State, Id., 228; Lowe v. State, 4 Id., 34; Irwin v. State 7 Id., 78; Potter v. State, 9 Id., 55; Pickens v. State, Id., 270; Ex parte Rogers, 10 Id., 655; Williams v. State, 13 Id., 285; Kain v. State, 16 Id., 282; Hefner v. State, Id., 573; Gresham v. State, 19 Id., 504; Brothers v. State, 22 Id., 447, 3 S. W. R., 737; Foster v. State, 25 T. Cr. R., 543, 8 S. W. R., 664; Reddick v. State, 31 T Cr. R., 587, 21 S. W. R., 684; Hooper v. State, 30 T. Cr. R., 412, 17 S. W. R., 1066; Epps v. State, 38 T. Cr. R., 284, 42 S. W. R., 552; Morgan v. State, 34 T., Id., 677; Thomas v. State, 40 Id., 36; Boggess v. State, 43 Id., 347.

Not available under plea of not guilty, but must be specially pleaded. Quashal of former indictment, as barred by limitations, cannot be set up as plea of former acquittal. Swancoat v. State, 4 T. Cr. R., 105.

Not available if conviction was under illegal indictment, or if former indictment was dismissed, or if new trial under first indictment was awarded. Simco v. State, 9 T. Cr. R., 338, Longley v. State, 43 T., 490.

Whether or not the indictment was valid, an acquittal under it is good bar to subsequent prosecution. Shoemaker v. State, 126 S. W. R., 887.

Practice. Plea bad on its face is subject to demurrer or motion to strike out. Epps v. State, 38 T. Cr. R., 284, 42 S. W. R., 552; Williams v. State, 37 T. Cr. R., 6 S. W. R., and cases cited.

But if plea sets up facts that should be submitted to jury, it would be error to sustain demurrer. Fenton v. State, 33 T. Cr. R., 633, 28 S. W. R., 537.

If the plea is not excepted to or motion to strike out interposed, it must go to the jury. Grisham v. State, 19 T. Cr. R., 504, and cases cited.

Evidence; what sufficient: Kain v. State, 16 Id., 282; Hooper v. State, 30 T. Cr. R., 402, 17 S. W. R., 1066; Fehr v. State, 36 T. Cr. R., 93, 35 S. W. R., 381; Morton v. State, 37 T. Cr. R., 131, 38 S. W. R., 1019.

Charge of court. On trial for cattle theft, the defense of former acquittal was interposed, the indictment charging a different animal and different owner than involved in previous trial. The court charged that it devolved upon defendant to prove that the animals were taken at the same time and place so as to constitute a single taking. Held correct. Hozier v. State, 6 T. Cr. R., 542.

In the absence of proof showing the identity of the two transactions the court should instruct to disregard the plea altogether. Morton v. State, 37 T. Cr. R., 131, 38 S. W. R., 1019.

Amendment, when exception is sustained: Grisham v. State, 19 T. Cr. R., 504, Deaton v. State, 44 T., 446.

Former jeopardy. Ante, Art. 9, and notes.

Agreement to turn state's evidence, is available as a special plea, though not explicitly recognized by statute. Having complied with his part of such a completed agreement, an accused may plead it in estoppel to prosecution, but failing to so comply, he cannot claim immunity. On the subject, see Nicks v. State, 40 T. Cr. R., 48 S. W. R., 186, and cases cited; Neeley v. State, 27 T. Cr. R., 324, 11 S. W. R., 376.

The contrary dictum in Holm's case, 20 T. Cr. R., 509, that the special plea of agreement to turn state's evidence controvenes this article, disapproved. Camron v. State, 32 T. Cr. R., 180, 22 S. W. R., 682, and cases cited.

The prosecuting attorney is circumscribed in his authority to make such agreement by ante, Art. 37. See said article, and notes; Fleming v. State, 28 T. Cr. R., 234.

Plea in abatement, as such, in criminal cases, is not recognized by our Codes. Woods v. State, 26 T. Cr. R., 490, 10 S. W. R., 108, and cases cited; Hardin v. State, 4 T. Cr. R., 355; State v. Oxford, 30 T., 428.

Art. 573. [562] **Special plea must be verified.**—Every special plea shall be verified by the affidavit of the defendant. [O. C. 485.]

Swancoat v. State, 4 T. Cr. R., 105; Samuels v. State, 25 Id., 537, 8 S. W. R., 656.

Art. 574. [563] **Issues of fact on special plea to be tried by jury.**—All issues of fact presented by a special plea shall be tried by a jury. [O. C. 486.]

Post, Art. 770.

Exception to the rule arises in misdemeanor when defendant has waived jury. In such case, the court may decide special pleas without passing on their verity. Taylor v. State, 4 T. Cr. R., 29.

Art. 575. [564] **Exceptions to the substance of an indictment.**—There is no exception to the substance of an indictment or information, except—

1. That it does not appear from the face of the same that an offense against the law was committed by the defendant.

Construed. Failure to allege matter of which the court has judicial knowledge, will not vitiate indictment. State v. Mann, 13 T., 61.

That the indictment is uncertain is not a good exception; that it "does not set forth the offense in plain and intelligible words" is a good exception, either to form or substance, under the seventh subd. of Art, 451, ante. State v. Schwartz, 25 T., 764. And see Collins v. State, 25 T., Supp., 202.

There is no such plea recognized by our Codes as a general demurrer or general exception to an indictment which does not specify defect in indictment as of form or substance. Phillips v. State, 29 T., 226; State v. Schoolfield, Id., 501.

2. That it appears from the indictment or information that a prosecution for the offense is barred by a lapse of time, or that the offense was committed after the finding of the indictment.

Ante, Art. 451, subds. 4 and 6, and notes.

Bar of limitation. It must appear affirmatively from the charging part of an indictment or information that the offense was committed within the period of limitation. Brewer v. State, 5 T. Cr. R., 248, and cases cited; Blake v. State, 3 Id., 149; State v. Eubanks, 41 T., 291. And see Mitten v. State, 24 T. Cr. R., 346, 6 S. W. R., 196.

Impossible date. Indictment is fatally defective that charges the offense as committed subsequent to the finding of the indictment itself. On appeal conviction would be reversed, though the omission be plainly a clerical error in transcribing the indictment. Robles v. State, 5 T. Cr. R., 46.

Amendment is indictment as to the time of the commission of the offense is matter of substance, and is not permissible under any circumstances. Sanders v. State, 26 T., 119; Drummond v. State, T. Cr. R., 150, overruling State v. Elliott, 30 T., 148; Sharp v. State, 6 T. Cr. R., 650; Goddard v. State, 14 Id., 566; Huff v. State, 23 Id., 291, 4 S. W. R., 890.

3. That it contains matter which is a legal defense or bar to the prosecution.

4. That the indictment or information shows, upon its face, that the court trying the case had no jurisdiction thereof. [O. C. 487.]

Plea to jurisdiction is available to accused independent of this subdivision. Woods v. State, 26 T. Cr. R., 490, 10 S. W. R., 108, citing Owens v. State, 25 T. Cr. R., 552, 8 S. W. R., 658.

Venue must be alleged in the indictment, and it must be within the jurisdiction of the court. Ante, Art. 257, and notes, and ante, Art. 451, subd. 5, and notes.

Exception will reach failure of allegation of venue. Collins v. State, 6 T. Cr. R., 647, Robins v. State, 9 Id., 666; Orr v. State, 25 Id., 453, 8 S. W. R., 644.

Such omission is a defect that cannot be cured by amendment. Collins v. State, 6 T. Cr. R., 647; Robins v. State, 6 T. Cr. R., 666.

Information filed in the county court on a complaint which was filed in the justice court and then in the county court gives the latter court jurisdiction. Morrow v. State, 37 T. Cr. R., 330, 39 S. W. R., 944. And see generally, Harberger v. State, 4 T. Cr. R., 26; Ingle v. State, Id., 91; Montgomery v. State, Id., 140; Nance v. State, 21 T. Cr. R., 457, 1 S. W. R., 448; Miller v. State, 24 T. Cr. R., 346; 6 S. W. R., 196; Nichols v. State, 28 T. Cr. R., 105, 12 S. W. R., 500.

This district court can try an indictment for felony that includes a misdemeanor, and to adjudge, not only as to the felony, but as to any lower grade of the offense the verdict may find. Nance v. State, 21 T. Cr. R., 457, 1 S. W. R., 448, and

cases cited. But for exception to rule see Robles v. State, 38 T. Cr. R., 81, 41 S. W. R., 620.

As to cases originating in unorganized counties: Hernandez v. State, 19 T. Cr. R., 408, and cases cited.

The evidence of sufficiency of the evidence on which the indictment was predicated cannot be challenged by plea to jurisdiction. Jacobs v. State, 35 T. Cr. R., 410, 34 S. W. R., 110, following Terry v. State, 15 T. Cr. R., 66.

Transferred cases: Ante, Art. 485, 486, 487 and notes.

Exceptions to indictment, under the general rule, are such only as are prescribed by this article. Schwartz v. State, 25 T., 764; Williams v. State, 20 T. Cr. R., 358; Lott v. State, 18 Id., 627.

But an exception or motion in arrest of judgment, on ground that indictment was found by illegal grand jury, is available. Lott v. State, supra; Ex parte Reynolds, 35 T. Cr. R., 437, 34 S. W. R., 120, and cases cited.

That the grand jury was not sworn is not a good exception to indictment. Chivarrio v. State, 17 T. Cr. R., 390. Compare Vanvickle v. State, 22 Id., 625, 2 S. W. R., 642.

That the indictment does not commence "In the name and by the authority of the state of Texas," and that it does not conclude "Against the peace and dignity of the state" on exceptions, fatal to indictment. Jefferson v. State, 24 T. Cr. R., 535, and cases cited; Wood v. State, 27 Id., 538, 11 S. W. R., 525, and cases cited; Rowlett v. State, 23 T. Cr. R., 191, 4 S. W. R., 582, and cases cited.

Such are exceptions to matter of substance as well as form. Wade v. State, 52 T. Cr. R., 619, 108 S. W. R., 677, and cases cited.

Practice. Clerk's failure to file indictment is not ground for quashal. Boren v. State, 32 T. Cr. R., 637, 25 S. W. R., 775.

Record on appeal showing no action by court below on exceptions to indictment, the presumption obtains that they were waived. Myers v. State, 31 T., 173; Thompson v. State, 18 T., 572.

Under Art. 849, post, defects of substance may be raised by motion in arrest of judgment, on appeal, as well as by exception. Anderson v. State, 20 T. Cr. R., 595; Strickland v. State, 19 Id., 518.

That in his notation in minutes of presentment of indictment he misnamed the offense, is not tenable exception. Rowlett v. State, 23 T. Cr. R., 191; 4 S. W. R., 582. And see Barr v. State, 16 T. Cr. R., 333.

Proper for state to except to defendant's special plea. Post, Art. 600.

As to amendment of indictment or indictments, see post, Arts. 597, 598, 599.

Art. 576. [565] **Exceptions to the form of an indictment.**—Exceptions to the form of an indictment or information may be taken for the following causes only:

1. That the indictment or information does not appear to have been presented in the proper court, as required by article 451 or 478.

Ante, Art. 478, subd. 2 and 3; 451, subd. 2, and notes.

Exceptions; presentment of indictment. That the indictment does not show on its face that it was presented in the proper court is good exception on motion to quash. Murphy v. State, 29 T. Cr. R., 507, 16 S. W. R., 417, and cases cited; Mathews v. State, 44 S. W. R., 376.

But this exception must be in limine; it cannot be made in arrest of judgment. Jones v. State, 32 T. Cr. R., 110, 22 S. W. R., 149, citing Niland v. State, 19 T. Cr. R., 166; Rather v. State, 25 T. Cr. R., 623, 9 S. W. R., 69, and cases cited. Rowlett v. State, 23 T. Cr. R., 191, 4 S. W. R., 582, and cases cited; Murphy v. State, 29 T. Cr. R., 507, 16 S. W. R., 417.

Such an exception comes too late in the new tribunal after change of venue. Barr v. State, 16 T. Cr. R., 333, and cases cited.

There being two district courts of the county, it was not necessary that the indictment should show on its face in which of the two it was presented. Phillips v. State, 35 T. Cr. R., 480, 34 S. W. R., 272, citing Sargeant v. State, Id., 325, 33 S. W. R., 364.

Not essential that indictment show date the grand jury was organized. Murphy v. State, 36 T. Cr. R., 24, 35 E. W. R., 174.

Nor state term at which grand jury was organized. Grayson v. State, 35 T. Cr., 629, 34 S. W. R., 961.

Indictment not invalid because returned on a legal holiday. Webb v. State, 40 S. W. R., 989.

Exceptions to indictment are not too late of they follow the state's announcement for trial. Carr v. State, 19 S. W. R., 635.

2. The want of any other requisite or form prescribed by articles 439 and 466, except the want of the signature of the foreman of the grand jury, or in the case of an information, of the signature of the attorney representing the state. [O. C. 488.]

Signature of foreman of grand jury should be appended to indictment, but its omission is not fatal either on exception or arrest of judgment. Robinson v. State, 24 T. Cr. R., 4, 5 S. W. R., 509, citing Weaver v. State, 19 T. Cr. R., 547; Pierson v. State, 23 T., 579; State v. Powell, 24 T., 135; Witherspoon v. State, 39 T. Cr. R., 65, 44 S. W. R., 164.

Information, though it must be based upon affidavit, must clearly show, on its face, that the charge is preferred by the prosecuting attorney. Johnson v. State, 17 T. Cr. R., 230, and cases cited. And see Anderson v. State, 53 Id., 525, 111 S. W. R., 738; Arbuthnot v. State, 38 T. Cr. R., 509, 34 S. W. R., 269.

Signature of the county attorney is not indispensible to the validity of information. Jones v. State, 30 T. Cr. R., 426, 17 S. W. R., 1080, citing Rosberry v. State, 1 T. Cr. R., 664.

Presumption obtains in the absence of converse proof that the assistant county attorney possessed all the necessary legal qualifications. Kelly v. State, 36 T. Cr. R., 480, 38 Id., 39.

Art. 577. [566] **Motions, etc., shall be in writing.**—All motions to set aside an indictment or information, all special pleas and exceptions, shall be in writing. [O. C. 489.]

Art. 578. [567] **Two days allowed for filing written pleadings.**—In all cases, the defendant shall be allowed two entire days, exclusive of all fractions of a day after his arrest, and during the term of the court, to file written pleadings. [O. C. 491, 494, 495, 496.]

Practice. Waiver. Pleas filed by a defendant, under compulsion, before the expiration of the two days provided by this article cannot be considered nor treated as a waiver of such time. Reed v. State, 31 T. Cr. R., 35, 19 S. W. R., 678.

The two days to which the defendant is entitled must be computed from the filing of the information against him. Evans v. State, 36 T. Cr. R., 32, 35 S. W. R., 169.

Art. 579. [568] **When defendant is entitled to service of copy of indictment, etc.**—In cases where the defendant is entitled to be served with a copy of the indictment, he shall be allowed the two days' time mentioned in the preceding article to file written pleadings after such service. [O. C. 496.]

Practice; service of indictment. This article is mandatory, and, without regard to the period of his custody, defendant is entitled to two full days' service of the copy of indictment. Woodall v. State, 25 T. Cr. R., 617, 8 S. W. R., 802.

A second indictment being substituted for a previous one dismissed for defects, defendant was entitled to a two full days' service of copy of said second indictment after his arrest under the same. Lockwood v. State, 32 T. Cr. R., 137, 22 S. W. R., 413, and cases cited; Harris v. State, Id., 279, 22 S. W. R., 1037.

But, going to trial voluntarily and without objection before the expiration of the two days, defendant will not be heard to complain. Callison v. State, 37 T. Cr. R., 211, 39 S. W. R., 300.

Too late after verdict to raise the issue of non-service of copy of indictment. Bonner v. State, 29 T. Cr. R., 223, 15 S. W. R., 821, and cases cited.

Art. 580. [569] **Defendant may file written pleadings at any time, etc.**—The two preceding articles shall not be construed so as to preclude the defendant from filing written pleadings at any time before the case is called for trial, except in case of change of venue. [O. C. 496a.]

Post, Art. 630, and notes.

Art. 581. [570] **Plea of guilty; how made in felony case.**—A plea of guilty in a felony case must be made in open court, and by the defendant in person; and, in such case, the proceedings shall be as provided in articles 565 and 566.

Ante, Arts. 565, 566, and notes; Johnson v. State, 39 T. Cr. R., 625, 48 S. W. R., 70.

Art. 582. [571] **Plea of guilty in misdemeanor.**—A plea of guilty in a case of misdemeanor may be made, either by the defendant or his counsel in open court; and, in such case, the defendant or his counsel may waive a jury, and the punishment may be assessed by the court, either upon evidence or without it, at the discretion of the court.

Monition to defendant pleading guilty to misdemeanor is not required, the object of this article being to take the plea of guilty in such cases out of the operation of post, Art. 810, regulating confessions as testimony. Johnson v. State, 39 T. Cr. R., 625, 48 S. W. R., 70, distinguishing Rice's case, 22 T. Cr. R., 654, 3 S. W. R., 791.

Art. 583. [572] **Any person charged with misdemeanor may plead guilty without jury in the county court at special session held for that purpose.**—When any person charged with a misdemeanor in the county court shall desire to make speedy disposition of his case upon a plea of guilty, without the intervention of a jury, the county judge shall be authorized and permitted to hold a special session of the court to dispose of such cause; and, in such case, the court being in session, the county judge may hear and determine such plea of guilty, and assess the punishment in like manner as if the defendant had been convicted at a regular term; and the same shall be duly entered of record in the minutes of the court; and the same proceedings shall be had to enforce the judgment as in other cases in the county court. [Act April 4, 1891.]

Art. 584. [573] **Plea of not guilty, how made.**—The plea of not guilty may be made by the defendant or by his counsel in open court; and, in all cases where the defendant refuses to plead, the plea of not guilty shall be entered for him by the court. [O. C. 480.]

Ante, Art. 564, and notes.

Plea of defendant in a case less than capital must be interposed as soon as the case is called for trial. Post, articles 640, 641, and notes; McGraw v. State, 31 T. Cr. R., 336, 20 S. W. R., 740.

Art. 585. [574] **Plea of not guilty, how construed.**—The plea of "not guilty" shall be construed to be a denial of every material allegation in the indictment or information. Under this plea, evidence to establish the insanity of defendant, and every fact whatever tending to acquit him of the accusation may be introduced, except such facts as are proper for a special plea under article 572. [O. C. 497.]

Art. 586. [575] **Pleas of guilty and not guilty may be oral.**—The plea of "guilty" and the plea of "not guilty" may be made orally, and shall be entered of record on the minutes of the court.

Ante, Arts. 564, 565, 566, and notes.

7. OF THE ARGUMENT AND DECISION OF MOTIONS, PLEAS AND EXCEPTIONS.

Art. 587. [576] **Motions, etc., to be heard and decided without delay.**—The motion to set aside an indictment or information, and all exceptions, shall be heard together, and shall be decided without delay. [O. C. 502.]

Art. 588. [577] **Same subject.**—The court, at its discretion, may hear and determine such pleadings as are named in the preceding article at any time before a trial upon the plea of not guilty has been entered upon, but not afterward.

Art. 589. [578] **Defendant may open and conclude argument.**—The counsel of the defendant has the right to open and conclude the argument upon all pleadings of the defendant, presented for the decision of the judge.

Art. 590. [579] **Special pleas setting forth matters of fact.**—Such special pleas as set forth matter of fact proper to be tried by a jury shall be submitted, and tried with a plea of "not guilty." [O. C. 503.]

Ante, Art. 572, and notes; post, Art. 770.

Practice. The special plea of former conviction or acquittal, is supported by any evidence on the trial, must be submitted in connection with the plea of not guilty, with instruction to find first on such plea. Grisham v. State, 19 T. Cr. R., 504, and cases cited.

Art. 591. [580] **Process to procure testimony on written pleadings.**—Where the matters involved in any written pleading depend, in whole or in part, upon testimony, either written or verbal, and not altogether upon the record of the court, every process known to the law may be obtained, either on behalf of the state or of the defendant, for the purpose of procuring such testimony; but there shall be no delay on account of the want of the testimony, unless it be shown to the satisfaction of the court that all the means given by the law have been used to procure the same. [O. C. 503.]

Art. 592. [581] **Where motion to set aside, etc., is sustained in misdemeanor.**—Where the motion to set aside an indictment or information, or an exception to the same, is sustained, the defendant, in a case of misdemeanor, shall be discharged, but may be again prosecuted within the time allowed by law. [O. C. 504.]

Construed. Under this article, the defendant in a misdemeanor case cannot be held, as in a felony case, but must be discharged; and this rule applies whether the indictment is set aside on the motion of the state or that of the defendant. Turner v. State, 21 T. Cr. R., 198, 18 S. W. R., 96.

Art. 593. [582] **In cases of felony.**—If the motion to set aside or the exception to the indictment in cases of felony be sustained, the defendant shall not therefore be discharged, but may be immediately recommitted by order of the court, upon motion of the attorney representing the state or without motion; and proceedings may afterward be had against him as if no prosecution had ever been commenced. [O. C. 505.]

Practice nol prosequi in a felony case, upon a good indictment, terminates that prosecution; and there is no authority under our Codes to hold defendant in custody, when no new proceedings by complaint or otherwise have been instituted against him. Venters v. State, 18 T. Cr. R., 198.

Art. 594. [583] **Shall be fully discharged, when.**—Where, after the motion or exception is sustained, it is made known to the court by sufficient testimony that the offense of which the defendant is accused will be barred by lim-

itation before another indictment can be preferred, he shall, in every case, be fully discharged. [O. C. 506.]

Art. 595. [584] **When exception is that no offense is charged.**—If an exception to an indictment or information is taken and sustained upon the ground that there is no offense against the law charged therein, the defendant shall be discharged, unless an affidavit be filed accusing him of the commission of an offense punishable by law. [O. C. 507.]

Practice. If the trial court sustains exceptions to indictment as to matter of substance, it should discharge defendant, and final judgment be entered accordingly; but, if the exception sustained be to matter of form only, the judgment should be but interlocutory and defendant committed to custody by order of court. State v. Thornton, 32 T., 104.

Final judgment cannot be rendered on exceptions to indictment held bad for the offense charged, but good for an offense of lower degree.

In such case the prosecuting officer should either proceed to trial on the lesser degree or dismiss the prosecution and procure a new indictment. State v. Bowden, 41 T., 635.

See question suggested. Venters v. State, 18 T. Cr. R., 198.

Art. 596. [585] **When defendant is held by order of court, etc., shall be discharged in ten days, unless, etc.**—In case the motion to set aside the indictment or the exceptions thereto are sustained, but the court refuses to discharge the defendant at the expiration of ten days from the order sustaining such motions or exceptions, the defendant shall be discharged, unless in the meanwhile complaint under oath has been made before a magistrate charging him with an offense against the law, or unless another indictment has been presented against him for such offense.

Art. 597. [586] **When exception is on account of form.**—When the exception to an indictment or information is merely on account of form, the same shall be amended, if decided to be defective, and the cause proceed upon such amended indictment or information. [O. C. 508.]

Ante, Arts 576, and notes.

Art. 598. [587] **Amendment of indictment or information.**—Any matter of form in an indictment or information may be amended at any time before an announcement of ready for trial upon the merits by both parties, but not afterward. No matter of substance can be amended.

Practice. Indictment cannot be amended as to matter of substance, and such, in an indictment for violating the local option law, is the allegation of the particular election and the newspaper publications under it. Wade v. State, 52 T. Cr. R., 619, 108 S. W. R. 677.

Art. 599. [588] **Amendments, made how.**—All amendments of an indictment or information shall be made with the leave of the court, and under its direction.

Amendment of indictment is permissible only in matter of form or as to the name of the accused, and in no case as to matter of substance. Edwards v. State, 10 T. Cr. R., 25; Calvin v. State, 25 T., 789.

Same. Even as to form amendment cannot be made after both parties have announced. Ante, Art. 598; Osborne v. State, 23 T. Cr. R., 431, 5 S. W. R., 251; Williams v. State, 34 T. Cr. R., 100, 29 S. W. R., 472.

Matters of substance; instances: Commencement and conclusion of indictment or information. Wade v. State, 52 T. Cr. R., 619, 108 S. W. R., 677, and cases cited.

Venue. Smith v. State, 25 T. Cr. R., 454, 8 S. W. R., 645; Orr Id., 453, 8 S. W. R., 644, citing Lawson v. State, 13 T. Cr. R., 83.

Time offense was committed. Huff v. State, 23 Id., 291, 4 S. W. R., 890, and cases cited.

Failure to charge an offense. Bates v. State, 12 T. Cr. R., 26.

Matters of form; instances: Allegations of the court and the term thereof are matters of form and amendable. Murphy v. State, 29 T. Cr. R., 507, 16 S. W. R., 417, and cases cited.

File mark on indictment or information. Boren v. State, 32 T. Cr. R., 637, 25 S. W. R., 775; Rippey v. State, 29 T. Cr. R., 37, 14 S. W. R., 448, and cases cited.

Error as to date of organization of grand jury. Murphy v. State, 36 T. Cr. R., 24, 35 S. W. R., 174.

Term at which grand jury was organized, and matters embraced in second and third subdivision of Art. 451, and such amendments, must be made before announcement for trial. Grayson v. State, 35 T. Cr. R., 629, 34 S. W. R., 691, and see Stiff v. State, 21 T. Cr. R., 255, 17 S. W. R., 726.

Complaint cannot be amended as to matter of substance. Huff v. State, 23 T. Cr. R., 291, 4 S. W. R., 890; Wilson v. State, 6 T. Cr. R., 154; Patillo v. State, 3 Id., 442.

Record must show affirmatively that the amendment was in fact made, and not merely ordered. Robbins v. State, 9 T. Cr. R., 666, and cases cited.

Art. 600. [589] **State may except to plea, etc.**—When a special plea is filed by the defendant, the state may except to its efficiency for substantial defects; and, if the exception be sustained, the plea may be amended. If the plea be not excepted to, it shall be considered that issue has been taken upon the same. [O. C. 509, 510.]

Ante, Art. 572, and notes.

Prejudice. Exception to special plea, not being acted on by the court, failure to submit said plea to the jury was reversible error. Munch v. State, 25 T. Cr. R., 30, 7 S. W. R., 341, citing Grisham v. State, 19 T. Cr. R., 504.

Art. 601. [590] **Former acquittal or conviction; when a bar and when not a bar.**—A former judgment of acquittal or conviction in a court of competent jurisdiction shall be a bar to any further prosecution for the same offense, but shall not bar a prosecution for any higher grade of offense over which said court had not jurisdiction, unless such trial and judgment were had upon indictment or information, in which case, the prosecution shall be barred for all grades of the offense.

Ante, Arts. 9, 255, 256, 561, and notes.

Decisions. Former conviction and life sentence for one murder will not bar prosecution for another murder. Coleman v. State, 35 T. Cr. R., 404, 33 S. W. R., 1083.

The award of new trial to defendant bars the plea of former conviction. Maines v. State, 37 T. Cr. R., 40 S. W. R., 490, and cases cited.

Conviction for the greater offense bars prosecution for the lesser. Givens v. State, 6 T., 344.

The degrees of homicide are not distinct offenses, but are merely grades of one common offense (homicide), and the evidence relied upon in a prosecution for manslaughter, under an indictment for murder, under which defendant had been previously acquitted of the two degrees of murder, being that ordinarily denominated murder evidence, the court did not err in refusing a requested instruction to acquit on the ground that the evidence did not support the charge of manslaughter. Cornelius v. State, 54 T. Cr. R., 172, 112 S. W. R., 1064.

Art. 602. [591] **Plea of not guilty allowed where motion, etc., has been overruled.**—Judgment shall, in no case, be given against the defendant where his motion, exception or plea is overruled; but he shall, in all cases, be allowed

to plead not guilty. If he refuses to plead, it shall be considered as if the plea were offered, and be noted accordingly. [O. C. 512.]

Ante, Arts. 563, 575.

8. OF CONTINUANCE.

Art. 603. [592] **Continuance by operation of law, when.**—Criminal actions are continued by operation of law when there is not sufficient time for trial at any particular term of a court, or where the defendant has not been arrested. [O. C. 513.]

Construed. The entry of a nol. pros., and holding of accused, pending new indictment, in order to secure continuance for the state is irregular and improper practice. Venters v. State, 18 T. Cr. R., 198.

Defendant will not be permitted to resort to the statute on severance from co-defendant, etc., merely to secure the continuance of his own case. Stewart v. State, 27 T. Cr. R., 1, 10 S. W. R., 442.

But the overruling of the defendant's application for continuance is not equivalent to announcement for trial on merits, and so to preclude defendant from invoking the severance statute. Dotson v. State, 32 T. Cr. R., 529, 24 S. W. R., 890.

Continuance as to one of plural defendant's, jointly indicated, operates continuance as to all. Thompson v. State, 9 T. Cr. R., 301, citing Krebs v. State, 3 Id., 348.

Mistrial does not operate continuance; accused may be retried at same term. Jones v. State, 3 Id., 575.

Art. 604. [593] **By consent of parties.**—A criminal action may be continued by consent of the parties thereto, in open court, at any time.

Art. 605. [594] **For sufficient cause shown.**—A criminal action may be continued on the written application of the state or of the defendant, upon sufficient cause shown; which cause shall be distinctly and fully set forth in the application. [O. C. 514, 517, 520.]

Non-statutory continuance. An application for continuance based upon other than statutory grounds, is addressed to the sound discretion of the court, and, unless that discreton has been abused, its action will not be revised. Dougherty v. State, 33 T. Cr. R., 173, 26 S. W. R., 60; Krebs v. State, 8 T. Cr. R., 1; Myers v. State, 7 T. Cr. R., 640, and cases cited.

Absence of leading counsel is not cause for continuance, when it appears that accused was represented by other counsel, and no prejudice to his rights was shown. Mixon v. State, 35 T. Cr. R., 66, 35 S. W. R., 394; Weaver v. State, 34 T. Cr. R., 282, 30 S. W. R., 220.

Intoxication of leading counsel not cause for continuance, when it appears that defense was represented by junior counsel with skill and ability. Webb v. State, 40 S. W. R., 989.

Debilitating sickness of accused on his call for trial is cause for continuance of postponement. Brown v. State, 38 T., 482.

Tainted witness. The trial developing what the main state's witness was an unpardoned convict, accused, to avail the discovery as newly discovered evidence, should have filed motion for continuance to secure record of conviction, etc. Batson v. State, 36 T. Cr. R., 606, 38 S. W. R., 48, distinguishing White v. State, 33 T. Cr. R., 177, 26 S. W. R., 72.

Continuance is not available to secure the evidence of a separately indicted co-defendant whose case had been continued for the state over defendant's objection. Moon v. State, 15 T. Cr. R., 1; Phelps v. State, Id., 45.

Severance being accorder, and the co-defendant convicted, the accused is not entitled to continuance until his co-defendant's appeal is disposed of. Krebs v. State, 8 T. Cr. R., 1, and cases cited. And see Stouard v. State, 27 Id., 1, 10 S. W. R., 442.

Severance is not awardable as basis for continuance when the co-defendant is at large on a forfeited bail bond. Anderson v. State, 8 T. Cr. R., 542.

Legal holiday is not ground for postponement or continuance. Pender v. State, 12 T. Cr. R., 496, citing Dunlap v. State, 9 Id., 179.

Art. 606. [595] **First application by the state for a continuance.**—It shall be sufficient, upon the first application by the state for a continuance, if the same be for the want of a witness, to state—

1. The name of the witness and his residence, if known, or that his residence is unknown.

2. The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused it to be issued, or to have applied for, a subpoena in cases where the law authorized the issuance of an attachment.

3. That the testimony of the witness is believed, by the applicant, to be material for the state. [O. C. 515.]

Disobedience of subpoena; what constitutes. Ante, Art. 530; Hill v. State, 18 T. Cr. R., 665, and cases cited. And see Harvey v. State, 35 Id., 545, 34 S. W. R., 623; Mixon v. State, 36 T. Cr. R., 66, 35 S. W. R., 394.

Diligence. A witness' default on subpoena entitled accused to attachment. Clark v. State, 38 T. Cr. R., 30, 40 S. W. R., 992; Rowland v. State, 35 T., 487; Long v. State, 17 T. Cr. R., 128.

Failure to sue out attachment on disobedience of subpoena is failure of diligence. Harvey v. State, 35 T. Cr. R., 545, 34 S. W. R., 623; Massie v. State, 30 T. Cr. R., 64, 16 S. W. R., 770, and cases cited.

Diligence requires that the party desiring the testimony of a witness subpoenaed by the other party, shall have the process sued out by the first party show the fact. Byrd v. State, 39 T. Cr. R., 609, 47 S. W. R., 72; Mixon v. State, 36 T. Cr. R., 66, 35 S. W. R., 394.

Practice. The application for continuance must be complete within itself, and no presumptions will be entertained to support it. Massie v. State, 30 T. Cr. R., 64, 16 S. W. R., 770; Thomas v. State, 17 T. Cr. R., 437, and cases cited.

Art. 607. [569] **Subsequent application by the state.**—On any subsequent application for a continuance by the state, for the want of a witness, the application, in addition to the requirements in the preceding article, must show—

1. The facts which the applicant expects to establish by the witness, and it must appear to the court that they are material.

2. That the applicant expects to be able to procure the attendance of the witness at the next term of the court.

3. That the testimony can not be procured from any other source during the present term of the court. [O. C. 516.]

Art. 608. [597] **First application by defendant for a continuance.**—In the first application by the defendant for a continuance, it shall be necessary, if the same be on account of the absence of a witness, to state under oath—

1. The name of the witness and his residence, if known, or that his residence is not known.

Post, Art. 609, and notes.

Construed. Application must state residence of witness, and if temporarily absent how long he had been absent, and when he left county of his residence. Dove v. State, 36 T. Cr. R., 105, 35 S. W. R., 648; Thomas v. State, 17 T. Cr. R., 437, and cases cited.

Application insufficient, which failed to show when it was ascertained that the witness resided in the county to which second attachment was requested. Hughes v. State, 18 T. Cr. R., 130.

Facts indicating that alleged absent witness was a fictitious person. Byrd v. State, 39 T. Cr. R., 609, 47 S. W. R., 721.

2. The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused to be issued, or to

have applied for, a subpoena, in cases where the law authorizes the issuance of an attachment.

Diligence; what must be shown: Henderson v. State, 5 T. Cr. R., 134; Labbaite v. State, 6 T. Cr. R., 257; Reynolds v. State, 7 Id., 576; Skipworth v. State, 8 Id., 135; Anderson v. State, Id., 542; Greenwood v. State, 9 Id., 638; O'Neal v. State, 14 Id., 582; Hart v. State, Id., 657; Childers v. State, 16 Id., 524; Thomas v. State, 17 Id., 437; Hawkins v. State, Id., 593; Timbrook v. State, 18 Id., 1; McGrath v. State, 35 Id., 413, 34 S. W. R., 127; Peyton v. State, Id., 508, 34 S. W. R., 615; Snodgrass v. State, 36 Id., 207, 36 S. W. R., 477; Henry v. State, 38 T. Cr. R., 356, 42 S. W. R., 559; Shanks v. State, 25 T., Supp., 326.

Failure to sue out process; when excusable: Buie v. State, 1 T. Cr. R., 452; Mapes v. State, 14 Id., 129; Long v. State, 17 Id., 128; Phillips v. State, 35 Id., 480, 34 S. W. R., 272; Dawson v. State, 38 T. Cr. R., 9, 40 S. W. R., 731; Clark v. State, Id., 30, 40 S. W. R., 992; Boggs v. State, Id., 82, 41 S. W. R., 642; DeWarren v. State, 29 T. 464; Dinkins v. State, 42 Id., 250.

When not excusable: Goodman v. State, 4 T. Cr. R., 349; Coward v. State, 6 Id., 59; Hutchinson v. State, Id., 648; Hicks v. State, 10 Id., 490; Hill v. State, 36 Id., 438, 37 S. W. R., 736; Yanez v. State, 20 T., 656; Shanks v. State, 25 T., Supp., 326; Townsend v. State, 41 Id., 134; Cox v. State, 43 Id., 656.

Process. The application for continuance must show the process for the absent witness and the diligence used in procuring service of the same. Note essentials of such showing. Atkins v. State, 11 T. Cr. R., 8; Williams v. State, 10 Id., 114; Payton v. State, 33 Id., 508, 34 S. W. R., 615; Snodgrass v. State, 36 T. Cr. R., 207, 36 S. W. R., 477; Dove v. State, 36 T. Cr. R., 105, 35 S. W. R., 648; Sykes v. State, 53 T. Cr. R., 165, 108 S. W. R., 1179; Price v. State, Id., 428, 11 S. W. R., 654.

Attachment. Hyde v. State, 16 T., 445; Blaine v. State, 34 T. Cr. R., 448; Hill v. State, 18 Id., 665; Rowland v. State, 35 T., 487; Holland v. State, 38 T., 474; Townsend v. State, 5 T. Cr. R., 574; Skipworth v. State, 8 Id., 135; Coward v. State, 6 Id., 59; Hughes v. State, 18 Id., 130.

Diligence as to deposition. If the case be one in which the deposition of an absent witness is authorized, diligence to procure such deposition must be shown. Harvey v. State, 35 T. Cr. R., 545, 34 S. W. R., 623; De Alberts v. State, 34 T. Cr. R., 508, 31 S. W. R., 391; Stouard v. State, 27 T. Cr. R., 1, 10 S. W. R., 442.

Burden of proof on defendant seeking continuance. Long v. State, 17 T. Cr. R., 128, and cases cited.

3. The facts which are expected to be proved by the witness, and it must appear to the court that they are material.

Application is insufficient if it fails to set out facts expected to be proved. Pilot v. State, 38 T. Cr. R., 575, 43 S. W. R., 112; Thomas v. State, 17 T. Cr. R., 437; Holland v. State, 31 Id., 345, 20 S. W. R., 750; King v. State, 34 T. Cr. R., 228, 29 S. W. R., 1086.

Such facts must be stated definitely, and not by way of vague, indefinite allegations, conclusions and opinions. Snodgrass v. State, 36 T. Cr. R., 207, 36 S. W. R., 407; Shirley v. State, 37 T. Cr. R., 475, 36 S. W. R., 267; Garrett v. State, Id., 198, 38 S. W. R., 1017; Pilot v. State, supra.

And see Brown v. State, 23 T., 195; Henry v. State, 38 T. Cr. R., 306, 42 S. W. R., 559; Willison v. State, 7 T. Cr. R., 400; Bowman v. State, 40 T., 8; McCulloch v. State, 35 T. Cr. R., 268, 33 S. W. R., 230.

Must show materiality. Garrett v. State, 37 T. Cr. R., 198, 38 S. W. R., 1017; Wyley v. State, 34 T. Cr. R., 514, 31 S. W. R., 393; Williams v. State, 34 T. Cr. R., 327, 30 S. W. R., 669; Yates v. State, 35 T. Cr. R., 231, 33 S. W. R., 121; Mixon v. State, 36 T. Cr. R., 66, 35 S. W. R., 394; Koller v. State, Id., 496, 38 S. W. R., 44; Robinson v. State, 37 T. Cr. R., 195, 39 S. W R., 107; Myers v. State, 56 T. Cr. R., 222, 118 S. W. R., 1032; Yale v. State, Id., 272, 120 S. W. R., 419.

Competency and admissibility. The absent testimony must be both competent and admissible. Clore v. State, 26 T. Cr. R., 624; 10 S. W. R., 242; Bailey v. State, Id., 706, 9 S. W. R., 270; King v. State, 34 T. Cr. R., 228, 29 S. W. R., 1086; Mask v. State, Id., 136, 31 S. W. R., 408; Linhart v. State, 33 T. Cr. R., 504, 27 S. W. R., 260; Magruder v. State, 35 T. Cr. R., 214, 33 S. W. R., 233.

Alibi. Dove v. State, 36 T. Cr. R., 105, 35 S. W. R., 648; Long v. State, 39 T. Cr. R., 461, 46 S. W. R., 821; Underwood v. State, 38 T. Cr. R., 193, 41 S. W. R., 618; Blake v. State, Id., 377, 43 S. W. R., 107

Threats. Ellis v. State, 30 T. Cr. R., 601, 18 S. W. R., 139; Allen v. State, 17 T. Cr. R., 637; Brown v. State, 23 T., 195; Norris v. State, 32 T. Cr. R., 172, 22 S. W. R., 592; Riley v. State, 9 T. Cr. R., 354; Dowe v. State, 31 Id., 278, 20 S. W. R., 583; Miller, Id., 609, 21 S. W. R., 925.

Defendant's good character. For this purpose, continuance not available. Wright v. State, 37 T. Cr. R., 627, 40 S. W. R., 491; Parks v. State, 35 T. Cr. R., 378, 33 S. W. R., 872; Benson v. State, 38 T. Cr. R., 487, 43 S. W. R., 527.

Impeaching testimony. Continuance not available for that purpose alone. Garrett v. State, 37 T. Cr. R., 198, 38 S. W. R., 1017; Rodgers v. State, 36 T. Cr. R., 563, 38 S. W. R., 184; Butts v. State, 35 T. Cr. R., 364, 33 S. W. R., 866; Franklin v. State, 34 T. Cr. R., 203, 29 S. W. R., 1088.

The absent testimony must be exculpatory, but see the rules by which the issue is tested on conflict of the inculpatory proof and that set out in the application for continuance. McAdams v. State, 26 T. Cr. R., 86, 5 S. W. R., 826; Millirons v. State, 34 T. Cr. R., 12, 28 S. W. R., 685. And see Jackson v. State, 31 T. Cr. R., 552, 21 S. W. R., 367; Boggs v. State, 38 T. Cr. R., 82, 41 S. W. R., 642.

Testimony not inconsistent with the guilt of accused is immaterial. Browning v. State, 26 T. Cr. R., 432, 9 S. W. R., 770; Abrigo v. State, 29 T. Cr. R., 143, 15 S. W. R., 408.

Cumulative testimony. Merely because the absent testimony is cumulative should not defeat a first continuance. McAdams v. State, 24 T. Cr. R., 86, 5 S. W. R., 826; Hyden v. State, 31 T. Cr. R., 401, 20 S. W. R., 764; Wilson v. State, 18 T. Cr. R., 576; Adams v. State, 19 Id., 1. Compare Harvey v. State, 35 T. Cr. R., 545, 34 S. W. R., 623, and see Gilcrease v. State, 33 T. Cr. R., 619, 28 S. W. R., 531; Johnson v. State, 55 T. Cr. R., 134, 114 S. W. R., 1178.

Failing in diligence and based on testimony purely cumulative, application for second continuance was properly refused. Lahue v. State, 51 T. Cr. R., 159, 101 S. W. R., 1008; Dobbs v. State, 54 T. Cr. R., 579, 113 S. W. R., 921.

Contradictory evidence. Continuance is not available for evidence to set up a defense contradictory of that already interposed. Bratton v. State, 34 T. Cr. R., 477, 31 S. W. R., 379; Burleson v. State, 33 T. Cr. R., 549, 28 S. W. R., 198.

4. That the witness is not absent by the procurement or consent of the defendant.

Application must allege that the witness' absence is without defendant's procurement or consent, and negative any possible contrary inference, or that it is for delay. White v. State, 9 T. Cr. R., 41; Pullen v. State, 11 Id., 89; Cocker v. State, 31 T., 498.

And these allegations may be met and overcome by controverting affidavits for the state. Sargent v. State, 35 T. Cr. R., 325, 33 S. W. R., 364, and cases cited. If the improbability of ever securing the witness appears, the continuance should be refused. Sinclair v. State, 34 T. Cr. R., 453, 30 S. W. R., 1070.

First application for continuance need not state that the desired proof can not be otherwise procured. Parker v. State, 18 T. Cr. R., 72, citing Pinckard v. State, 13 T. Cr. R., 468.

Practice. Suggestion that deceased's friends may have procured the absence of certain witness calls for close inquiry into the matter by the court. Logan v. State, 39 T. Cr. R., 573, 47 S. W. R., 645.

5. That the application is not made for delay.

White v. State, 9 T. Cr. R., 41; Zumwalt v. State, 3 Id., 521; Peck v. State, Id., 611.

6. That there is no reasonable expectation that attendance of the witness can be secured during the present term of court by a postponement of the trial to some future day of said term; and the truth of the first, or any subsequent application, as well as the merit of the ground set forth therein and its sufficiency shall be addressed to the sound discretion of the court called to

pass upon the same, and shall not be granted as a matter of right; provided, that should an application for continuance be overruled, and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the application was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted, and the cause continued for the term, or postponed to a future day of the same term. [O. C. 518.]

Timbrook v. State, 18 T. Cr. R., 1; Strickland v. State, 13 Id., 364; Beatey v. State, 16 Id., 421; Thomas v. State, 17 Id., 437.

Construed. Since the adoption of this subdivision, continuance, the application therefor complying with all statutory requirements, is no longer, as theretofore, a matter of right, but is addressed to the sound discretion of the court. Abrigo v. State, 29 T. Cr. R., 143, 15 S. W. R., 408; McAdams v. State, 24 T. Cr. R., 86, 5 S. W. R., 826; Wooldridge v. State, 13 T. Cr. R., 443. And see Bronson v. State, 127 S. W. R., 175.

Scire facias. Rule differs, however, in a scire facias case, wherein, as in civil cases, if the application conforms to the statute, the continuance is a matter of right. Bailey v. State, 26 T. Cr. R., 341, 9 S. W. R., 270.

As to judicial discretion: Miller v. State, 18 T. Cr. R., 232; Harris v. State, Id., 287; Irvine v. State, 20 Id., 12; McAdams v. State, 24 Id., 86, 5 S. W. R., 826.

Art. 609. [598] **Subsequent application by defendant.**—Subsequent applications for continuance on the part of the defendant shall, in addition to the requisites in the preceding article, state also—

1. That the testimony can not be procured from any other source known to the defendant.

McCulloch v. State, 35 T. Cr. R., 268, 33 S. W. R., 230; Henderson v. State, 5 T. Cr. R., 134; Pinckard v. State, 13 Id., 468.

2. That the defendant has reasonable expectation of procuring the same at the next term of the court. [O. C. 516.]

Smith v. State, 22 T. Cr. R., 316, 3 S. W. R., 684.

Generally. Second application must conform strictly to the statute, and nothing will be presumed in its favor. Henderson v. State, 5 T. Cr. R., 134; Barrett v. State, 9 Id., 33.

Must show diligence, and the diligence be sufficient. Laurence v. State, 31 Id., 601, 21 S. W. R., 766; Handline v. State, 6 Id., 347.

Will not be granted for merely cumulative evidence. Harvey v. State, 35 Id., 545, 34 S. W. R., 623, and compare Gilcrease v. State, 33 T. Cr. R., 619, 28 S. W. R., 531; Johnson v. State, 55 T. Cr. R., 134, 114 S. W. R., 1178.

Diligence not shown: Washington v. State, 35 T. Cr. R., 154, 32 S. W. R., 693; Dill v. State, 1 T. Cr. R., 278; Parkerson v. State, 9 Id., 72; Martin v. State, Id., 293; Henderson v. State, 22 T., 593; Hyde v. State, 16 T., 445.

Sufficient as to diligence: Preston v. State, 4 T. Cr. R., 186.

Practice. Subsequent applications for continuance are addressed to the sound discretion of the court. Krebs v. State, 8 T. Cr. R., 1; Johnson v. State, 7 Id., 297; Myers v. State, Id., 640.

An application which follows a prior continuance by consent is a second application, and must conform to the statute. McKinney v. State, 8 T. Cr. R., 626.

Art. 610. [599] **Defendant shall swear to his application.**—All applications for continuance on the part of the defendant must be sworn to by himself. [O. C. 521.]

Anderson v. State, 8 T. Cr. R., 542.

Art. 611. [600] **Written motion not necessary.**—It shall not be necessary to file any written motion for continuance; the motion, based upon the written statement, may be made orally. [O. C. 522.]

Art. 612. [601] **Statements in application may be denied under oath, etc.**—Any material fact stated, affecting diligence, in an application for a continuance may be denied by the adverse party. The denial shall be in writing, and supported by the oath of some credible person, and filed as soon as practicable after the filing of the application for a continuance.

Art. 613. [602] **Proceedings when denial is filed.**—When a denial is filed, as provided in the preceding article, the issue shall be tried by the judge; and he shall hear testimony by affidavits, and grant or refuse continuance, according to the law and facts of the case.

Practice. Under this and the preceding article, the state may controvert the showing of diligence by counter affidavits. Murry v. State, 1 T. Cr. R., 174; Rucker v. State, 7 Id., 549; Hyde v. State, 16 T., 445.

This right, however, does not extend to the traverse of the desired testimony, but only to diligence or the probability of securing the witness. Dixon v. State, 2 T. Cr. R., 530. But as contra, under certain circumstances, see Henry v. State, 38 Id., 306, 42 S. W. R., 559.

The materiality and truth of absent testimony can not be contested before a jury, and before the court, only on motion for new trial, not on the original hearing of the application for continuance. Attaway v. State, 31 T. Cr. R., 475, 20 S. W. R., 925.

Article 601 applies only to the issue of diligence. Howard v. State, 8 T. Cr. R., 53.

Proper to refuse continuance on the contraverting affidavits of the witnesses named in the application. Wilkins v. State, 35 Id., 525, 34 S. W. R., 627.

The trial judge can hear the issue controverting diligence, only on evidence supported by affidavit. Richardson v. State, 28 T. Cr. R., 216, 12 S. W. R., 870.

That the state failed to controvert diligence on the hearing of the application will not preclude it from doing so when the issue is again brought forward on motion for new trial. Richardson v. State, supra; Jackson v. State, 23 T. Cr. R., 183, 5 S. W. R., 371, and cases cited; Jetton v. State, 17 T. Cr. R., 311. And see post, article 841, and notes.

Art. 614. [603] **No argument heard, unless, etc.**—No argument shall be heard on an application for a continuance, unless requested by the judge; and, when argument is heard, the applicant shall have the right to open and conclude the same.

Discretion to hear argument or not abides with the trial judge. Parkerson v. State, 9 T. Cr. R., 72.

Art. 615. [604] **Defendant in capital case entitled to bail, when, etc.**—If a defendant in a capital case demand a trial, and it appears that more than one continuance has been granted to the state, and that the defendant has not before applied for a continuance, he shall be entitled to be admitted to bail, and unless it be made to appear to the satisfaction of the court that a material witness of the state had been prevented from attendance by the procurement of the defendant or some person acting in his behalf. [O. C. 524.]

Under this article, the state having secured two continuances, and the accused applied for none, habeas corpus for bail was available to the latter. Ex parte Walker, 3 T. Cr. R., 668.

Art. 616. [605] **Continuance after trial commenced, when.**—A continuance may be granted on the application of the state or defendant after the trial has commenced, when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial commenced, which no reasonable diligence could have anticipated, the applicant is so taken by surprise that a fair trial can not be had, or the trial may be postponed to a subsequent day of the term. [O. C. 526.]

Practice. Drunkenness of defendant when his case is called for trial, to be cause for postponement, should be claimed at the time, and not reserved for motion for new trial. Inglin v. State, 36 T. Cr. R., 472, 37 S. W. R., 861.

And, as to action of court on appearance of defendant for trial drunk, see Branch v. State, 35 T. Cr. R., 304, 33 S. W. R., 356.

The sudden seizure and debilitating illness of the defendant during trial requires postponement of proceedings or continuance. Brown v. State, 38 T., 482.

Illness of a witness that compelled him to leave the court house before testifying will not authorize award of new trial, when the evidence, as a whole, and independent of his testimony, is sufficient to sustain the conviction. Land v. State, 34 T. Cr. R., 330, 30 S. W. R., 788.

The inculpatory evidence operating as a surprise, which rendered necessary the testimony of a witness duly served, but disabled by acute illness, motion to withdraw announcement and continuance should have been granted. Schulze v. State, 28 T. Cr. R., 316, 12 S. W. R., 1084.

The critical, immediate illness of a material witness entitles defendant to a continuance, and he can not be compelled to go with the court and jury to the house of the sick witness to take his testimony. Adams v. State, 9 T. Cr. R., 1.

Continuance being asked for two witnesses, one absent and the other drunk, the court held the latter sober enough to testify, and ordered the defendant to trial, who was convicted on circumstantial evidence. Continuance should have been granted. McDow v. State, 10 T. Cr. R., 98.

Same. If the defendant was induced by state's deception to announce ready for trial and is convicted, new trial should be granted. March v. State, 44 T., 64; Eldridge v. State, 12 T. Cr. R., 208. And see Cotton v. State, 4 T., 260; Stanley v. State, 16 T. Cr. R., 392.

And further, on artifice or deception by the prosecution, see Townsend v. State, 5 T. Cr. R., 574; Robbins v. State, 33 Id., 573, 28 S. W. R., 473; Garner v. State, 34 T. Cr. R., 356, 30 S. W. R., 782.

Surprise. Under our practice, a party need not be surprised by the testimony of his witness before attacking it, but may do so in any manner except by proving bad character. See in extenso, Blake v. State, 38 T. Cr. R., 377, 43 S. W. R., 107.

Being surprised by the testimony of a witness, the party must move for continuance or postponement to meet the testimony. He can not raise the issue of surprise for first time on motion for new trial. Caldwell v. State, 28 T. Cr. R., 566, 14 S. W. R., 122; Bryant v. State, 35 T. Cr. R., 394, 33 S. W. R., 978.

Further on surprise, see Higginbotham v. State, 3 T. Cr. R., 447; Walker v. State, 7 Id., 245; Hodde v. State, 8 Id., 382; Webb v. State, 9 Id., 490; Childs v. State, 10 Id., 183; Creswell v. State, 14 Id., 1; Sutton v. State, Id., 518; Yanez v. State, 20 T., 656; Cunningham v. State, Id., 162; Mayfield v. State, 44 Id., 59.

Practice. Continuance for surprise should not be refused merely upon the ground of previous overruling of ordinary application for continuance. McKinney v. State, 8 T. Cr. R., 626.

Same. While surprise can not be urged first in the motion for new trial, it can be again raised at that time, because of refusal of the court to postpone in the first instance. Roach v. State, 21 T. Cr. R., 249, 17 S. W. R., 464, and cases cited.

This article does not contemplate that, in case of postponement, after the jury was impaneled, the court had also the right to discharge the jury; nor would it have that right even in the case of continuance for the term, except upon a clear showing of necessity. Pizano v. State, 20 T. Cr. R., 139.

Continuance; joint defendants: Krebs v. State, 3 T. Cr. R., 348; s. c., 8 T. Cr. R., 1; Slawson v. State, 7 Id., 63; Myers v. State, Id., 640; Thompson v. State, 9 Id., 301; Stouard v. State, 27 Id., 1.

Amendment of application for continuance is a matter within the sound discretion of the court. McKinney v. State, T. Cr. R., 626; Skaro v. State, 43 T., 88.

Mere admission by the state that the absent witness, if present, would testify as claimed by defendant, is not sufficient of itself to defeat continuance. Hyde v. State, 16 T., 446; DeWarren v. State, 29 Id., 464. And further, on the subject of admissions to defeat continuance, see Skaro v. State, 43 T., 88; Graves v. State, 9 T. Cr. R., 559; Hackett v. State, 13 Id., 406; Adams v. State, 19 Id., 1; McGrew v. State, 31 Id., 356, 20 S. W. R., 740; Harvey v. State, 35 Id., 545, 34 S. W. R., 623; Phipps v. State, 36 T. Cr. R., 216, 36 S. W. R., 753.

Practice. In its sound discretion, the court, for good reason only, may set aside a continuance granted defendant without defendant's consent. Brown v. State, 3 T. Cr. R., 294. And see Callahan v. State, 30 T., 488.

On appeal. The appellate court can not, in the absence of a statement of facts, pass intelligently on the action of the trial court in overruling a motion for continuance, as, in revising that action, it must be positioned to pass upon every phase of the absent testimony in the light of the evidence on the trial. Trevinio v. State, 2 T. Cr. R., 90; Wooldridge v. State, 13 Id., 443; Holland v. State, 31 Id., 345, 20 S. W. R., 750; Loakman v. State, 32 T. Cr. R., 561, 25 S. W. R., 20; Smith v. State, 33 T. Cr. R., 569, 28 S. W. R., 471; Bryant v. State, 35 T. Cr. R., 394, 33 S. W. R., 978.

9. DISQUALIFICATION OF THE JUDGE.

Art. 617. [606] **Causes which disqualify judges, etc.**—No judge or justice of the peace shall sit in any case where he may be the party injured, or where he has been of counsel for the state or the accused, or where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree. [Const., Art. 5, § 11.]

Construed in connection with section 2, article 5, of the constitution the tests of disqualification under the statute are: Pecuniary interest; whether he is the injured party; relationship to the party at interest or the injured party; and whether he has been of counsel in the case.

Interest does not signify every bias, partiality or prejudice which the judge may entertain with reference to the case, as contradistinguished from "interest" as indicating a pecuniary right or privilege in some way dependent upon the result of the cause. Taylor v. Williams, 26 T., 583.

The judge of a court of civil appeals, who is a tax payer of a certain city, has no such pecuniary interest in said city as would disqualify him to sit on a case involving action for damages against that city. Dallas v. Peacock, 33 S. W. R., **distinguishing** Austin v. Nalle, 85 T., 520, 22 S. W. R., 668.

County judge not disqualified by reason of fees allowed him in criminal cases. Bennett v. State, 4 T. Cr. R., 72.

An see generally in illustration, Clark v. State, 23 T. Cr. R., 260, 5 S. W. R., 115; January v. State, 36 Id., 488, 38 S. W. R., 179, distinguishing Davis v. State, 44 T., 583; Ex parte Ambrose, 32 T. Cr. R., 468, 24 S. W. R., 291.

Prejudice of trial judge not ground for reversal of conviction, unless such prejudice is based upon probable interest. Johnson v. State, 31 T. Cr. R., 456, 20 S. W. R., 985.

Practice. The provisions of this statute must be fully complied with to entitle the accused to the change, and this is not done by the supporting affidavit of himself, and one other person. Macklin v. State, 53 T. Cr. R., 197, 109 S. W. R., 145, citing O'Neal v. State, 14 Id., 582; Gibson v. State, 53 Id., 349, 110 S. W. R., 41, and see Mitchell v. State, 43 T., 512.

Relationship; how computed: See Reed v. State, 11 T. Cr. R., 587; January v. State, 36 Id., 488, 38 S. W. R., 179; Ex parte Tinsley, 37 T. Cr. R., 517, 40 S. W. R., 360.

Disqualified as of counsel: Thompson v. State, 9 T. Cr. R., 649; Wilks v. State, 27 Id., 381, 11 S. W. R., 415; Johnson v. State, 29 Id., 526, 16 S. W. R., 418; Abrams v. State, 31 Id., 449, 20 S. W. R., 987; Utzman v. State, 32 Id., 426, 24 S. W. R., 412; Koening v. State, 33 Id., 367, 26 S. W. R., 835; Beason v. State, 39 Id., 56, 44 S. W. R., 167.

A disqualified judge can not be qualified by consent of parties. Abrams v. State, 31 T. Cr. R., 449, 20 S. W. R., 987, and cases cited, following Slaven v. Wheeler, 58 T., 23.

Trial of the issue of disqualification: Benson v. State, 39 T. Cr. R., 56, 44 S. W. R., 167; Slaven v. Wheeler, 58 T., 23; Abrams v. State, 31 T. Cr. R., 449, 20 S. W. R., 987; Johnson v. State, 29 Id., 526, 16 S. W. R., 418.

Art. 618. [607] **Proceedings when judge of district court is disqualified.**—If a judge of the district court shall be disqualified from sitting in any crimi-

nal action pending in his court, no change of venue shall be made necessary thereby; but the parties, or their counsel, shall have the right to select and agree upon an attorney of the court to preside as special judge in the trial thereof. [Act Aug. 15, 1876, p. 141.]

Practice. Under this article, the district attorney, as representing the state, is empowered to agree with defendant on a special judge, when the regular judge is disqualified. Davis v. State, 44 T., 523; Early v. State, 9 T. Cr. R., 476, overruling Murray v. State, 34 T., 331.

Such agreement must be in writing, and verbal arrangements will not suffice. Thompson v. State, 9 T. Cr. R., 649; Smith v. State, 24 Id., 290, 6 S. W. R., 40.

Art. 619. [608] **Should the parties fail to agree.**—Should the parties not agree upon an attorney to try the case on or before the day set for the trial of the criminal docket, the district judge shall forthwith certify the facts to the governor, who shall at once appoint some practicing attorney, learned in the law, to try such case.

Art. 620. [609] **Special judge shall take oath of office.**—The attorney agreed upon or appointed, as provided in the two preceding articles, shall, before he enters upon his duties as special judge, take the oath of office required by the constitution of the state; and his selection by the parties, or appointment by the governor, as the case may be, and the fact that the oath of office was administered to him shall be entered upon the minutes of the court as a part of the record of the cause; and he shall have all the power and authority of the district judge that may be necessary to enable him to conduct, try, determine and finally dispose of such case.

Practice. As to procedure in the selection of special judge, see in extenso Smith v. State, 24 T. Cr. R., 290, 6 S. W. R., 40.

And as to oath, see same case, distinguishing Early v. State, 9 T. Cr. R., 476.

And generally see McMurry v. State, 9 Id., 207; Perry v. State, 14 Id., 166; Wilson v. State, Id., 205; Powers v. State, 23 Id., 42, 5 S. W. R., 153; Blanchette v. State, 29 T. Cr. R., 46, 14 S. W. R., 392; Lockhart v. State, 32 Id., 149, 22 S. W. R., 413; Brazell v. State, 33 Id., 333, 26 S. W. R., 723; Gill v. State, 36 Id., 509, 38 S. W. R., 190.

On appeal, the record must show the disqualification of the regular judge, and by what authority the special judge was selected or designated. This record is also defective, in not showing that the special judge was sworn. Reed v. State, 55 T. Cr. R., 137, 114 S. W. R., 834.

Art. 621. [610] **When judge of county court is disqualified, etc.**—When the judge of the county court is disqualified in any criminal case pending in the county court, the parties interested may, by consent, appoint a proper person to try said case; and, if the parties shall fail to agree upon a special judge to try such case, on or before the third day of the term of the court at which said case may be called for trial, the county judge shall forthwith certify the facts to the governor, who shall appoint some practicing attorney to try such case. [Amended 1893, p. 83; Const., Art. 5, § 16.]

Art. 622. [610a] **Special judge shall take oath.**—The attorney agreed upon or appointed as provided in the preceding article shall, before he enters upon his duties as special judge, take the oath of office required by the constitution of the state; and his selection by the parties or appointment by the governor, as the case may be, and the fact that the oath of office was administered to him, shall be entered upon the minutes of the court as a part of the records of the cause; and he shall have all the power and authority of the county judge that may be necessary to enable him to conduct, try, and finally dispose of said case. [Act 1893, p. 83.]

Art. 623. [610b] **Compensation.**—A special judge selected or appointed in accordance with the preceding articles shall receive the same compensation as now provided by law for regular county judges in similar cases. [Id.]

Art. 624. [611] **When a justice of the peace is disqualified.**—If a justice of the peace shall be disqualified from sitting in any criminal action pending before him, he shall transfer the same to the nearest justice of the peace of the county who is not disqualified to try it.

Art. 625. [612] **What the order of transfer shall state, etc.**—In the cases provided for in the two preceding articles, the order of transfer shall state the cause of the transfer, and name the court to which the transfer is made, and the time and place, when and where, the parties and witnesses shall appear before such court; and the rules governing the transfer of cases from the district to inferior courts shall govern in the transfer of cases under the two preceding articles.

10. CHANGE OF VENUE.

Art. 626. [613] **District judge may order change of venue on his own motion, when.**—Whenever in any case of felony the district judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the state, can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue. [Act Aug. 21, 1876, p. 274; Const., Art. 5, § 45.]

Post, Arts. 637, 638, 639, 640.

Change of venue by the court on its own motion: Frizzell v. State, 30 T. Cr. R., 42, 16 S. W. R., 751, and cases cited.

Order must show grounds: Cox v. State, 8 T. Cr. R., 254; Bowden v. State, 12 Id., 246; Campbell v. State, 35 Id., 160, 32 S. W. R., 774.

Prejudice of the trial judge is no ground for change of venue. Gaines v. State, 38 T. Cr. R., 202, 42 S. W. R., 385.

Practice. Trial judge should change venue when satisfied that, from any cause, a fair and impartial trial of the case can not be had. Webb v. State, 9 T. Cr. R., 490; see Steagald v. State, 22 Id., 464, 73 S. W. R., 771; Massey v. State, 31 Id., 371, 20 S. W. R., 753, 3 S. W. R., 771; Bohannon v. State, 14 Id., 271; Frizzell v. State, 30 Id., 42, 16 S. W. R., 751; Lacey v. State, 30 Id., 119, 16 S. W. R., 761.

Same. Defendant would have right, on change of venue by the court, to another change upon any statutory ground that would have sufficed him in the first instance. Frizzell v. State, supra; citing Thurmond v. State, 27 T. Cr. R., 347; 11 S. W. R., 451.

And see Woodring v. State, 33 T. Cr. R., 26, 24 S. W. R., 293.

Same. Objection to change of venue must be taken in the tribunal ordering the change, and can not be made by plea to the jurisdiction of the new tribunal. Ex parte Cox, 12 T. Cr. R., 665, and cases cited; Bowden v. State, 12 Id., 246.

Change of venue is not authorized in a misdemeanor case. Fox v. State, 53 T. Cr. R., 153, 109 S. W. R., 370, following Halsel v. State, 29 Id., 22, 18 S. W. R., 418; Johnson v. State, 31 Id., 456, 20 S. W. R., 985.

Two mistrials will authorize the court to change the venue, when it is satisfied a fair and impartial trial can not be had in the county of prosecution. Campbell v. State, 35 T. Cr. R., 160, 32 S. W. R., 774. And see Webb v. State, 9 Id., 490.

Art. 627. [614] **State may have change of venue, when, etc.**—Whenever the district or county attorney shall represent in writing to the district court before which any felony case is pending, that, by reason of existing combinations or influences in favor of the accused, or on account of the lawless condition of affairs in the county, a fair and impartial trial as between the accused and the state can not be safely and speedily had; or whenever he shall represent that the life of the prisoner, or of any of the witnesses, would be jeoparded

by a trial in the county in which the case is pending, the judge shall hear proof in relation thereto, and, if satisfied that such representation is well founded, and that the ends of public justice will be subserved thereby, he shall order a change of venue to any county in his own, or in an adjoining district. [Act Aug. 21, 1876, p. 274.]

Massey v. State, 31 T. Cr. R., 371, 20 S. W. R., 758; Stegald v. State, 22 Id., 464, 3 S. W. R., 771; Fox v. State, 53 Id., 153, 109 S. W. R., 270.

Art. 628. [615] **Change of venue; when granted on application of defendant.**—A change of venue may be granted on the written application of the defendant, supported by his own affidavit and the affidavit of at least two credible persons, residents of the county where the prosecution is instituted, for either of the following causes, the truth and sufficiency of which the court shall determine:

1. That there exists in the county where the prosecution is commenced so great a prejudice against him that he can not obtain a fair and impartial trial.

2. That there is a dangerous combination against him instigated by influential persons, by reason of which he can not expect a fair trial. [O. C. 527.]

Construed. This article has no connection with, or reference to, Art. 629, post, and the "prejudice" herein contemplated is such prejudice, from whatever cause or source, against the accused individually, or because of the particular case against him, as to involve a prejudgment of the same, and deprive him of "a fair trial by an impartial jury." Such prejudice being shown, the defendant can not be deprived of his right to a change of venue, because the "bias or prejudice" of the jurors summoned to try him must be tested by subdivisions 12 and 13 of Art. 692, post. See in extenso, Randle v. State, 34 T. Cr. R., 43, 28 S. W. R., 953. And see Meyers v. State, 39 Id., 500, 46 S. W. R., 817.

Proof showed that the prejudice against accused was confined to a single section of the county, and one of the jurors who tried the case resided in that section. Held, the refusal to change the venue was not error. Johnson v. State, 26 T. Cr. R., 399, 9 S. W. R., 762.

The action of the trial court on change of venue asked on the ground of local prejudice will not be revised in the absence of a clear showing of abuse of discretion. Lacy v. State, 30 T. Cr. R., 119, 16 S. W. R., 761, and cases cited; Bohannon v. State, 14 Id., 271; Gaines v. State, 38 Id., 202, 42 S. W. R., 385, and cases cited.

The mere fact that the sheriff, apprehensive of mob violence, called for troops, which troops were present at the trial, not sufficient to require change of venue. Harrison v. State, 43 S. W. R., 1002.

The prejudice of the trial judge not alone sufficient to require change of venue. Gaines v. State, 38 T. Cr. R., 202, 42 S. W. R., 385; Johnson v. State, 31 Id., 456, 20 S. W. R., 985.

Practice. The provisions of this statute must be fully complied with to entitle the accused to the change, and this is not done by the supporting affidavit of himself and one other person. Macklin v. State, 53 T. Cr. R., 197, 109, S. W. R., 145, citing O'Neal v. State, 14 Id., 582; Gibson v. State, 53 Id., 349, 110 S. W. R., 41. And see Mitchell v. State, 43 T., 512.

Dangerous combination, etc., being relied upon for change of venue, it devolves upon accused to clearly establish such combination. Such proof is not afforded by resolutions of a Masonic lodge commemorative of the virtues of the deceased, slain by the accused. Lacy v. State, 30 T. Cr. R., 119, 16 S. W. R., 761; Miller v. State, 31 Id., 609, 21 S. W. R., 925.

Defendant is entitled to but one change of venue. Rothschild v. State, 7 T. Cr. R., 519; Webb v. State, Id., 490.

Change as to one of several parties jointly indicted is change as to all. Cock v. State, 8 T. Cr. R., 659. But, quaere, see Krebs v. State, 8 Id., 1.

Acts, conduct and threats of a mob may be good ground for change of venue. Miller v. State, 32 T. Cr. R., 320, 20 S. W. R., 1103; Steagald v. State, 22 Id., 464, 3 S. W. R., 771. And see Massey v. State, 31 Id., 371, 20 S. W. R., 758.

And generally, see Brown v. State, 33 T. Cr. R., 147, 25 S. W. R., 789; Cravey v. State, 23 Id., 677, 5 S. W. R., 162; Dupree v. State, 2 Id., 613; O'Neal v. State, 14 Id., 582; Davis v. State, 19 Id., 201; Carr, Id., 635; Mitchell v. State, 43 T., 512; Blackburn v. State, Id., 522; Wall v. State, 18 Id., 683.

Art. 629. [616] **Where jury can not be procured for trial of felony.**—When an unsuccessful effort has been once made in any county to procure a jury for the trial of a felony and all reasonable means have been used, if it be made to appear to the court by the written affidavit of the attorney for the state, or any other credible person, that no jury can probably be had in that county, the court may order a change of venue, and cause the reasons therefor to be placed upon the minutes of the proceedings. [O. C. 528.]

Ante, Art. 628, and notes.

Construed. This article applies to cases in which an unsuccessful effort to secure a trial by jury has been made. Randle v. State, 34 T. Cr. R., 43, 28 S. W. R., 953.

Two mistrials will authorize the judge to change the venue, if he is satisfied a fair and impartial trial can not be had in the county of the venue. Campbell v. State, 35 T. Cr. R., 160, 32 S. W. R., 774. And see Webb v. State, 9 T. Cr. R., 490.

Art. 630. [617] **Application may be made before announcing ready for trial, etc.**—An application for a change of venue may be heard and determined, before either party has announced ready for trial; but, in all cases before a change of venue is ordered, all motions to set aside the indictment, and all special pleas and exceptions which are to be determined by the judge, and which have been filed, shall be disposed of by the court, and, if overruled, the plea of not guilty entered. [O. C. 592.]

Construed. This article requires that all matters which do not affect the substance of the change must be disposed of before the defendant applies for change of venue. Vance v. State, 34 T. Cr. R., 395, 30 S. W. R., 792, and cases cited; Goode v. State, 123 S. W. R., 597.

This article is directory only, and can not operate to defeat an application for change of venue. Though filed after the state has announced, it is in time if filed before the accused has announced. Carr v. State, 19 T. Cr. R., 365.

The motion for change of venue may be heard and determined before announcement for trial, and it is not required that special venire should have been drawn and summoned before the motion for change of venue can be acted upon. Sims v. State, 36 T. Cr. R., 154, 36 S. W. R., 256.

Art. 631. [618] **Venue changed to nearest county, unless, etc.**—Upon the grant of a change of venue, the criminal cause shall be removed to some adjoining county, the court house of which is nearest to the court house of the county where the prosecution is pending, unless it be made to appear to the satisfaction of the court that such nearest county is subject to some objection sufficient to authorize a change of venue in the first instance. [O. C. 530.]

"Nearest county" construed. This article applies to change of venue on application of either state or accused, and not to change by the court on its own motion. Frizzell v. State, 30 T. Cr. R., 42, 16 S. W. R., 751, and cases cited.

The change of venue by the court on its own motion will not affect the defendant's right to apply for change from the new jurisdiction. Frizzell v. State, supra; Thurmond v. State, 27 T. Cr. R., 347, 11 S. W. R., 451.

Granting the motion for change of venue, the court was authorized to send the case to another than the nearest county. Woodson v. State, 24 T. Cr. R., 153, 6 S. W. R., 184, citing Bohannon v. State, 14 T. Cr. R., 271, and cases cited. And see McCoy v. State, 27 Id., 415, 11 S. W. R., 454.

Art. 632. [619] **Where adjoining counties are all subject to objection, etc.**—If it be shown in the application for a change of venue, or otherwise, that all the counties adjoining that in which the prosecution is pending are subject to some valid objection, the cause may be removed to such county as the court may think proper. [O. C. 531.]

Ante, Art. 631, and notes.

Art. 633. [620] **Application for change of venue may be controverted, how.**—The credibility of the persons making affidavit for change of venue, or their means of knowledge, may be attacked by the affidavit of a credible person; and the issue thus formed shall be tried and determined by the judge, and the application granted, or refused, as the law and facts shall warrant.

Construed. Either one of the two modes stated in this article is sufficient to raise the issue to be tried. Smith v. State, 21 T. Cr. R., 277, 17 S. W. R., 471, and cases cited.

Who may make controverting affidavits: Dunn v. State, 7 T. Cr. R., 600; Hunnicutt v. State, 20 Id., 632; Pierson v. State, 21 Id., 14; 17 S. W. R., 468; Smith v. State, Id., 277, 17 S. W. R., 471; Baw v. State, 33 Id., 24, 24 S. W. R., 293.

Matter of allegation: Davis v State, 19 T. Cr. R., 201; Logan v. State, 39 Id., 573, 47 S. W. R., 645.

Practice. There was no error in permitting the state to file a second installment of controverting affidavits. Baw v. State, 33 T. Cr. R., 24, 24 S. W. R., 293. Nor was there error in striking out additional supporting affidavits filed by defendant after issue joined, and a full investigation of the question involved in the motion for change of venue. Long v. State, 32 T. Cr. R., 140, 22 S. W. R., 409, and cases cited.

The issue involves not merely the general character of the compurgators for truth and veracity, but as well, their means of knowledge. Henning v. State, 24 T. Cr. R., 315, 6 S. W. R., 137; Dunn v. State, 7 Id., 600; Winkfield v. State, 41 T., 148.

Mere negative controverting affidavits are of no avail against direct supporting affidavits. Walker v. State, 42 T., 360. And see Burford v. State, 43 T., 415.

The trial court is empowered to inqure into the motives and feelings of compurgators to determine their credibility. Smith v. State, 31 T. Cr. R., 14, 19 S. W. R., 252.

If the motion sets up both grounds, and but one is contraverted, the defendant is entitled, as matter of right, to the change on the ground not assailed. Carr v. State, 19 T. Cr. R., 635. But compare Cotton v. State, 32 T., 614.

Burden of proof. Issue being joined on the motion of defendant, the burden of proof is on him. Lacy v. State, 30 T. Cr. R., 119, 16 S. W. R., 761, and cases cited.

Practice. On the trial of the issue raised by the controverting affidavits, the court may resort to any legitimate method or proof to enable him to reach a conclusion. Cotton v. State, 32 T., 614.

And generally, as to practice on the trial of the issue, see Buie v. State, — T. Cr. R., 452; Dixon v. State, 2 Id., 530; Dupree v. State, Id., 613; Crow v. State, 4 Id., 374; McCarty v. State, Id., 461; Labbaite v. State, 6 Id., 257; Meyers v. State, 7 Id., 640; Davis v. State, 19 Id., 201; Pierson v. State, 21 Id., 14, 17 S. W. R., 468; Smith v. State, Id., 277, 17 S. W. R., 471; Scott v. State, 23 Id., 521, 5 S. W. R., 142; Cravey v. State, Id., 677, 5 S. W. R., 162; Hanning v. State, 24 Id., 315, 6 S. W. R., 137; Meuly v. State, 26 Id., 274, 9 S. W. R., 563; Smith v. State, 31 Id., 14, 19 S. W. R., 252; Blain v. State, 34 Id., 448, 31 S. W. R., 368; Rowland v. State, 35 T., 487; Winkfield v. State, 41 Id., 148; Crow v. State, Id., 468.

Art. 634. [621] **Order of judge shall not be revised on appeal, unless, etc.**—The order of the judge granting or refusing a change of venue shall not be revised upon appeal, unless the facts upon which the same was based are presented in a bill of exceptions prepared, signed, approved and filed at the term of the court at which such order was made.

Practice on appeal. Under the unbroken line of decisions, this statute is mandatory, and not only must it be circumstantially complied with, but unless the bill of exception contains the evidence, the question will not even be considered on appeal. Gibson v. State, 53 T. Cr. R., 349, 110 S. W. R., 41, and cases cited.

And likewise it must be shown that exception was taken and reserved in the court a quo. Gibson v. State, supra, and cases cited. And see Harbolt v. State, 39 T. Cr. R., 129, 44 S. W. R., 1110.

The jurisdiction of the new forum can not be assailed unless exceptions to the change were saved in the court a quo, and that court can not be attacked in the new tribunal by plea to jurisdiction. Gibson, supra, and cases cited.

See Ellison v. State, 12 T. Cr. R., 557.

Discretion with which the trial court is clothed with reference to change of venue must be clearly shown to have been abused before the appellate court will intervene. Bohannon v. State, 14 T. Cr. R., 271, and cases cited; Lacy v. State, 30 Id., 119, 16 S. W. R., 761, and cases cited.

And see McGee v. State, 14 T. Cr. R., 366; Baw v. State, 33 Id., 24, 24 S. W. R., 293.

Art. 635. [622] **Clerks' duties in case of change of venue.**—When an order for a change of venue has been made, the clerk of the court where the prosecution is pending shall make out a true transcript of all the orders made in the cause, and certify thereto under his official seal, and shall transmit the same, together with all the original papers in the case, to the clerk of the court to which the venue has been changed. [O. C. 532.]

Construed. This article requires only that the orders shall be certified, and this without regard to the number of pages. No particular form of certificate is prescribed, nor does it require a caption as part of the transcript. Wolforth v. State, 31 T. Cr. R., 387, 20 S. W. R., 741.

The transcript need not embody the order impaneling the grand jury. Vance v. State, 34 T. Cr. R., 395, 30 S. W. R., 792.

Practice. The new tribunal has power to compel the clerk of the court a quo to supply any differences in his transcript necessary to show all proceedings preliminary to removal. Wolforth v. State, 31 T. Cr. R., 387, 20 S. W. R., 741, citing Brown v. State, 6 Id., 286.

Same. Transcript failing to show that the change of venue had been duly ordered, proof of that fact can not be made by parol, unless it be shown that a copy of the order can not be had. Valentine v. State, 6 T. Cr. R., 439. And see Byrd v. State, 26 Id., 374, 9 S. W. R., 759.

Not required by this article that transcript contain copy of the indictment; sufficient to transmit original indictment. Goode v. State, 123 S. W. R., 597.

Art. 636. [623] **Same subject.**—The clerk shall also, in a change of venue, before transmitting the original papers, make a correct copy of the same, certifying thereto under his official seal, and retain such copy in his office, to be used in case the originals or any of them be lost. [O. C. 533.]

See in extenso, Byrd v. State, 26 T. Cr. R., 374, 9 S. W. R., 759.

Art. 637. [624] **If defendant is on bail, shall be recognized.**—When a change of venue is ordered and the defendant is on bail, he shall be required to enter into recognizance forthwith, conditioned for his appearance before the proper court at the next succeeding term thereof; or, if the court of the county to which the cause is taken be then in session, he shall be recognized to appear before said court on a day fixed, and from day to day and term to term thereafter until discharged. [O. C. 534.]

Construed. The order transferring a criminal case to another county does not transfer the jurisdiction, unless the defendant be recognized to appear before the proposed new tribunal. State v. Butler, 38 T., 560. But in connection with this case, see the three succeeding articles.

Art. 638. [625] **Defendant failing to give recognizance shall be kept in custody, etc.**—If the defendant fails to give recognizance, as required in the preceding article, he shall be safely kept in custody by the sheriff, to be disposed of as provided in the two succeeding articles.

Construed. The sheriff of the county of the court a quo can not take bail. Harbolt v. State, 39 T. Cr. R., 129, 44 S. W. R., 1110.

Art. 639. [626] **If defendant be in custody.**—When the venue is changed in any criminal action, if the defendant be in custody, an order shall be made for his removal to the proper county, and his delivery to the sheriff thereof before the next succeeding term of the district court of the county to which the case is to be taken, and he shall be removed by the sheriff accordingly, and delivered as directed in the order. [O. C. 535.]

See Harbolt v. State, 39 T. Cr. R., 129, 44 S. W. R., 1110.

Art. 640. [627] **If court be in session, etc.**—If the court of the county to which the case is removed be then in session, the defendant shall be removed forthwith, and delivered to the sheriff of such county. [O. C. 536.]

Construed. The state, in a murder case, having continued twice and defendant never having sought continuance, the new tribunal may admit defendant to bail. Ex parte Walker, 3 T. Cr. R., 668, but distinguished in Ex parte Springfield, 28 Id., 27, 11 S. W. R., 677.

Art. 641. [628] **Witness need not again be summoned, etc.**—When the venue in a criminal action has been changed, it shall not be necessary to have the witnesses therein again subpoenaed, attached or recognized, but all the witnesses who have been subpoenaed, attached or recognized to appear and testify in the cause shall be held bound to appear before the court to which the cause has been transferred, in the same manner as if there had been no such transfer.

Mesne process. To show diligence on an application for change of venue, it is not necessary to sue out new process. Means v. State, 10 T. Cr. R., 16.

11. OF DIMINISHING PROSECUTIONS.

Art. 642. [629] **Defendant in custody and no indictment presented, prosecution dismissed, unless, etc.**—When a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation before the district court, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant at the next term of the court which is held after his commitment or admission to bail. [O. C. 537.]

Construed. The failure of the grand jury to indict the accused at the term succeeding his commitment entitled the defendant to discharge under this article. Ex parte Porter, 16 T. Cr. R., 321.

Before discharge can be had under this article, it must be made to appear affirmatively that, subsequent to the committal or bail of accused, a grand jury had convened and been discharged and had failed to indict. Ex parte Oakley, 54 T. Cr. R., 608, 114 S. W. R., 131.

Art. 643. [630] **Prosecution may be dismissed by state's attorney, etc.**—The district or county attorney may, by permission of the court, dismiss a criminal action at any time upon complying with the requirements of article 37 of this Code. [O. C. 538.]

Ante, Art. 37, and notes; post, Arts. 729, 730, and notes.

Construed. A prosecuting attorney can dismiss a prosecution only upon full compliance with the requirements of Art. 7, ante. Kelly v. State, 480, 38 S. W. R., 39; Fleming v. tSate, 28 Id., 234. See Discrin v. State, 127 S. W. R., 1038.

Dismissal of appeal from recorder's to district court for want of prosecution is error, as such dismissal dismisses the entire case. Ex parte McNamara, 33 T. Cr. R., 363, 26 S. W. R., 506.

Prosecution being dismissed, there is no legal authority to hold the defendant in custody without complaint or otherwise. Venters v. State, 18 T. Cr. R., 198.

TITLE 8.

OF TRIAL AND ITS INCIDENTS.

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1. Of the Mode of Trial.
2. Of the Special Venire in Capital Cases.
3. Of the Formation of the Jury in Capital Cases.
4. Of the Formation of the Jury in Cases Less than Capital.
5. Of the Trial Before the Jury.
6. Of the Verdict.
7. Of Evidence in Criminal Actions.
   1. General Rules.
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   5. Miscellaneous Provisions.
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CHAPTER ONE.

OF THE MODE OF TRIAL.

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Article 644. [631] **Jury the only mode of trial, when.**—The only mode of trial upon issue of fact is by jury, unless in cases specially excepted. [O. C. 539.]

Const., Art. 1, sec. 15; ante, Arts. 10, 21 and 28, and notes.

Art. 645. [632] **Jury; when of twelve, when of six.**—In the district court, the jury shall consist of twelve men; in the county court and inferior courts, the jury shall consist of six men.

Const., Art. 5, Secs. 13 and 17; ante, arts. 10, 21 and 22, and notes. The jury in the district court comprises twelve persons, neither more or less. Jester v. State, 26 T. Cr. R., 369, 9 S. W. R., 616, and cases cited.

The record reciting the names of but eleven men, the impaneling of the twelfth can not be presumed. Gerard v. State, 10 T. Cr. R., 690, and cases cited.

In the county court, the jury must consist of six persons, no more and no less, and no presumption can be taken to supply an entry importing a jury of but one man. Marks v. State, 10 T. Cr. R., 334.

Art. 646. [633] **Defendant must be personally present, etc.**—In all prosecutions for felonies, the defendant must be personally present on the trial, and he must likewise be present in all cases of indictment or information for misdemeanors where the punishment or any part thereof is imprisonment in jail. [O. C. 640.]

Defendant's presence throughout the trial, from beginning to end and at every proceeding, is indispensable. The jury can not be discharged in the absence of the defendant. Rudder v. State, 29 T. Cr. R., 262, 15 S. W. R., 717, and cases

cited; Madison v. State, 17 Id., 479, and cases cited; Page v. State, 9 Id., 466; Brown v. State, 38 T., 482; Killman v. State, 53 Id., 570, 112 S. W. R., 92; Derden v. State, 56 Id., 396, 120 S. W. R., 485; Emery v. State, 123 S. W. R., 133.

The rule is different in a misdemeanor trial. Killman v. State, 53 T. Cr. R., 570, 112 S. W. R., 92; Selman v. State, 33 Id., 631, 28 S. W. R., 541.

Generally on the subject, see Gibson v. State, 3 T. Cr. R., 437; Krautz v. State, 4 Id., 534; Richardson v. State, 7 Id., 486; Corn v. State, 11 Id., 390; Granger v. State, Id., 454; Powers v. State, 23 Id., 42, 5 S. W. R., 153; Hand v. State, 28 Id., 28, 11 S. W. R., 679; Upchurch v. State, 36 Id., 624, 38 S. W. R., 206; Gonzales v. State, 38 Id., 62, 41 S. W. R., 605.

Scire facias. Principal in an appeal bond is not bound, on scire facias, to make personal appearance, but may appear by counsel. Williams v. State, 51 T. Cr. R., 252, 103 S. W. R., 929.

Practice. Certain proof having been made in the unobserved absence of defendant in charge of the sheriff, the court, on the return of defendant, charged the jury not to consider such proof as so made, and required the re-introduction of the witness and evidence. Held, correct. Cason v. State, 52 T. Cr. R., 220, 106 S. W. R., 337.

Art. 647. [634] **Defendant may appear by counsel, when, etc.**—In all other cases of misdemeanor, the defendant may, by consent of the attorney representing the state, appear by counsel, and the trial may proceed without his personal presence. [O. C. 541.]

Appearance by defendant in misdemeanor may be made by counsel, but latter need not bring into court the money to meet possible fine and costs. Neaves v. State, 4 T. Cr. R., 1.

Defendant can not enter into recognizance to appear, on appeal, by attorney—he must enter into the recognizance himself. Chaney v. State, 23 T. Cr. R., 23; Ferrell v. State, 29 Id., 489.

Appellant in misdemeanor, under appeal bond, could appear by counsel. Page v. State, 9 T. Cr. R., 466.

Scire facias. Principal in apepal bond may appear by counsel. Williams v. State, 51 T. Cr. R., 252, 103 S. W. R., 929.

Art. 648. [635] **Defendant on bail.**—When the defendant in a case of felony is on bail, he shall, before the trial commences, be placed in the custody of the sheriff, and his bail be considered as discharged. [O. C. 542.]

Construed. This article, construed in connection with post, Art. 654, means that when the defendant is ready to plead to the accusation, he is then placed in the custody of the sheriff and his bail discharged, and not before. Fossett v. State, 43 T. Cr. R., 117, 67 S. W. R., 322.

Art. 649. [636] **Sureties still bound in case of mistrial.**—If there be a mistrial in a case of felony, the original sureties of the defendant shall be still held bound for his appearance until they surrender him in accordance with the provisions of this Code. [O. C. 543.]

Art. 650. [637] **Criminal docket shall be kept.**—There shall be kept by each clerk of the district and county court, and by each inferior court having jurisdiction in criminal cases, a docket in which shall be set down the style of each criminal action, the file number thereof, the nature of the offense, the names of counsel and the proceedings had therein, and the date of each proceeding. [O. C. 544.]

Art. 651. [638] **District court shall fix a day for criminal docket.**—The district court shall, on the first day of its organization at each term, fix a day for taking up the criminal docket, which shall be noted on the minutes; but, in case of failure to make such order, the criminal docket may be taken up on any day not earlier than the third day of the term. [O. C. 545.]

Practice. This article does not conflict with Art. 659, post, which expressly authorizes the court to set any day of the term for the trial of a capital case. Gaines v. State, 38 T. Cr. R., 202, 42 S. W. R., 385; Roberts v. State, 30 Id., 291, 17 S. W. R., 450.

Art. 652. [639] **County court shall hold a term for criminal business.**—The county court of each county shall hold a term for criminal business on the first Monday in every month, or at such other time as may have been fixed in accordance with law; but no criminal action shall be called for trial before nine o'clock a. m. of the first day of such term. [Act June 16, 1876, p. 17, § 2.]

Const., Art. V, Sec. 17; Thomas v. State, 14 T. Cr. R., 200; Wilson v. State, 15 Id., 150.

Art. 653. [640] **Defendant required to plead.**—In all cases less than capital, the defendant is required, when his cause is called for trial, before it proceeds further, to plead by himself or his counsel whether or not he is guilty. [O. C. 546.]

Ante, Arts. 569-586, and notes.

Time to plead. The defendant in any but a capital case should be required to plead on announcement of the parties for trial, or the refusal of continuance. Shaw v. State, 17 T. Cr. R., 225, citing Cole v. State, 11 Id., 67.

The judgment entry reciting plea by defendant being denied by defendant, in motions for new trial, and in arrest, and those motions sustained by uncontroverted affidavits, the new trial should have been granted. Shaw, supra.

The unsupported affidavit of the defendant could not avail against such a judgment recital. Gordon v. State, 29 T. Cr. R., 410, 16 S. W. R., 337.

Directory only. This article, however, is directory only, and it suffices if, after the jury is impaneled and the indictment read to the defendant, he is required to plead, or plea of "not guilty" is entered for him. McGrew v. State, 31 T. Cr. R., 336, 20 S. W. R., 740.

Art. 654. [641] **Meaning of the term "called for trial."**—By the term "called for trial" is meant the stage of the cause when both parties have announced that they are ready, or when a continuance, having been applied for, has been denied. [O. C. 547.]

Construed. In connection with the preceding article, this article is directory and not mandatory. McGrew, supra.

Under no circumstances can a party be legally compelled to go to trial until his case is regularly reached on the docket. Nichols v. State, 3 T. Cr. R., 546, citing Thomas v. State, 36 T., 315. But as an exception under extraordinary conditions, see Shehane v. State, 13 T. Cr. R., 533, citing Jones v. State, 8 Id., 648.

CHAPTER TWO.

OF THE SPECIAL VENIRE IN CAPITAL CASES.

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Article 655. [642] **Definition of a special venire.**—A "special venire" is a writ issued by order of the district court, in a capital case, commanding the sheriff to summon such a number of persons, not less than thirty-six, as the court in its discretion may order, to appear before the court on a day named in the writ, from whom the jury for the trial of such case is to be selected. [O. C. 548.]

The writ of special venire. The mere fact that the writ was addressed to the sheriff "or any constable" will not authorize its quashal, especiall when it is shown that the sheriff actually executed and returned the writ. Jackson v. State, 30 T. Cr. R., 664, 18 S. W. R., 643, citing Suit v. State, Id., 319, 17 S. W. R., 458.

The writ of special venire must include not fewer than thirty-six persons to be summoned. Hall v. State, 28 T. Cr. R., 146, 12 S. W. R., 739; Taylor v. State, 14 Id., 340.

Not essential that special venire in a murder case be captioned as of the case pending, or contain name of deceased. Bowen v. State, 3 T. Cr. R., 617.

Hypercritical objection. Objection that the seal impressed on the writ omitted the word "of" before the name of the county, is hypercritical. Cordova v. State, 6 T. Cr. R., 208.

There was a discrepancy between the names of three persons drawn on the special venire and the names as written in the copy served on defendant, but neither of said three persons served on trial jury, and defendant did not exhaust his peremptory challenges. Held, no ground for quashal of the special venire. Williams v. State, 29 T. Cr. R., 89, 14 S. W. R., 388, and cases cited.

That one of the named veniremen was dead and another beyond the court's jurisdiction. Held, no ground for quashal of venire. Smith v. State, 21 T. Cr. R., 277, 17 S. W. R., 471.

No ground for quashing special venire that but 42 of 100 persons summoned were in attendance, the others being disqualified or excused by the parties. Martin v. State, 38 T. Cr. R., 462, 43 S. W. R., 352.

No ground for quashal of venire or return that of the persons named in the writ the sheriff actually summoned fewer than thirty-six. Hall v. State, 28 T. Cr. R., 146, 12 S. W. R., 739; Taylor v. State, 14 Id., 340.

Not until a special venire regularly issued and executed has been exhausted or discharged with defendant's consent, has the court the power to order another. Hall, supra, citing Sharpe v. State, 17 T. Cr. R., 486; Bates v. State, 19 T., 123.

Only in capital cases are special venires provided for. Walker v. State, 28 T. Cr. R., 503, 13 S. W. R., 360.

Construction of statutes. For the most part, the statutes relating to special venire are directory only, and should be liberally construed. Roberts v. State, 30 T. Cr. R., 291, 17 S. W. R., 450, and cases cited.

Amendment of the writ to show the true date of the order for the return of the same, was properly permitted by the court. Suit v. State, 30 T. Cr. R., 319, 17 S. W. R., 458.

The docket showing the order for the writ, it was proper to allow the amendment of the minutes of the court, after the return of the writ, to conform to the order. English v. State, 34 T. Cr. R., 190.

As to amendment of sheriff's return, see notes to Art. 669, post.

Art. 656. [643] **State may obtain order for special venire, etc.**—When there is pending in any district court a criminal action for a capital offense, the district or county attorney may, at any time after indictment found, on motion either written or oral, obtain an order for a special venire to be issued in such case.

Construed. It devolves upon the state in the first instance to ask for a special venire. If the state defaults in this respect, the defendant has the right, at any time before agreeing to accept the regular jury, to object to being tried by any other than a special venire. Farrar v. State, 44 T. Cr. R., 236, 70 S. W. R., 210.

Failure of defendant in a capital case to demand a special venire prior to the overruling of his motion for continuance, is not tantamount to waiver of his right to such venire. Farrar, supra.

Practice. The trial court may, on the continuance of a capital case, order a special venire, returnable at the next succeeding term, and set the case for trial on a day certain of such succeeding term. Roberts v. State, 30 T. Cr. R., 291, 17 S. W. R., 450.

Murder by a person under 17 years of age is not a capital case, and does not require a special venire. Ex parte Walker, 28 T. Cr. R., 246, 13 S. W. R., 861; s. c., Id., 503, 13 S. W. R., 860.

Art. 657. [644] **Defendant may obtain special venire, when.**—The defendant in a capital case may also obtain an order for a special venire at any time after his arrest upon an indictment found, upon a motion in writing, supported by the affidavit of himself or counsel, stating that he expects to be ready for the trial of his case at the present term of the court.

Construed. As to defendant's failure to demand special venire, see Farrar v. State, 44 T. Cr. R., 236, 70 S. W. R., 210.

Capital felony. Conviction in the second degree under indictment for murder, though a new trial be ordered, is acquittal of first degree murder, and the case is no longer capital, and therefore does not entitle special venire at subsequent trial. Cheek v. State, 4 T. Cr. R., 444.

See in extenso, Hall v. State, 28 T. Cr. R., 146, 12 S. W. R., 739. And Foster v. State, 38 Id., 525, 43 S. W. R., 1009, for instances of error in depriving accused of his right to select his trial jury from the original special venire.

Order for special venire may be made at a previous term of court. Roberts v. State, 30 T. Cr. R., 291, 17 S. W. R., 450.

It must be for not less than thirty-six persons. Hall v. State, 28 T. Cr. R., 146, 12 S. W. R., 739; Taylor v. State, 14 Id., 340. And see Hunter v. State, 34 Id., 599, 31 S. W. R., 674; Harrison v. State, 3 Id., 558.

Practice on appeal. The record on appeal, though silent as to order for special venire, showing that a jury was impanel under a special venire, it will be presumed that the proper order was made and entered, or that it was waived by the accused. Williams v. State, 29 T. Cr. R., 89, 14 S. W. R., 388. Overruling Steagald v. State, 22 Id., 464, 3 S. W. R., 771.

Art. 658. [645] **Order of the court; writ.**—The order of the court for the issuance of the writ shall specify the number of persons required to be summoned, and the time when such persons shall attend, and the time when such writ shall be returnable; and the clerk shall forthwith issue the writ in accordance with such order.

Art 659. [646] **Capital cases may be set for particular day.**—A capital case may, by agreement of the parties, be set for trial or disposition for any particular day of the term with the permission of the court; or the court may, at its discretion, set a day for the trial or disposition of the same; and the

day agreed upon by the parties, or fixed by the court, may be changed and some other day fixed, should the court at any time deem it advisable.

Ante, Art. 651, and notes.

Construed. Proper for the court to set the trial of a pending case on a day certain of the succeeding term, and order special venire accordingly. Roberts v. State, 30 T. Cr. R., 291, 17 S. W. R., 450. And that day may precede the day set for taking up the criminal docket. Gaines v. State, 38 T. Cr. R., 202, 42 S. W. R., 385.

And the case should be taken up on the day thus set, whether regularly reached on the docket or not. Mitchell v. State, 43 T., 512.

Art. 660. [647] **Manner of selecting special venire.**—Whenever a special venire is ordered, the clerk or his deputy, in the presence and under the direction of the judge, shall draw from the wheel containing the names of jurors, the number of names required for such special venire, and shall prepare a list of such names in the order in which they are drawn from the wheel, and attach such lists to the writ and deliver the same to the sheriff; and the cards containing such names shall be sealed up in an envelope, and shall be retained by the clerk for distribution, as herein provided. If, from the names so drawn, any of the men are impaneled on the jury and serve as many as four days, the cards containing the names of the men so serving shall be put by the clerk, or his deputy, in the box provided for that purpose, and the cards containing the names of the men not impaneled shall again be placed by the clerk, or his deputy, in the wheel containing the names of the eligible jurors. [Act Aug. 1, 1876, p. 82, § 23; amended 1907, p. 271.]

Constitutional law. This article must be construed in connection with post, Art. 664, held constitutional as a general law applicable to certain counties in Texas, and as not obnoxious on the ground that it is a special law or that it is class legislation. Held, further, that a county which has two cities aggregating a population of 20,000, comes within the scope of the law. Logan v. State, 54 T. Cr. R., 74, 111 S. W. R., 1028; Brown v. State, Id., 121, 112 S. W. R., 80; Smith v. State, Id., 293, 113 S. W. R., 289; Brown v. State, 55 Id., 9, 114 S. W. R., 820; Halsford v. State, 56 Id., 118, 120 S. W. R., 193; Oates v. State, Id., 571, 120 S. W. R., 370.

Art. 661. [647a] **Same.**—Whenever the names of the persons selected by the jury commissioners to do jury service for the term shall have been drawn one time to answer summons to a venire facias, then the names of the persons selected by the said commissioners, and which form the special venire list, shall be placed upon tickets of similar size and color of paper, and the tickets placed in a box and well shaken up; and, from this box, the clerk, in the presence of the judge, in open court, shall draw the number of names required for further venire service, and shall prepare a list of such names, in the order in which they are drawn from the box, and attach such list to the writ, and deliver the same to the sheriff; and it shall furthermore be the duty of the clerk, and he shall prevent the name of any person from appearing more than twice on all of such lists. [Amended Act 1905, p. 18.]

Drawing special venire. Presence of defendant or counsel at the drawing of the special venire not essential. Cordova v. State, 6 T. Cr. R., 207; Pockett v. State, 5 Id., 552.

The box provided may be an ordinary cigar box with a lid. It is not required that the clerk personally shall draw the names. Pockett v. State, supra.

The special venire must be drawn of those persons, if any, selected by the jury commissioners as jurors for the term. Weaver v. State, 19 T. Cr. R., 547.

And see generally, Smith v. State, 21 T. Cr. R., 277, 17 S. W. R., 471; Giebel v. State, 28 Id., 151, 12 S. W. R., 591; Hunter v. State, 34 Id., 599, 31 S. W. R., 674.

Construed. This article, as amended, was intended to, and does provide, that no juryman drawn by the jury commissioners, shall be required to serve or be drawn on

but one venire in a capital case. This amendment neither expressly nor by implication repeals Art. 666, post. Gibson v. State, 53 T. Cr. R., 349, 110 S. W. R., 41.

Art. 662. **Not to amend or repeal chapter 1, title 7, this Code.**—Nothing contained herein is to be construed as in any manner amending or repealing any part of chapter 1, title 7, of the Code of Criminal Procedure. [Act 1907, p 272.]

Art. 663. **Repeals article 661 as to counties with cities of 20,000.**—Article 661 of the Code of Criminal Procedure, as amended by the act of 1905, page 18, is hereby repealed, so far as it applies to all counties of this state having a city or cities aggregating twenty thousand or more in population. [Id.]

Art. 664. **Officer wilfully or negligently failing to perform duty, penalty.**—Between the first and fifteenth day of August every two years, in all counties in this state having a city or cities therein containing a population aggregating twenty thousand or more people, as shown by the last United States census, the tax collector, or one of his deputies, and the tax assessor, or one of his deputies, and the sheriff, or one of his deputies, and the county clerk, or one of his deputies, and the district clerk, or one of his deputies, shall meet at the court house of the county, and select from the qualified jurors of the county, the jurors for service in the district and county courts in such county for the ensuing two years, in the manner provided in the Revised Civil Statutes of Texas. If any of said officers shall wilfully or negligently fail to serve as herein provided, or if any of the said officers shall wilfully or negligently fail to designate one of their deputies for such service, or if, after such designation, such deputy shall wilfully or negligently fail to serve, the officer so failing to serve or to designate a deputy, or the deputy so failing to serve, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars. [Id., p. 271.]

Constitutional law. The act of the Thirtieth Legislature, chapter 139, of which this article is a part, is held constitutional as a general law applicable to certain counties in Texas, and as not obnoxious on the ground that it is a special law or that it is class legislation. Held, further, that a county which has two cities aggregating 20,000 population comes within the scope of the law. Logan v. State, 54 T. Cr. R., 74, 111 S. W. R., 1028; Brown v. State, Id., 121, 112 S. W. R., 80; Smith v. State, Id., 298, 113 S. W. R., 289; Brown v. State, 55 Id., 9, 114 S. W. R., 820; Halsford v. State, 56 Id., 118, 120 S. W. R., 193; Oates, Id., 571, 120 S. W. R., 370.

Art. 665. **Person putting in or taking from wheel, violating any provision of this law or failing to perform any duty, penalty.**—If any person shall put into the wheel, or take from the wheel, except at the times and in the manner provided for by law, a card or cards bearing the name or names of any person, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars. If any person shall violate any of the provisions of this law, or shall wilfully or negligently fail or neglect to perform any duty herein required of him, then, where no penalty is specifically imposed by the terms of this law, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than fifty nor more than five hundred dollars. [Id., p. 272.]

Art. 666. [648] **In case no jurors, or not a sufficient number.**—When, from any cause, no jurors have been selected by the jury commissioners for the term, or when there shall not be a sufficient number of those selected to make the number required for the special venire, the court shall order the sheriff to summon a sufficient number of good and intelligent citizens who are qualified jurors in the county to make the number required by the special venire.

Construed. This article is not affected by the amendment to Art. 664 of 1905, which amendment was intended to and does provide that no juryman drawn by the jury commission shall be required to serve or be drawn on but one venire in a capital case. Gibson v. State, 53 T. Cr. R., 349, 110 S. W. R., 41.

When the special venire has been exhausted, the defendant is not now, as before the revision of the Codes, entitled to have the regular jury selected by the commissioners for the term called to complete the panel before the court can order talesmen from the body of the county. Dean v. State, 37 T. Cr. R., 506, 40 S. W. R., 266, following Weathersby, 29 Id., 278, 15 S. W. R., 823, which overrules on the point, Weaver v. State, 19 Id., 547; Cahn v. State, 27 Id., 709, 11 S. W. R., 723; Williams v. State, 29 Id., 89, 14 S. W. R., 338, and Roberts v. State, 5 Id., 141. And see Brotherton v. State, 30 Id., 369, 17 S. W. R., 932; Thompson v. State, 33 Id., 217, 26 S. W. R., 198.

And see generally: Hicks v. State, 5 T. Cr. R., 488; Sanschen v. State, 8 Id., 45; Wyers v. State, 22 Id., 258, 2 S. W. R., 722; Habel v. State, 28 Id., 588, 13 S. W. R., 1001; Adams v. State, 35 Id., 285, 33 S. W. R., 354; Sanchez v. State, 39 Id., 389, 46 S. W. R., 249.

Art. 667. [649] **Same subject.**—When, from any cause, there is a failure to select a jury from those who have been summoned upon the special venire, the court shall order the sheriff to summon any number of persons that it may deem advisable for the formation of the jury.

Talesman. The sheriff and his deputies must take the prescribed oath before summoning talesman.

And minutes may be amended to show that the oath was administered. Habel v. State, 28 T. Cr. R., 588, 13 S. W. R., 1010; Shaw v. State, 32 Id., 155; 22 S. W. R., 588; Adams v. State, 35 Id., 285, 33 S. W. R., 354; Rodriguez v. State, 32 Id., 259, 22 S. W. R., 978.

Special venire was exhausted and the sheriff executed the second by summoning residents of the city in which the trial was being held. Motion was made to quash on alleged prejudice against the defendant in the city, and have persons summoned from the county outside the city. Held, properly overruled. Griscom v. State, 4 T. Cr. R., 374.

The court may verbally order the summons of talesman. Roberts v. State, 5 T. Cr. R., 141; Harris v. State, 6 Id., 97.

Art. 668. [650] **Service of writ.**—The sheriff or other officer executing the writ shall summon the persons whose names are upon the list attached to the writ, to be and appear before the court at the time named in such writ, which summons shall be made verbally upon the jurors in person.

Art. 669. [651] **Return of writ.**—The officer executing the writ shall return the same promptly on or before the time it is made returnable. The return shall state the names of those who have been summoned; and, if any of those whose names are upon the list have not been summoned, the return shall state the diligence that has been used to summon them and the cause of the failure to summon them.

Return. That the sheriff's return shows service on fewer than the thirty-six named in the special venire is not a valid objection. Hall v. State, 28 T. Cr. R., 146, 12 S. W. R., 739; Taylor v. State, 14 Id., 340.

It is only required that the sheriff exercise reasonable diligence in summoning the venire. Defendant is not entitled to process for veniremen not summoned. Rodriguez v. State, 23 T. Cr. R., 503, 5 S. W. R., 255.

If, however, through mistake, a venireman is returned served, when in fact he was not, defendant would be entitled to process for him. Osborne v. State, 23 T. Cr. R., 432, 5 S. W. R., 251.

To controvert the return of the officer as to any particular juror, the defendant must sue out process for his production in court. Livar v. State, 26 T. Cr. R., 115, 9 S. W. R., 552; Charles v. State, 13 Id., 658.

As to diligence: Parker v. State, 33 T. Cr. R., 111, 21 S. W. R., 604; Lewis v. State, 15 Id., 647; Charles v. State, supra.

That fewer persons than named in the writ were in attendance is not ground for quashing special venire. Martin v. State, 38 T. Cr. R., 462, 43 S. W. R., 352.

Amendment. Return may be amended by permission and under direction of the court. Suit v. State, 30 T. Cr. R., 319, 17 S. W. R., 458, and cases cited.

Art. 670. [652] **Sheriff shall be instructed by court as to summoning jurors.**—When the sheriff is ordered by the court to summon persons upon a special venire whose names have not been selected as provided in articles 660 and 661, the court shall, in every case, caution and direct the sheriff to summon such men as have legal qualifications to serve on juries, informing him of what those qualifications are, and shall further direct him, as far as he may be able, to summon men of good character who can read and write, and such as are not prejudiced against the defendant or biased in his favor, if he knows of the existence of such bias or prejudice. [O. C. 553.]

Ante, Art. 667, and notes.

Art. 671. [653] **Copy of list of jurors shall be served on defendant, etc.**—The clerk, immediately upon receiving the list of names of persons summoned under a special venire, shall make a certified copy thereof, and issue a writ commanding the sheriff to deliver such certified copy to the defendant; and such sheriff shall immediately deliver such copy to the defendant, and return the writ, indorsing thereon the manner and time of its execution. [O. C. 553.]

Service. The copy to be served on the defendant must be of the names of the persons actually summoned, and not those originally drawn. Harrison v. State, 3 T. Cr. R., 558.

That copy need not set out the sheriff's return on the special venire. In any event, such an omission could be cured by amendment. Sterling v. State, 15 T. Cr. R., 249; citing Washington v. State, 8 Id., 377.

Talesmen. This right to service of copy does not carry right to service of copy of talesmen to complete jury after the special venire is exhausted. Dew v. State, 31 T. Cr. R., 278, 20 S. W. R., 583, and cases cited; Brotherton v. State, 30 Id., 369, 17 S. W. R., 932.

Art. 672. [654] **One day's service of copy before trial.**—No defendant in a capital case shall be brought to trial until he has had one day's service of a copy of the names of persons summoned under a special venire facias, except where he waives the right, or is on bail; and, when such defendant is on bail, he shall not be brought to trial until after one day from the time the list of persons so summoned shall have been returned to the clerk of the court in which said prosecution is pending; but the clerk shall furnish the defendant, or his counsel, a list of the persons so summoned, upon their application therefor. [O. C. 554; amended by Act Feb. 15, 1887, p. 5.]

As to the object of this statute, see Bates v. State, 19 T., 123; Foster v. State, 38 T. Cr. R., 525, 43 S. W. R., 1009.

Construed. In computing time under this article, both the day of service and the day of trial must be excluded. Speer v. State, 2 T. Cr. R., 246.

Sunday being the intervening day, the statute is complied with. Adams v. State, 35 T. Cr. R., 286, 33 S. W. R., 354.

Entitled to service in person; on counsel not sufficient. Jones v. State, 33 Id., 617, 28 S. W. R., 464.

If the copy contains the names of the jurors summoned, it is not affected by the fact that it also contains the names of other persons erased. Murray v. State, 21 T. Cr. R., 466, 1 S. W. R., 522. And see Washington v. State, 8 Id., 377; Sterling v. State, 15 Id., 249.

Service may be had at any time after indictment, but defendant, unless he waives the right, is entitled to one day before trial. The statute is mandatory. Robles

v. State, 5 T. Cr. R., 346; Kellum v. State, 33 Id., 82, 24 S. W. R., 897, and cases cited; Jones, Id., 617, 28 S. W. R., 464.

Waiver. Defendant's failure to assert his right on call of his case amounts to his waiver, and it is too late after verdict to complain of no service. Hamilton v. State, 3 T. Cr. R., 537; Bonner v. State, 29 Id., 223, 15 S. W. R., 821, and cases cited.

Two copies, one of 60 and the other of 52 names, having been served on defendant in jail, the special venire should have been quashed. Foster v. State, 38 T. Cr. R., 525, 43 S. W. R., 1009.

Trial court erred in discharging from the special venire twelve veniremen who, when the case was called, were considering verdict in another case, and ordering a new special venire. Bates v. State, 19 T., 123.

Selection from the venire will not be delayed by the fact that two of the veniremen are out on another case. Stephens v. State, 31 T. Cr. R., 365, 20 S. W. R., 826; but compare Thurston v. State, 18 Id., 26.

And further, see Swafford v. State, 3 T. Cr. R., 77; Bowen v. State, Id., 617; Jackson v. State, 4 Id., 292; Thompson v. State, 19 Id., 524; Osborne v. State, Id., 431, 5 S. W. R., 251; Hudson v. State, 28 Id., 323, 13 S. W. R., 388; Williams v. State, 29 Id., 89, 14 S. W. R., 388; Campbell v. State, 30 Id., 645, 18 S. W. R., 409; Mitchell v. State, 36 Id., 278, 33 S. W. R., 367.

CHAPTER THREE.

OF THE FORMATION OF THE JURY IN CAPITAL CASES.

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Article 673. [655] **In capital cases, names of jurors to be called, etc.**—When any capital case is called for trial, and the parties have announced ready for trial, the names of those summoned as jurors in the case shall be called at the court house door; and such as are present shall be seated in the jury box; and such as are not present may be fined by the court a sum not exceeding fifty dollars; and, at the request of either party, an attachment may issue for any person summoned, who is not present, to have him brought forthwith before the court. [O. C. 555.]

Construed. This article is directory, and a substantial compliance with its provisions is sufficient. Jackson v. State, 30 T. Cr. R., 664, 18 S. W. R., 643, and cases cited.

Attachment can not issue for a juror until he has been summoned and defaulted. Thompson v. State, 19 T. Cr. R., 593.

In the event stated, either party may have attachment returnable instanter. If not called for, the right to attachment is deemed waived. A cause should not be unreasonably delayed because of an absent juror who has been summoned. If such a one appears before the jury is completed, he may be examined and qualify or be challenged. Sinclair v. State, 35 T. Cr. R., 130, 32 S. W. R., 531, and cases cited; Sawyer v. State, 39 Id., 557, 47 S. W. R., 650, and cases cited.

Before resort to new special venire, the entire original venire as far as summoned must be exhausted, and the defendant was entitled to compulsory process for the veniremen summoned, but who did not appear. Cahn v. State, 27 T. Cr. R., 709, 11 S. W. R., 723.

Art. 674. [656] **Shall be sworn to answer questions.**—When those who are present are seated in the jury box the court shall cause to be administered to them the following oath: "You, and each of you, solemnly swear that you will make true answers to such questions as may be propounded to you by the court, or under its direction, touching your service and qualification as a juror, so help you God."

Directory, only, is this article, and requires only substantial compliance. Jackson v. State, 30 T. Cr. R., 664, 18 S. W. R., 643, and cases cited.

Practice. While veniremen may be sworn in groups, they should be examined separately. Wason v. State, 3 T. Cr. R., 474; Hardin v. State, 4 Id., 355, and cases cited.

Trial court has no power to refuse a juror's right to "affirm" instead of "swear," or to discharge a juror, over defendant's objection, who refused to swear, but offered to affirm. Such error was fundamental. Bill of Rights, sec. 5; Riddle v. State, 46 S. W. R., 1058.

Art. 675. [657] **Excuses heard and determined by court.**—The court shall now hear and determine the excuses offered by persons summoned for not serving as jurors, if any there be; and, if an excuse offered be considered by the court sufficient, the court shall discharge the person offering it from service.

Construed. This article is mandatory only. It is not cause for reversal that a juror, after qualifying, but before being passed upon by the parties, was excused by the court. Goodall v. State, 47 S. W. R., 360.

Art. 676. **Persons summoned as jurors may claim exemption, how and when.**—That all persons summoned as jurors in any court of this State, who are exempt by statutory law from jury service, may hereafter, if they so desire to claim their exemptions, make oath before any officer authorized by law to administer oaths, or before the officers summoning such person, stating their exemptions, and file said affidavit, at any time before the convening of said court, with the clerk of said court, which shall constitute sufficient excuse without appearing in person. [Act 1907, p. 216.]

Excusing veniremen: Robles v. State, 5 T. Cr. R., 346; Bejerano v. State, 6 Id., 265; Foster v. State, 8 Id., 248; Hill v. State, 10 Id., 618; Ellison v. State, 12 Id., 557; Thuston v. State, 18 Id., 26; Thompson v. State, 19 Id., 593; Kennedy v. State, Id., 618; Murray v. State, 21 Id., 466, 1 S. W. R., 522; Livar v. State, 26 Id., 115, 9 S. W. R., 552; Jackson v. State, 30 Id., 664, 18 S. W. R., 643; Stephens v. State, 31 Id., 365, 20 S. W. R., 826. And see Upchurch v. State, 36 Id., 624, 38 S. W. R., 206.

Art. 677. [658] **May be excused by consent of parties.**—A person summoned upon a special venire may be excused from attendance by the court at any time before he is impaneled, by consent of both parties.

Art. 678. [659] **Challenge to the array may be heard.**—Before proceeding to try the persons summoned as to their qualifications to serve as jurors, the court shall hear and determine a challenge to the array, if any be made.

Art. 679. [660] **State may challenge array, when.**—The array of jurors summoned for the trial of any capital case may be challenged by the state, when it is shown that the officer summoning the jurors has acted corruptly, and has wilfully summoned jurors with a view to securing an acquittal. [O. C. 568.]

Ante, Art. 409, and notes.

Challenge to the array of the trial jury applies only when that jury was summoned by the sheriff, and not when it was summoned by jury commissioners. Carter v. State, 39 T. Cr. R., 345, 46 S. W. R., 236.

Art. 680. [661] **Defendant may challenge array, when.**—The defendant may challenge the array for the following causes only: That the officer summoning the jury has acted corruptly, and has wilfully summoned persons upon the jury known to be prejudiced against the defendant with a view to cause him to be convicted. [O. C. 569.]

Practice. This article prescribes the only mode in which defendant may attack the action of the sheriff in summoning on the new panel certain jurors, on the regular panel set aside on defendant's previous motion. Arnold v. State, 38 T. Cr. R., 1, 40 S. W. R., 734.

The only grounds for challenge to array of trial jury are those stated in this and the preceding article. Anderson v. State, 34 T. Cr. R., 196, 29 S. W. R., 384; Ross v. State, 56 Id., 275, 118 S. W. R., 1034.

Art. 681. [662] **Two preceding articles do not apply, when.**—The two preceding articles do not apply when the jurors summoned are those who have been selected by jury commissioners. In such case, no challenge to the array is allowed.

Carter v. State, 39 T. Cr. R., 345, 46 S. W. R., 236; Arnold v. State, 38 Id., 1, 40 S. W. R., 734; O'Bryan v. State, 12 Id., 118; Ross v. State, 36 Id., 275, 118 S. W. R., 1034.

Art. 682. [663] **Challenge to the array must be in writing, etc.**—All challenges to the array must be made in writing, setting forth distinctly the grounds of such challenge; and, when made by the defendant, it must be supported by his affidavit, or the affidavit of some credible person.

Ante, Art. 680, and notes.

Decisions: The challenge to the array, which must be in writing, must precede challenge to the poll. Cooley v. State, 38 T., 636.

Challenge to the array not available to a negro on ground that his proffered jury comprises white men only. Carter v. State, 39 T. Cr. R., 345, 46 S. W. R., 236.

Nor to a defendant on the ground that some of the jurors are incompetent and disqualified. Mitchell v. State, 43 T., 512.

Nor on ground that the sheriff, without authority, summoned other persons than those named in the writ. Harris v. State, 6 T. Cr. R., 97.

And see Tuttle v. State, 6 T. Cr. R., 556; Coker v. State, 7 Id., 83; Buie v. State, Id., 453; Castinado v. State, Id., 582; Giebel v. State, 28 Id., 151, 12 S. W. R., 591; Sanchez v. State, 39 Id., 389, 46 S. W. R., 249.

Art. 683. [664] **Judge shall decide challenge without delay.**—When a challenge to an array is made, the judge shall hear evidence, and decide whether the challenge shall be sustained or not, without delay.

Art. 684. [665] **Proceedings when such challenge is sustained.**—If the challenge be sustained, the array of jurors summoned shall be discharged, and the court shall order other jurors to be summoned in their stead, and shall direct that the officer who summoned the persons so discharged, and on ac-

count of which officer's misconduct the challenge has been sustained, shall not summon any other jurors in the case.

Art. 685. [666] **Defendant entitled to list of persons summoned.**—When a challenge to the array has been sustained, the defendant shall be entitled to service of a copy of the list of names of those summoned by order of the court, as in the first instance.

Ante, Arts. 671 and 672, and notes.

Art. 686. [667] **Court shall proceed to try qualifications of persons summoned.**—When no challenge to the array has been made, or, having been made, has been overruled, the court shall proceed to try the qualifications of those who have been summoned, and who are present, to serve as jurors.

Art. 687. [668] **Mode of testing qualifications.**—In testing the qualifications of a juror, he having first been sworn as provided in article 674, he shall be asked the following questions by the court, or under its direction:

1. Are you a qualified voter in this county and state, under the constitution and laws of this state?

Jurors. Qualifications. Only qualified voters are competent jurors. Armendares v. State, 10 T. Cr. R., 44. Note point on which this case is overruled by Leeper v. State, 29 Id., 63, 15 S. W. R., 411.

Citizen defined: Abrigo v. State, 29 T. Cr. R., 143, 15 S. W. R., 408.

Disqualification. Disqualification of a juror for non-age will not be reviewed on appeal unless it is made to appear defendant was not wanting in diligence to ascertain the fact and that injury resulted to him. Trueblood v. State, 1 T. Cr. R., 650.

Non-citizenship of county or state is not cause for new trial, unless it be that the disqualification was not known, and defendant was not lacking in diligence. Johnson v. State, 27 T., 758; Roseborough v. State, Id., 570; O'Mealy v. State, 1 T. Cr. R., 80; Leeper v. State, 29 Id., 63, 15 S. W. R., 411, over Brackenridge v. State, 27 Id., 513, 11 S. W. R., 630. And see Sutton v. State, 31 Id., 297, 20 S. W. R., 564.

Qualified citizen, etc., of an unorganized county is a qualified juror in the county to which it is attached. Groom v. State, 23 T. Cr. R., 82, 3 S. W. R., 668.

2. Are you a householder in the county, or a freeholder in the state?

If the person interrogated answers the foregoing questions in the affirmative, the court shall hold him to be a qualified juror until the contrary be shown by further examination or other proof. Provided, that his failure to pay poll tax as required by law shall not be held to disqualify him for jury service in any instance. [Amended, Act 1903, 1st S. S., p. 16; amended, Act 1905, p. 207.]

"Householder;" "Freeholder." He who is the head of and provider of a family occupying a house, whether married or single, is a householder. Lane v. State, 29 T. Cr. R., 310, 15 S. W. R., 827, and cases cited, criticizing Robles v. State, 5 Id., 346.

And see Maines v. State, 35 T. Cr. R., 109, 31 S. W. R., 667; Bejarano v. State, 6 Id., 265; Boren v. State, 23 Id., 28, 4 S. W. R., 463; Williams v. State, 36 Id., 225, 36 S. W. R., 444; Mays v. State, Id., 437, 37 S. W. R., 721; Brennan v. State, 33 T., 266; Schuster v. LaLonde, 57 T., 28.

Art. 688. [669] **When held to be qualified, etc.**—When a juror has been held to be qualified, he shall be passed to the parties, first to the state and then to the defendant, for acceptance or challenge.

Art. 689. [670] **Two kinds of challenges.**—Challenges to individual jurors are of two kinds, peremptory and for cause. [O. C. 570.]

Art. 690. [671] **A peremptory challenge.**—A peremptory challenge is made to a juror without assigning any reason therefor. [O. C. 571.]

Post, Arts. 691, 710, 711.

Peremptory challenge is not, of itself, a right to select, but the right to reject jurors to a certain number, invulnerable to challenge for cause, and it may be used to the number allowed capriciously or arbitrarily. Defendant must have exhausted his peremptory challenges before he will be heard to complain of the court's action on challenges for cause. Heskew v. State, 17 T. Cr. R., 161, and cases cited; Roberts v. State, 30 Id., 291, 17 S. W. R., 450; Williams, Id., 354, 17 S. W. R., 408; Wilson v. State, 32 Id., 22, 22 S. W. R., 39. And see Cooley v. State, 38 T., 636; Seals v. State, 35 Id., 138, 32 S. W. R., 545.

An accepted juror can not be removed by peremptory challenge. McMillan v. State, 7 T. Cr. R., 142.

Art. 691. [672] **Number of challenges in capital cases.**—In capital cases, both the state and defendant shall be entitled to fifteen peremptory challenges; and, where there are more defendants than one tried together, the state shall be entitled to eight peremptory challenges for each of said defendants; and each defendant shall be entitled to eight peremptory challenges. [O. C. 572; amended, Act 1897, p. 12.]

Peremptory challenge. The offense being committed before, and the trial taking place after the amendment took effect, the defendant was entitled only to the number of challenges provided by the original article. Edmondson v. State, 44 S. W. R., 154.

Conviction for second degree murder is acquittal of first degree, and the case is no longer capital. Accordingly, on new trial under said conviction, the defendant would be entitled to ten instead of twenty peremptory challenges. Cheek v. State, 4 T. Cr. R., 444.

Defendant or his attorney must keep record of challenges exhausted by him, and not rely on the clerk. Miller v. State, 36 T. Cr. R., 47, 35 S. W. R., 391.

He can not complain of being compelled to exhaust a peremptory challenge when the court gave him another in lieu of it. Blackwell v. State, 29 T. Cr. R., 194, 15 S. W. R., 597.

Peremptory challenge in excess of the number prescribed by law is properly refused. McKinney v. State, 31 T. Cr. R., 583, 21 S. W. R., 683, and cases cited; Pierson v. State, 21 Id., 14, 17 S. W. R., 468; Thompson v. State, 19 Id., 593.

Art. 692. [673] **A challenge for cause may be made for what reason.**—A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. It may be made for any one of the following reasons:

1. That he is not a qualified voter in the state and county, under the constitution and laws of the state; provided, that his failure to pay poll tax as required by law shall not be held to disqualify him for jury service in any instance.

Ante, Art. 687, subd. 1.

2. That he is neither a householder in the county nor a freeholder in the state.

Ante, Art. 692, subd. 1.

3. That he has been convicted of theft or any felony.

Const., Art. 6, Sec. 1, subd. 4. And see post, Art. 1051.

Unpardoned convict. Under this subdivision and under Art. 695, post, a juror who had theretofore been convicted and sentenced for perjury, and who had never

been pardoned and his citizenship restored, is not a qualified juror. Rice v. State, 52 T. Cr. R., 359, 107 S. W. R., 832.

Pardoned convict. Under Article 4, Sec. 2 of the constitution, and post, Art. 1051, the governor has the pardoning power, except in cases of treason and impeachment. He may exercise it after the convict has served out his sentence, and the pardon so granted restores the civil rights of the convict as a citizen, and revives his competency as a juror. Easterwood v. State, 34 T. Cr. R., 400, 31 S. W. R., 294, and cases cited.

4. That he is under indictment or other legal accusation for theft or any felony.

Post, Art. 695.

Construed. To sustain this ground, there must be proof aliunde the voir dire examination of the proposed juror. Sewell v. State, 15 T. Cr. R., 56.

5. That he is insane or has such defect in the organs of seeing, feeling or hearing, or such bodily or mental defect or disease as to render him unfit for jury service.

Post, Art. 695; Mitchell v. State, 36 T. Cr. R., 278, 33 S. W. R., 367; Hart v. State, 15 Id., 202; Caldwell v. State, 41 T., 86.

6. That he is a witness in the case.

Construed. That the proffered juror belongs to the regular panel or that he denies any knowledge of the case, will not remove this disqualification. West v. State, 8 T. Cr. R., 119. But see Seals v. State, 35 Id., 138, 32 S. W. R., 545.

7. That he served on the grand jury which found the indictment.

Construed. One in this category is not ipso facto disqualified, though the ground is a good one for challenge. It is not, however, a good ground for a new trial in the absence of a showing of diligence with which the accused is charged. Self v. State, 39 T. Cr. R., 455, 47 S. W. R., 26. And see Aud v. State, 36 Id., 76, 35 S. W. R., 671; Franklin v. State, 2 Id., 8; Johnson v. State, 34 Id., 115, 29 S. W. R., 473.

8. That he served on a petit jury in a former trial of the same case.

Construed. A juror is not disqualified because he was a juror on the trial of defendant for a previous similar though different transaction. Arnold v. State, 38 T. Cr. R., 1, 40 S. W. R., 734.

A juror is not incompetent merely because he was rejected by peremptory challenge at a previous trial of the case. Nalley v. State, 28 T. Cr. R., 387, 13 S. W. R., 670.

A juror who tried and convicted the co-defendant of the accused on the same particular charge is disqualified to try the latter. Sessions v. State, 37 T. Cr. R., 58, 38 S. W. R., 605, and cases cited. And see Gilmore v. State, Id., 81, 38 S. W. R., 787.

9. That he is related within the third degree of consanguinity or affinity to the defendant.

10. That he is related within the third degree of consanguinity or affinity to the person injured by the commission of the offense, or to the private prosecutor, if there be one.

Relationship to private prosecutor. The relationship stated is cause for challenge. Subscribers to a fund for the employment of counsel to prosecute accused are not private prosecutors. Heacock v. State, 13 T. Cr. R., 97; McGee v. State, 37 Id., 668, 40 S. W. R., 967, and cases cited.

No ground for challenge that the juror was a brother of the deputy sheriff. Miller v. State, 36 T. Cr. R., 47; 35 S. W. R., 391

The disqualification named in this subdivision is not available to the state, but only to the defendant when properly raised. Blake v. State, 9 Id., 328.

The brother-in-law of the alleged injured person is not a competent juror to try defendant. Powers v. State, 27 T. Cr. R., 700, 11 S. W. R., 646.

The husband of the second cousin of the injured person comes within the inhibition of third degree by affinity, and disqualifies him as a juror. Page v. State, 22 T. Cr. R., 551, 3 S. W. R., 745.

Defendant challenged for cause that the juror was related to the owner of other horses charged as stolen in the same transaction. Held, that the challenge should have been sustained. Wright v. State, 12 T. Cr. R., 163.

11. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime.

Construed. **Scruple against infliction of death penalty** is a good cause for challenge on the part of the state. Sawyer v. State, 39 T. Cr. R., 557, 47 S. W. R., 650; White v. State, 16 T., 206; Burrell v. State, 18 Id., 713; Little v. State, 39 Id., 654, 47 S. W. R., 984, and cases cited; Thompson v. State, 18 Id., 593; Kennedy v. State, 19 Id., 618; Gonzales v. State, 31 Id., 508, 21 S. W. R., 253.

12. That he has a bias or prejudice in favor of or against the defendant.

Construed. This ground is as available to the state as to the defendant. Withers v. State, 30 T. Cr. R., 383, 17 S. W. R., 936, and cases cited.

"Bias" defined. Pierson v. State, 18 T. Cr. R., 524.

That the proposed juror expressed to accused the day before the trial his hope for acquittal, good cause for challege. Mason v. State, 15 T. Cr. R., 534.

And see Giebel v. State, 28 T. Cr. R., 151, 12 S. W. R., 591; Long v. State, 10 Id., 186; Sewall v. State, 15 Id., 56; Graham v. State, 28 Id., 582, 13 S. W. R., 1010; Hanks v. State, 21 Id., 526; Henrie v. State, 41 T., 573.

"Prejudice" defined. Meyers v. State, 39 T. Cr. R., 500, 46 S. W. R., 817, following Randle v. State, 34 Id., 43, 28 S. W. R., 953.

Extreme ill feeling of a juror for accused, unknown to the latter until after the trial, is good cause for new trial. Long v. State, 32 T. Cr. R., 409. And see further Nash v. State, 2 T. Cr. R., 362; Washburn v. State, 31 Id., 352, 20 S. W. R., 715; Shaw v. State, 32 Id., 155, 22 S. W. R., 588; Ray v. State, 35 Id., 354, 33 S. W. R., 869; and 36 Id., 76; Driver v. State, 37 Id., 160, 38 S. W. R., 1020.

Race prejudice as cause for challege: Lester v. State, 2 T. Cr. R., 432; Cavitt v. State, 15 Id., 190; Fendrick v. State 39 Id., 147, 45 S. W. R., 589; Williams v. State, 44 T., 34; Bass v. State, 127 S. W. R., 1020.

13. That from hearsay or otherwise there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict. For the purpose of ascertaining whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusions so established will influence his verdict. If he answers in the affirmative, he shall be discharged; if he answers in the negative, he shall be further examined by the court, or under his direction, as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and, if the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial, and will render such verdict, may, in its discretion, admit him as competent to serve in such case; but, if the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged.

Conclusions formed. For rule testing the juror under this subdivision, see Rothschild's case, 7 T. Cr. R., 520.

And see Johnson v. State, 21 T. Cr. R., 368, 17 S. W. R., 252; Steagald v. State, 22 Id., 464, 3 S. W. R., 771; Suit v. State, 30 Id., 20, 17 S. W. R., 458; McKinney

v. State, 31 Id., 583, 21 S. W. R., 683; Miller v. State, 32 Id., 319, 20 S. W. R., 1103; Trotter v. State, 37 Id., 468, 36 S. W. R., 278; Hamlin v. State, 39 Id., 579, 47 S. W. R., 656.

Practice; examination of juror. Juror's answer on voir dire that the conclusion formed will affect his verdict is conclusive and he must be excused. Answering that it would not, the juror is subject to the further examination by the court to satisfy the latter of his impartiality. Stagner v. State, 9 T. Cr. R., 440.

And see Spear v. State, 16 T. Cr. R., 98; Rockhold v. State, Id., 577; Shannon v. State, 34 Id., 5, 28 S. W. R., 540; Randle v. State, Id., 43, 28 S. W. R., 953; Arnold v. State, 38 Id., 5, 40 S. W. R., 735; Kugadt v. State, Id., 681, 44 S. W. R., 989.

From reading newspapers: As to rule on opinion formed from reading newspapers, and examination in connection therewith, see Rothschild v. State, 7 T. Cr. R., 519; Grissom v. State, 4 Id., 374.

The formed conclusion contemplated in this subdivision does not include impartiality arising from ignorance or incompetency. Accordingly a juror who reads newspapers may be competent, though he may have formed an opinion therefrom, provided that opinion is not fixed or will not influence his verdict. Ashton v. State, 31 T. Cr. R., 479, 21 S. W. R., 47, and cases cited.

From rumor, hearsay, etc. Though an opinion, based upon rumor and hearsay, may have been formed, a juror is not disqualified for that reason if he shows on his voir dire that he could render an impartial verdict on the law and evidence. Sawyer v. State, 39 T. Cr. R., 557, 47 S. W. R., 650, and cases cited.

When it transpires that a juror who qualified himself on voir dire did have, when doing so, a fixed opinion, new trial should be granted on defendant making proper showing of ignorance of the fact. McWilliams v. State, 32 T. Cr. R., 269, 22 S. W. R., 970. And further on this ground of disqualification, see Kugadt v. State, 38 Id., 631, 44 S. W. R., 989.

From statement of witness, etc. Note distinction between opinion formed from rumor and that from conversations with a witness. Shannon v. State, 34 T. Cr. R., 5, 28 S. W. R., 540.

In the latter case, challenge to the juror was properly sustained. Trotter v. State, 37 T. Cr. R., 468, 36 S. W. R., 278.

The bill of exceptions must disclose the witness talked to, whether he was a material witness and whether the witness was a factor in the opinion formed. Wade v. State, 35 T. Cr. R., 170, 32 S. W. R., 772.

From evidence on former trial, etc. Jurors who had tried a co-defendant, though on voir dire they stated they had formed no opinion as to defendan's guilt, are disqualified. Sessions v. State, 37 T. Cr. R., 58, 38 S. W. R., 605, citing Obenchain v. State, 35 Id., 490, 34 S. W. R., 278, and Shannon v. State, 34 Id., 5, 28 S. W. R., 540; Gilmore v. State, 37 Id., 81, 38 S. W. R., 787. Compare Pierson v. State, 21 Id., 14, 17 S. W. R., 468.

The formed opinion must relate to the particular case on trial and not to similar cases theretofore tried. Arnold v. State, 38 T. Cr. R., 1, 40 S. W. R., 734; Segars v. State, 35 Id., 45, 31 S. W. R., 370.

Practice. The inquisition must be as to the jurors opinon affecting the guilt or innocence of the accused on trial, and not that of his co-defendant previously tried. Peddy v. State, 31 T. Cr. R., 21 S. W. R., 542, citing Pierson v. State, 21 Id., 14, 17 S. W. R., 468.

And further, see Parchman v. State, 2 T. Cr. R., 228; Grisson v. State, 4 Id., 374; Rothschild v. State, 7 Id., 519; Shields v. State, 8 Id., 427; Wade v. State, 12 Id., 358; Thompson v. State, 19 Id., 593; Johnson v. State, 21 Id., 368, 17 S. W. R., 252; Shaw v. State, 27 T., 750.

In doubt as to the juror's qualification, he should be rejected. Dreyer v. State, 11 T. Cr. R., 631; Black v. State, 42 T. 377.

Diligence in sounding the juror on his voir dire is imposed on the defendant, and it is too late to take advantage of laches in this respect on motion for new trial. Aud v. State, 36 T. Cr. R., 76, 35 S. W. R., 671, overruling on this point Hanks v. State, 21 T., 527. And see Armstrong v. State, 34 Id., 248, 30 S. W. R., 235.

14. That he can not read and write. This cause of challenge shall not be sustained, when it appears to the court that the requisite number of jurors

who are able to read and write, can not be found in the county. [O. C. 575; amended, Act 1903, 1st S. S., p. 16; amended Act 1905, p. 207.]

Construed. Though able to read, a person unable to write is disqualified under this subdivision. Rainey v. State, 20 T. Cr. R., 470.

Ability to write means ability to express ideas on paper with pen or pencil, and not mere ability to trace the writer's name. Johnson v. State, 21 T. Cr. R., 368, 17 S. W. R., 252.

And it means to write in the English and not a foreign language. Wright v. State, 12 T. Cr. R., 163. Unless it be shown that enough persons to form a jury able to write in the English language cannot be found in the county of the forum. Garcia v. State, 12 Id., 335.

Inability to speak and understand English is good cause for challenge. McCampbell v. State, 9 T. Cr. R., 124, and cases cited.

A deaf person tendered as a juror should be excused. Mitchell v. State, 36 T. Cr. R., 278, 33 S. W. R., 367.

Previous jury service it not now a disqualifying cause or ground for challenge. Hunter v. State, 30 T. Cr. R., 314, 17 S. W. R., 414.

New trial. The disqualification of a juror who sat on the trial is not per se cause for new trial, nor unless it was made to appear that injury resulted to accused from his service. Leeper v. State, 29 T. Cr. R., 63, 14 S. W. R., 398, overruling on this point, Lester v. State, Id., 432, Armendares v. State, 10 Id., 44. Boren v. State, 23 Id., 28, 4 S. W. R., 463, and Breckenridge v. State, 27 Id., 573, 11 S. W. R., 630. Mays v. State, 36 Id., 437, 37 S. W. R., 721, and cases cited.

Practice on appeal: What bill of exception must show: Shaw v. State, 27 T., 750; Hudson v. State, 28 T. Cr. R., 323, 13 S. W. R., 388; Rippey v. State, 29 Id., 37, 14 S. W. R., 448; Blackwell v. State, Id., 194, 15 S. W. R., 597; Sutton v. State, 31 Id., 297, 20 S. W. R., 564; Aistrop v. State, Id., 467, 20 S. W. R., 989; Kramer v. State, 34 Id., 84, 29 S. W. R., 157; Jordan v. State, 37 Id., 224, 38 S. W. R., 780; Jones v. State, Id., 433, 35 S. W. R., 975.

Art. 693. [674] **Other evidence may be heard.**—Upon a challenge for cause, the examination is not confined to the answers of the juror, but other evidence may be heard in support of or against the challenge. [O. C. 577.]

Shaw v. State, 27 T., 750.

Art. 694. [675] **Juror shall not be asked certain questions.**—In examining a juror, he shall not be asked a question, the answer to which may show that he has been convicted of an offense which disqualifies him, or that he stands charged by indictment or other legal accusation with theft or any felony. [O. C. 577.]

Sewell v. State, 15 T. Cr. R., 56; Shaw v. State, 27 T., 750.

Art. 695. [676] **No juror shall be impaneled, when.**—No juror shall be impaneled when it appears that he is subject either to the third, fourth or fifth clause of challenge in article 636, although both parties may consent.

Greer v. State, 14 T. Cr. R., 179; Sewell v. State, 15 Id., 56; Easterwood v. State, 34 Id., 400, 31 S. W. R., 294; Rice v. State, 52 Id., 359, 107 S. W. R., 832.

Art. 696. [677] **Names of persons summoned shall be called in their order.**—In selecting the jury from the persons summoned, the names of such persons shall be called in the order in which they appear upon the list furnished the defendant; and each juror shall be tried and passed upon separately; and a person who has been summoned, but who is not present, may, upon his appearance before the jury is completed, be tried as to his qualifications and impaneled as a juror, unless challenged; but no cause shall be unreasonably delayed on account of the absence of such person. [O. C. 556-558.]

Jury law; Practice. Jurors shall be called in the order in which they appear on the list furnished the defendant, and each shall be passed upon separately, first by the state and then by the defendant. Caldwell v. State, 12 T. Cr. R., 302; Clark v. State, 8 Id., 350; Norbach v. State, 43 T., 242; Mitchell Id., 512.

When the name of a certain juror on the venire served on defendant was reached, the sheriff appraised the court that said juror had not been summoned, and the court ordered the jury to be completed from the remaining jurors. Held error. Proceedings should have been suspended until the unserved juror could be served and produced, or a new venire facias should have issued and the jury organized de novo. Osborne v. State, 23 T. Cr. R., 431, 5 S. W. R., 251.

Not error for the court, ordering attachment for absent jurors, to refuse to postpone proceedings until return of attachment. Deen v. State, 37 T. Cr. R., 506, 40 S. W. R., 266; Jackson v. State, 30 Id., 664. 18 S. W. R., 643, and cases cited. Habel v. State, 28 Id., 588, 13 S. W. R., 1001.

Withdrawal of acceptance of juror. Having accepted a juror, the state may withdraw that acceptance for good disqualifying cause, since discovered. Mitchell v. State, 43 T., 512.

But the disqualifiing cause must have been discovered since the opportunity to challenge, or be one not ordinarily discoverable on the voir dire of the juror, which must be disclosed on the application for tardy challenge. Baker v. State, 3 T. Cr. R., 525, overruling Hubotter v. State, 32 T., 479, and Cooley v. State, 38 Id., 698. And see Horbach v. State, 43 T., 242.

Peremptory challenge will not reach a juror once accepted, and this whether or not the jury is full. Horbach v. State, supra; Drake v. State, 5 T. Cr. R., 649.

Art. 697. [678] **Judge shall decide qualifications of jurors, etc.**—The court is the judge, after proper examination, of the qualifications of a juror, and shall decide all challenges without delay and without argument thereupon. [O. C. 579.]

Art. 698. [679] **Oath to be administered to each juror.**—As each juror is selected for the trial of the case, the following oath shall be administered to him by the court, or under its direction: "You solemnly swear that in the case of the state of Texas against A B, the defendant, you will a true verdict render, according to the law and the evidence, so help you God." [O. C. 563.]

Organization of jury; decisions. In a capital case, each juror, as selected, is sworn and impaneled, and once impaneled cannot be excused without consent of defendant, unless the entire panel is discharged. In non-capital cases, the jury is impaneled only when complete in number and sworn in a body. Rippey v. State, 29 T. Cr. R., 37, 14 S. W. R., 448.

Objection that the jurors in a capital case were not sworn seriatim as examined, but in a body on completion of the panel, comes too late when first mooted in motion for new trial. Caldwell v. State, 12 T. Cr. R., 302.

If the record merely shows that the jury in a felony case was "sworn" or "sworn according to law," the presumption obtains that the statutory oath was administered. If, however, the record shows affirmatively that the oath administered was not the prescribed oath, a conviction will be reversed. Stephens v. State, 33 T. Cr. R., 101, 25 S. W. R., 286, and cases cited.

Under post, Art. 938, as amended by the act of 1897, the appellate court will presume that the proper oath was administered to the jury, unless the contrary is shown by proper bill of exception.

Art. 699. [680] **Court may adjourn persons summoned, etc., but jurors, when sworn, shall not separate, unless, etc.**—The court may adjourn persons summoned as jurors in a capital case to any day of the term; but when jurors have been sworn in a case, those who have been so sworn shall be kept together and not permitted to separate until a verdict has been rendered, or the jury finally discharged, unless by permission of the court, with the consent of the state and the defendant, and in charge of an officer. [O. C. 605.]

Decisions. If, by a mistake, more than twelve men were selected on the jury, the last jurors sworn in excess of twelve must be discharged. Ballard v. State, 38 T., 504; Davis v. State, 9 T. Cr. R., 634.

Art. 700. [681] **Persons not selected shall be discharged.**—When a jury of twelve men has been completed, the other persons who may be in attendance under a summons to appear as jurors in the case shall be discharged from further attendance therein.

Art. 701. **Persons summoned on special venire, challenged or excused, paid, when.**—That all men summoned on special venire, and who shall have been challenged or excused from service on the trial, and who reside more than one mile distant from the court house of the county, shall be paid, out of the jury fund, one dollar for each day that he attends court on said summons; provided, further, no person shall receive pay as a special venireman and regular juror for the same day; provided, that no per diem shall, in any event, be allowed any venireman under this act, who resides within the corporate limits of the county seat, if incorporated, nor shall any per diem be allowed any venireman for more than one case the same day. [Act 1907, p. 214.]

CHAPTER FOUR.

OF THE FORMATION OF THE JURY IN CASES LESS THAN CAPITAL.

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Article 702. [682] **Duty of clerk when parties are ready for trial.**—When the parties have announced ready for trial in a criminal action less than capital, the clerk shall write the names of all the regular jurors entered of record for that week on separate slips of paper, as near the same size and appearance as may be, and shall place the slips in a box and mix them well. [Act Aug. 1, 1876, p. 82, § 21.]

Art. 703. [683] **Same subject.**—The clerk shall draw from the box, in the presence of the court, the names of twenty-four jurors, if in the district court, or so many as there may be, if there be a less number in the box; and the names of twelve jurors, if in the county court, or so many as there may be, if there be a less number in the box, and write the names, as drawn, upon two slips of paper, and deliver one slip to the attorney for the state and the other to the defendant or his attorney. [Id., § 22.]

Organization of jury; practice. Objection to the manner of drawing and listing the jury from the box must be taken at the time, and comes too late when mooted on motion for new trial. Jones, 37 T. Cr. R., 433; 35 S. W. R., 975, citing McMahon, 17 Id., 321, and Caldwell v. State, 12 Id., 302.

The defendant cannot demand, nor the court direct, the drawing of more than the statutory number of names from the box to form the petit jury. Burfey v. State, 3 T. Cr. R., 519; Jones v. State, Id., 575.

Not a substantial objection by defendant that the list served on him contained more than twenty-four names. Bratt v. State, 41 S. W. R., 624. And see Davis v. State, 9 T. Cr. R., 634.

Art. 704. [684] **When other jurors to be summoned.**—When there are not as many as twelve names drawn from the box, if in the district court, or, if in the county court, as many as six, the court shall direct the sheriff to summon such number of qualified persons as the court may deem necessary to complete the panel; and the names of the persons thus summoned shall be placed in the box and drawn and entered upon the slips as provided in the preceding articles.

See Davis v. State, 9 T. Cr. R., 634.

Organization of jury; practice. Eight of the regular panel of jurors were out on another case when this one was called, and, of the sixteen remaining, seven jurors were secured, and the court refused to postpone for the eight, and completed the jury from talesmen. Held, correct (Ante, Art. 703, post, Arts. 705, 706.) Thurmond v. State, 37 T. Cr. R., 367, 35 S. W. R., 965.

Proper to complete the jury with talesmen when members of the regular panel or the jury in another case. Leslie v. State, 47 S. W. R., 367.

Art. 705. [685] **Challenge for cause to be made, when.**—When as many as twelve or more jurors, if in the district court, or six or more, if in the county court, are drawn, and the lists of their names delivered to the parties, if either party desire to challenge any juror for cause, the challenge shall now be made, and the proceedings in such case shall be the same as in capital cases.

Ante, Art. 692 and notes; post, Art. 707.

Art. 706. [686] **When number is reduced, etc., by challenge, others to be drawn, etc.**—If the number of jurors be reduced by challenge to less than twelve in the district court, or six in the county court, the court shall order other jurors to be drawn or summoned, as the case may be, and placed upon the lists in place of those who have been set aside for cause.

See Thurmond v. State, 37 T. Cr. R., 35 S. W. R., 965.

Organizing jury, practice. After challenging several jurors for cause, the defendant demanded that the panel be filled before his resort to peremptory challenge. There being no residuum from which to supply those challenged for cause, the court properly required the defendant to proceed with those left. Speiden v. State, 3 T. Cr. R., 156; Logan v. State, 55 Id., 180, 115 S. W. R., 1193.

Art. 707. [687] **Cause for challenge same as in capital cases, except, etc.**—The challenges for cause in all criminal actions are the same as provided in capital cases in article 692, except cause 11 in said article, which is applicable to capital cases only.

Ante, Art. 692, and notes.

Art. 708. [688] **Peremptory challenge to be made, when.**—When a juror has been challenged and set aside for cause, his name shall be erased from the lists furnished the parties, and when there are twelve names remaining on the lists not subject to challenge for cause, if in the district court, or six names, if in the county court, the parties shall proceed to make their peremptory challenges, if they desire to make any.

Organization of jury; practice. Objection to the impanelment of a challenged juror comes too late after the jury has been sworn and the defendant has pleaded, as failure of proper diligence. Such, in any event, would be held harmless error

in default of showing of bias or prejudice on the part of the juror to the injury of defendant. Munson v. State, 34 T. Cr. R., 498, 31 S. W. R., 387.

The discharge, after the trial had begun, of the last sworn of thirteen persons impaneled on the jury, was proper practice. Ballard v. State, 38 T., 504; Davis v. State, 9 T. Cr. R., 634.

Art. 709. [689] **In felonies not capital, number of challenges.**—In prosecutions for felonies not capital, the defendant and state shall each be entitled to ten peremptory challenges; and, where more defendants than one are tried together, each defendant shall be entitled to five peremptory challenges, and the state to five, for each defendant. [O. C. 573; amended, Act 1897, p. 13.]

Art. 710. [690] **In misdemeanors.**—In misdemeanors tried in the district court, the state and defendant shall be each entitled to five peremptory challenges; if tried in the county court, the state and defendant shall be each entitled to three peremptory challenges; and, if there are more defendants than one tried together, each defendant shall be entitled to three peremptory challenges in either court. [O. C. 574.]

Art. 711. [691] **Manner of making peremptory challenge.**—The manner of making a peremptory challenge shall be as follows: The party desiring to challenge a juror or jurors peremptorily shall erase the name or names of such juror or jurors from the list furnished him by the clerk, and the party may erase any number of names not exceeding the number of peremptory challenges allowed him by law. [Act Aug. 1, 1876, p. 82.]

Waiver. A defendant may waive the statutory formalities in the impanelment of the jury. Grant, 3 T. Cr. R., 1.

Defendant is not entitled to a list of the jurors peremptorily challenged or stricken from the list by the state before proceeding himself. Phillips v. State, 6 T. Cr. R., 44.

Art. 712. [692] **Lists shall be returned to clerk, when.**—When the parties have made their peremptory challenges, as provided in the preceding article, or when they decline to make any, they shall deliver their lists to the clerk; and the clerk shall, if the case be in the district court, call off the first twelve names on the lists that have not been erased; and, if the case be in the county court, he shall call off the first six names on the lists that have not been erased; and the persons whose names are called shall be sworn as jurors to try the case. [Id.]

Art. 713. [693] **When jury is left incomplete, court shall direct, etc.**—When, by peremptory challenges, the jury is left incomplete, the court shall direct such number of other jurors to be drawn or summoned, as the case may be, as the court may consider sufficient to complete the jury; and the same proceedings shall be had in selecting and impaneling such other jurors as are had in the first instance.

Ante, Art. 706.

Art. 714. [694] **Oath to be administered to jurors.**—When the jury has been selected, the following oath shall be administered to them by the court, or under its direction: "You, and each of you, solemnly swear that in the case of the state of Texas against A B, the defendant, you will a true verdict render according to the law and the evidence, so help you God." [O. C. 563.]

Ante, Art. 698, and notes.

Oath, as prescribed in this article, must be administered to the jury in a body in all felony cases less than capital. Stephens v. State, 33 T. Cr. R., 101, 25 S. W. R., 286, and cases cited.

Art. 715. [695] **When there are no regular jurors, court shall order jurors to be summoned.**—When, from any cause, there are no regular jurors for the week from whom to select a jury, the court shall order the sheriff to summon forthwith such number of qualified persons as it may deem sufficient; and, from those summoned, a jury shall be formed, as provided in the preceding articles of this chapter.

Ante, Arts. 666, 667, and notes.

Jury law; practice. No jury having been drawn for the term, the court properly ordered the sheriff to summon one for the week. Certain of those disqualifying, the court did not err in requiring the defendant to select a jury from those remaining. Thompson v. State, 44 S. W. R., 837; Wyatt v. State, 38 T. Cr. R., 42 S. W. R., 598. And see Schuh v. State, 124 S. W. R., 908.

Same. The panel being quashed or motion of defendant and another jury summoned by order of court, it is no objection that some of the jurors summoned were on the quashed panel. Arnold v. State, 38 T. Cr. R., 1, 40 S. W. R., 734.

Same. A jury organized under the provisions of this article is legal, and not obnoxious to the objection that it deprived the defendant of a trial by "due course of law." Sanchez v. State, 39 T. Cr. R., 389, 46 S. W. R., 249.

Same. The jury commissioners, under the direction of the court, having selected jurors for three weeks, in which time the term was not completed, the court had the sheriff to select jurors for the fourth week, during which the defendant was tried. Held, the jury so summoned was a legal one. Green v. State, 53 T. Cr. R., 490, 110 S. W. R., 920.

All criminal cases on the docket, including that of accused, were set for the first three days of the term, beginning Monday, for which the regular jury had been summoned. Defendant's case, at his request, was postponed on call, until Friday. The court having inadvertently discharged the jury, it is held that the court properly directed the sheriff to summon a jury to try the case. Kosmoroski v. State, 127 S. W. R., 1056.

Art. 716. [696] **Array may be challenged as in capital cases.**—The array of jurors may be challenged by either party for the causes and in the manner provided in capital cases, and the proceedings in such case shall be the same.

Ante, Arts. 678-684, and notes.

Practice. Motion to quash the array of jurors should be sustained where they were not chosen by commissioners as the law directs, but were selected and summoned by the sheriff. Irvin v. State, 57 T. Cr. R., 331, 123 S. W. R., 127.

CHAPTER FIVE.

OF THE TRIAL BEFORE THE JURY.

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Article 717. [697] **Order of proceeding in trial.**—A jury having been impaneled in any criminal action, the cause shall proceed to trial in the following order:

1. The indictment or information shall be read to the jury by the district or county attorney.

Reading indictment. This article is mandatory, and the indictment must be read in the order named to avert reversal on appeal. Wilkins v. State, 15 T. Cr. R., 420; Essary v. State, 53 T. Cr. R., 596, 111 S. W. R., 927, and cases cited.

Reading of the indictment at a subsequent stage of the proceedings, without the reintroduction of the testimony gone before, will not cure the omission. Essary v. State, supra.

But the reintroduction of the testimony on the tardy reading of the indictment will cure the omission. Barbee v. State, 32 T. Cr. R., 170, 22 S. W. R., 402.

Same; waiver. Opportune reading of the indictment being overlooked, the state offered, on rearraignment of defendant who refused to plead, to reintroduce its evidence. Defendant objected on the ground that it was already before the jury. Held, that such objection was equivalent to waiver by defendant of the reintroduction of the testimony, and he was properly required to proceed. Barbee v. State, supra.

Same. While not necessary that the judgment shall recite the reading of the indictment to the jury, it is better practice that it do so immediately preceding the recital of defendant's plea. It is sufficient if the fact is authenticated in any part of the record, as for instance in the judge's charge. White v. State, 18 T. Cr. R., 57.

2. The special pleas, if any, shall be read by the defendant's counsel, and if the plea of not guilty is also relied upon, it shall also be stated.

3. The district attorney, or the counsel prosecuting in his absence, shall state to the jury the nature of the accusation and the facts which are expected to be proved by the state in support thereof.

Construed. This subdivision is directory only, and its infraction is cause for reversal only on showing of prejudice to defendant's rights. But note appellate court's admonition in this connection. Hoisey v. State, 24 T. Cr. R., 35, 5 S. W. R., 523; Essary v. State, 53 T. Cr. R., 596, 111 S. W. R., 927.

Defendant's statement is inopportune at this juncture, and refusal to permit it was not error. Owen v. State, 52 T. Cr. R., 65, 105 S. W. R., 513.

4. The testimony on the part of the state shall be introduced.

Practice; eyewitness testimony. The state is not required to examine every eyewitness to the transaction, but the prosecuting attorney is vested with discretion to use as many as he may deem necessary to a legal conviction. Darter v. State, 39 T. Cr. R., 40, 44 S. W. R., 850, and cases cited.

But on an issue depending on opinion evidence, an eyewitness being accessible, should be called to testify by the state. Thompson v. State, 30 T. Cr. R., 325, 17 S. W. R., 448.

5. The nature of the defenses relied upon shall be stated by the counsel of the defendant, and what are the facts expected to be proved in their support.

Practice. Defendant's statement, opportune at this point, was properly excluded when tendered under subdivision 3. What would be the effect of refusal to permit it at this juncture is not decided. Oven v. State, 52 T. Cr. R., 65, 105 S. W. R., 513.

6. The testimony on the part of the defendant shall be offered.

7. Rebutting testimony may be offered on the part of the state and of the defendant. [O. C. 580.]

Rebutting testimony. The common law rule confining cross-examination to matters involved in the examination in chief, or in rebuttal to the witnesses' cross-examination, does not obtain in Texas, but is entirely abrogated by the article which follows, post, 718. The exercise of the discretion conferred upon the trial judge by said article will be revised only when it has been abused. Morris v. State, 30 T. Cr. R., 95, 16 S. W. R., 757, and cases cited.

Whether in rebuttal or not, evidence essential to the due administration of justice is admissible. Upton v. State, 33 T. Cr. R., 231, 26 S. W. R., 197. And see Pilot v. State, 38 Id., 515, 43 S. W.R.,112.

Art. 718. [698] **Testimony allowed at any time before argument.**—The court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appear that it is necessary to a due administration of justice. [O. C. 581.]

Construed. This article, which is an exception to the general rule, marks the limit of the discretionary powers of the court. Under it, the court may, when deemed necessary to the due administration of justice, admit evidence at any time before the conclusion of argument, but not afterwards. See in extenso Williams v. State., 35 T. Cr. R., 183, 32 S. W. R., 893.

This discretion to admit testimony after the evidence has been closed and pending argument extends to excluding proffered evidence at that time, and it is only on the abuse of such discretion that the court's exclusion of the same will be revised. Demert v. State, 39 T. Cr. R., 271, 45 Id., 917; Gonzales v. State, 32 T. Cr. R., 611, 25 S. W. R., 781; Nalley v. State, 28 T. Cr. R., 387, 13 S. W. R., 670; Elsworth v. State, 52 T. Cr. R., 1, 104 S. W. R., 903.

Art. 719. [699] **Witnesses placed under rule.**—At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under rule. [O. C. 582.]

Art. 720. [700] **Witnesses under rule kept separate, or, etc.**—When witnesses are placed under rule, those summoned for the prosecution may be kept separate from those summoned for the defense, or they may all be kept together, as the court shall direct. [O. C. 583.]

Art. 721. [701] **Part of witnesses may be placed under rule.**—The party requesting the witnesses to be placed under rule may designate such as he desires placed under rule, and those not designated will be exempt from the rule, or the party may have all the witnesses in the case placed under rule.

Art. 722. [702] **When under rule, shall be attended by an officer.**—Witnesses under rule shall be atttended by an officer, and all their reasonable wants provided for, unless the court, in its discretion, directs that they be allowed to go at large; but in no case where the witnesses are under rule shall they be allowed to hear the testimony in the case, or any part thereof.

Art. 723. [703] **Shall be instructed by the court, etc.**—Witnesses, when placed under rule, shall be instructed by the court that they are not to converse with each other or with any other person about the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under rule; and the officer who attends the witnesses shall report to the court at once any violation of its instructions; and the party violating the same shall be punished for contempt of court.

"The rule." The enforcement of the rule sequestering witnesses at the request of either party, is committed to the sound discretion of the trial court. They may be separated, state from defendant, allowed at large, or kept together under surveillance of the sheriff. Action of the court with regard to the rule will be revised only on abuse of discretion. McMillan v. State, 7 T. Cr. R., 142; Welhousen v. State, 30 Id., 18-300.

And whether or not a witness who has violated the rule, or who was placed under it after it was invoked, will be permitted to testify, is a matter of judicial discretion subject to review only for abuse. Cook v. State, 30 T. Cr. R., 607, 18 S. W. R., 412, citing Sherwood v. State, 42 T., 498; Blackwell v. State, 29 Id., 194, 15 S. W. R., 597; Baldwin v. State., 39 Id., 245-714. And see Rummel v. State, 22 Id., 558, 3 S. W. R., 763; Thomas v. State, 33 Id., 607, 28 S. W. R., 534; King v. State, 34 Id., 228, 29 S. W. R., 1086.

Witnesses exempt from rule: Attorneys in the case. Boatmeyer v. State, 31 T. Cr. R., 473, 20 S. W. R., and cases cited.

Deputy sheriffs and other officers of the court. Williams v. State, 37 T. Cr. R., 147, 38-999.

Medical experts. Leach v. State, 22 T. Cr. R., 279, 3-539.

Character witnesses. Roach v. State, 41 T., 261; Johnson v. State, 10 T. Cr. R., 571.

Same; practice. It is not good practice to permit counsel to confer with witnesses under the rule, but it will not be revised in the absence of showing of prejudice to accused. Kennedy v. State, 19 T. Cr. R., 618, and cases cited.

With such permission, the court may prescribe conditions. Holt v. State, 9 T. Cr. R., 571.

A witness cannot be taken from the stand for a conference with counsel. Williams v. State, 35 T., 355; Davis v. State, 6 T. Cr. R., 196.

A witness who has testified and been discharged from the rule may be recalled to explain his testimony. Goins v. State, 41 T., 334. And see Roach v. State, 41 T., 261.

Violation of the rule by a witness subjects him to punishment for contempt. Cross v. State, 11 T. Cr. R., 84.

Note this case of a flagrant violation of the rule. Welhousen v. State, 30 T. Cr. R., 623. 18-300.

Generally, see Trotter v. State, 37 T. Cr. R., 468, 36-278; Heath v. State, 7 Id., 464.

Art. 724. [704] **Order of argument.**—When a criminal cause is to be argued, the order of argument may be regulated by the presiding judge; but,

in all cases, the state's counsel shall have the right to make the concluding address to the jury. [O. C. 585.]

Limitation of agreement is within the discretion of the court. Counsel dissatisfied with the limit fixed must subject at the time. Bailey v. State, 37 T. Cr. R., 579, 40-281.

Order and latitude of argument are likewise matters committed to the discretion of the court, and revisable only in the event of abuse to the prejudice of the accused. Bingham v. State, 6 T. Cr. R., 169; Morales v. State, 1 Id., 494; Cross v. State, 11 Id., 84; Vines v. State, 31 Id., 31, 19 S. W. R., 545. And see Walker v. State, 32 Id., 175, 26-507; Tooke v. State, 23 Id., 12, 3 S. W. R., 782.

Jury law; practice. Pending discussion of the admissibility of evidence, the trial court is vested with discretion to retire the jury, and it should do so when the subject matter of the discussion might have an influence upon the jury. The exercise of this discretion is subject to revision for abuse. Allison v. State, 14 T. Cr. R., 402; White v. State, 10 Id., 381; Bogen v. State, Id., 467, 17 S. W. R., 1087. And see Crook v. State, 27 Id., 198, 11 S. W. R., 444.

Same. The trial court is vested with power to restrict counsel in the reading of authority to the jury, and, being sufficiently advised as to the law of a question, may decline to hear authority. Hudson v. State, 6 T. Cr. R., 565.

The extent to which counsel may read authority as part of his argument to the jury is a matter confined to the court, subject to revision for abuse only. Jacobs v. State, 37 T. Cr. R., 428, 35-978; Phipps v. State, 36 Id., 216, 36-753.

Art. 725. [705] **In prosecutions for felony.**—In prosecutions for felony, the court shall never restrict the argument to a less number of addresses than two on each side. [O. C. 586.]

Construed. This article cannot be construed to entitle a defendant's one counsel to two speeches. Morales v. State, 1 T. Cr. R., 499.

Argument is legitimate only when restricted to the discussion of the facts in the case and the conclusions legitimately deducible from the law applicable to them. Thompson v. State, 43 T., 268; Hatch v. State, 8 T. Cr. R., 416.

And see generally and in illustration: Laubach v. State, 12 T. Cr. R., 583; Ashlock v. State, 16 Id., 13; McInturf v. State, 20 Id., 335; Leonard v. State, Id., 442; Clark v. State, 23 Id., 260; 5 S. W. R., 575; Mayes v. State, 33 Id., 33, 24 S. W. R., Armstrong v. State, 34 Id., 248, 30 S. W. R., 235; Ray v. State, 35 Id., 834, 33 S. W. R., 869; Fuller v. State, 30 Id., 559, 17 S. W. R., 1108; Noble v. State, 38 Id., 368, 43 S. W. R., 80; Little v. State, 39 Id., 654, 47 S. W. R., 984.

Same. Illegal and improper argument. Allusion in argument by the prosecuting attorney to the defendant's failure to testify is specifically forbidden by statute, and the error is not cured by rebuke from the court. Brazell v. State, 33 T. Cr. R., 333, 26 S. W. R., 723; Hunt v. State, 28 Id., 149, 12 S. W. R., 737; Fulcher v. State, Id., 465, 13 S. W. R., 750; Wilkins v. State, 33 Id., 320, 26 S. W. R., 409.

Same. Assaults upon defendant's character, when not an issue in the case, and in a way calculated to prejudice him before the jury, is reversible error. Turner v. State, 39 T. Cr. R., 322, 45 S. W. R., 1020. And see Stephens v. State, 20 Id., 255; Coyle v. State, 31 Id., 604, 21 S. W. R., 765; Pollard v. State, 33 Id., 197, 26 S. W. R., 70.

Same. Argument before a jury which invokes public opinion should not be tolerated by the trial court. Kennedy v. State, 19 T. Cr. R., 620. And see Grosse v. State, 11 Id., 364; Conn v. State, Id., 390, which compare with Aud v. State, 36 Id., 76, 35-671; Crawford v. State, 15 Id., 501; Clark v. State, 23 Id., 260, 5 S. W. R., 115.

Same. Vituperation, villification and abuse in argument, tolerated to the prejudice of the defendant, will necessitate the reversal of a conviction. Crawford v. State, 15 T. Cr. R., 501; Sterling v. State, 249; Hunnicutt v. State, 18 Id., 500; Rix v. State, 19 Id., 308.

And see generally on the subject: Morris v. State, 39 T. Cr. R., 371, 46 S. W. R., Pierson v. State, 18 Id., 524; McConnell v. State, 22 Id., 354, 3 S. W. R., 699; Wearthersby v. State, 29 Id., 278, 15 S. W. R., 823; Rahm v. State, 30 Id., 310, 17 S. W. R., 416; Parks v. State, 35 Id., 378; 33 S. W. R., 872; Kugadt v. State, 38 Id., 681, 44 S. W. R., 989.

Same. Race prejudice exploited in argument in a manner to influence passion and injure a negro defendant will necessitate reversal of a conviction. Lester v. State, 2 T. Cr. R., 432; Garello v. State, 31 Id., 56, 20 S. W. R., 179.

Same. Injection of opinion as to guilt of an accused is improper argument, and should not be countenanced by trial courts, but of itself is not cause for reversal. See on the question, Brazell v. State, 33 T. Cr. R., 333, 26 S. W. R. 723; Habel v. State, 28 Id., 588, 13 S. W. R., 1001; Kennedy v. State, 19 Id., 536; Pierson v. State, 18 Id., 524.

Same. Stating facts in his argument, counsel should confine himself to those in proof and as proved, and not as personally known to him. Orman v. State, 24 T. Cr. R., 495, 6 S. W. R., 544; Tillery v. State, Id., 251, 5 S. W. R., 842.

And see generally on the question: Lauback v. State, 12 T. Cr. R., 583; Greene v. State, 17 Id., 395; Clark v. State, 260, 5 S. W. R., 115; Nalley v. State, 28 Id., 387, 13 S. W. R., 670; Bice v. State, 37 Id., 38, 38 S. W. R., 803.

Art. 726. [706] **Defendant's right to sever on trial.**—When two or more defendants are jointly prosecuted, they may sever in the trial upon the request of either. [O. C. 587.]

Severance, under this article, which is mandatory, is a matter of right when the parties have brought themselves within its purview. Willey v. State, 22 T. Cr. R., 408, 3 S. W. R., 570, and cases cited. King v. State, 35 Id., 472, 34 S. W. R., 282. And see Conn v. State, 11 Id., 390; Shaw v. State, 39 Id., 161, 45 S. W. R., 597.

And this carries with it the right of the parties to fix the order of their trial by agreement. Teiman v. State, 28 T. Cr. R., 144, 12 S. W. R., 742.

But failing such agreement, the court will fix the order of trial. Parker v. State, 33 T. Cr. R., 111, 21 S. W. R., 604; Chumley v. State, 32 Id., 255, 26 S. W. R., 406.

But, as under article 90 of the Penal Code, the principal must be tried before his accessory—he cannot claim a severance to have his accessory tried first. Williams v. State, 27 T. Cr. R., 466, 11 S. W. R., 481.

Severance will not be granted when it will operate a continuance. Thompson v. State, 35 T. Cr. R., 511, 34 S. W. R., 629.

Severance is properly refused when one of the two co-defendants has agreed with the state to testify in its behalf. Dawson v. State, 34 T. Cr. R., 263, 30 S. W. R., 224.

The right of one defendant to a severance and the trial first of the other in order to secure his testimony, cannot be defeated by the granting of a continuance to such other. Davis v. State, 33 T. Cr. R., 344, 26 S. W. R., 410.

Independent of other sufficient showing, one defendant is not entitled to a continuance to obtain the testimony of his co-defendant. Stouard v. State, 27 T. Cr. R., 1, 10 S. W. R., 422.

In awarding a severance, then continuing the case of the joint defendant, and then forcing the first to trial, the court deprived him of his legal rights and erred. Krebs v. State, 3 T. Cr. R., 348.

A defendant will not be heard in opposition to severance asked by his co-defendant. Berry v. State, 4 T. Cr. R., 492.

But on the application for severance, the party first to be tried must be in court and ready for trial; if at large, severance must be denied. Anderson v. State, 8 T. Cr. R., 542.

Same. Practice. Appeal on severance of the party first tried will not operate continuance for the co-defendant pending action of the appellate court. Krebs v. State, 8 T. Cr. R., 1, and cases cited.

Art. 727. [707] **Same subject.**—Where two or more defendants are prosecuted for an offense growing out of the same transaction, by separate indictments, either defendant may file his affidavit in writing that one or more parties are indicted for an offense growing out of the same transaction for which he is indicted, and that the evidence of such party or parties is material for the defense of the affiant, and that the affiant verily believes that there is not sufficient evidence against the party or parties whose evidence is desired to secure his or their conviction, such party or parties for whose evidence said affidavit is made shall first be tried; and, in the event that two or more de-

fendants make such affidavit and can not agree as to their order of trial, then the presiding judge shall direct the order in which the defendants shall be tried; provided, that the making of such affidavit does not, without other sufficient cause, operate as a continuance to either party. [Act March 21, 1887, p. 33.]

Ante, Art. 726, and notes.

Affidavit for severance based upon "belief" that the testimony of the co-defendant is material is insufficient. Shaw v. State, 39 T. Cr. R., 161, 45 S. W. R., 597.

That affiant "verily believes there is no evidence against the co-defendant," is held sufficient in Reed v. State, 11 T. Cr. R., 509.

The statutes affecting severance are mandatory, and refusal of continuance will not defeat a defendant's right to severance and the prior trial of his co-defendant. Dodson v. State, 32 T. Cr. R., 529, 24 S. W. R., 899.

Articles construed. The preceding, this and the subsequent article, apply to joint defendants whether jointly or separately indicted, and whether indicted, some as principals and others as accomplices or accessories. King v. State, 35 T. Cr. R., 472, 34 S. W. R., 282, which compare with Williams v. State, 27 Id., 466, 11 S. W. R., 481.

Practice. The state has the right to dismiss prosecution against one or more joint defendants, with whom it has not contracted, and whom it did not subsequently use as state witnesses; and the remaining co-defendant will not be heard to complain of refusal of severance and their first trial to render their evidence available. Hobbs v. State, 53 T. Cr. R., 71, 112 S. W. R., 308, overruling on the point, Puryear's case, 50 Id., 454, 98 S. W. R., 258. (The effect of this decision is to overrule on the same point Wolf's case, 46 Id., 79 S. W. R., 520, and Follis' case, Id., 203, 78 S. W. R., 1069, followed in Puryear's case; and revive the decision in Brown's case, 42 Id., 176, 58 S. W. R., 131, specifically overruled in Puryear's case.)

Same. Severance is available only when defendants are indicted for the same transaction. False statements of the same tenor and effect by two defendants, though referring to the same subject matter, are separate transactions and distinct offenses. Anderson v. State, 56 T. Cr. R., 360, 120 S. W. R., 462.

Practice on appeal. The appellate court will not look to the statement of facts to ascertain whether or not the accused was prejudiced by the refusal of a severance below. King v. State, 35 T. Cr. R., 472, 34 S. W. R., 282; Anderson v. State, supra.

Art. 728. [708] **Order in which they will be tried, etc.**—When a severance is claimed, the defendants may agree upon the order in which they are to be tried, but, in case of their failure to agree, the court shall direct the order of trial.

Ante, Art. 726, and notes.

Art. 729. [709] **May dismiss as to one who may be witness.**—The attorney representing the state may, at any time, under the rules provided in article 37, dismiss a prosecution as to one or more defendants jointly indicted with others; and the person so discharged may be introduced as a witness by either party. [O. C. 588.]

Hobbs v. State, 53 T. Cr. R., 71, 112 S. W. R., 308.

Dismissal of prosecution. Ante, Arts. 37 and 630, and notes.

Practice. One of several joint defendants being on trial, the court permitted the prosecuting attorney to call up the case of a co-defendant and dismiss it in order to make him a witness. Held, that there was no error. Johnson v. State, 570. And see Ex parte Park, 37 T. Cr. R., 590, 40 S. W. R., 300; Nicks v. State, 40 Id., 1, 48 S. W. R., 186, and cases cited.

But the immunity involved in such dismissal pertains only to that particular case and not to any other distinct offense. Mosely v. State, 35 T. Cr. R., 211, 32-1042, and cases cited.

A joint defendant who refuses on final trial his agreement to turn state's evidence, though he testified on habeas corpus, is not entitled to the promised immunity. Nicks v. State, 40 T. Cr. R., 1, 48 S. W. R., 186, and cases cited.

Art. 730. [710] **Where there is no evidence against a defendant jointly prosecuted.**—When it is apparent that there is no evidence against a defendant in any case where he is jointly prosecuted with others, the jury may be directed to find a verdict as to such defendant; and, if they acquit, he may be introduced as a witness in the case. [O. C. 589.]

Practice. When, on the joint trial of plural defendants, it develops that the evidence, if at all, so feebly involves one that he is willing to be tried on the case made by the State, he has the right to demand that the jury pass upon his case before the other defendants open their defense; and in all such cases the jury should be charged by the court, and should render their verdict as to such defendant as though he had no connection with the others. Bybee v. State, 36 T., 366; Lyles v. State, 41 Id., 172, citing Jones v. State, 13 Id., 168.

Art. 731. [711] **Where it appears the court has no jurisdiction.**—Where it appears in the course of a trial that the court has no jurisdiction of the offense, or that the facts charged in the indictment do not constitute an offense, the jury shall be discharged. [O. C. 590.]

Art. 732. [712] **In such case court may commit, when.**—If the want of jurisdiction arises from the fact that the defendant is not liable to prosecution in the county where the indictment was presented, the court may, in cases of felony, order the defendant into custody for a reasonable length of time to await a warrant for his arrest from the proper county; or, if the offense be bailable, may require the defendant to enter into recognizance to answer before the proper court; in which case, a certified copy of the recognizance shall be transmitted forthwith to the clerk of the proper court, to be enforced by that court in case of forfeiture as in other cases. [O. C. 591.]

Ante, Arts. 593-596 and notes.

Art. 733. [713] **Defendant shall be discharged in all cases, when.**—In all cases where it appears that the facts charged in the indictment or information do not constitute an offense, and in all cases of misdemeanor where it appears that the court has no jurisdiction of the same, and the jury is discharged, as provided in article 731, the defendant shall also be discharged; but such discharge shall be no bar in any case to a prosecution before the proper court for any offense against the law. [O. C. 590-592.]

Ante, Arts. 592-595 and notes.

Art. 734. [714] **The jury are judges of fact.**—The jury are the exclusive judges of the facts in every criminal cause, but not of the law in any case. They are bound to receive the law from the court and be governed thereby. [O. C. 593.]

Post, Art. 786 and notes.

Charge of court. Practice. Unless the general charge embodies the substance of this article, it would be error to refuse a correct requested charge, including also the resonable doubt. Lensing v. State, 45 S. W. R., 572.

And see generally: Taylor v. State, 3 T. Cr. R., 387; Johnson v. State, 5 Id., 423; Allison v. State, Id., 402; Walker v. State, Id., 609; Jackson v. State, 22 Id., 442, 3 S. W. R., 111; Barbee v. State, 23 Id., 199; 4 S. W. R., 584; Carr v. State, 24 Id., 562, 7 S. W. R., 328; Weatherford v. State, 31 Id., 530, 21 S. W. R., 251; Williams v. State, 33 Id., 128, 25 S. W. R., 629; Collins v. State, 39 Id., 441, 46 S. W. R., 933.

Art. 735. [715] **Charge of court to the jury.**—After the argument of any criminal cause has been concluded, the judge shall deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case; but he shall not express any opinion as to the weight of evidence, nor shall he sum up the testimony. This charge shall be given in all cases of felony, whether asked or not. [O. C. 594.]

Practice. Charge of the court in felony cases must be in writing, and in this the statute is mandatory. Williams v. State, 18 T. Cr. R., 409; West v. State, 2 Id., 209; Henry v. State, 9 Id., 358.

The court's verbal admonition to the jury to pay strict attention to his reading or his written charge, was no part of the charge, and not assignable as error. Sargent v. State, 35 T. Cr. R., 325, 33 S. W. R., 364.

Same. As to prefatory statements in charge. The preliminary statement in the opening paragraph of the charge of the nature of the offense imputed by the indictment is not obnoxious to the objection that it is judicial assumption. Wolfforth v. State, 31 T. Cr. R., 387, 20 S. W. R., 741, citing McGrew v. State, Id., 336, 20 S. W. R., 740.

Inadvertence in misstating the name of the offense once is immaterial error when the charge states it correctly in other and subsequent parts of the charge. Oxford v. State, 32 T. Cr. R., 272, 22 S. W. R., 971.

But note suggestion that a mistake in the preliminary statement of the charge may affect the verdict. O'Bryan v. State, 27 T. Cr. R., 339, 11 S. W. R., 443. And on the same subject see McCoy v. State, 7 Id., 379, and compare Arcia v. State, 28 Id., 198, 12 S. W. R., 599.

Same. For general rule governing the charge of the court, see in extenso, Surrell v. State, 29 T. Cr. R., 597, 15 S. W. R., 816.

And see generally: Greta v. State, 9 T. Cr. R., 429; Ashlock v. State, 16 Id., 13; Tillery v. State, 24 Id., 251, 5 S. W. R., 824; Johnson v. State; 30 Id., 419, 17 S. W. R., 1070; Williams v. State, Id., 429, 17 S. W. R., 1071; Nalley v. State, Id., 456, 17 S. W. R., 1084; Farrar v. State, 29 Id., 250, 15 S. W. R., 719; Parks v. State, Id., 597, 16 S. W. R., 532; Green v. State, 32 Id., 298, 22 S. W. R., 1094; Morales v. State, 36 Id., 234, 36 S. W. R., 435; Tippett v. State, 37 Id., 188, 39 S. W. R., 120.

Same. And, whether asked or not, a written charge must be given in all felony cases. It must be a full and complete application of the law, and all the evidence, and expressed in plain language to the understanding of the jury. Miers v. State, 34 T. Cr. R., 161, 29 S. W. R., 1074; Cornelius v. State, 54 Id., 173, 112 S. W. R., 1050; and as illustrating the rule, see Morales v. State, 36 Id., 234, 36 S. W. R., 435; Jones v. State, 35 Id., 565, 34 S. W. R., 631; Reeves v. State, 34 Id., 483; 31 S. W. R., 382. And see Woodall v. State, 126 S. W. R., 591.

And this rule applies especially to every defense reasonably presented by the evidence. Wheeler v. State, 54 T. Cr. R., 350, 30 S. W. R., 913.

Same. Practice. The charge should be framed hypothetically, and to meet whatever state of facts presented by the evidence; it would be error to cover a state of facts not mooted by the proof. On the whole question see Reynolds v. State, 14 T. Cr. R., 427; Taylor v. State, 17 Id., 46; Jones v. State, 13 T. Cr. R., 168; Wright v. State, 41 Id., 246; Darnell v. State, 43 Id., 147; Stephenson v. State, 4 T. Cr. R., 591; O'Connell v. State, 18 Id., 344; Blain v. State, 30 Id., 702, 18 S. W. R., 862.

The charge need not embrace the literal statutory definition of the offense, yet, when that is not done, it must define or explain the elements or ingredients of the offense. Cody v. State, 4 T. Cr. R., 238; and in illustration see Guest v. State, 24 Id., 235, 5 S. W. R., 840; Walton v. State, 29 Id., 163, 15 S. W. R., 646.

Same. "The law applicable to the case" means the case as made by the pleadings and the evidence, that is, the allegations in the indictment and the testimony on the trial. Lister v. State, 3 T. Cr. R., 17; Surrell v. State, 29 Id., 321, 15 S. W. R., 816, and cases cited.

Same. General and abstract propositions. It is error for the court to charge merely the general or abstract propositions of law, but it must be constructed upon the evidence in the particular case. Marshall v. State, 40 T., 200; Farrar v. State,

42 Id., 275; Hackett v. State, 13 T. Cr. R., 406; Croell v. State, 25 Id., 596, 8 S. W. R., 816; Duncan v. State, 30 Id., 1, 16 S. W. R., 753.

And on the question generally. Whaley v. State, 9 T. Cr. R., 305; Scott v. State, 10 Id., 112; Conn v. State, 11 Id., 390; Walker v. State, 13 Id., 618; Boddy v. State, 14 Id., 528; Brown v. State, 23 Id., 195, 4 S. W. R., 588; Taylor v. State, 24 Id., 299, 6 S. W. R., 42; Lynch v. State, 24 Id., 350, 6 S. W. R., 190; Johnson v. State, 27 Id., 163, 11 S. W. R., 106; Crook v. State, Id., 198, 11 S. W. R., 444; Brown v. State, Id., 330, 11 S. W. R., 412; Mahoney v. State, 33 Id., 388, 26 S. W. R., 622; Armstrong v. State, Id., 417, 26 S. W. R., 829; Milrainey v. State, Id., 577, 28 S. W. R., 537; Franklin v. State, 34 Id., 286, 30 S. W. R., 231; Carter v. State, 37 Id., 404, 35 S. W. R., 378; Williford v. State, 38 Id., 393, 42 S. W. R., 393, 42 S. W. R., 972.

Same. The charge must conform to and be limited by the specific offense alleged in the indictment. Reed v. State, 29 T. Cr. R., 449, 16 S. W. R., 99; Tooney v. State, 5 Id., 163; Parker v. State, 22 Id., 105, 3 S. W. R., 140; Smith v. State, Id., 316, 3 S. W. R., 684; Blocker v. State, 27 Id., 16, 10 S. W. R., 439; Whitcomb v. State, 30 Id., 269, 17 S. W. R., 258; Fuller v. State, Id., 559, 17 S. W. R., 1108; Mitchell v. State, 38 Id., 325, 42 S. W. R., 989; Burt v. State, Id., 397, 40 S. W. R., 1108; Mitchell v. State, 38 Id., 325, 42 S. W. R., 989; Burt v. State, Id., 397, 40 S. W. R., 1000; Higgins v. State, Id., 539, 43 S. W. R., 1012

Same. Charge is erroneous which in any way, and to any degree, conveys to the jury the impression of the judge on any of the evidence. Dobbs v. State, 51 T. Cr. R., 113, 100 S. W. R., 946; Simmons v. State, 55 Id., 117 S. W. R., 141.

Same. The charge must embrace every phase of the case made by the evidence. Black v. State, 38 T. Cr. R., 58, 41 S. W. R., 606; Knox v. State, 11 Id., 148; Odle v. State, 13 Id., 612; Smith v. State, 15 Id., 139; Alexander v. State, 25 Id., 260, 7 S. W. R., 867; Johnson v. State, 27 T., 766; Thumm v. State, 24 T. Cr. R., 667, 7 S. W. R., 236; Pollard v. State, 33 Id., 197, 26 S. W. R., 70.

And however meager the evidence on a defensive issue, it must be submitted in the charge. Scott v. State, 10 T. Cr. R., 112; Garza v. State, 38 Id., 317, 42 S. W. R., 563, and cases cited.

Same. As to minor degrees. In cases of offenses of degrees, the charge must present the law applicable to every degree which has any support in the evidence, however meager. Blocker v. State, 27 T. Cr. R., 16, 10 S. W. R., 439, and cases cited. And see White v. State, 30 T. Cr. R., 652, 18 S. W. R., 462; Thomas v. State, 33 Id., 607, 28 S. W. R., 534; Chapman v. State, 34 Id., 27, 28 S. W. R., 811.

And in illustration, see Pharr v. State, 10 T. Cr. R., 485; Nalley v. State, 28 Id., 387, 13 S. W. R., 670; Jones v. State, 29 Id., 338, S. W. R., 403; Muely v. State, 31 Id., 155, 18 S. W. R., 411; Utzman v. State, 32 Id., 426, 24 S. W. R., 412; Harvey v. State, 35 Id., 345, 34 S. W. R., 623; Burt v. State, 38 Id. 397, 40 S. W. R., 1000; Frederick v. State, 39 Id., 147, 45 S. W. R., 589.

Same. Unless the evidence suggests or raises a doubt as to a minor degree of the offense, it would be error to charge on such minor degree. Little v. State, 39 T. Cr. R., 654, 47 S. W. R., 236.

But the evidence raising a doubt, it should be resolved in favor of the defense, and the charge given. McLaughlin v. State, 10 T. Cr. R., 340; Maria v. State, 28 T., 698; Moore v. State, 26 Id., 322, 9 S. W. R., 610; Boyd v. State, 28 Id., 137, 12 S. W. R., 737. And generally, see Carter v. State, Id., 355, 13 S. W. R., 147; Barbee v. State, 34 Id., 129, 29 S. W. R., 776.

Same. Defensive matter must be charged upon affirmatively on the issue as raised by the evidence, and a merely implied or negative charge in regard to such matters will be held erroneous. Reynolds v. State, 8 T. Cr. R., 412; Jackson v. State, 15 Id., 84; Winters v. State, 37 T. Cr. R., 582, 40 S. W. R., 303, citing Shannon v. State, Id., 2, 28 S. W. R., 687.

Same. Limitations. It devolves upon the state to show the offense within the period of limitations, but the evidence suggesting no doubt on the question, charge on it is unnecessary. Vincent v. State, 10 T. Cr. R., 331; Cohen v. State, 20 Id., 224, and cases cited. Moore v. State, Id., 278.

But evidence raising the issue, it must be charged. Wimberly v. State, 22 T. Cr. R., 506, 3 S. W. R., 717. And see Proctor v. State, 37 Id., 366, 35 S. W. R., 172; Brooks v. State, 38 Id., 167, 31 S. W. R., 410.

Same. Character evidence. While it is competent for the defendant to prove his previous good character, it is not the subject matter of charge to the jury. Pharr v. State, 9 T. Cr. R., 129; and especially when it was not put in issue. Gose v. State, 6 Id., 121; Lockhart v. State, 3 Id., 567.

Same. Defendant as witness. The court must charge upon every phase of case as presented by the evidence, whether for state or defendant, and cannot be limited to issues raised by the testimony of the defendant as a witness in his own behalf. Sowell v. State, 32 T. Cr. R., 482, 24 S. W. R., 504.

The evidence showing the defendant's explanation of his possession of stolen property to be false, and the evidence aliunde raising the issue of an honest and legal possession, that issue should also be submitted in the charge. James v. State, 32 T. Cr. R., 509, 24 S. W. R., 642; Pollard v. State, 33 Id., 197, 26 S. W. R., 70.

Generally on the subject: Reed v. State, 32 T. Cr. R., 25, 22 S. W. R., 22; Mahoney v. State, 33 Id., 388, 26 S. W. R., 622; Hargrove v. State, Id., 431, 29 S. W. R., 993; Sexton v. State, Id., 416, 26 S. W. R., 833; Oliver v. State, Id., 541, 28 S. W. R., 202; Hayes v. State, 36 Id., 146, 35 S. W. R., 983; Harrell v. State, 37 Id., 612, 40 S. W. R., 799; Doggett v. State, 39 Id., 5, 44 S. W. R., 148; Quinn v. State, Id., 257, 45 S. W. R., 694.

Same. Joint defendants. See generally: Cronin v. State, 30 T. Cr. R., 278, 17 S. W. R., 410; Hays v. State, Id., 472; 17 S. W. R., 1063; Tittle v. State, Id., 597, 17 S. W. R., 1118; Martin v. State, 38 Id., 285, 43 S. W. R., 91.

Same. Plural counts. One of two counts in an indictment being defective and the other good, it is proper for the count, in its charge, to submit only the latter. McMurtry v. State, 38 T. Cr. R., 521, 43 S. W. R., 1010, and cases cited.

The submission to the jury by the court of but one of several counts in the indictment is equivalent to the election by the state to claim conviction on that count alone. Moore v. State, 37 T. Cr. R., 552, 40 S. W. R., 287; Smith v. State, 34 Id., 29 S. W. R., 774, and cases cited.

And generally: Pollard v. State, 33 T. Cr. R., 197, 26 S. W. R., 70; Tigerina v. State, 35 Id., 302, 33 S. W. R., 353; Hurley v. State, 36 Id., 73, 25 S. W. R., 371; Rosson v. State, 37 Id., 87, 38 S. W. R., 788; Peacock v. State, Id., 418, 35 S. W. R., 964.

Same. An erroneous charge, when it inures to the benefit of the accused, is immaterial error, even when excepted to. Green v. State, 32 T. Cr. R., 298, 22 S. W. R., 1094, overruling to that extent: Surrel's case, 29 Id., 321, 15 S. W. R., 816; White's case, 28 Id., 71, 12 S. W. R., 406; Jenkin's case, Id., 12 S. W. R., 411, and Habel's case, Id., 588, 13 S. W. R., 1001. And see Wilkins v. State, 35 Id., 525, 34 S. W. R., 627; Gonzales v. State, Id., 33, 33 S. W. R., 363; Scruggs v. State, Id., 622, 34 S. W. R., 951; Charlise v. State, 37 Id., 108, 38 S. W. R., 991; Briscoe v. State, Id., 464, 36 S. W. R., 281.

Same. Weight of evidence. Neither in his chargne nor in ruling upon the admissibility of proffered testimony can the trial judge trench in the least upon the weight of the testimony or the credibility of the witness. Kirk v. State, 35 T. Cr. R., 224, 32 S. W. R., 1045.

And generally see: Rice v. State, 3 T. Cr. R., 451; Harrison v. State, 8 Id., 183; Harrison v. State, 9 Id., 407; McWhorter v. State, 11 Id., 584; Walker v. State, 13 Id., 618; Wyers v. State, 22 Id., 258, 2 S. W. R., 722; Borchers v. State, 31 Id., 517, 21 S. W. R., 192; Ayers v. State, 37 Id., 1, 38 S. W. R., 792; Walters v. State, Id., 388, 35 S. W. R., 652; Milsaps v. State, 38 Id., 570, 43 S. W. R., 1015; Brown v. State, 23 T., 195; Walker v. State, 42 Id., 360.

Same. Practice. A charge is error that singles out evidence to the exclusion of other facts in evidence. Ratigan v. State, 33 T. Cr. R., 301, 26 S. W. R., 407; Copeland v. State, 36 Id., 575, 38 S. W. R., 210; Howard v. State, 18 Id., 348; Carter v. State, 39 Id., 1, 46 S. W. R., 236; Varnarsdale v. State, 35 Id., 587, 34 S. W. R., 931.

Same. Weight of evidence. A charge which trenches in the smallest degree on the weight of the evidence is erroneous. See preceding authorities and Hughes v. State, 32 T. Cr. R., 379, 23 S. W. R., 891; Rice v. State, 3 Id., 451; Bishop v. State, 43 T., 390; Litman v. State, 9 T. Cr. R., 461; Stockholm v. State, 24 Id., 598, 7 S. W. R., 338.

Same. Exceptions to the rule. It is the duty of the court to construe written instruments and to instruct upon their effect, meaning, etc., Smith v. State, 24 T.

Cr. R., 1, 5 S. W. R., 510; Overly v. State, 34 Id., 500, 31 S. W. R., 377; Darbyshire v. State, 36 Id., 547, 38 S. W. R., 173.

The same rule applies to orders, judgments and decrees of the court that may be called in question. Wright v. State, 37 T. Cr. R., 3, 35 S. W. R., 150.

As to effect of revenue license: Monford v. State, 35 T. Cr. R., 237, 33 S. W. R., 351; Flock v. State, 34 Id., 314, 30 S. W. R., 794.

And in further illustration, see Jones v. State, 5 T. Cr. R., 130; Broxton v. State, 9 Id., 97; McVea v. State, 35 Id., 1, 26 S. W. R., 834; Scott v. State, Id., 11, 29 S. W. R., 274.

Same. Impeaching testimony, is designed to disprove and falsify the very evidence it attacks; charge not in consonance with this rule is error. Winn v. State, 34 T. Cr. R., 37, 28 S. W. R., 807; Cline v. State, 33 Id., 482, 27 S. W. R., 128; Howard v. State, 25 Id., 686, 8 S. W. R., 929; Trotter v. State, 37 Id., 468, 36 S. W. R., 278.

The necessity for instruction on impeaching testimony arises only on rare occasions and under peculiar and extraordinary occasions. Thurmond v. State, 27 T. Cr. R., 347, 11 S. W. R., 451. And see Williams v. State, 10 Id., 8.

Same. When impeaching evidence should be limited. Coker v. State, 35 T. Cr. R., 57, 31 S. W. R., 655; Paris v. State, Id., 82, 31 S. W. R., 855, and cases cited; Phillips v. State, Id., 480, 34 S. W. R., 272. Compare Morales v. State, 36 Id., 234, 36 S. W. R., 435.

Same. When it need not be limited. Givens v. State, 35 T. Cr. R., 563, 34 S. W. R., 626. Compare Rider v. State, 26 Id., 334, 9 S. W. R., 688. And see McGee v. State, 43 S. W. R., 512.

Same. Conflict of evidence. For rule as to charge on conflicting evidence, see Morgan v. State, 44 T., 511; Rideus v. State, 41 Id., 199; Henderson v. State, 1 T. Cr. R., 432.

But to add that in determining the credibility of the witness, the jury could consider the age, intelligence, interest, apparent bias, etc., of the witness, and all other circumstances of the case, is error as on the weight of evidence. Harrell v. State, 37 T. Cr. R., 612, 40 S. W. R., 799—overuling on the point McGrath v. State, 35 Id., 34 S. W. R., 127; Lancaster v. State, 36 Id., 16, 35 S. W. R., 165, Cockerell v. State, 32 Id., 585, 25 S. W. R., 421, Brown v. State, 2 Id., 215, and Adams v. State, 20 S. W. R., 548.

It is for the jury to solve a conflict of evidence, and not for the court to determine it, in the charge. Wasson v. State, 3 T. Cr. R., 474.

Same. Confessions and admissions must go to the jury as other evidence and charge that they are to be regarded as the strongest proof, is fundamental error as well as upon the weight of evidence. Morrison v. State, 41 T., 516; Harris v. State, 1 T. Cr. R.; Grant v. State, 2 Id., 163.

There being other evidence of guilt than the confession, the trial court did not err in refusing to charge that confession alone is not sufficient to convict. Smith v. State, 28 T. Cr. R., 309, 12 S. W. R., 1104; Franks v. State, 45 S. W. R., 1013; Mathews v. State, 39 Id., 553, 47 S. W. R., 647.

Same. Circumstantial evidence. It is only when the evidence is purely and wholly circumstantial that the court is required to instruct the jury on that character of evidence, and when it is such, failure to charge the rule governing it, is fundamental error. Puryear v. State, 28 T. Cr. R., —, 11 S. W. R., 929; Taylor v. State, 27 Id., 463, 11 S. W. R., 462; Crowell v. State, 24 Id., 404, 6 S. W. R., 318; Leftwich v. State, 34 Id., 489, 31 S. W. R., 385; Robertson v. State, 33 Id., 366, 26 S. W. R., 508; Goode v. State, 56 Id., 418, 120 S. W. R., 199.

Same. There is no prescribed formula for a charge on circumstantial evidence, and one that conveys the proper understanding to the jury is sufficient. Loggins v. State, 8 T. Cr. R., 434, citing Brown v. State, 23 T., 195; Hubby v. State, Id., 197; Chitester v. State, 33 Id., 635, 28 S. W. R., 683.

Same. .The rule in Webster's case is the adopted rule in this state, for which see Campbell v. State, 10 T. Cr. R., 560; Hubby v. State, 8 Id., 597; Henderson v. State, 14 T., 503.

And see Smith v. State, 618, 33 S. W. R., 339; Baldez v. State, 37 Id., 413, 35 S. W. R., 664; Hill v. State, Id., 415, 35 S. W. R., 660; Boggs v. State, 38 Id., 82, 41 S. W. R., 642.

Same. Misdemeanors. Failure to charge on circumstantial evidence in a misdemeanor case is not reversible error, unless a requested instruction on the subject

was refused and exception reserved. Lucio v. State, 35 T. Cr. R., 320, 33 S. W. R., 358; Martin v. State, 32 Id., 441, 24 S. W. R., 512.

Same. Alibi. The defense of alibi being interposed with supporting evidence, refusal of the court to charge thereon is reversible error. Tittle v. State, 35 T. Cr. R., 96, 31 S. W. R., 677; citing Anderson v. State, 34 Id., 546, 31 S. W. R., 673.

And generally on the subject see: Ayers v. State, 21 T. Cr. R., 399, 17 S. W. R., 253; Crook v. State, Id., 200, 11 S. W. R., 444; Watson v. State, 28 Id., 34, 12 S. W. R., 404; Bennett v. State, 30 Id., 341, 17 S. W. R., 545; Loggins v. State, 32 Id., 364, 24 S. W. R., 512; Oxford v. State, Id., 272, 22 S. W. R., 971; Polanka v. State, 33 Id., 634, 28 S. W. R., 541.

Same. There is no prescribed form for charge on alibi. For forms approved, see Walker v. State, 6 T. Cr. R., 576; Boothe v. State, 4 Id., 202; Caldwell v. State, 28 Id., 566, 14 S. W. R., 122; Galleher v. State, Id., 247, 12 S. W. R., 1087.

Same. Extraneous matter. For rules regulating the charge as to the limitation and restriction of extraneous matter, admitted in proof to meet the exigencies of the particular case, see Davidson v. State, 22 T. Cr. R., 372, 3 S. W. R., 662, and cases cited; Mallory v. State, 37 Id., 482, 36 S. W. R., 751, and cases cited.

Not necessary, however, to limit when the extraneous matter was relied upon solely for impeachment. Wilson v. State, 37 T. Cr. R., 373, 35 S. W. R., 390, and cases cited. Estill v. State, 38 Id., 255, 42 S. W. R., 305.

Same. Accomplice testimony. See post, Art. 801, and notes.

When the evidence implicates a state's witness, and his testimony materially prejudices the defense, the court must charge the law of accomplice testimony. Winn v. State, 15 T. Cr. R., 169; Burke v. State, Id., 156; Setterlee v. State, 13 Id., 169.

"Accomplice" defined. Post, Art. 801, and notes; Phillips v. State, 17 Id., 169, and cases cited; Parr v. State, 36 Id., 38 S. W. R., 180.

Same. Peremptory charge that the witness is an accomplice, is proper when his connection with the crime is an admitted fact. In case of any degree of doubt, it must be left to the jury to determine. Williams v. State, 33 T. Cr. R., 128, 25 S. W. R., 629; White v. State, 30 Id., 18 S. W. R., 462; Armstrong, Id., 417, 26 S. W. R., 829; Sessions v. State, 37 Id., 58, 38 S. W. R., 605.

Art. 736. [716] **Charge shall not discuss the facts, etc.**—It is beyond the province of a judge sitting in criminal causes to discuss the facts or use any argument in his charge calculated to rouse the sympathy or excite the passion of a jury. It is his duty to state plainly the law of the case. [O. C. 595.]

Construed. Argumentative charge. This article does not prohibit proper argumentation in the charge, but limits the judge in the "use of any argument calculated to arouse the sympathy or influence the passion of the jury." Cesure v. State, 1 T. Cr. R., 19. And see in illustration Stuckey v. State, 7 Id., 174; Brown v. State, 23 T., 195; Bryant v. State, 35 Id., 394, 33 S. W. R., 978.

Same. Repetition of certain facts and issues to the point of imparting to them undue prominence is improper in the charge. Bonner v. State, 29 T. Cr. R., 223, 15 S. W. R., 821; Irwin v. State, 20 Id., 12. And in illustration, see Bryant v. State, 16 Id., 144; Russell v. State, 37 Id., 314, 39 S. W. R., 674; Tillery v. State, 24 Id., 251, 5 S. W. R., 842.

A general exception to the charge will not be considered unless it involves an error fundamental in character, or such as may have injuriously affected the defendant. Gonzales v. State, 30 T. Cr. R., 203, 16 S. W. R., 978; Peace v. State, 27 Id., 83, 10 S. W. R., 761; Garello v. State, 31 Id., 56, 20 S. W. R., 179; Bogan v. State, 30 Id., 466, 17 S. W. R.,1087.

Under the amendment of 1897 to post Art. 743, errors in the charge are not reversible unless excepted to when given or made ground in the motion for new trial, and even in such cases must disclose probable injury to the rights of defendant.

Self-defense. Penal Code, Art. 1014, subdivision 6, and notes, Mitchell v. State, 38 T. Cr. R., 170, 41 S. W. R., 816; Sims v. State, Id., 637.

Provoking Difficulty. As to rules applicable to charge, see Goodwin v. State, 38 T. Cr. R., 466, 43 S. W. R., 336; Williford v. State, 38 Id., 393, 42 S. W. R., 972; Winters v. State, 37 Id., 582, 40 S. W. R., 303; Carter v. State, Id., 403, 35 S. W. R., 378; Walters v. State, Id., 388, 35 S. W. R., 652.

Abandonment of difficulty. To be sufficient to revive the perfect right of self-defense, the abandonment of the difficulty must be one which clearly evinces a

withdrawal in good faith, and shows clearly the honest effort of the slayer for peace. Roberts v. State, 30 T. Cr. R., 291, 17 S. W. R., 450.

Art. 737. [717] **Either party may ask written instructions.**—After or before the charge of the court to the jury, the counsel on both sides may present written instructions, and ask that they be given to the jury. The court shall either give or refuse these charges, with or without modification, and certify thereto; and, when the court shall modify a charge, it shall be done in writing and in such manner as to clearly show what the modification is. [O. C. 596.]

Requested charges. The court properly refused to recall the jury and deliver a specially requested charge, when no exception to the general charge was taken, and no request was made for time in which to prepare special instruction. Barton v. State, 53 T. C. R., 443, 111 S. W. R., 1042.

Case in which this article should have been charged. Snowberger v. State, 126 S. W. R., 878.

Art. 738. [718] **Charges shall be certified by judge.**—The general charge given by the court, as well as those given or refused at the request of either party, shall be certified by the judge, and filed among the papers in the cause, and shall constitute a part of the record of the cause. [O. C. 595.]

Charge of the court must be certified by the judge. McLain v. State, 30 T. Cr. R., 482, 17 S. W. R., 1092.

The judge's signature is a sufficient certification. Hildreth v. State, 19 T. Cr. R., 195, and cases cited.

The charge, after certification, must be filed. McLain v. State, 30 T. Cr. R., 482, 17 S. W. R., 1092.

Art. 739. [719] **No charge in misdemeanor, except, etc.**—In criminal actions for misdemeanor, the court is not required to charge the jury, except at the request of the counsel on either side; but, when so requested, shall give or refuse such charges, with or without modification, as are asked in writing. [O. C. 598.]

Misdemeanors. The court is not required to charge the jury in misdemeanor cases unless requested by counsel, and then can give only proper charges requested in writing. Waechter v. State, 34 T. Cr. R., 297, 30 S. W. R., 444.

The charge may be verbal in a misdemeanor case only upon consent of the defendant. Harkey v. State, 33 T. Cr. R., 100, 25 S. W. R., 291. And see Wilson v. State, 15 Id., 150, overruling Hobbs v. State, 7 Id., 117.

Art. 740. [720] **No verbal charge, except, etc.**—No verbal charge shall be given in any case whatever, except in cases of misdemeanor, and then only by consent of the parties.

Art. 741. [721] **Judge shall read to jury, what.**—When charges are asked, the judge shall read to the jury only such as he gives. [O. C. 600.]

Art. 742. [722] **Jury may take charge with them.**—The jury may take with them, in their retirement, the charges given by the court after the same have been filed; but they shall not be permitted to take with them any charge, or portion of a charge, that has been asked of the court and which the court has refused to give. [O. C. 601.]

Art. 743. [723] **Judgment will be reversed on appeal, when, etc.**—Whenever it appears by the record in any criminal action, upon appeal of the defendant, that any of the requirements of the eight preceding articles have been disregarded, the judgment shall not be reversed, unless the error appearing from the record was calculated to injure the rights of the defendant, which error shall be excepted to at the time of the trial, or on a motion for a new trial. [O. C. 602; amended Act 1897, p. 17.]

Practice. Erroneous instructions, under this amended article, will not operate reversal of conviction unless excepted to when given, and such exception brought up by bill or made ground in motion for new trial. Pena v. State, 38 T. Cr. R., 333, 42 S. W. R., 991; Sue v. State, 52 Id., 122, 105 S. W. R., 804; Wilson v. State, Id., 173, 105 S. W. R., 1026; Jones v. State, 53 Id., 131, 110 S. W. R., 741; Keye v. State, Id., 320, 111 S. W. R., 400; Grant v. State, 127 S. W. R., 173.

Construed. This is a remedial statute, designed to prevent reversals for mere technical errors, and it does not change the rule as to the court's charge on alibi nor institute a more rigorous or technical rule than existed aforetime. Charge being otherwise sufficient, conviction will not be reversed for a failure to submit the defense of alibi, unless brought up by exception. Schaper v. State, 57 T. Cr. R., 201, 122 S. W. R., 257, citing Jones v. State, 53 T. Cr. R., 131, 110 S. W. R., 776, which overrules Allen v. State, 45 Id., 468, 76 S. W. R., 458; Wilcher v. State, 47 Id., 30, 83 S. W. R., 384, and Bird v. State, 48 Id., 188, 87 S. W. R., 146.

Art. 744. [724] **Bill of exceptions.**—On the trial of any criminal action, the defendant, by himself or counsel, may tender his bill of exceptions to any decision, opinion, order or charge of the court or other proceedings in the case; and the judge shall sign such bill of exceptions, under the rules prescribed in civil suits, in order that such decision, opinion, order or charge may be revised upon appeal. [O. C. 603.]

Bills of exceptions. As to practice with regard to the preparation of bills of exceptions, see rules for the district court. 2 T. Cr. R., 665, 666.

Exception to the charge of the court, to be considered, must point out the objection. Thompson v. State, 32 T. Cr. R., 265, 22 S. W. R., 979.

All that is required is that a general exception be taken at the time the charge is given or refused, with request for time to prepare bill containing the specific objections, to be presented before the jury returns verdict. Martin v. State, 25 T. Cr. R., 557, 8 S. W. R., 682, and cases cited.

Art. 745. [725] **Jury in felony case shall not separate until, unless, etc.**—After the jury has been sworn and impaneled to try any case of felony, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorney representing the state and the defendant, and in charge of an officer. [O. C. 605.]

Construed. This article, construed in connection with section 10 of the Bill of Rights, is imperative and mandatory, and a separation of the jury, except under the conditions imposed, is fundamental error. McCampbell v. State, 37 T. Cr. R., 607, 40 S. W. R., 496, overruling Kelly v. State, 28 Id., 120, 12 S. W. R., 505; Brown v. State, 38 T., 482.

Separation without consent of the defendant will necessitate reversal without regard to injury to the defendant. Boyett v. State, 26 T. Cr. R., 690, 9 S. W. R., 275; Defriceed v. State, 22 Id., 570.

Separation that was immaterial. Robinson v. State, 126 S. W. R., 276.

Art. 746. [726] **In misdemeanor case jury may separate.**—In case of misdemeanor, the court may, at its discretion, permit the jury to separate before the verdict, after giving them proper instructions in regard to their conduct as jurors in the case while so separated.

Practice. This article does not authorize the court to reconvene a discharged jury in order to remedy an informal, or render another verdict. Cannon v. State, 3 T. Cr. R., 31.

Art. 747. [727] **Sheriff may provide jury with, etc.**—It is the duty of the sheriff to provide a suitable room for the deliberation of the jury, in all criminal cases, and to supply them with such necessary food and lodging as he

can obtain; but no spirituous, vinous or malt liquor of any kind shall be furnished them. [O. C. 606.]

Warren v. State, 9 T. Cr. R., 619; Wright v. State, 17 Id., 152.

Jury law. The drinking of liquor by a juror while considering of the verdict is not ground for new trial or reversal, unless it was to such excess as to probably affect his verdict. Rider v. State, 26 T. Cr. R., 334, 9 S. W. R., 688.

Jury law. That a bailiff was present during the deliberations of the jury is not of itself cause for new trial, but a suggestion of such official in the hearing of the jury at such a time affecting the trial is. Slaughter v. State, 24 T., 410; Martin v. State, 9 T. Cr. R., 293; Dansby v. State, 34 T., 392.

Same. That an outsider conversed with a juror pending the finding of the verdict is not cause for new trial, unless it is made to appear that prejudice resulted to the defendant therefrom. Shaw v. State, 32 T. Cr. R., 155, 22 S. W. R., 588; March v. State, 44 T., 64; Pickens v. State, 31 T. Cr. R., 554, 21 S. W. R., 362.

Art. 748. [728] **No person shall be with jury or permitted to converse with them, etc.**—No person shall be permitted to be with a jury while they are deliberating upon a case, nor shall any person be permitted to converse with a juror after he has been impaneled, except in the presence and by the permission of the court, or except in a case of misdemeanor where the jury have been permitted by the court to separate; and in no case shall any person be permitted to converse with the juror about the case on trial. [O. C. 607.]

Art. 749. [729] **Punishment for violation of preceding article.**—Any juror or other person violating the preceding article shall be punished for contempt of court by fine not exceeding one hundred dollars.

Martin v. State, 9 T. Cr. R., 293.

Art. 750. [730] **Officer shall attend jury.**—In order to supply all the reasonable wants of the jury, and for the purpose of keeping them together and preventing intercourse with any other person, the sheriff shall see that they are constantly attended by a proper officer, who shall always remain sufficiently near the jury to answer to any call made upon him by them, but shall not be with them while they are discussing the case; nor shall such officer, at any time while the case is on trial before them, converse about the case with any of them, nor in the presence of any of them. [O. C. 608, 609.]

As applied under this article, see Hunnicutt v. State, 18 T. Cr. R., 498; Williams v. State, 33 Id., 128, 25 S. W. R., 629, and compare Walker v. State, 37 T., 366. And see also Dansby v. State, 34 T., 392.

Art. 751. [731] **Jury may take all papers in the case.**—The jury may take with them, on retiring to consider their verdict, all the original papers in the cause, and any papers used as evidence. [O. C. 610.]

Construed. This article is permissive and not mandatory. Schultz v. State, 15 T. Cr. R., 258. And see Crook v. State, 4 T. Cr. R., 265; Heard v. State, 9 Id., 545, 34 S. W. R., 623; Lancaster v. State, 36 Id., 16, 35 S. W. R., 165.

Art. 752. [732] **Foreman appointed.**—The jury, in all cases, shall appoint one of their body foreman, in order that their deliberations may be conducted with regularity and order. [O. C. 611.]

Art. 753. [733] **Jury may communicate with the court.**—When the jury wish to communicate with the court, they shall make their wish known to the sheriff, who shall inform the court thereof; and they may be brought before the court, and, through their foreman, shall state to the court, either verbally or in writing, what they desire to communicate. [O. C. 612, 613.]

Construed. While this article designates the foreman as spokesman for the jury in communicating with the court, the mere fact that a juror other than the foreman addressed a written inquiry to the judge, can not affect the verdict, unless prejudice be shown. Willis v. State, 24 T. Cr. R., 586, 6 S. W. R., 857.

After retirement and the absence of defendant, the jury returned into court and asked to be relieved of further consideration of the case, which the court refused. Held, no such violation of this article as to require reversal. Washington v. State, 56 T. Cr. R., 195, 119 S. W. R., 689, following Wilkinson v. State, 49 Id., 170, 91 S. W. R., 228.

Art. 754. [734] **Jury may ask further instruction.**—The jury, after having retired, may ask further instruction of the judge touching any matter of law. For this purpose, the jury shall appear before the judge, in open court, in a body, and through their foreman shall state to the court, either verbally or in writing, the particular point of law upon which they desire further instruction; and the court shall give such instruction in writing, but no instruction shall be given, except upon the particular point on which it is asked. [O. C. 614.]

Additional charges. The authority of the court to give additional charges, of its own motion, is not abridged by this statute, though the defendant must be present when such additional charges are given, or must have waived his right to be present. Benavides v. State, 31 T. Cr. R., 173, 20 S. W. R., 369; Gardner v. State, 56 Id., 594, 120 S. W. R., 895.

Such instructions must be given to the jury in a body, in charge of the proper officer, and after proper notice to the defendant or his attorney, and the rule applies when additional instructions are asked by the jury. Coon v. State, 11 T. Cr. R., 390.

The additional instructions being asked by the jury, the court must answer them in writing, limiting the instructions to the particular point indicated. Taylor v. State, 42 T., 504; Post v. State, 10 T. Cr. R., 598.

And generally on the subject, see Newman v. State, 43 T., 531; Swift v. State, 8 T. Cr. R., 614; McDonald v. State, 15 Id., 493; Wilson v. State, 37 Id., 156, 38 S. W. R., 1013; Boggs v. State, 38 Id., 82, 41 S. W. R., 642.

Art. 755. [735] **Jury may have witness re-examined, when.**—If the jury disagree as to the statement of any particular witness, they may, upon applying to the court, have such witness again brought upon the stand; and he shall be directed by the judge to detail his testimony to the particular point of disagreement, and no other, and he shall be further instructed to make his statement in the language used in his examination as nearly as he can. [O. C. 615.]

Practice. On the recall of a witness under this article, he can not be re-examined, but must be required to repeat, in the very words of his testimony, what he stated on the point inquired about. Campbell v. State, 42 T., 591.

This right of recall is limited to the request of the jury, and the court can not be held to error because it refused recall on request of attorneys. Wilson v. State, 37 T. Cr. R., 373, 35 S. W. R., 390.

For better practice where counsel disagree as to the testimony of a witness, see Lister v. State, 3 T. Cr. R., 17.

In a case where counsel for defense moved the court to withdraw the evidence of a state witness because he was not sworn, the court allowed the recall of the witness, who was sworn and re-examined. Held, not error. Thomas v. State, 1 T. Cr. R., 289.

Objection that a witness was permitted to testify on the trial without being sworn, comes too late when first raised on motion for new trial. Goldsmith v. State, 32 T. Cr. R., 112, 22 S. W. R., 405.

Depositions taken before an examining court are held to come within the purview of this article. Clark v. State, 28 T. Cr. R., 189, 12 S. W. R., 729.

Art. 756. [736] **Defendant shall be present, when.**—In every case of felony, the defendant shall be present in the court when any such proceeding

is had, as mentioned in the three next preceding articles. His counsel shall also be called. In cases of misdemeanor, the defendant need not be personally present. [O. C. 617.]

Defendant's presence. In felony cases, the defendant's presence when any of the proceedings indicated in the three preceding articles are had, is imperative. The personal presence of a defendant in misdemeanor case is not required. Mapes v. State, 13 T. Cr. R., 85, and cases cited.

Art. 757. [737] **If a juror become sick after retirement.**—If, after the retirement of the jury, in a felony case, any one of them becomes so sick as to prevent the continuance of his duty, or any accident or circumstance occurs to prevent their being kept together, the jury may be discharged. [O. C. 618.]

Constitutional law. This article does not infringe the constitution, Art. 1, Sec. 14, and is constitutional. Woodward v. State, 42 T. Cr. R., 188, 58 S. W. R., 135.

Discharge of jury. The serious and probably fatal illness of the child of a juror is a circumstance of such necessity as authorizes and justifies the discharge of the jury. Woodward v. State, supra. And see ante, Art. 22, and notes; Hill v. State, 10 T. Cr. R., 618; Ellison v. State, 12 Id., 557; Sterling v. State, 15 Id., 249; Heskew v. State, 17 Id., 161.

Art. 758. [738] **In misdemanor case in district court.**—In a misdemeanor case, in the district court, if nine of the jury can be kept together, they shall not be discharged; but, if more than three of the twelve are discharged, the entire jury must be discharged. [Const., Art. 5, § 13; Act Aug. 1, 1876, p. 82, § 19.]

Art. 759. [739] **Disagreement of jury.**—The jury may be discharged after the cause is submitted to them, when they can not agree, and both parties consent to their discharge, or where they have been kept together for such time as to render it altogether improbable they can agree; in this latter case, the court, in its discretion, may discharge them. [O. C. 619.]

Ante, Art. 9, and notes.

Discharge of jury. The test, except in case of consent, is that the jury has been kept together for such time as to render it altogether improbable that they could not agree. And that fact must be found by the judgment discharging the jury. Wright v. State, 35 T. Cr. R., 158, 32 S. W. R., 701.

The judicial discretion vested by this article is not measured by "reasonable time," and the discharge of the jury on that ground alone, or before they have been kept together for a such a time as to render agreement altogether improbable, attaches jeopardy. Powell v. State, 17 T. Cr. R., 345. And note the point on which this case overrules Mosely v. State, 33 T., 671, and Taylor v. State, 35 Id., 97.

And see in illustration, Penn v. State, 36 T. Cr. R., 140, 35 S. W. R., 973; Schindler v. State, 17 Id., 408; Varnes v. State, 20 Id., 107; Brady v. State, 21 Id., 659, 1 S. W. R., 462; Clark v. State, 28 Id., 189, 12 S. W. R., 729.

Art. 760. [740] **Final adjournment discharges jury.**—A final adjournment of the court, before the jury have agreed upon a verdict, discharges them. [O. C. 620.]

Discharge by final adjournment of court. The statute providing a four weeks' term of court, that term expires by limitation at 12 o'clock at night on the last Saturday, and after that hour no legal decree or order can be entered. Ex parte Juneman, 28 T. Cr. R., 486, 13 S. W. R., 783.

Art. 761. [741] **If no verdict, cause may be again tried, etc.**—When a jury has been discharged, as provided in the four next preceding articles, without having rendered a verdict, the cause may be again tried at the same or another term. [O. C. 621.]

Mistrial of a cause revives its status as though there had been no trial, and the cause may be tried again at the same term. A continuance to the next term is available to the defendant on a sufficient showing. Jones v. State, 3 T. Cr. R., 575; Garrett v. State, 37 Id., 198, 38 S. W. R., 1017.

Art. 762. [742] **Court may proceed with other business.**—The court may, during the retirement of the jury, proceed to any other business and adjourn from time to time, but shall be deemed open for all purposes connected with the case before the jury. [O. C. 622.]

Jones v. State, 8 T. Cr. R., 648; Shehane v. State, 13 Id., 533; Miller v. State, 32 Id., 266.

CHAPTER SIX.

OF THE VERDICT.

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Article 763. [743] **Definition of "verdict."**—A "verdict" is a declaration by a jury of their decision of the issues submitted to them in the case, and it must be in writing and concurred in by each member of the jury.

Defined. The verdict is the decision of the jury on the issues submitted to them; it must be in writing, and must be concurred in by all the members of the jury. Wooldridge v. State, 13 T. Cr. R., 443.

It must speak the truth between the state and the defendant, as to the offense charged in the indictment. If it finds guilty of any offense within the different degrees embraced in the indictment, it must assess the punishment, except where it is absolutly fixed by the statute. Buster v. State, 42 T., 315.

If otherwise good, verdict is sufficient if written with pencil. Ellis v. State, 30 T. Cr. R., 601, 18 S. W. R., 139.

Not imperative that it be endorsed on the indictment. Schultz v. State, 15 T. Cr. R., 259.

Need not be dated, but an incorrect date may be corrected by direction of the court. Hardy v. State, 37 T. Cr. R., 55, 38 S. W. R., 615.

Need not refer to defendant by name. George v. State, 17 T. Cr. R., 513.

Art. 764. [744] **In felony case, twelve jurors must concur, etc.**—Not less than twelve jurors can render and return a verdict in a felony case, and the verdict shall be signed by the foreman.

Construed. The verdict in a felnoy case must be signed by the foreman; such signature not necessary in a misdemeanor verdict. Barton v. State, 44 S. W. R., 1093.

A jury of more than twelve persons is an illegal one and can not render a legal verdict. Ballard v. State, 38 T., 504.

Art. 765. [745] **When nine jurors may render verdict, etc.**—In cases of misdemeanor, in the district court, where one or more of the jurors have been discharged from serving after the cause has been submitted to them, if there be as many as nine of the jurors remaining, those remaining may render and return a verdict; but, in such case, the verdict must be signed by each one of the jurors rendering it. [Act Aug. 1, 1876, p. 12, § 19.]

Const., Art. 5, Sec. 13; Ray v. State, 4 T. Cr. R., 450.

Art. 766. [746] **Six jurors in county court.**—In the county court, in all criminal actions, the jury consists of six men, and the verdict must be concurred in by each of them.

Const., Art. 5, Sec. 17.

Waiver. The accused in a misdemeanor may waive his right of trial by jury, and this implies his right to consent to a jury of fewer than six persons. This waiver must be shown by the record on appeal. Stell v. State, 14 T. Cr. R., 59.

Art. 767. [747] **When jury have agreed, etc.**—When the jury have agreed upon a verdict, they shall be brought into court by the proper officer; and if, when asked, they answer that they have agreed, the verdict shall be read aloud by the clerk; and, if in proper form and no juror dissents therefrom, and neither party requests to have the jury polled, the verdict shall be entered upon the minutes of the court. [O. C. 623.]

Verdict can be received and entered of record on Sunday, but the defendant must be present, though his attorney need not be. Huffman v. State, 28 T. Cr. R., 174, 12 S. W. R., 588; Brown v. State, 32 Id., 119, 22 S. W. R., 596, and cases cited.

It can not be received on Sunday, when the term of court expired by limitation at twelve o'clock the night previous. Ex parte Juneman, 28 T. Cr. R., 486, 13 S. W. R., 783.

Art. 768. [748] **Polling the jury.**—It is the right, either of the state or of the defendant, to have the jury polled, which is done by calling separately the name of each juror and asking him if it is his verdict. If all, when asked, answer in the affirmative, the verdict shall be entered upon the minutes; but, if any juror answer in the negative, the jury shall retire again to consider of their verdict. [O. C. 624.]

Construed. This article only requires of each jury a categorical reply to the question whether "this is your verdict?" Bean v. State, 17 T. Cr. R., 60.

Neither this nor the succeeding article was modified by the act of the thirtieth legislature, page 31. Darden v. State, 56 T. Cr. R., 396, 120 S. W. R., 485.

Art. 769. [749] **Defendant must be present, when.**—In cases of felony, the defendant must be present when the verdict is read, unless he escapes after the commencement of the trial of the cause; but, in cases of misdemeanor, it may be received and read in his absence. [O. C. 625.]

Darden v. State, 56 T. Cr. R., 396, 120 S. W. R., 485.

Art. 770. [750] **Verdict must be general.**—The verdict in every criminal action must be general; when there are special pleas upon which the jury are to find, they must say in their verdict that the matters alleged in such pleas are true or untrue; where the plea is not guilty, they must find that the defendant is either "guilty" or "not guilty;" and, in addition thereto, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty. [O. C. 626.]

Verdict must be general, finding defendant either guilty or not guilty. It must be general as contradistinguished from special. Slaughter v. State, 24 T., 410.

Verdict of guilty means of the offense charged. Steinberger v. State, 35 T. Cr. R., 492, 34 S. W. R., 617.

Misspelling of the word "guilty," if "guilty" was plainly intended and understood, has been held, since the earlier decisions of this court, not to affect the verdict. Price v. State, 36 T. Cr. R., 403; and see Roberts v. State, 33 Id., 83, 24 S. W. R., 895.

And see in illustration, Lawrence v. State, 20 T. Cr. R., 536; Foster v. State, 21 Id., 80, 17 S. W. R., 548; Jacobs v. State, 28 Id., 80, 12 S. W. R., 408; Beabout v. State, 37 Id., 515, 40 S. W. R., 405; McGee v. State, 39 Id., 190, 45 S. W. R., 709.

A general verdict on an indictment containing more than one count will be applied to any one of the counts supported by the evidence. McMurtry v. State, 38 T. Cr. R., 521, 43 S. W. R., 1010, and cases cited; Lovejoy v. State, 40 Id., 89, 48 S. W. R., 520, and cases cited.

This rule will not apply when a preliminary motion to quash was overruled, when it should have been sustained as to certain defective counts. Under such conditions, the submission of all the counts was error. McMurtry v. State, supra.

Construction of verdict. Verdicts are to be given a reasonable intendment and construction, and are not to be avoided unless because of doubtful import or want of statutory sufficiency. Partain v. State, 22 T. Cr. R., 10, 2 S. W. R., 854, and cases cited.

Murder by poison is per se murder of first degree, but the verdict to be sufficient must expressly find that degree. Brooks v. State, 42 T. Cr. R., 347, 60 S. W. R., 53.

A judgment pleaded in bar must be a final judgment, or a judgment of conviction on which an apepal was pending; otherwise it would be entitled to no consideration. Linley v. State, 57 T. Cr. R., 305, 122 S. W. R., 873.

Art. 771. [751] **When offense of different degree is charged.**—Where a prosecution is for an offense consisting of different degrees, the jury may find the defendant not guilty of the higher degree (naming it), but guilty of any degree inferior to that charged in the indictment or information. [O. C. 630.]

Penal Code, Art. 1142, and notes.

Construed. This article distinguishes between the degree directly and affirmatively charged in the indictment, and the lesser degrees of the same offense, charged by inclusion. The article contemplates only such included offenses of lesser degree, as are necessarily included by inference within the allegations as distinguished from the higher degree directly and affirmatively charged; and a verdict which responds to the higher offense, directly charged, is not uncertain, because it might also be applied to an included offense of lesser degree not so charged. McGee v. State, 37 T. Cr. R., 190, 45 S. W. R., 709, following Nettles v. State, 5 Id., 386, and overruling on the point Guest v. State, 24 Id., 530, 7 S. W. R., 242.

In murder cases, the verdict of conviction must find the degree. McCloud v. State, 37 T. Cr. R., 237, 39 S. W. R., 104, following Buster v. State, 42 T., 315.

In illustration, see Slaughter v. State, 24 T., 410 (explained in Buster, supra); Bowen v. State, 28 T. Cr. R., 498, 13 S. W. R., 787; Hays v. State, 33 Id., 546, 28 S. W. R., 203; Styles v. State, 37 Id., 599, 40 S. W. R., 498.

Art. 772. [752] **Offenses consisting of degrees.**—The following offenses include different degrees:

1. Murder, which includes all the lesser degrees of culpable homicide, and also an assault with intent to commit murder.
2. An assault with intent to commit any felony, which includes all assaults of an inferior degree.
3. Maiming, which includes disfiguring, wounding, aggravated assault and battery and simple assault and battery.
4. Arson, which includes every malicious burning made penal by law.
5. Burglary, which includes every species of house breaking and theft or other felony when charged in the indictment in connection with the burglary.
6. Theft, which includes swindling and all unlawful acquisitions of personal property punishable by the Penal Code.

7. Perjury, which includes all false swearing made punishable by the Penal Code.

8. Bigamy, which includes adultery and fornication.

9. Adultery, which includes fornication.

10. Riot, which includes unlawful assembly.

11. Kidnaping or abduction, which includes false imprisonment.

12. Every offense against the person includes within it assaults with intent to commit said offense, when such attempt is a violation of the penal law.

13. Every offense includes within it an attempt to commit the offense, when such an attempt is made penal by law. [O. C. 631.]

Constitutional law. So far only as it includes embezzlement, this subdivision is unconstitutional and void. Huntsman v. State, 12 T. Cr. R., 619, overruling Whitworth v. State, 11 Id., 414. ("Embezzlement," following the word "swindling," originally stricken out.)

Art. 773. [753] **Informal verdict may be corrected.**—If the jury find a verdict which is informal, their attention shall be called to it, and, with their consent, the verdict may, under the direction of the court, be reduced to the proper form. [O. C. 627.]

Construed. This article expressly authorizes the correction of any informality in the verdict by the jury, under the direction of the court. Gage v. State, 9 T. Cr. R., 259; Taylor v. State, 14 Id., 340; May v. State, 6 Id., 191; Robinson v. State, 23 Id., 315, 4 S. W. R., 904; Rocha v. State, 38 Id., 69, 41 S. W. R., 611.

Art. 774. [754] **If jury refuse to have verdict corrected.**—If the jury refuse to have the verdict altered, they shall again retire to their room to deliberate, unless it manifestly appear that the verdict is intended as an acquittal; and, in that case, the judgment shall be rendered accordingly, discharging the defendant. [O. C. 628.]

Robinson v. State, 23 T. Cr. R., 4 S. W. R., 904; Alston v. State, 41 T., 39.

Art. 775. [755] **Where several defendants are tried jointly.**—Where several defendants are tried together, the jury may convict such of the defendants as they deem guilty and acquit others. [O. C. 632.]

Construed. This article is self-expressive, and in its operation does not except adultery or any other character of case. Alonzo v. State, 15 T. Cr. R., 378.

The verdict must assess the punishment against each of joint defendants convicted. Flynn v. State, 8 T. Cr. R., 398, overruling Bennett v. State, 30 T., 521; Hays v. State, 30 T. Cr. R., 472, 17 S. W. R., 1063, and cases cited. And see Mootry v. State, 35 Id., 450, 33 S. W. R., 877; Williams v. State, 5 Id., 226.

Art. 776. [756] **Same subject.**—Where the jury, on the trial of several defendants, agrees to a verdict as to one or more, and can not agree as to others, they may find a verdict as to those in regard to whom they agree; and judgment shall be rendered accordingly; and the case, as to the rest, may be tried by another jury. [O. C. 633.]

Art. 777. [757] **In case of acquittal.**—In all cases of acquittal, the defendant shall be immediately discharged from all further liability upon the charge for which he has been tried, and judgment upon the verdict accordingly shall be at once rendered and entered. [O. C. 635.]

Art. 778. [758] **Judgment entered immediately.**—In every case of acquittal or conviction, the proper judgment shall be entered immediately. [O. C. 634.]

Construed. The defendant in a felony case must be present when entry of judgment is made. Mapes v. State, 13 T. Cr. R., 85.

But this does not mean his presence when the clerk is performing the ministerial act of entering up the judgment after conclusion of trial. Powers v. State, 23 Id., 42, 5 S. W. R., 153.

Informal entry of the judgment on the minutes of the court, even with the failure of the judge to approve and sign the minutes, will not vitiate a judgment. Hurley v. State, 35 T. Cr. R., 282, 33 S. W. R., 354.

As to entry nunc pro tunc, see Estes v. State, 38 T. Cr. R., 506, 43 S. W. R., 982.

Art. 779. [759] **When verdict of guilty in felony.**—When a verdict of guilty is rendered in any case of felony, the defendant shall remain in custody to await the further action of the court thereon. [O. C. 634.]

Art. 780. [760] **Acquittal for insanity.**—When the defendant is acquitted on the ground of insanity, the jury shall so state in their verdict. [O. C. 636.]

Construed; charge of the court. This article is directory only, and though it is better practice for the court to charge it when insanity is an issue, failure to so charge is not material error. Massengale v. State, 24 T. Cr. R., 181, 6 S. W. R., 35. And see Frizzell v. State, 30 Id., 42, 16 S. W. R., 751.

Art. 781. [761] **Verdict on plea of guilty by person insane.**—When a jury has been impaneled to assess the punishment upon a plea of "guilty," they shall say in their verdict what the punishment is which they assess; but where the jury are of opinion that a person pleading guilty is insane they shall so report to the court, and an issue as to that fact be tried before another jury; and if, upon such trial, it be found that the defendant is insane, such proceedings shall be had as are directed in title twelve, chapter one, of this Code. [O. C. 637.]

Post, Arts. 1019, 1023, 1026.

Art. 782. [762] **Conviction of lower is acquittal of higher offense.**—If a defendant, prosecuted for an offense which includes within it lesser degrees, be convicted of an offense lower than that for which he is indicted, and a new trial be granted him, or the judgment be arrested for any cause other than the want of jurisdiction, the verdict upon the first trial shall be considered an acquittal of the higher offense; but he may, upon a second trial, be convicted of the same offense of which he was before convicted, or any other inferior thereto. [O. C. 642.]

Ante, Art. 572, and notes.

Construed. It is well settled that, under this article, the accused being tried for the higher grade of offense, is convicted of a lower, such conviction operates an acquittal of all higher grades. Cornelius v. State, 54 T. Cr. R., 173, 112 S. W. R., 1061.

CHAPTER SEVEN.

OF EVIDENCE IN CRIMINAL ACTIONS.

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1. GENERAL RULES.

Article 783. [763] **Rules of common law shall govern, except, etc.**—The rules of evidence known to the common law of England, both in civil and criminal cases, shall govern in the trial of criminal actions in this state, except where they are in conflict with the provisions of this Code or of some statute of the state. [O. C. 638.]

Penal Code, Art. 9, and notes; ante, Art. 26, and notes.

Construed. As against statutory enactments, the common law rules of procedure, construction and evidence, have no standing in this state. Lockman v. State, 32 T. Cr. R., 563, 25 S. W. R., 20. And see McKenzie v. State, Id., 568, 25 S. W. R., 462; Cline v. State, 36 S. W. R., 1099.

But when, upon any particular rule of evidence, our statutes are silent, the common law applies. Bluman v. State, 33 T. Cr. R., 43, 21 S. W. R., 1027.

As to rebutting evidence. The common law rule which confines cross-examination of a witness to matters inquired about on his examination in chief, has been abrogated in this state. Ante, Art. 718, and notes; Morris v. State, 30 T. Cr. R., 95, 16 S. W. R., 757.

Art. 784. [764] **Rules of statute shall govern, when.**—The rules of evidence prescribed in the statute law of this state in civil suits, shall, so far as applicable, govern also in criminal actions, when not in conflict with the provisions of this Code or of the Penal Code. [O. C. 639.]

Written instruments; filing and written notice. Under the Revised Civil Statutes, a certified copy of an instrument being admissible in like manner as the original, proof of its execution could be made as in case of the original, and it could be used in evidence by proof of its execution on the trial without the necessity of filing the same among the papers three days before trial and giving notice thereof to the opposite party. Golin v. State, 37 T. Cr. R., 90, 38 S. W. R., 794.

The rule as to the three days filing does not obtain where the execution of the written instrument is proved by the testimony of subscribing witnesses or by a party who saw it executed. Williams v. State, 30 T. Cr. R., 153, 16 S. W. R., 760.

And see Allison v. State, 14 T. Cr. R., 402; Johnson v. State, 9 Id., 249; Graves v. State, 28 Id., 354, 13 S. W. R., 149.

Art. 785. [765] **Defendant presumed to be innocent; reasonable doubt.**—The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence; and, in case of reasonable doubt as to his guilt, he is entitled to be acquitted. [O. C. 640.]

Penal Code, Art. 11, and notes.

Presumption of innocence abides with the defendant throughout the trial of the case, and until his guilt is established. The burden is on the state to overcome this presumption, and it never shifts. This rule should be charged in felony cases in connection with the charge on reasonable doubt, and those two charges are correctly given in the language of the statute. However, the failure to charge the presumption of innocence is not reversible, unless objection was preserved by bill or a proper requested instruction was refused. Black v. State, 1 T. Cr. R., 368; Priesmuth v. State, Id., 480; Slade v. State, 29 Id., 381, 16 S. W. R., 253; Thompson v. State, 37 Id., 227, 38 S. W. R., 785.

Reasonable doubt defined: Chapman v. State 3 T. Cr. R., 67; Ham v. State, 4 Id., 645; Billard v. State, 30 T., 367; Cave v. State, 41 Id., 182; Crook v. State, 27 T. Cr. R., 198, 11 S. W. R., 444; Zwicker v. State, Id., 539, 11 S. W. R., 633.

The reasonable doubt applies to every issue in the case. Smith v. State, 7 T. Cr. R., 382; Perry v. State, 44 T., 473; Walker v. State, 42 Id., 360; Gallagher v. State, 28 T. Cr. R., 247, 12 S. W. R., 1087.

Failure to charge on the reasonable doubt is fundamental error. Logan v. State, 40 T. Cr. R., 85, 48 S. W. R., 575; Mace v. State, 6 Id., 470; Alonzo v. State, 15 Id., 378.

And see Abram v. State, 36 T. Cr. R., 44, 35 S. W. R., 389; Schultz v. State, 20 Id., 316.

In misdemeanors, the charge is not required unless asked, but refusal of such request is error. May v. State, 6 T. Cr. R., 191, and cases cited.

Burden of proof never shifts from the state. This is an elementary principle with but few and rare exceptions, and it is error to refuse such instruction when requested. Black v. State, 1 T. Cr. R., 368; Horn v. State, 33 Id., 541, and cases cited.

Art. 786. [766] **Jury are the judges of facts.**—The jury, in all cases, are the exclusive judges of the facts proved, and of the weight to be given to the testimony, except where it is provided by law that proof of any particular fact is to be taken as either conclusive or presumptive proof of the existence of another fact, or where the law directs that a certain degree of weight is to be attached to a certain species of evidence. [O. C. 643.]

Construed. While it is the province of the court to determine the admissibility of evidence, it is the exclusive province of the jury to pass upon the credibility and the weight of the same. Walker v. State, 37 T., 366; Wharton v. State, 45 Id., 2; Fore v. State, 5 T. Cr. R., 251; Johnson v. State, Id., 423; Carr v. State, 24 Id., 562, 7 S. W. R., 328; Seal v. State, 28 T., 491.

Conflict of evidence. The jury is charged with the exclusive duty and authority to reconcile conflicts of evidence. Failure to so charge, however, is not now reversible error unless excepted to or made ground in motion for new trial. Turner v. State, 37 T. Cr. R., 451, 40 S. W. R., 980; Fizini v. State, 100 S. W. R., 394, and cases cited; Miller v. State, 35 T. Cr. R., 209, 33 S. W. R., 207.

Art. 787. [767] **Judge shall not discuss evidence offered, etc.**—In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply de-

cide whether or not it is admissible; nor shall he, at any stage of the proceedings previous to the return of a verdict, make any remark calculated to convey to the jury his opinion of the case.

Construed. This article is self-explanatory. The court should admit or exclude proffered testimony without comment. Moore v. State, 33 T. Cr. R., 306, 26 S. W. R., 403; Wilson v. State, 17 Id., 536; Kirk v. State, 35 Id., 224, 32 S. W. R., 1045; McCullar v. State, 36 Id., 213, 36 S. W. R., 585. But see instances of judicial interposition held immaterial error. McGee v. State, 37 Id., 668, 40 S. W. R., 967; Harrell v. State, 39 Id., 204, 45 S. W. R., 581.

And see further on the subject, Rodriguez v. State, 23 T. Cr. R., 503, 5 S. W. R., 255; Stayton v. State, 32 Id., 33, 22 S. W. R., 38; Chalk v. State, 35 Id., 116, 32 S. W. R., 534; Thompson v. State, Id., 352, 33 S. W. R., 871.

2. OF PERSONS WHO MAY TESTIFY.

Art. 788. [768] **Persons incompetent to testify.**—All persons are competent to testify in criminal actions, except the following:

1. Insane persons, who are in an insane condition of mind at the time when they are offered as witnesses, or who were in that condition when the events happened of which they are called to testify.

Insane Person. The prosecutrix in a rape case, who was insane before and when the offense was committed and when called to testify, was an incompetent witness. Lopez v. State, 30 T. Cr. R., 487, 17 S. W. R., 1058.

This disqualification does not extend to one who had been insane, but had recovered. Singleton v. State, 57 T. Cr. R., 560, 124 S. W. R., 92.

Charge of court. Ballerton v. State, 52 T. Cr. R., 381, 107 S. W. R., 826.

2. Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath.

Child witness is competent when he is shown to have sufficient understanding of the nature of an oath, a matter that is committed to the sound discretion of the court, to be revised only in case of abuse. Brown v. State, 2 T. Cr. R., 115; Hawkins v. State, 27 Id., 273, 11 S. W. R., 409, and cases cited; Oxsheer v. State, 38 Id., 499, 43 S. W. R., 335.

Test of a child witness, as to method, is a matter confided to the trial judge, and his action will be revised only when his discretion has been abused. Williams v. State, 12 T. Cr. R., 127.

See instances: Taylor v. State, 22 T. Cr. R., 529, 3 S. W. R., 753; Davidson v. State, 39 T., 139; Mason v. State, 2 T. Cr. R., 192; Holst v. State, 23 Id., 1, 3 S. W. R., 757; Wolfforth v. State, 31 Id., 387, 20 S. W. R., 741; Nichols v. State, 32 Id., 391, 23 S. W. R., 680; Parker v. State, 33 Id., 111, 21 S. W. R., 604; Colter v. State, 37 Id., 284, 39 S. W. R., 576. And see Williams v. State, 44 T., 34; Mann v. State, Id., 642; Smith v. State, 41 Id., 352.

3. All persons who have been or may be convicted of felony in this state, or in any other jurisdiction, unless such conviction has been legally set aside, or unless the convict has been legally pardoned for the crime of which he was convicted. But no person who has been convicted of the crime of perjury or false swearing, and whose conviction has not been legally set aside, shall have his competency as a witness restored by a pardon, unless such pardon by its terms specifically restore his competency to testify in a court of justice. [O. C. 644.]

Felony is an offense punishable by death or imprisonment in the penitentiary. Penal Code, Art. 55, and notes.

To disqualify under this article, the party must have been convicted of a felony. Pitner v. State, 23 T. Cr. R., 366, 5 S. W. R., 210; Woods v. State, 26 Id., 490, 10 S. W. R., 108; Ward v. White, 86 T., 170, 23 S. W. R., 981.

Convict defined. Penal Code, Art. 27.

A witness is not disqualified under this article until he has been convicted of a felony and sentence has been passed upon him or he has accepted sentence. He is not a convict so long as his conviction is on appeal, nor until it has been affirmed. Stanley v. State, 39 T. Cr. R., 482, 46 S. W. R., 645; Robinson v. State, 36 Id., 104, 35 S. W. R., 651; Foster v. State, 39 Id., 399, 46 S. W. R., 231.

One previously convicted of the same offense who is yet under convict bond for fine and costs, is incompetent as a witness—distinguishing Ex Parte Logsden, 35 T. Cr. R., 56, 31 S. W. R., 646; Baldwin v. State, 39 Id., 245, 45 S. W. R., 714.

An unpardoned felony convict is a competent witness in his own behalf. Williams v. State, 28 T. Cr. R., 301, 12 S. W. R., 1103; Shannon v. State, Id., 474, 13 S. W. R., 599. And see Quintona v. State, 29 Id., 16 S. W. R., 258.

"Other jurisdiction" is not limited to the tribunals of the United States exercising jurisdiction in Texas. A judgment of conviction in another state, shown to be valid, and to be a conviction of felony under the laws of such state, would disqualify the person as a witness in this state. Pitner v. State, 23 T. Cr. R., 366, 5 S. W. R., 210.

Practice; proof of disqualification: White v. State, 33 T. Cr. R., 177, 26 S. W. R., 72, and cases cited; Bratton v. State., 34 Id., 477, 31 S. W. R., 379; Moore v. State, 39 Id., 266, 45 S. W. R., 809.

Same; full pardon: Martin v. State, 21 T. Cr. R., 1, 17 S. W. R., 430; Thornton v. State, 20 Id., 519; Hunnicutt v. State, 18 Id., 498; Rivers v. State, 10 Id., 177; Bennett v. State, 24 Id., 73, 5 S. W. R., 527.

Same; conditional pardon: McGee v. State, 29 T. Cr. R., 596, 16 S. W. R., 422, and cases cited.

A full pardon, once granted, delivered and accepted, can not be revoked by the pardoning power, though if procured by fraud it would be void from its granting. Roson v. State, 23 T. Cr. R., 287, 4 S. W. R., 666.

As to credibility of a pardoned convict, see Thornton v. State, 519; Bennett v. State, 24 Id., 73, 5 S. W. R., 527; Dudley v. State, Id., 163, 5 S. W. R., 649.

To discredit a witness, he may be asked if he was ever confined in the penitentiary for crime, and he can be required to answer. Lights v. State, 21 T. Cr. R., 308, 17 S. W. R., 428, overruling Ivey v. State, 41 T., 45. And see Woodson v. State, 24 T. Cr. R., 153, 6 S. W. R., 184.

Art. 789. [769] **Female alleged to be seduced may testify.**—In prosecutions for seduction, under the provisions of the Penal Code, the female alleged to have been seduced shall be permitted to testify; but no conviction shall be had upon the testimony of the said female, unless the same is corroborated by other evidence tending to connect the defendant with the offense charged. [Act 22d Leg., ch. 33, p. 34.]

Construed. This statute, enlarging a class of persons competent to testify as witnesses, is not ex post facto in relation to offenses previously committed. See this case in illustration. Mrous v. State, 31 T. Cr. R., 597, 21 S. W. R., 764.

Practice; evidence of prosecutrix in seduction. Kelly v. State, 33 T. Cr. R., 31, 24 S. W. R., 295; Snodgrass v. State, 36 Id., 207, 36 S. W. R., 477; Davis v. State, Id., 548; 38 S. W. R., 174; Barnes v. State, 37 Id., 320, 39 S. W. R., 684; Anderson v. State, 39 Id., 83, 45 S. W. R., 15.

Prosecutrix an accomplice: Penal Code, Arts. 1448, 1449, and notes. And see McCullar v. State, 36 T. Cr. R., 213, 36 S. W. R., 585; Wright v. State, 31 Id., 354, 20 S. W. R., 756.

Art. 790. [770] **Defendant may testify.**—Any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause; provided, that where there are two or more persons jointly charged or indicted,

and a severance is had, the privilege of testifying shall be extended only to the person on trial. [Act 21st Leg., April 4, 1889.]

Construed. This article but confers a discretionary privilege on the defendant; if he accepts it, he assumes the liabilities, penalties and burdens of an ordinary witness. Quintana v. State, 29 T. Cr. R., 401, 16 S. W. R., 258; Huffman v. State, 28 Id., 174, 12 S. W. R., 588; Brown v. State, 38 Id., 597, 44 S. W. R., 176.

A defendant testifying in his own behalf can not be impeached by his unwarned confessions made in arrest. Morales v. State, 36 T. Cr. R., 234, 36 S. W. R., 435; overruling on the point Quintana v. State, 29 Id., 401, 16 S. W. R., 258; Ferguson v. State, 31 Id., 93, 19 S. W. R., 901, and Phillips v. State, 35 Id., 480, 34 S. W. R., 272.

Cross-examination of a defendant testifying as a witness in his own behalf, is not confined to matters elicited on his examination in chief. Brown v. State, 38 T. Cr. R., 597, 44 S. W. R., 176.

He may be impeached by proof of his contradictory evidence on a former trial of the case, though not then warned that his evidence might be used against him on a subsequent trial. Collins v. State, 39 T. Cr. R., 441, 46 S. W. R., 933.

Defendant's failure to testify. The last clause of this article peremptorily prohibits any allusion by counsel to the defendants failure to testify. Wilson v. State, 54 T. Cr. R., 505, 113 S. W. R., 529, and cases citey.

This rule covers the proceedings on a former trial. Hare v. State, 56 T. Cr. R., 6, 118 S. W. R., 544, and cases cited.

Charge of the court in reiteration of the statute that defendant's failure to testify is not to be taken as a circumstance against him is not error. Guinn v. State, 39 T. Cr. R., 257, 45 S. W. R., 694.

Such reference by the prosecuting attorney is subject to review, even without a statement of facts, when made to appear by bill of exceptions. Brown v. State, 57 T. Cr. R., 269, 122 S. W. R., 565.

Under this same article, it is reversible error for the prosecuting attorney to ask the defendant if he testified in his own behalf on his previous trial. Id.

Art. 791. [771] **Principals, accomplices and accessories.**—Persons charged as principals, accomplices or accessories, whether in the same indictment or different indictments, can not be introduced as witnesses for one another, but they may claim a severance; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others. [O. C. 230.]

Penal Code, Arts. 89-91, and notes.

Construed. Parties charged jointly or severally with the same offense are competent witnesses for the state, but not for each other. Underwood v. State, 38 T. Cr. R., 193, 41 S. W. R., 618; Freeman v. State, 33 Id., 568, 28 S. W. R., 471; Rangel v. State, 22 Id., 642, 3 S. W. R., 788.

This rule as disqualifying the parties as witnesses for one another applies only to those indicted, and not to those only suspected of complicity. Scroggin v. State, 30 T. Cr. R., 92, 16 S. W. R., 651; Campbell v. State., Id., 646, 18 S. W. R., 409.

In misdemeanor, a defendant who has been convicted and has satisfied the punishment imposed, is a competent witness for his co-defendant. Tillery v. State, 21 T., 201; Jordan v. State, 29 T. Cr. R., 595, 16 S. W. R., 543. And see Baldwin v. State, 39 Id., 245, 45 S. W. R., 714.

Art. 792. [772] **Court may interrogate witness touching competency.**—The court may, upon suggestion made, or of its own option, interrogate a person who is offered as a witness, for the purpose of ascertaining whether he is competent to testify, or the competency or incompetency of the witness may be shown by evidence. [O. C. 645.]

Practice under this article: Schell v. State, 2 T. Cr. R., 30; Hunnicutt v. State, 18 Id., 499; Maleek v. State, 33 Id., 14, 24 S. W. R., 417; Kirk v. State, 35 Id., 225, 32 S. W. R., 1045.

Art. 793. [773] **All other persons competent witnesses.**—All other persons, except those enumerated in articles 798 and 805, whatever may be the relationship between the defendant and witness, are competent to testify, except that an attorney at law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship. [O. C. 646.]

Privileged communications to attorney. The rule excluding as evidence communications, coming within the purview of this article, should be rightly enforced. Sutton v. State, 16 T. Cr. R., 490.

This rule includes all knowledge coming to the attorney, from whatsoever surce, because of the relationship of attorney and client. Hernandez v. State, 18 T. Cr. R., 134.

In illustration as coming within the rule, see Walker v. State, 19 T. Cr. R., 176; Orman v. State, 24 Id., 495, 6 S. W. R., 544; Rahm v. State, 30 Id., 310, 17 S. W. R., 416; Everett v. State, 30 Id., 682, 18 S. W. R., 674; Russell v. State, 38 Id., 590, 44 S. W. R., 159.

Art. 794. [774] **Husband and wife shall not testify as to, etc.**—Neither husband nor wife shall, in any case, testify as to communications made by one to the other, while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation subsisted, except in a case where one or the other is prosecuted for an offense; and a declaration or communication made by the wife to the husband, or by the husband to the wife, goes to extenuate or justify an offense for which either is on trial. [O. C. 647.]

Art. 795. [775] **Same subject.**—The husband and wife may, in all criminal actions, be witnesses for each other; but they shall, in no case, testify against each other, except in a criminal prosecution for an offense committed by one against the other. [O. C. 648.]

Construed. This inhibition does not extend to putative spouses living in unlawful cohabitation. Mann v. State, 44 T., 642.

Spouses are competent witnesses against each other when the prosecution involves acts of personal violence by one against the other. Baxter v. State, 34 T. Cr. R., 516, 31 S. W. R., 394, and cases cited.

Instances where competent: Dumas v. State, 14 T. Cr. R., 465; Bramlette v. State, 21 Id., 611, 2 S. W. R., 765; Cook v. State, 22 Id., 511, 3 S. W. R., 549; Hall v. State, 31 Id., 565, 21 S. W. R., 368; Mathews v. State, 32 T., 117; Ex Parte Fatheree, 34 T. Cr. R., 594, 31 S. W. R., 403. And see Clubb v. State, 14 Id., 192, and Rios v. State, 39 Id., 675, 47 S. W. R., 987.

Instances where incompetent: Roach v. State, 41 T., 261; Overton v. State, 43 Id., 616; Compton v. State, 13 T. Cr. R., 271; Thompson v. State, 14 Id., 70; Johnson v. State, 27 Id., 135, 11 S. W. R., 34; McLean v. State, 32 Id., 521; Boyd v. State, 33 Id., 470, 26 S. W. R., 1080; Miller v. State, 37 Id., 575, 40 S. W. R., 313.

Cross-examination limited: Merritt v. State, 39 T. Cr. R., 70, 45 S. W. R., 21, and cases cited.

Art. 796. [776] **Religious opinion, etc., does not disqualify.**—No person is incompetent to testify on account of his religious opinion or for the want of any religious belief. [Bill of Rights, § 5.]

Const., Art. 1, Sec. 5.

Construed. Religious belief is not a prerequisite to one's competency as a witness. It is sufficient if he understands the obligation to speak the truth, and penalty for testifying falsely. Colter v. State, 37 T. Cr. R., 284, 39 S. W. R., 576.

And see Allen v. State, 16 T. Cr. R., 237; Gonzales v. State, 31 T., 495; Ake v. State, 6 T. Cr. R., 398.

Art. 797. [777] **Defendant jointly indicted may testify, when.**—A defendant jointly indicted with others, and who has been tried and convicted, and whose punishment was fine only, may testify for the other defendant after he has paid the fine and costs.

Joint defenses in misdemeanor, see notes, to ante, Art. 791.

Art. 798. [778] **Judge of the court is a competent witness.**—The judge of a court trying an offense is a competent witness for either the state or the defendant, and may be sworn upon the trial and examined. [O. C. 650.]

Valentine v. State, 6 T. Cr. R., 439.

Art. 799. [779] **Judge not required to testify, when.**—When it is proposed to offer the testimony of a judge in a cause pending before him, he is not required to testify if he declares that there is no fact within his knowledge important in the cause. [O. C. 651.]

Art. 800. [780] **Oath administered to the judge by the clerk.**—When the judge of a court is offered as a witness, the oath may be administered to him by the clerk. [O. C. 652.]

Art. 801. [781] **Testimony of accomplice not sufficient to convict, unless, etc.**—A conviction can not be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient, if it merely shows the commission of the offense. [O. C. 653.]

Ante, Art. 791, and notes; Penal Code, Arts. 74 to 91, inclusive, and notes.

Construed in connection with Penal Code, Art. 79. Huffman v. State, 57 T. Cr. R., 399, 123 S. W. R., 596.

Art. 802. [782] **In trials for forgery, etc.**—In trials for forgery, the person whose name is alleged to have been forged is a competent witness; and, in all cases, not otherwise specially provided for, the person injured, or attempted to be injured, is a competent witness. [O. C. 658.]

3. EVIDENCE AS TO PARTICULAR OFFENSES.

Art. 803. [783] **Must be two witnesses, etc., in treason, or, etc.**—No person can be convicted of treason, except upon the testimony of at least two witnesses to the same overt act, or upon his own confession in open court. [O. C. 654.]

Art. 804. [784] **What evidence not admitted in treason, etc.**—Evidence shall not be admitted in a prosecution for treason as to an overt act not expressly charged in the indictment; nor shall any person be convicted under an indictment for treason, unless one or more overt acts are expressly charged therein. [O. C. 655.]

Art. 805. [785] **In case where two witnesses are required.**—In all cases where, by law, two witnesses, or one with corroborating circumstances, are required to authorize a conviction, if the requirement be not fulfilled, the court shall instruct the jury to render a verdict of acquittal, and they are bound by the instruction. [O. C. 656.]

Construed. This article announces an exception to the general rule that the jury are the exclusive judges of the credibility of the witnesses, etc., and imposes the duty upon the court to first pass on the competency and sufficiency of the evidence, and then instruct acquittal when the requirements of the law as to the quantum of evidence have not been met, and that responsibility can not be shifted to the jury. Gabrielsky v. State, 13 T. Cr. R., 429; Hernandez v. State, 18 Id., 134; Warers v. State, 30 Id., 284, 17 S. W. R., 411.

Art. 806. [786] **Perjury and false swearing; two witnesses, etc., required.**—In trials for perjury, no person shall be convicted except upon the testimony of two credible witnesses, or of one credible witness, corroborated strongly by other evidence as to the falsity of the defendant's statement, under oath, or upon his own confession in open court. [O. C. 657.]

Perjury. Quantum of proof. Penal Code, Art. 309, and notes.

"Credible witness" is one who, being competent to give testimony, is worthy of belief. If but one of two persons testifying to the perjury is a credible witness, a coniction therefor can not stand. Kitchen v. State, 29 T. Cr. R., 45, 14 S. W. R., 392, and cases cited.

Charge of the court on the quantum of evidence being otherwise correct, it is not necessary that it further instruct the jury to disregard the testimony of a witness they did not regard a credible person. Beach v. State, 32 T. Cr. R., 241, 22 S. W. R., 976, citing Muely's case, 31 Id., 155, 18 S. W. R., 411.

Instance an instruction incorrect in law, and as upon the weight of evidence. Hughes v. State, 32 T. Cr. R., 379, 23 S. W. R., 891, citing Muely's case, supra. And see also Whitaker v. State, 37 Id., 479, 36 S. W. R., 253.

"Strongly corroborated" defined: Franklin v. State, 38 T. Cr. R., 346, 43 S. W. R., 85. And note suggestion in this (Franklin's case), that Kempe's case, 28 Id., 519, 13 S. W. R., 869, to the effect that a conviction for perjury can not be had on evidence purely circumstantial, appears to be overruled by Beach v. State, 32 Id., 241, 22 S. W. R., 976, and Plummer v. State, 35 Id., 202, 33 S. W. R., 228.

And see Butler v. State, 36 T. Cr. R., 483, 38 S. W. R., 787; Scott v. State, 34 Id., 41, 28 S. W. R., 947.

Art. 807. [787] **Proof of intent to defraud in forgery.**—In trials of forgery, it need not be proved that the defendant committed the act with intent to defraud any particular person. It shall be sufficient to prove that the forgery was, in its nature, calculated to injure or defraud any of the sovereignties, bodies corporate or politic, officers or persons, named in the definition of the offense of forgery in the Penal Code. [O. C. 659.]

Ante, Art. 454, and notes; Garza v. State, 38 T. Cr. R., 317, 42 S. W. R., 563; McClasson v. State, Id., 351, 43 S. W. R., 93.

4. OF DYING DECLARATIONS AND OF CONFESSIONS OF THE DEFENDANT.

Art. 808. [788] **Dying declarations, evidence, when.**—The dying declaration of a deceased person may be offered in evidence, either for or against a defendant charged with the homicide of such deceased person, under the restrictions hereafter provided. To render the declarations of the deceased competent evidence, it must be satisfactorily proved:

1. That at the time of making such declaration he was conscious of approaching death, and believed there was no hope of recovery.

Dying declaration. This subdivision states an imperative prerequisite, and excludes the slightest hope or expectation of recovery, and this, though dissolution follows such hope immediately. See in extenso, Ex parte Meyers v. State, 33 T. Cr. R., 204; Fulcher v. State, 28 Id., 465, 13 S. W. R., 750, and cases cited.

Consciousness of impending death; how proved. Miller v. State, 27 T. Cr. R., 63, 10 S. W. R., 445; Kerbo v. State, 3 Id., 348; Fulcher v. State, supra; Pierson v. State, 21 Id., 14, 17 S. W. R., 468; Bryant v. State, 35 Id., 394, 33 S. W. R., 978.

2. That such declaration was voluntarily made, and not through the persuasion of any person.

3. That such declaration was not made in answer to interrogatories calculated to lead the deceased to make any particular statement.

As to interrogations under this subdivision, see Pierson v. State, 18 T. Cr. R., 524; Testard v. State, 26 Id., 260, 9 S. W. R., 888; Taylor v. State, 38 Id., 552, 43 S. W. R., 1019.

4. That he was of sane mind at the time of making the declaration. [O. C. 660.]

Sanity of declarant. That, when he made the declarations, the declarant was of sane mind, conscious of impending death, and that he made the declarations voluntarily, and not in answer to questions calculated to elicit any particular statement, is a sufficient predicate. Miller v. State, 27 T. Cr. R., 63, 10 S. W. R., 445; Cahn v. State, Id., 709, 11 S. W. R., 723.

Predicate. Each element, as prescribed by the four subdivisions of this article, must be proved to establish the predicate for the admission of dying declarations, when they are not res gestae. Ledbetter v. State, 23 T. Cr. R., 245, 5 S. W. R., 226; Irby v. State, 25 Id., 203, 7 S. W. R., 705; Fulcher v. State, 28 Id., 465, 13 S. W. R., 750.

Practice in laying predicate: Chalk v. State, 35 T. Cr. R., 116, 32 S. W. R., 534; Sims v. State, 36 Id., 154, 36 S. W. R., 256; Benevides v. State, 31 T., 579.

Note, a statement, proved as part of the dying declaration of the decedent, held not obnoxious as evidence on the ground that it was mere opinion. Gaines v. State, 127 S. W. R., 181.

Res gestae. The declaration of the murdered wife immediately after she was shot, in the presence of accused, that he had killed her, and that of the son immediately following, in the presence of the accused, that he had killed her, were admissible as res gestae. Wynne v. State, 127 S. W. R., 213.

Art. 809. [789] **Confession of defendant.**—The confession of a defendant may be used in evidence against him if it appear that the same was freely made without compulsion or persuasion, under the rules hereafter prescribed. [O. C. 661.]

Art. 810. [790] **When confession shall not be used.**—The confession shall not be used, if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed; provided, that where the defendant is unable to write his name and sign the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness. [O. C. 662; amended, Act 1907, p. 219.]

"Confession" defined. Ferguson v. State, 31 T. Cr. R., 93, 19 S. W. R., 901; Nolen v. State, 14 Id., 474, overruling Rhodes v. State, 11 Id., 563.

Practice; evidence: Ingle v. State, 1 T. Cr. R., 307; Banks v. State, 13 Id., 182; Long v. State, Id., 211; Sauls v. State, 30 Id., 17 S. W. R., 1066.

Construed. This article relates solely to "confessions," and does not include exculpatory statements. Ferguson v. State, 31 T. Cr. R., 93, 19 S. W. R., 901; Quintana v. State, 29 Id., 401, 16 S. W. R., 258.

Under this article, as amended, confessions made under arrest are not admissible unless made voluntarily in the examining court, in accordance with law, or in writing, and signed by defendant. Gaston v. State, 55 T. Cr. R., 270, 116 S. W. R., 282. And see Martin v. State, 57 Id., 264, 124 S. W. R., 681.

Confessions can not be deduced from mere circumstantial evidence, but must flow from positive statements. Eckert v. State, 9 T. Cr. R., 105; Conner v. State, 17 Id., 1; Powers v. State, 23 Id., 42, 5 S. W. R., 153.

And see Willard v. State, 26 T. Cr. R., 126, 9 S. W. R., 358; Brooks v. State, Id., 184, 9 S. W. R., 526; Adams v. State, 33 Id., 354.

A confession which does not recite a legal warning, does not name the person so warning, and does not contain the statement that it could be used on the trial, is not admissible as a written confession under the statute. Boyman v. State, 126 S. W. R., 1142.

Burden of proof is on the state to show competency. Note the several facts to be proved as predicate. Thomas v. State, 35 T. Cr. R., 178, 32 S. W. R., 771.

And, generally, on the subject, see Angell v. State, 8 T. Cr. R., 451; Burks v. State, 24 Id., 326, 6 S. W. R., 300; Womack v. State, 16 Id., 178, which, compare with Williams v. State, 19 Id., 276.

Admissibility must be determined by the judge. Cain v. State, 18 T., 387; Speer v. State, 4 T. Cr. R., 474; Nolen v. State, 8 Id., 585.

5. MISCELLANEOUS PROVISIONS.

Art. 811. [791] **When part of an act, declaration, etc., is given in evidence.**—When part of an act, declaration or conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, as, when a letter is read, all other letters on the same subject between the same parties may be given. And when a detailed act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood or to explain the same may also be given in evidence. [O. C. 664.]

Construed. Practice. The party against whom a confession or admission is admitted, is entitled to prove the whole of what he said on the subject at the time of making it. Such is the common law rule, which is expanded by this article so as not to confine such explanatory act to the very time of making it, and to extend it so as to render such acts admissible, if necessary, to a full understanding of or to explain the confession, although the same may have transpired at a different time, and so remote even as to be inadmissible as res gestae. Greene v. State, 17 T. Cr. R., 395, overruling on the point Shrivers v. State, 7 Id., 450; Harrison v. State, 20 Id., 387; Potts v. State, 56 Id., 39, 118 S. W. R., 535.

Same. This article is not intended to operate against the defendant, and can not be invoked by the state to exclude defendant's declarations, when made in custody, if the same are otherwise admissible as res gestae. Harrison v. State, supra.

And generally on the subject: Bonnard v. State, 25 T. Cr. R., 173, 7 S. W. R., 862; Rogers v. State, 26 Id., 404, 9 S. W. R., 762; Wood v. State, 28 Id., 61, 12 S. W. R., 405; Gallagher v. State., 28 Id., 247, 12 S. W. R., 1087; Epson v. State, 29 Id., 607, 16 S. W. R., 780; Craig v. State, 30 Id., 619, 18 S. W. R., 297; Spearman v. State, 34 Id., 279, 30 S. W. R., 229; Manning v. State, 37 Id., 180, 39 S. W. R., 118; Jackson v. State, 55 Id., 79, 115 S. W. R., 262, and cases cited.

A part of the conversation with the accused, being admitted in evidence, the adverse party has the right to prove the entire conversation, and all conversations connected therewith. Carter v. State, 127 S. W. R., 215.

Art. 812. [792] **Written part of an instrument shall control, etc.**—When an instrument is partly written and partly printed, the written shall control the printed portion when the two are inconsistent. [O. C. 665.]

Art. 813. [793] **When subscribing witness denies execution, etc., of instrument.**—When a subscribing witness denies or does not recollect the execution of an instrument to which his name appears, its execution may be proved by other evidence. [O. C. 666.]

Proof of execution: Morrow v. State, 22 T. Cr. R., 239, 2 S. W. R., 624; Graves v. State, 28 Id., 354, 13 S. W. R., 149; Abrigo v. State, 29 Id., 143, 15 S. W. R.,

408; Williams v. State, 30 Id., 153, 16 S. W. R., 760; Caston v. State, 31 Id., 304, 20 S. W. R., 585; Golin v. State, 37 Id., 90, 38 S. W. R., 794.

Art. 814. [794] **Evidence of handwriting by comparison.**—It it competent in every case to give evidence of handwriting by comparison, made by experts or by the jury; but proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath. [O. C. 667.]

Standard of comparison. A signature, as a standard of comparison, must be an admitted signature, or proved to be such by indubitable evidence. Opinion evidence based upon general knowledge of the handwriting will not suffice. Phillips v. State, 6 T. Cr. R., 364; Hatch v. State, Id., 384; Heard v. State, 9 Id., 1; Watson v. State, Id., 237; Rogers v. State, 11 Id., 608; Hancock v. State, 13 Id., 97; Williams v. State, 27 Id., 466, 11 S. W. R., 481; Hunt v. State, 33 Id., 252, 26 S. W. R., 206.

Expert testimony. This article expressly authorizes the proof of handwriting by comparison made by experts. Spieden v. State, 3 T. Cr. R., 156.

But such proof alone is not sufficient to establish the handwriting of a witness who denies his signature under oath. Brooks v. State, 57 T. Cr. R., 251, 122 S. W. R., 386. And see Batte v. State, Id., 125, 122 S. W. R., 561.

"Expert" defined. See in extenso, Heacock v. State, 13 T. Cr. R., 98.

Non-expert witness. As a general rule, handwriting can not be proved by a non-expert, unless he has seen the person write, or is familiar with his acknowledged handwriting. And see authorities cited as to the most satisfactory evidence in the premises. Mapes v. Leal, 27 T., 345; Hanley v. Gandy, 28 Id., 211; Haynie v. State, 2 T. Cr. R., 168; Haun v. State, 13 Id., 383; Manning v. State, 37 Id., 180, 39 S. W. R., 118; Bratt v. State, 38 Id., 721, 41 S. W. R., 622.

Comparison of handwriting by the jury: Hatch v. State, 6 T. Cr. R., 384; Chester v. State., 23 Id., 577, 5 S. W. R., 125.

Art. 815. [795] **Party may attack testimony of his own witness, when and how.**—The rule that a party, introducing a witness, shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in other manner, except by proving the bad character of the witness. [O. C. 668.]

Construed. Before this article can apply, the witness must not merely have failed to meet expectation in his testimony, but must have testified adversely and injuriously to the party introducing him. Erwin v. State, 32 T. Cr. R., 519, 24 S. W. R., 904, and cases cited; Dunagin v. State, 38 Id., 614, 44 S. W. R., 148.

And see White v. State, 10 T. Cr. R., 381; Thomas v. State, 14 Id., 70; Self v. State, 28 Id., 398, 13 S. W. R., 602; Blake v. State, 38 Id., 377, 43 S. W. R., 107.

Art. 816. [796] **Interpreter shall be sworn to interpret, when.**—When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person may be subpoenaed, attached or recognized in any criminal action or proceeding, to appear before the proper judge or court to act as interpreter in such criminal action or proceeding, under the same rules and penalties as are provided in the case of the witnesses.

Construed. This article does not provide an interpreter for a non-English speaking defendant. Livar v. State, 26 T. Cr. R., 115, 9 S. W. R., 552.

CHAPTER EIGHT.

OF THE DEPOSITIONS OF WITNESSES AND TESTIMONY TAKEN BEFORE EXAMINING COURTS AND JURIES OF INQUEST.

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Article 817. [797] **Defendant may have deposition taken when examination, etc.**—When an examination takes place in a criminal action before a magistrate, the defendant may have the deposition of any witness taken by any officer or officers hereafter named in this chapter; but the state or person prosecuting shall have the right to cross-examine the witnesses; and the defendant shall not use the deposition for any purpose, unless he first consent that the entire evidence or statement of the witness may be used against him by the state on the trial of the case. [O. C. 764.]

See Hobbs v. State, 53 T. Cr. R., 71, 112 S. W. R., 308, which follows Porch v. State, 51 Id., 7, 99 S. W. R., 1122, and overrules Cline v. State, 36 Id., 320, 36 S. W. R., 1099, and Childers v. State, 30 Id., 160, 16 S. W. R., 903.

Art. 818. [798] **May also be taken, when.**—Depositions of witnesses may also, at the request of the defendant, be taken in the following cases:

1. When the witness resides out of the state.
2. When the witness is aged or infirm. [O. C. 765.]

Evans v. State, 12 T. Cr. R., 370.

Art. 819. [799] **Depositions within the state, taken by whom.**—Depositions of witnesses within the state may be taken by a supreme or district judge, or before any two or more of the following officers: The county judge of a county, notary public, clerk of the district court and clerk of the county court. [O. C. 766.]

See notes to ante, Art. 817.

Art. 820. [800] **May be taken out of the state, by whom.**—Depositions of a witness residing out of the state may be taken before the judge or chancellor of a supreme court of law or equity, or before a commisioner of deeds and depositions for this state, who resides within the state where the deposition is to be taken. [O. C. 767.]

Decisions. A notary public is not qualified to take depositions in criminal cases beyond the limits of this state. Lienpo v. State, 28 T. Cr. R., 179, 12 S. W. R., 588.

A consul of the United States is qualified to take depositions in foreign countries for use in this state. Adams v. State, 19 T. Cr. R., 250.

Art. 821. [801] **Depositions of non-resident witness temporarily within the state.**—The deposition of a non-resident witness who may be tempor-

arily within the state, may be taken under the same rules which apply to the taking of depositions of other witnesses in the state. [O. C. 768.]

Blake v. State, 38 T. Cr. R., 377, 43 S. W. R., 107.

Art. 822. [802] **Shall be taken as in civil cases.**—The rule prescribed in civil cases for taking the depositions of witnesses shall, as to the manner and form of taking and returning the same, govern in criminal actions, when not in conflict with the requirements of this Code. [O. C. 769.]

Blake v. State, 38 T. Cr. R., 377, 43 S. W. R., 107.

Art. 823. [803] **Same objections to depositions as in civil cases.**—The same rules of procedure as to objections to depositions shall govern in criminal actions which are prescribed in civil actions, when not in conflict with this Code. [O. C. 770.]

Objection to the officer taking the depositions, to the form and manner of taking them, and must be made at the first term after the filing of the same, and not a later one. Blake v. State, 38 T. Cr. R., 377, 43 S. W. R., 107; Lienpo v. State, 28 Id., 179, 12 S. W. R., 588; Adams v. State, 19 Id., 250. And see Kerry v. State, 17 Id., 178, and Pinkney v. State, 12 Id., 352; Helvenston v. State, 53 Id., 636, 111 S. W. R., 959, citing Horn v. State, 50 Id., 404, 97 S. W. R., 822; Benson v. State, 56 Id., 52, 118 S. W. R., 1049, and cases cited.

Art. 824. [804] **How defendant shall proceed in taking depositions.**—When the defendant desires to take the deposition of a witness at any other time than before the examining court, he shall, by himself or counsel, file with the clerk of the court in which the case is pending a statement on oath setting forth the facts necessary to constitute a good reason for taking the same; and, in addition thereto, state in his affidavit that he has no other witness whose attendance on the trial can be procured, by whom he can prove the facts he desires to establish by the deposition. [O. C. 771.]

Kerry v. State, 17 T. Cr. R., 178; Adkins v. State, 19 Id., 250; Hennesy v. State, 23 Id., 340, 5 S. W. R., 215.

Art. 825. [805] **Written interrogatories filed, etc., as in civil cases.**—In cases arising under the preceding article, written interrogatories shall be filed with the clerk of the court, and a copy of the same served on the district attorney, or county attorney of the proper district or county, the length of time required for service of interrogatories in civil actions. [O. C. 765.]

Art. 826. [806] **Certificate of officer taking deposition.**—In every case where depositions are taken under commission in criminal actions, the officer or officers taking the same shall certify that the person deposing is the identical person named in the commission, and is a credible person; or, if they can not certify to the identity of the witness, there shall be an affidavit of some person attached to the deposition proving the identity and credibility of such witness, and the officer or officers shall certify that the person making the affidavit is known to them, and is worthy of credit. [O. C. 773.]

Art. 827. [807] **Where two officers act, each shall sign and seal.**—In cases where it is required that two officers shall act in executing a commission to take depositions, the official seal and signature of each shall be attached to the certificate authenticating the deposition. [O. C. 774.]

Art. 828. [808] **Deposition before examining court, taken how.**—The deposition of a witness taken before an examining court may be taken without interrogatories; but whenever a deposition is so taken it shall be done by the proper officer or officers; and there shall be allowed, both to the state and to the defendant, full liberty of cross-examination. [O. C. 775.]

Ante, Art. 819, enumerates the officers authorized to take depositions before an examining court.

Art. 829. [809] **May be taken without commission.**—The depositions of witnesses taken before an examining court may be taken without a commission; and, if such examining court be held by a supreme or district judge, he shall, upon request, proceed to take depositions of the witnesses. [O. C. 776.]

Kerry v. State, 17 T. Cr. R., 178.

Art. 830. [810] **Duty of officer to attend.**—Where any of the officers, other than a supreme or district judge, are called upon to take a deposition before an examining court, it is their duty to attend and take the same. [O. C. 777.]

Art. 831. [811] **How deposition shall be returned.**—A deposition taken in an examining court shall be sealed up and delivered by the officer or officers, or one of them, to the clerk of the court of the county having jurisdiction to try the offense; in all other cases the return of depositions may be made as provided for depositions in civil actions. [O. C. 778.]

Cowell v. State, 16 T. Cr. R., 87; Kerry v. State, 17 Id., 178; Byrd v. State, 26 Id., 374, 9 S. W. R., 759.

Art. 832. [812] **Depositions shall not be read, unless oath be made that, etc.**—Depositions taken in criminal actions shall not be read, unless oath be made that the witness resides out of the state; or, that, since his deposition was taken, the witness has died; or that he has removed beyond the limits of the state; or that he has been prevented from attending the court through the act or agency of the defendant; or by the act or agency of any person whose object was to deprive the defendant of the benefit of the testimony; or that, by reason of age or bodily infirmity, such witness can not attend. [O. C. 779.]

Practice. **Depositions** can be admitted as evidence only upon the full compliance with the requirements of this chapter. The consent of parties to the taking of depositions, except in conformity with this rule, will not qualify them over subsequent objections. Johnson v. State, 27 T., 758; Cline v. State, 12 Id., 370.

And see Ballinger v. State, 11 T. Cr. R., 323; Pinkney v. State, 12 Id., 352; Parker v. State, 18 Id., 72; Stegall v. State, 22 Id., 464, 3 S. W. R., 771; Martinas v. State, 26 Id., 91, 9 S. W. R., 356; McGee v. State, 31 Id., 71, 19 S. W. R., 764.

Note. The foregoing cases and other previous ones were decided with reference to depositions on the issue of their admissibility as taken, before an examining trial, and were overruled in Cline v. State, 36 T. Cr. R., 320, 36 S. W. R., 1099, except on the qusetion of predicate. The Cline case, in turn, was overruled by the Hobbs case, 53 Id., 71, 112 S. W. R., 308, following Porch's case, 51 Id., 7, 99 S. W. R., 1122, with the effect of reviving the decisions cited.

Art. 833. [813] **District or county attorney may make oath.**—When the deposition is sought to be used by the state, the oath prescribed in the preceding article may be made by the district or county attorney, or any other credible person; and, when sought to be used by the defendant, the oath shall be made by him in person. [O. C. 780.]

Martinas v. State, 26 T. Cr. R., 91, 9 S. W. R., 356; Scruggs v. State, 35 Id., 622, 34 S. W. R., 951.

Art. 834. [814] **Testimony taken before examining court may be read in evidence, when.**—The deposition of a witness taken before an examining court or a jury of inquest, and reduced to writing, and certified according to law, in cases where the defendant was present when such testimony was taken, and had the privilege afforded him of cross-examining the witness, may be

read in evidence as is provided in the two preceding articles for the reading in evidence of depositions. [Act Nov. 10, 1866, p. 160.]

Porch v. State, 51 T. Cr. R., 7, 99 S. W. R., 1122, and Hobbs v. State, 53 Id., 71, 112 S. W. R., 308, overruling Cline v. State, 36 Id., 320, 36 S. W. R., 1099, and Childers v. State, 30 Id., 160, 16 S. W. R., 903.

TITLE 9.

OF PROCEEDINGS AFTER VERDICT.

Chapter
1. Of New Trials.
2. Arrest of Judgment.
3. Judgment and Sentence.
   1. In Cases of Felony.
   2. Judgment in Cases of Misdemeanor.
4. Execution of Judgment.
   1. Collection of Pecuniary Fines.
   2. Enforcing Judgment in Misdemeanors Where the Punishment Is Imprisonment.
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CHAPTER ONE.

OF NEW TRIALS.

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Article 835. [815] **Definition of "new trial."**—A "new trial" is the rehearing of a criminal action, after verdict, before the judge or another jury, as the case may be. [O. C. 669.]

Practice. New trial is unavailable, and habeas corpus the only proceeding to rectify injustice on examining trial. Butler v. State, 36 T. Cr. R., 483, 38 S. W. R., 787.

Art. 836. [816] **Granted only to a defendant.**—A new trial can in no case be granted where the verdict or judgment has been rendered for the defendant. [O. C. 670.]

Construed. This article applies to scire facias cases. Perry v. State, 14 T. Cr. R., 166; Robertson v. State, Id., 211; Jester v. State, 86 T., 555, which overrule Gary v. State, 11 T. Cr. R., 527.

Art. 837. [817] **New trial in felony cases granted, for what causes.**—New trials, in cases of felony, shall be granted for the following causes, and for no other:

1. Where the defendant has been tried in his absence, or has been denied counsel.

Ante, Arts. 4 and 646, and notes. Bill of Rights, Sec. 10.

Construed. Only in capital cases is the court required to appoint counsel for defendant. Ante, Art. 558, and notes.

2. Where the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant.

Construed. Verdict can not be avoided on the affidavits of jurors that they mis-

understood a clearly expressed charge of the court, correct in the exposition of legal questions. McCulloch v. State, 35 T. Cr. R., 268, 33 S. W. R., 230; Davis v. State, 43 T., 189.

That the charge bore the file mark and style of another case, and, indeed, was used in such other case, will not authorize new trial, if it was applicable to the case on trial. Lowe v. State, 11 T. Cr. R., 253, citing Austin v. State, 42 T., 355.

That the court erased a paragraph of the charge after having read it to the jury, is an objection that must be reserved by bill at the time, and not raised, for the first time, on motion for new trial. Augley v. State, 35 T. Cr. R., 427, 34 S. W. R., 116.

Material conflicts in a charge of the court will reverse a conviction. Blair v. State, 26 T. Cr. R., 387, 9 S. W. R., 890.

An erroneous charge, though excepted to, if harmless or favorable to defendant, is not cause for reversal. Green v. State, 32 T. Cr. R., 298, 22 S. W. R., 1094, overruling Surrell's case, 29 Id., 321, 15 S. W. R., 816; White's case, 28 Id., 71, 12 S. W. R., 406; Jenkins' case, Id., 86, 12 S. W. R., 411, and Habel's case, Id., 588, 13 S. W. R., 1001.

And, further, on practice, see Nettles v. State, 4 T. Cr. R., 337; Roe v. State, 25 Id., 33, 8 S. W. R., 463; Wolfforth v. State, 31 Id., 387, 20 S. W. R., 741.

Other errors of court. Where, under the facts developed, the court should have changed the venue of its own motion, its refusal of new trial is ground for reversal. Steagald v. State, 22 T. Cr. R., 464, 3 S. W. R., 771.

A manifestly improper refusal of a continuance in the first instance, and, subsequently, of new trial, is cause for reversal. Ante, Art. 608, subd. 6, and notes.

3. Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors.

Construed. Pre-agreement of the jury to accept the average of the different terms of imprisonment, favored individually by the several jurors, is a verdict reached by lot. Hunter v. State, 8 T. Cr. R., 75.

But if the agreement to abide such quotient is made after, and not before, the result is ascertained, the verdict is not by lot, and is good. Ulrich v. State, 30 T. Cr. R., 61, 16 S. W. R., 769. And see Pruitt v. State, Id., 156, 16 S. W. R., 773.

4. Where a juror has received a bribe to convict, or has been guilty of any other corrupt conduct.

Decisions: Aud v. State, 36 T. Cr. R., 76, 35 S. W. R., 671, overruling Hanks v. State, 21 T., 526, as to opportune objection; Simms v. State, 8 Id., 230; Hawkins v. State, 27 Id., 273, 11 S. W. R., 409; Shaw v. State, 32 Id., 155, 22 S. W. R., 588; Cockrell v. State, Id., 585, 25 S. W. R., 421; Mayes v. State, 33 Id., 33, 24 S. W. R., 421; Driver v. State, 37 Id., 160, 38 S. W. R., 1020.

5. Where any material witness of the defendant has, by force, threats or fraud, been prevented from attending the court, or where any written evidence, tending to establish the innocence of the defendant, has been intentionally destroyed or removed so that it could not be produced upon the trial.

Generally: Ante, Arts. 608 and 616, and notes; Hartless v. State, 32 T., 89; Mayfield v. State, 44 Id., 59; Burton v. State, 9 T. Cr. R., 605; Childs v. State, 10 Id., 183; Jackson v. State, 18 Id., 586; Cunningham v. State, 20 Id., 162; Bryant v. State, 35 Id., 394, 33 S. W. R., 978; Sargent v. State, 35 Id., 325, 33 S. W. R., 364.

6. Where new testimony material to the defendant has been discovered since the trial. A motion for a new trial, based on this ground, shall be governed by the same rules as those which regulate civil suits.

Construed. The application of this subdivision is confided to the sound discretion of the trial court, reversible only in case of abuse. Shaw v. State, 27 T., 750; Burns v. State, 12 T. Cr. R., 270, and cases cited.

Requisites of motion for new trial based on newly discovered evidence. Shaw v. State, 27 T., supra; White v. State, 10 T. Cr. R., 167; Fisher v. State, 30 Id., 50, 18 S. W. R., 90; McVey v. State, 23 Id., 659; Riojas v. State, 36 Id., 182, 36 S. W.

R., 268; Carrico v. State, Id., 618, 38 S. W. R., 37; Wilson v. State, 37 Id., 156, 38 S. W. R., 1013; Mitchell v. State, 38 Id., 170, 41 S. W. R., 816.

7. Where the jury, after having retired to deliberate upon a case, have received other testimony; or where a juror has conversed with any person in regard to the case; or where any juror, at any time during the trial or after retiring, may have become so intoxicated as to render it probable his verdict was influenced thereby. But the mere drinking of liquor by a juror shall not be sufficient ground for granting a new trial.

Decisions: McWilliams v. State, 22 T. Cr. R., 269, 22 S. W. R., 970; Moore v. State, 36 Id., 88, 35 S. W. R., 668; Mitchell v. State, Id., 278, 33 S. W. R., 367; Tate v. State, 38 Id., 261, 42 S. W. R., 595; Wilson v. State, 39 Id., 365, 46 S. W. R., 251.

8. Where, from the misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial; and it shall be competent to prove such misconduct by the voluntary affidavit of a juror; and a verdict may, in like manner, in such cases be sustained by such affidavit.

Construed. This subdivision comes within the sound discretion of the court, and the affidavit authorized is available only in an extreme case, and under an imperative necessity for the accomplishment of justice. Johnson v. State, 27 T., 758; Hodges v. State, 6 T. Cr. R., 616; McCane v. State, 33 Id., 476, 26 S. W. R., 1087; Weatherford v. State, 31 Id., 530, 21 S. W. R., 251; Testard v. State, 26 Id., 260, 9 S. W. R., 888.

Disqualified juror. That one of the jurors who tried the case was an unpardoned convict, a fact unknown to the accused at the time his original motion for new trial was overruled and gave notice of appeal, would entitle the accused to new trial, provided the court had not lost jurisdiction of his case. Bundick v. State, 127 S. W. R., 543.

9. Where the verdict is contrary to law and evidence. A verdict is not contrary to the law and evidence, within the meaning of this provision, where the defendant is found guilty of an offense of inferior grade to, but of the same nature as, the offense proved. [O. C. 672.]

Note. To even partially list the cases disposed of under this subdivision would be to profitlessly summarize the many hundreds massed under the caption of "Fact Cases" carried in the index of each of the volumes of the Texas Criminal Reports, and would serve no purpose in statutory construction.

But on the qualifying or explanatory provisions of this subdivision, see Burnett v. State, 53 T. Cr. R., 515, 112 S. W. R., 74, and cases cited, and High v. State, 54 Id., 333, 112 S. W. R., 939, and cases cited.

Opportune motion. Whether or not a motion for new trial, filed after the expiration of the prescribed two days, is opportune, under the circumstances, is a matter confided to the discretion of the trial court; and that discretion will be revised only when exercised to defendant's prejudice. Smith v. State, 15 T. Cr. R., 139, citing White's case, 10 Id., 167.

See Wilkinson v. State, 15 T. Cr. R., 420; Leache v. State, 22 Id., 279, 3 S. W. R., 539; Spencer v. State, 34 Id., 65, 29 S. W. R., 159; Hernandez v. State, 18 Id., 134.

Art. 838. [818] **In misdemeanors, granted when.**—New trials in cases of misdemeanor may be granted for any of the causes specified in the preceding article, except that contained in subdivision one of said article.

Art. 839. [819] **Must be applied for within two days, except.**—A new trial must be applied for within two days after the conviction; but, for good cause shown, the court, in cases of felony, may allow the application to be made at any time before the adjournment of the term at which the conviction was

had. When the court adjourns before the expiration of two days from the conviction, the motion shall be made before the adjournment.

Art. 840. [820] **Motions for new trial shall be in writing.**—All motions for new trials shall be in writing, and shall set forth distinctly the grounds upon which the new trial is asked.

Art. 841. [821] **State may controvert truth of causes set forth, etc.**—The state may take issue with the defendant upon the truth of the causes set forth in the motion for a new trial; and, in such case, the judge shall hear evidence, by affidavit or otherwise, and determine the issue.

Ante, Art. 613, and notes.

Practice. Counter affidavits are available to the state. Dignowitty v. State, 17 T., 521; Childs v. State, 10 T. Cr. R., 183; Richardson v. State, 28 Id., 216, 12 S. W. R., 870; Ulrich v. State, 30 Id., 61, 16 S. W. R., 769.

They are not required, however, and the court may hear the state on oral testimony. Richardson v. State, supra; Kelly v. State, 31 Id., 211, 20 S. W. R., 365.

And see generally, Stanley v. State, 16 T. Cr. R., 392; White v. State, 19 Id., 343; Smith v. State, 28 Id., 309, 12 S. W. R., 1104; Keith v. State, 32 Id., 184, 22 S. W. R., 594; Lawrence v. State, 36 Id., 173, 36 S. W. R., 90.

Art. 842. [822] **Judge shall not discuss the evidence, etc.**—In granting or refusing a new trial, the judge shall not sum up, discuss or comment upon the evidence in the case, but shall simply grant or refuse the motion, without prejudice to either the state or the defendant.

Art. 843. [823] **Effect of a new trial.**—The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former convictions shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument. [O. C. 674.]

Construed. This article is self-expressive, and trial de novo on merits, as though the case had never been tried, follows the granting of a new trial. Beardall v. State, 9 T. Cr. R., 262.

Dilatory pleas are available to a defendant on his second trial. Cox v. State, 7 T. Cr. R., 405.

If special instructions requested on first trial are not asked on the second, they will be considered waived. Brackeen v. State, 29 T. Cr. R., 362, 16 S. W. R., 192.

Practice. Conditions under which trial courts should relax the rigor of practice with regard to new trials. Jordan v. State, 10 T., 479; Crow v. State, 33 T. Cr. R., 264, 26 S. W. R., 209; Owens v. State, 35 T., 361; Mullins v. State, 37 Id., 337; Turner v. State, 38 T., 166; Webb v. State, 41 Id., 67.

Reversible error for the prosecuting attorney to ask the defendant on the witness stand if he "had not been convicted and given ten years in this case," though the question was not answered, and notwithstanding reprimand by the court. Wyatt v. State, 124 S. W. R., 929.

Art. 844. [824] **When new trial is refused, statement of facts, etc.**—If a new trial be refused, a statement of facts may be drawn up and certified, and accompany the record as in civil suits. Where the defendant has failed to move for a new trial he is, nevertheless, entitled, if he appeals, to have a statement of the facts certified, and sent up with the record. [O. C. 673.]

Practice. A convicted defendant, whether he moved for new trial or not, if he appeals, is entitled, as a matter of right, to a statement of facts; and it is the prosecuting attorney's duty to aid the court in perfecting the record. Babb v. State, 8 T. Cr. R., 173.

If, without fault on his part, a convicted defendant is deprived of a statement of facts, on appeal, his conviction will be set aside. Bryans v. State, 29 T. Cr. R., 247, 15 S. W. R., 288.

A statement of facts filed out of term time must be based upon an order of court, allowing ten days for such filing. Williams v. State, 35 T. Cr. R., 391, 33 S. W. R., 1080.

Whether such an order shall be made is discretionary with the trial judge. Irby v. State, 34 Id., 283, 20 S. W. R., 221.

Such order must be entered of record and brought up with the transcript on appeal; not even the certificate of the judge that he granted the ten days and ordered the entry, will suffice. Blackshire v. State, 33 Id., 160, 25 S. W. R., 771.

And such statement of facts must have been filed within the ten days allowed. Yungman v. State, 35 T. Cr. R., 80, 31 S. W. R., 663; Bonner v. State, 38 Id., 599, 44 S. W. R., 172. And see Spencer v. State, 34 Id., 238, 30 S. W. R., 46.

The rule has been relaxed to authorize this court to consider the statement of facts, when it is made to appear that the appellant exercised due diligence, and that his failure to secure the filing of the statement opportunely, in term time or under order of the court, was not his or his attorney's fault, but resulted from causes beyond control. George v. State, 25 T. Cr. R., 229, 8 S. W. R., 25; Spencer v. State, Id., 585, 8 S. W. R., 648. (But see new article following, fixing thirty days, etc.)

Art. 845. **When appeal is taken from district or county court, statement of facts and bills of exceptions filed, when.**—When an appeal is taken from the judgment of conviction, rendered in any cause in any district court or county court, the parties to the cause shall be entitled to, and they are hereby granted, thirty days after the day of adjournment of court, in which to prepare and file a statement of facts and bills of exceptions; and, upon good cause shown, the judge trying the cause may extend the time in which to file a statement of facts and bills of exceptions. Provided, that the court trying such cause shall have power in term time or in vacation, upon the application of either party, defendant or state, for good cause, to extend the several times as hereinbefore provided, for the preparation and filing of the statement of facts and bills of exceptions; but the same shall not be so extended, so as to delay the filing of the statement of facts, together with the transcript of record, in the appellate court within the time prescribed by law; and, when the parties fail to agree upon a statement of facts, and that duty devolves upon the court, the court shall have such time in which to do so, after the expiration of the thirty days as hereinbefore provided, as the court may deem necessary; but the court in such case shall not postpone the preparation and filing of such statement of facts and bills of exceptions so as to delay the filing of same, together with a transcript of the record in the appellate court within the time prescribed by law. Provided, if the term of said court may, by law, continue more than eight weeks, said statement of facts and bills of exceptions shall be filed within thirty days after final judgment shall be rendered, unless the court shall, by order, entered of record in said cause, extend the time for filing such statement and bills of exceptions. [Act 1909, p. 376.]

Statement of facts. This article, being the act of 1909, entitles the appellant to thirty days after adjournment in which to file statement of facts, which time may be extended by the judge for good cause. Such extension being granted, and the statement of facts being filed within the extended time, it was error to thereafter strike out such statement as not filed within the time required by law. Pace v. State, 124 S. W. R., 949.

Art. 846. **Trial of felony cases in district court, duty of stenographer, what may be included in statement of facts, affidavit of defendant, order of court.**—In the trial of all criminal cases in the district court in which the defendant is charged with a felony, the official shorthand reporter shall keep an accurate stenographic record of all the proceedings of such trial, in like manner as is provided for in civil cases; and, should an appeal be prosecuted in any judgment of conviction, whenever the state and defendant can not agree as to the testimony of any witness, then, and in such event, so much of the transcript of the official shorthand reporter's report

with reference to such disputed fact or facts shall be inserted in the statement of facts as is necessary to show what witness testified to in regard to the same, and constitute a part of the statement of facts; and the same shall apply to the preparation of bills of exceptions; provided, that such stenographer's report when carried into the statement of facts or bills of exceptions, shall be condensed so as not to contain the questions and answers, except where, in the opinion of the judge, such questions and answers may be necessary in order to elucidate the fact or question involved; provided, that in all cases where the court is required to, and does appoint an attorney to represent the defendant in a criminal action, that the official shorthand reporter shall be required to furnish the attorney for the said defendant, if convicted, and where an appeal is prosecuted, with a transcript of his notes, for which said service he shall be paid by the State of Texas, upon the certificate of the district judge, one-half of the rate provided for in civil cases. Provided, that when any criminal case is appealed, and the defendant is not able to pay for a statement of facts, or to give security therefor, he may make affidavit of such facts; and, upon the making and filing of such affidavit, the court shall order the stenographer to make such statement of facts in duplicate, and deliver them, as 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. And provided, further, that in any civil case where the appellant or plaintiff in error has made the proof required to appeal his case without bond, he may make affidavit of such facts; and, upon the making and filing of such affidavit, the court shall order the stenographer to make such statement of facts in duplicate, and deliver the same as provided in other cases; but the stenographer shall receive no pay for the same; provided, that should any such affidavit so made be false, the party making the same shall be prosecuted and punished as is now provided by law for making false affidavit. [Id., p. 376.]

CHAPTER TWO.

ARREST OF JUDGMENT.

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Article 847. [825] **Definition of "motion in arrest of judgment."**—A "motion in arrest of judgment" is a suggestion to the court on the part of the defendant that judgment had not been legally rendered against him. The motion may be made orally or in writting, and the record must show the grounds of the motion. [O. C. 675.]

Art. 848. [826] **Must be made in two days, etc.**—The motion must be made within two days after the conviction; or, if the court adjourn before the expiration of two days from such conviction, then it may be made at any time before the final adjournment of the court for the term. [O. C. 676.]

Post, Art. 861, subd. 3, and notes.

Practice on appeal. The appellate court will not consider a post terminum motion for new trial or in arrest of judgment, unless sufficient excuse is shown for the delay. Valentine v. State, 6 T. Cr. R., 430. And see Reno v. State, 120 S. W. R., 429.

Art. 849. [827] **Shall be granted for what cause.**—A motion in arrest of judgment shall be granted upon any ground which would be good upon exception to an indictment or information for any substantial defect therein. [O. C. 678.]

Art. 850. [828] **Shall not be, etc.**—No judgment shall be arrested for want of form. [O. C. 679.]

Construed. Motion in arrest of judgment brings in review the sufficiency of the indictment to support the judgment. Washington v. State, 41 T., 583; Berliner v. State, 6 T. Cr. R., 182. And see Trimble v. State, 16 Id., 115; Strickland v. State, 19 Id., 518.

A general verdict on a good and a bad count in the indictment will not be reversed on refusal to arrest of judgment, if it is sustained by the good count. Fry v. State, 36 T. Cr. R., 582, 37 S. W. R., 741.

And see Slaughter v. State, 24 T., 410; Calvin v. State, 25 Id., 789; Senterfield v. State, 41 Id., 86; Howell v. State, 10 T. Cr. R., 298.

Art. 851. [829] **Effect of arresting a judgment.**—The effect of arresting a judgment is to place the defendant in the same position he was before the indictment or information was presented; and, if the court be satisfied from the evidence that he may be convicted upon a proper indictment or information, he shall be remanded into custody, or bailed, as the case may require. [O. C. 680.]

Calvin v. State, 25 T., 789.

Art. 852. [830] **Court may discharge defendant, when.**—Where the court is not satisfied from the proof that, upon a proper indictment or information, the defendant may be convicted, he shall be discharged. [O. C. 681.]

CHAPTER THREE.

JUDGMENT AND SENTENCE.

Article

1. In cases of felony.

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1. IN CASES OF FELONY.

Article 853. [831] **Definition of "judgment."**—A final judgment is the declaration of the court entered of record, showing—

1. The title and number of the case.
2. That the case was called for trial and that the parties appeared.
3. The plea of the defendant.
4. The selection, impaneling and swearing of the jury.
5. The submission of the evidence.
6. That the jury was charged by the court.
7. The return of the verdict.
8. The verdict.
9. In the case of a conviction, that it is considered by the court that the defendant is adjudged to be guilty of the offense as found by the jury; or, in case of acquittal, that the defendant be discharged.
10. That the defendant be punished as has been determined by the jury in cases where they have the right to determine the amount or the duration and the place of punishment in accordance with the nature and terms of the punishment prescribed in the verdict.

Construed. A judgment of final conviction, entered of record, is an essential prerequisite to the right of appeal. Ante, Art. 68, and notes; Washington v. State, 31 T. Cr. R., 84, 19 S. W. R., 900, and cases cited; Estes v. State, 38 Id., 506, 43 S. W. R., 982. And see Robinson v. State, 126 S. W. R., 276.

In non-felony cases, the sentence is in fact the final judgment, and must be pronounced before appeal can be perfected. Post, Art. 856, and notes; Arcia v. State, 26 T. Cr. R., 193, 9 S. W. R., 685. See Mapes v. State, 13 Id., 85.

"Judgment of conviction" defined. Pennington v. State, 11 T. Cr. R., 281, citing Mayfield v. State, 40 T., 289, and Nathan v. State, 28 Id., 326.

Final judgment must be in substantial compliance with the requirements of this article. Mirelles v. State, 13 T. Cr. R., 346, citing Pennington v. State, supra; Calvin v. State, 23 T., 577.

Under Art. 938, post., the third and fourth requirements prescribed by this article will be presumed to have been complied with, unless made an issue in the court below, and the contrary is affirmatively shown by bill of exception. Cases supra.

Judgment final which fails to affirmatively show that evidence was introduced, will be reversed. Creswell v. State, 37 T. Cr. R., 335.

The ninth and tenth requisites prescribed by this article must be shown in the final judgment. Gaither v. State, 21 T. Cr. R., 527, 1 S. W. R., 456; Mirelles v. State, 13 Id., 346; Anschicks v. State, 43 T., 587; Choate v. State, 2 T. Cr. R., 302, and cases cited.

As to diligence of counsel in connection with the record on the trial, see rule for the district court 120, 2 T. Cr. R., 680; Dement v. State, 39 Id., 271, 45 S. W. R., 917.

Art. 854. [832] **Definition of "sentence."**—A "sentence" is the order of the court, made in the presence of the defendant, and entered of record, pronouncing the judgment, and ordering the same to be carried into execution in the manner prescribed by law.

"Sentence" defined. Arcia v. State, 26 T. Cr. R., 193, 9 S. W. R., 685; Woods v. State, Id., 490, 10 S. W. R., 108.

In misdemeanors, the judgment is the sentence. Terry v. State, 30 T. Cr. R., 193, 17 S. W. R., 1075.

On a question of practice see Fletcher v. State, 37 T. Cr. R., 193, 38 S. W. R., 806.

Art. 855. [833] **Judgment and sentence, when.**—If a new trial is not granted, nor the judgment arrested, in cases of felony, the sentence shall be pronounced in the presence of the defendant at any time after the expiration of the time allowed for making the motion for a new trial or the motion in arrest of judgment. [O. C. 682.]

On appeal, the court cannot reform or correct a sentence where it is for a different offense from that for which defendant was convicted. Small v. State, 38 S. W. R., 798, overruling Peterson v. State, 25 T. Cr. R., 70, 7 S. W. R., 530.

Art. 856. [834] **In cases of appeal, sentence shall be pronounced.**—When an appeal is taken in cases of felony, where the verdict prescribes the death penalty, sentence shall not be pronounced, but shall be suspended until the decision of the court of appeals has been received. In all other cases of felony, sentence shall be propounded before the appeal is taken; and, upon the affirmance of the judgment by the court of appeals, the clerk thereof shall at once transmit the mandate of the court to the clerk of the court from which the appeal was taken, there to be duly recorded in the minute book of said court; and a certified copy of this record, under the seal of the court, shall be sufficient authority to authorize and require the sheriff to execute the sentence without further delay. [O. C. 683.]

Ante, Art. 68 and notes.

Construed. Under this article, sentence must be pronounced before appeal can be taken, in all convictions except felony with the death penalty assessed. Arcia v. State, 26 T. Cr. R., 193, 9 S. W. R., 685; Heinzman v. State, 34 Id., 26, 29 S. W. R., 156; and see Taylor v. State, 14 Id., 340. And see post, 941, 942.

Art. 857. [835] **Where two days do not intervene before adjournment.**—In cases where a conviction takes place so late in the term of the court as not to allow the two days' time for making a motion for a new trial, or in arrest of judgment, the sentence may be pronounced at any time before the court finally adjourns; provided, that in every case at least six hours shall be allowed for making either of these motions. [O. C. 684.]

Ex parte Parker; 35 T. Cr. R., 12, 29 S. W. R., 480.

Art. 858. [836] **Same subject.**—If, at the time a verdict is returned into court, there be less than six hours remaining, before the court, by law, must adjourn, it shall be lawful, and shall be the duty of the district judge, to sit during the whole of Saturday night and Sunday for the purpose of enabling the defendant to move for a new trial or in arrest of judgment, and prepare his cause for the court of appeals. This article shall not require the district

judge to sit longer than six hours after verdict rendered, if a motion for a new trial, or in arrest of judgment, shall not have been filed. [O. C. 685.]

Verdict must be rendered and received in term time, and one rendered after midnight of the last Saturday of the term is null and void. Ex parte Juneman v. State, 28 T. Cr. R., 486, 13 S. W. R., 783, and cases cited, and see Ex parte Parker, 35 Id., 12, 29 S. W. R., 480.

Art. 859. [837] **Where there has been a failure to enter judgment.**—Where, from any cause whatever, there is a failure to enter judgment and pronounce sentence upon conviction during the term, the judgment may be entered, and sentence pronounced, at any succeeding term of the court, unless a new trial has been granted, or the judgment arrested, or an appeal has been taken. [O. C. 686.]

Practice. Mapes v. State, 13 T. Cr. R., 85; Collins v. State, 16 Id., 274; Madison v. State, 17 Id., 479; Hand v. State, 28 Id., 28, 11 S. W. R., 679; Gonzales v. State, 339, 33 S. W. R., 363; Quarles v. State, 37 Id., 362, 39 S. W. R., 668.

And see Hinman v. State, 54 T. Cr. R., 434, 113 S. W. R., 280.

On appeal. McCorquodale v. State, 98 S. W. R., 879. And see Robinson v. State, 126 S. W. R., 276.

Art. 860. [838] **Before sentence, defendant shall be asked, etc.**—Before pronouncing sentence in a case of felony, the defendant shall be asked whether he has anything to say why the sentence should not be pronounced against him. [O. C. 687.]

Practice. In the absence of a showing to the contrary, it will be presumed that the trial judge complied with the provisions of this article. Furthermore, to authorize reversal of this ground it must appear by proper bill, that the court refused to query the defendant as required. Johnson v. State, 14 T. Cr. R., 306; Bohannon v. State, Id., 272.

Art. 861. [839] **Reasons which will prevent the sentence.**—The only reasons which can be shown, on account of which sentence can not be pronounced, are:

1. That the defendant has received a pardon from the proper authority, on the presentation of which, legally authenticated, he shall be discharged.

As to authentication of pardon, see post Art. 1057.

2. That the defendant is insane; and, if sufficient proof be shown to satisfy the court that the allegation is well founded, no sentence shall be pronounced. And where there is sufficient time left, a jury may be impaneled to try the issue. Where sufficient time does not remain, the court shall order the defendant to be confined safely until the next term of the court, and shall then cause a jury to be impaneled to try such issue.

Post, Arts. 1017-1030, and notes. And see Darnell v. State, 24 T. Cr. R., 6, 5 S. W. R., 522.

3. Where there has not been a motion for a new trial, or a motion in arrest of judgment made, the defendant may answer that he has good grounds for either or both of these motions, and either or both motions may be immediately entered and disposed of, although more than two days may have elapsed since the rendition of the verdict.

4. When a person who has been convicted of felony escapes after conviction and before sentence, and an individual supposed to be the same has been arrested, he may, before sentence is pronounced, deny that he is the person convicted, and an issue be accordingly tried before a jury as to his identity. [O. C. 688.]

Sentence cannot be passed upon an accused in the absence of an indictment charging him with an offense. Pate v. State, 21 T. Cr. R., 191, 17 S. W. R., 461, citing Beardall's case, 4 Id., 631.

Art. 862. [840] **Two or more convictions of same defendant at same term.**—When the same defendant has been convicted in two or more cases, and the punishment assessed in each case is confinement in the penitentiary or the county jail for a term of imprisonment, judgment and sentence shall be rendered and pronounced in each case in the same manner as if there had been but one conviction, except that the judgment in the second and subsequent convictions shall be that the punishment shall begin when the judgment and sentence in the preceding conviction have ceased to operate, and the sentence and execution thereof shall be accordingly. [Amended by Act Feb. 12, 1883, p. 8.]

Cumulative punishments held constitutional. Lilliard v. State, 17 T. Cr. R., 115; Lockhart v. State, 29 Id., 35, 13 S. W. R., 1012; Ex parte Cox, Id., 84, 14 S. W. R., 396; Ex parte Hunt, 20 Id., 361, 13 S. W. R., 145.

And, further, in construction of the article, see Ex parte Moseley, 30 T. Cr. R., 338, 17 S. W. R., 418; King v. State, 32 Id., 463, 24 S. W. R., 514; Smith v. State, 34 Id., 123; 29 S. W. R., 774; Ex parte Crawford, 36 Id., 180, 36 S. W. R., 92; Stewart v. State, 37 Id., 135, 38 S. W. R., 1143.

Art. 863. [841] **Sentence of death.**—Where the sentence of death is pronounced against a convict, a time shall be set for the execution of the same, not earlier than thirty days from the date of the sentence. [O. C. 689.]

Art. 864. [842] **Warrant for execution of death penalty.**—The clerk of the district court shall issue a warrant for the execution of the sentence of death, which shall recite the fact of conviction, setting forth specifically the offense, and the judgment of the court, the time fixed for its execution, and the manner in which it is to be executed. [O. C. 690.]

Art. 865. [843] **Another warrant may issue, when.**—When, from any cause, the warrant provided for in the preceding article can not be executed at the time specified therein for the execution of the same, the sheriff shall forthwith return such warrant to the clerk who issued the same, indorsing thereon the reason why the same has not been executed, and shall, at the same time, report in writing to the judge of the district court having jurisdiction over the case, either in term time or in vacation, the fact that such warrant has not been executed, and the reason why the same was not executed; and such judge shall thereupon fix another time for the execution of such sentence, and shall issue his written order to the proper clerk, directing such clerk to issue another warrant for the execution of such sentence, specifying in such order the time fixed for the execution thereof; and the clerk shall file such order among the papers in the case, and immediately issue a warrant accordingly; and the execution of such warrant shall proceed, as in the first instance.

Post, Art. 1056; Miller v. State, 34 T. Cr. R., 392, 30 S. W. R., 809.

2. JUDGMENT IN CASES OF MISDEMEANOR.

Art. 866. [844] **May be rendered in absence of defendant.**—The judgment in cases of misdemeanor may be rendered in the absence of the defendant. [O. C. 691.]

Misdemeanor. Justice courts are not courts of record. Their judgments are pronounced ore tenus, and entry thereof is a mere ministerial act. Ex parte Quong, 34 T. Cr. R., 511, 31 S. W. R., 391. And see Mapes v. State, 13 Id., 85; Cain v. State, 15 Id., 41.

Art. 867. [845] **Judgment when the punishment is fine only.**—When the punishment assessed against a defendant is a pecuniary fine only, the judgment shall be that the state of Texas recover of the defendant the amount of such fine and all the costs of the prosecution, and that the defendant, if present, be committed to jail until such fine and costs are paid, or if the defendant be not present, that a capias forthwith issue commanding the sheriff to arrest the defendant and commit him to jail, until such fine and costs are paid; also, that execution may issue against the property of such defendant for the amount of such fine and costs.

A judgment is final if it definitely puts the case out of court, whether rendered upon the merits or not. See in extenso, Terry v. State, 30 T. Cr. R., 408, 17 S. W. R., 408; 17 S. W. R., 1075, overruling in points of conflict, Heatherly's cases, 14 Id., 21, Braden's case, Id., 22 and Want's case, Id., 24.

And see Ex parte Dickerson, 30 T. Cr. R., 448, 17 S. W. R., 1076; Yates v. State, 37 Id., 347, 39 S. W. R., 933.

The provisions of this and ante, Art. 646, reconciled. Cain v. State, 15 T. Cr. R., 41.

Joint defendants. Verdict and judgment as against joint defendants, must assess a separate fine against each defendant. Hogg v. State, 40 T. Cr. R., 109, 48 S. W. R., 580; Caesar v. State, 30 Id., 274, 17 S. W. R., 258.

And see Hill v. State, 11 T. Cr. R., 379.

Art. 868. [846] **Judgment when the punishment is other than fine.**—When the punishment assessed is any other than a pecuniary fine, the judgment shall specify it, and order its enforcement by the proper process. It shall also adjudge the costs against the defendant, and order the collection thereof, as in other cases.

Construed. The court, in misdemeanor cases, has full control over its judgments until the adjournment of the trial term, and can, upon its own motion, set aside or reform the same, or grant a new trial, according to the justice of the case, upon the merits as well as matters of form. Metcalf v. State, 21 T. Cr. R., 174, 17 S. W. R., 142, and cases cited.

But the power does not extend to cases in which punishment has already been inflicted in whole or in part. Gresham v. State, 19 T. Cr. R., 504. And see Ex parte Cox, Id., 84, 14 S. W. R., 396; Ex parte Dockery, 38 Id., 293, 42 S. W. R., 599.

CHAPTER FOUR.

EXECUTION OF JUDGMENT.

Article

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1. COLLECTION OF PECUNIARY FINES.

Article 869. [847] **How judgment for fine satisfied and defendant discharged.**—When the judgment against a defendant is for a pecuniary fine and the costs of prosecution, he shall be discharged from the same—

1. When the amount of such fine and costs have been fully paid.
2. When the same have been remitted by the proper authority.
3. When the defendant has remained in custody the length of time required by law to satisfy the amount of such judgment, as hereinafter provided.

Art. 870. [848] **Recognizances, etc., payable in lawful money.**—All recognizances, bail bonds and undertakings of any kind, whereby a party becomes bound to pay money to the state, and all fines and forfeitures of a pecuniary character, shall be collected in the lawful money of the United States only. [O. C. 702.]

Construed. Forfeitures on recognizances and bail bonds can be remitted by the governor. Post, Art. 1052.

Fines imposed for misdemeanors are not debts, within the meaning of the constitutional inhibition of imprisonment for debt. Ex parte Mann, 39 T. Cr. R., 491, 46 S. W. R., 828, following Dixon v. State, 2 T., 484.

Art. 871. [849] **When judgment is fine, and defendant is present.**—When judgment has been rendered against a defendant for a pecuniary fine, if he is present, he shall be imprisoned in jail, until discharged as provided in article 867; and a certified copy of such judgment shall be sufficient to authorize such imprisonment, without further warrant or process. [O. C. 694, 695.]

Construed. As used in this article, "imprisoned" means actual imprisonment within the four walls of the jail. Luckey v. State, 14 T., 400.

A prisoner suffered to remain out of jail against a judgment ordering his confinement in jail, is, in contemplation of law, an escaped prisoner. Ex parte Wyatt, 29 T. Cr. R., 398, 16 S. W. R., 301.

Art. 872. [850] **When defendant is not present, capias shall issue.**—When a pecuniary fine has been adjudged against a defendant, and he is not present,

a capias shall forthwith issue for his arrest; and the sheriff shall execute the same by placing the defendant in jail until he is legally discharged.

Ex parte Dickerson, 30 T. Cr. R., 448, 17 S. W. R., 1076, citing Terry v. State, Id., 408, 17 S. W. R., 1075.

Art. 873. [851] **Capias shall recite what.**—Where a capias issues, as provided in the preceding article, it shall state the rendition and amount of the judgment and the amount unpaid thereon, and command the sheriff to take the body of the defendant and place him in jail, until the amount due upon such judgment, and the further costs of collecting the same are paid, or until the defendant is otherwise legally discharged. This writ is sufficient authority to justify the commitment of the defendant to jail. [O. C. 700.]

Art. 874. [852] **Capias may issue to any county in the state, etc.**—The capias provided for in this chapter may be issued to any county in the state, and shall be executed and returned as in other cases, except that no bail shall be taken in such cases.

Art. 875. [853] **Execution may issue for fine and costs.**—In all cases of pecuniary fine, an execution may issue for the fine and costs, notwithstanding a capias may have issued for the defendant; and a capias may issue for the defendant, notwithstanding an execution has been issued against his property. The execution shall be collected and returned as in civil actions. [O. C. 695.]

Art. 876. [854] **When execution is satisfied, etc.**—When the execution has been collected, the defendant shall be at once discharged; and, whenever the fine and costs have been legally discharged in any way, the execution shall forthwith be returned satisfied, and the defendant discharged.

Ex parte Price, 11 T. Cr. R., 538.

Art. 877. [855] **Further enforcement of the judgment.**—When a defendant has been committed to jail in default of the fine and costs adjudged against him, the further enforcement of such judgment shall be in accordance with the law of this state relating to county convicts.

Art. 878. [856] **Judgment for fine, etc., may be discharged by imprisonment, when.**—When a defendant is convicted of a misdemeanor, and his punishment is assessed at a pecuniary fine, if he makes oath in writing that he is unable to pay the fine and costs adjudged against him, he may be hired out to manual labor, or be put to work in the manual labor workhouse, or on the manual labor farm, or public improvements of the county; or, in case there be no such workhouse, farm or improvements, and, in case the county authorities fail to hire out such convict in accordance with the law regulating county convicts, he shall be imprisoned in the county jail for a sufficient length of time to discharge the full amount of fine and costs adjudged against him, rating such punishment at three dollars for each day thereof. [O. C. 694, 848; Amended.]

Construed. The hiring contemplated in this article must be a resident of the county of the conviction, and not of any other county. Ex parte Medaris, 38 T. Cr. R., 493, 43 S. W. R., 517.

It is only in default of the labor and hiring prescribed that a convict can claim the benefit of the three dollar per day rebate on imprisonment. Ex parte Bogel, 20 T. Cr. R., 127.

A misdemeanor convict who is also in custody under a charge of felony cannot be hired out. Ex parte Godfrey, 11 T. Cr. R., 34.

And see generally, Ex parte Dampier, 24 T. Cr. R., 561, 7 S. W. R., 330; Ex parte Thompson, 32 Id., 274, 22 S. W. R., 876; Ex parte Anderson, 34 Id., 14, 28 S. W. R., 807; Ex parte Hall, Id., 617, 31 S. W. R., 640; Ex parte, Bates, 37 Id.,

548, 40 S. W. R., 269; Ex parte Jones, 38 Id., 142, 41 S. W. R., 628; Ex parte Dockery Id., 293, 42 S. W. R., 599.

2. ENFORCING JUDGMENT IN MISDEMEANORS WHERE THE PUNISHMENT IS IMPRISONMENT.

Art. 879. [857] **Copy of judgment sufficient authority for imprisonment.**—When, by the judgment of the court, a defendant is to be imprisoned in jail, the sheriff shall execute the same by imprisoning the defendant for the length of time required by the judgment; and, for this purpose, a certified copy of such judgment shall be sufficient authority for the sheriff. [O. C. 704.]

Luckey v. State, 14 T., 400; Ex parte Wyatt, 29 T. Cr. R., 398, 16 S. W. R., 301. Ex parte Dockery, 38 Id., 293, 42 S. W. R., 599.

Art. 880. [858] **Capias, when punishment is imprisonment.**—When a capias is directed to be issued for the apprehension and commitment of a person convicted of a misdemeanor, the penalty of which, or any part thereof, is imprisonment in jail, the writ shall recite the judgment and command the sheriff to place the defendant in jail, to remain the length of time therein fixed; and this writ shall be sufficient to authorize the sheriff to enforce such judgment. [O. C. 705.]

Ex parte Dockery, 38 T. Cr. R., 293, 42 S. W. R., 599.

Art. 881. [859] **Defendant shall be discharged, when.**—When a defendant has remained in jail the length of time required by the judgment, he shall be discharged; and the sheriff shall then return the copy of the judgment, or the capias under which the defendant was imprisoned, to the proper court, stating how the same has been executed.

Art. 882. [860] **Further execution of judgment, etc.**—The further execution of the judgment and sentence shall be in accordance with the provisions of the law governing the penitentiaries of the state. The term shall commence from the time of sentence, or, in case of appeal, from the time of affirmance of the sentence by the court of criminal appeals.

Construed. Notwithstanding the provisions of this article, imprisonment penalty means actual confinement, and the term of imprisonment begins with the actual confinement. Sartain v. State, 10 T. Cr. R., 651.

3. ENFORCING JUDGMENT IN CAPITAL CASES.

Art. 883. [861] **Death warrant to be executed, when.**—The warrant for the execution of the sentence of death may be carried into effect at any time after eleven o'clock, and before sunset, on the day stated in such warrant. [O. C. 708.]

Art. 884. [862] **Executed, how.**—The sentence of death shall be executed by hanging the convict by the neck until he is dead. [O. C. 709.]

Art. 885. [863] **Shall take place within the walls of the jail, when.**—Where there is a jail in the county, and it is so constructed that a gallows can be erected therein, the execution of the sentence of death shall take place within the walls of the jail. [O. C. 710.]

Note. By requirement of the Revised Civil Statutes, jails must be so constructed as to meet the requirements of this article.

Art. 886. [864] **Who shall be present.**—Where the sentence of death is executed within the walls of the county jail, the sheriff shall notify any number of physicians or surgeons, not exceeding six, any number of justices of

the peace of his county, not exceeding four, and any number of freeholders in the county, not exceeding six, any, or all of whom, may be present, together with such deputies of the sheriff as he may require to be in attendance when the penalty of death is executed. [O. C. 711.]

Art. 887. [865] **Reasonable request of convict.**—The sheriff shall comply with any reasonable request of the convict; and, where the execution takes place within the walls of the county jail, shall permit such persons to be present (not exceeding five) as he may name. [O. C. 712.]

Art. 888. [866] **No torture shall be inflicted.**—No torture, or ill-treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law. [O. C. 713.]

Art. 889. [867] **Sheriff may order military company to aid.**—The sheriff may, when he supposes there will be a necessity, order such number of citizens of his county, or any military or militia company, to aid in preventing the rescue of a prisoner, or to prevent persons not authorized to be present from intruding themselves within the place of execution. [O. C. 715.]

Art. 890. [868] **When execution can not take place in jail.**—When the execution can not take place in the county jail, the sheriff shall select some other place in the county for that purpose; and such place shall be as private as he can conveniently find; and publicity in the execution shall be avoided as far as practicable.

Art. 891. [869] **Body of convict shall be buried, how.**—The body of a convict shall be decently buried, at the expense of the county, unless demanded by his relatives or friends, in which case, it shall be given to them, and shall never, unless by consent of the convict himself before execution, be delivered to any person for dissection. [O. C. 716.]

Art. 892. [870] **Sheriff shall return the warrant, stating, etc.**—The sheriff shall immediately return the warrant, stating in his return, indorsed thereon, or attached thereto—

1. The fact, time, place and mode of execution.
2. If the execution do not take place within the jail, the return shall state that there is no jail, or that it is so constructed that a gallows could not have been erected therein.
3. If the execution take place within the jail, the return shall state the names of the physicians, justices of the peace and freeholders present, and the names of all other persons present, if any, and the authority by which they were present.
4. If the execution does not take place within the jail, the return shall state the names of five freeholders of the county who were present.
5. That the body of the convict was decently buried, or delivered to his relatives or friends, naming them, or to some other person, by consent of the convict, naming such person, and naming two or more witnesses to the fact that the convict consented that his body might be delivered to such person. [O. C. 717.]

TITLE 10.

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Article 893. [871] **State can not appeal.**—The state shall have no right of appeal in criminal actions. [Const., Art. 5, § 26.]

Ante, Art. 497, and notes.

Art. 894. [872] **Defendant may appeal.**—A defendant in any criminal action, upon conviction, has the right of appeal under the rules hereinafter prescribed.

Defendant's right to writ of error in scire facias cases is provided in post, Art. 961.

Construed. Even without statutory provision, the right of appeal would exist under the constitution. Rep. v. Smith, Dallam, 407; Laturner v. State, 9 T., 451.

Such appeal, however, must be taken in conformity with the law in force at the time of the conviction, and an appeal in a felony case is not perfected by merely entering into recognizance to abide the decision of the appellate court. Brill v. State, 13 T., 79.

Final judgment is indispensable to the right of appeal. Ante, Art. 68, and notes.

Appeal will not be from a judgment that has been satisfied. Payne v. State, 12 T. Cr. R., 160.

Right of appeal in contempt cases recognized. Ex parte Degener, 30 T. Cr. R., 566, 17 S. W. R., 1111; Ex parte Kearby, 35 Id., 531, 34 S. W. R., 635; s. c., Id., 634, 34 S. W. R., 962; Ex parte Park, 37 Id., 590, 40 S. W. R., 300; Holman v. Mayer, 35 T., 668.

The issue being only of indentity, appeal does not lie. Washington v. State, 31 T. Cr. R., 84, 19 S. W. R., 900.

Nor from an ex parte proceeding in the trial court on the issue of insanity, after trial and conviction. Donnell v. State, 24 T. Cr. R., 6, 5 S. W. R., 522.

Motion for new trial is not an absolute essential prerequisite to defendant's right of appeal. Ante, Art. 844, and notes; Cotton v. State, 29 T., 186.

Right of appeal once exhausted cannot be revived. Ex parte Jones, 7 T. Cr. R., 365; Peterson v. State, 32 T., 477.

But an appeal dismissed for want of sentence can be revived on the entry of sentence nunc pro tunc. Smith v. State, 1 T. Cr. R., 516.

And, on reinstatement of appeal, see Downs v. State, 7 T. Cr. R., 483; Thompson v. State, 35 Id., 505, 34 S. W. R., 124; Cryer v. State, 36 Id., 621, 37 S. W. R., 753; Wright v. State, 37 Id., 3, 35 S. W. R., 150.

Art. 895. [873] **Appeals from district and county courts.**—Appeals from judgments rendered by the district or county court in criminal actions shall be heard by the court of criminal appeals. [Acts 22d Leg., S. S.]

Ante, Art, 68 and notes. "Appendix," sec. 26, 31 T. Cr. R., 647.

Art. 896. **Cases for violation of local option law to have preference, when, and shall be advanced.**—That in any criminal case wherein the defendant is charged with a violation of the local option law, prohibiting the sale of intoxicating liquors in local option territories, and wherein any constitutional question or the validity of such election is involved, all such cases, for the violation of such law, shall be preference cases, and, on motion, shall be advanced and immediately heard in said court. [Act 1907, p. 306.]

Art. 897. [874] **From justices of the peace to county court.**—Appeals from judgments rendered by justices of the peace and other inferior courts in criminal actions shall be heard by the county court, except in counties where there is a criminal district court, in which counties such appeals shall be heard by such criminal district courts.

Appellate jurisdiction of cases arising under this article, in counties having a criminal district court, appertains to such criminal district courts. Bautsch v. Galveston, 27 T. Cr. R., 342, 11 S. W. R., 414.

If the justice court was without jurisdiction, the county court acquired none by appeal. Neil v. State, 43 T., 91; Vecker v. State, 4 T. Cr. R., 234.

Judgment of the county court on appeal, when it does not exceed fine of one hundred dollars, exclusive of costs, is final. Tison v. State, 35 T. Cr. R., 360, 38 S. W. R., 872, following Nelson v. State, 33 Id., 379, 26 S. W. R., 623.

The legislature has no power to confer the charter right to municipal corporations to abrogate the right of appeal in criminal cases, or restrict the appellate jurisdiction of the court of criminal appeals. Bautsch v. Galveston, 27 T. Cr. R., 342, 11 S. W. R., 414; Cornelius v. Dallas, 37 Id., 309, 39 S. W. R., 679.

Art. 898. [875] **Defendant need not be present.**—The defendant in a criminal action need not be personally present upon the hearing of his cause in the court of criminal appeals, but he may appear in person in cases where, by law, he is not committed to jail upon appeal. [Acts 22d Leg., S. S.]

See "Appendix," sec. 27, 31 T. Cr. R., 647; Tooke v. State, 23 T. Cr. R., 10, 3 S. W. R., 782.

Art. 899. **Defendant must be personally present, when; verdict may be received in his absence, when; presumption that he was present, when.**—In all prosecutions for felonies, the defendant must be personally present at the trial; and he must likewise be present in all cases of indictmnt for misdemeanors where the punishment, or any part thereof, is imprisonment in jail; provided, that in all cases, the verdict of the jury shall be received by the court, and entered upon the records thereof in the absence of the defendant, when such absence on his part is wilful or voluntary, and when so received, it shall have the same force and effect as if received and entered in the presence of such defendant; and when the record in the appellate court shows that the defendant was present at the commencement, or any portion of the trial, it shall be presumed, in the absence of all evidence in the record to the contrary, that he was present during the whole trial. [Act 1907, p. 31.]

Art. 900. **Defendant in felony cases on bail shall remain on bail until verdict of guilty.**—Where the defendant in cases of felonies is on bail when his trial commences, the same shall not thereby be considered as discharged, until the jury shall return into court a verdict of guilty, and the defendant 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 of guilty, as under the law he now has before the trial commences; but immediately upon the return into court of such verdict of guilty, he shall be placed in the custody of the sheriff, and his bail be considered as discharged. [Id., p. 31.]

Art. 901. [876] **In felony cases where defendant is convicted and appeals, shall have right to remain on bail, when.**—In all cases of felony, where, upon the trial thereof, the defendant has been convicted, and his punishment assessed at confinement in the penitentiary for any period of fifteen years or less, and where an appeal is taken from such conviction, and judgment rendered thereon, the defendant thus convicted shall have the right to remain on bail during the pendency of said appeal, and until the judgment of the trial court is affirmed by the court of criminal appeals, and the mandate thereof filed with the clerk of such trial court, by entering into a recognizance in said court, in such sum as is fixed by the court. [Id., p. 31.]

Art. 902. **When defendant appeals and bail is allowed, shall be committed to jail, until he enters into recognizance.**—Where the defendant appeals in any case of felony from the judgment of the district court, and where bail is allowed by the provisions of this act, he shall, if he be in custody, be committed to jail, unless he enters into a recognizance to appear as hereinafter required; and, if he be in custody, his notice of appeal shall have no effect whatever to release him from such custody until he enters into recognizance; and no recognizance shall be taken or allowed, unless the defendant is in custody of the sheriff at the time thereof. [Id., p. 31.]

Art. 903. **Form of such recognizance.**—In all appeals from judgments and convictions for felonies where bail is hereby allowed, the following form of recognizances shall be considered sufficient:

"The State of Texas,
vs.
A. B.
No....."

"This day came into open court A. B., defendant in the above entitled cause, who, together with C. D. and E. F., sureties, acknowledged them-

selves jointly and severally indebted to the state of Texas in the sum $....., conditioned that the said A. B., who stands charged with the offense of.....in this court, and who has been convicted of the offense of.....in this court, shall appear before this court from day to day, and from term to term, of the same, and not depart therefrom, without leave of this court, in order to abide a judgment of the court of criminal appeals of the state of Texas in this case." [Id., p. 31.]

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.**—If, for any cause, the defendant fails to enter into and make the recognizance mentioned in article 903 during the term of court, but gave notice of and took an appeal from such conviction during such term, he shall, notwithstanding such failure, be permitted to give bail and obtain his release from custody by giving, after the expiration of such term of court and in vacation, his bail bond to the sheriff, with two or more good and sufficient sureties, in which the defendant, together with his sureties, shall acknowledge themselves severally indebted to the state of Texas in the sum of money fixed by the court, upon the conditions as are provided for in recognizances in article 903; but before such bail bond shall be accepted and the defendant released from custody by reason thereof, the same must be approved by such sheriff and the court trying said cause, or his successor in office. That when said bond is so given, approved and accepted, the defendant shall be released from custody. [Id., p. 32.]

Art. 905. **Procedure in fixing and forfeiting recognizance and bail bond.**—The amount of such recognizance and bail bond shall be fixed by the court in which judgment was rendered, and the sufficiency of the security thereon shall be tested, and the same proceedings had as in cases of forfeitures in other cases of recognizances and bail bonds. [Id., p. 32.]

Art. 906. **On receipt of mandate of court of criminal appeals affirming judgment, duty of clerk to issue capias.**—When the clerk of any district court from whose judgment an appeal has been taken in felony cases wherein bail has been allowed shall receive the mandate of the court of criminal appeals affirming such judgment, he shall immediately file the same in said court, and forthwith shall issue a capias for the arrest of the defendant, for the execution of the sentence of the court, which shall recite the fact of conviction, setting forth the offense and the judgment and sentence of the court, the appeal from and affirmance of such judgment and the filing of such mandate, and shall command the sheriff to arrest and take into his custody the defendant, and place him in jail and therein keep him until delivered to the proper penitentiary authorities, as directed by said sentence. The sheriff shall forthwith execute such capias by placing the defendant in jail and therein keep him as directed. [Id., p. 32.]

Art. 907. **Capias may issue to what county and executed how.**—The capias provided for by this law may be issued to any county of this state, and shall be executed and returned as in other felony cases, except that no bail shall be taken in such cases. [Id., p. 32.]

Art. 908. **Right of appeal not to be abridged.**—The right of appeal, as otherwise provided by law, shall in no wise be abridged by the provisions of this chapter. [Id., p. 33.]

Art. 909. **If no jail in county, etc.**—If the jail of the county is unsafe, or if there be no jail, the judge of the district court may, either in term time or in vacation, order the prisoner to be committed to the jail, of the nearest county in his district, which is safe.

Art. 910. [878] **Appeal in felony cases prosecuted immediately.**—An appeal in a felony case may be prosecuted immediately to the term of the court

of criminal appeals pending at the time the appeal is taken, or to the first term of such court after such appeal, without regard to the law governing appeals in other cases; and it shall be the duty of the clerk, upon the application of either the state or the defendant, to make out and forward, without delay to the court of criminal appeals, a transcript of the case. [Acts 22d Leg., S. S.]

Ayers v. State, 12 T. Cr. R., 450.

Art. 911. [879] **When transcript may be filed.**—The transcript may be filed in the court of criminal appeals, and the case tried and determined in said court, while the district court in which the conviction was had is yet in session; and, upon an affirmance of the judgment of conviction by the court of criminal appeals, sentence may be pronounced by the district court, at the same term at which the conviction was had, or any term thereafter.

See "Appendix," sec. 30, 31 T. Cr. R., 647.

Transcript on appeal may be filed in court of criminal appeals, and the appeal heard while the court at which the conviction was had is in session. Bundick v. State, 127 S. W. R., 543.

Art. 912. [880] **When defendant escapes, pending an appeal.**—In case the defendant, pending an appeal in a felony case, shall make his escape from custody, the jurisdiction of the court of criminal appeals shall no longer attach in the case; and, upon the fact of such escape being made to appear, the court shall, on motion of the attorney general, or attorney representing the state, dismiss the appeal; but the order dismissing the appeal shall be set aside, if it shall be made to appear that the accused had voluntarily returned to the custody of the officer from whom he escaped, within ten days.

"Appendix," sec. 31, 21 T. Cr. R., 648; Rule 77 for court of criminal appeals, 2 T. Cr. R., 645.

Construed. The escape of a convicted appellant, pending his appeal, ousts the jurisdiction of the appellate court, and his appeal can be reinstated, only by his voluntary return to legal custody within ten days after escape. Lunsford v. State, 10 T. Cr. R., 118; Hammons v. State, 35 Id., 17, 29 S. W. R., 780.

Recapture is not voluntary return, and will not reinstate appeal. Ex parte Wood, 19 T. Cr. R., 46; Loyd v. State, Id., 137.

Art. 913. [881] **Sheriff shall report escape, etc.**—When any such escape of a prisoner occurs, the sheriff who had him in custody shall immediately report the fact, under oath, to the district or county attorney of the county in which the conviction was had, who shall forthwith forward such report to the attorney general at the court to which the transcript was sent; and such report shall be sufficient evidence of the fact of such escape to authorize the dismissal of the appeal.

"Appendix," sec. 31, 31 T. Cr. R., 648.

Art. 914. [882] **Appeal may be taken, when.**—An appeal may be taken by the defendant at any time during the term of the court at which the conviction is had. [O. C. 725.]

Practice. Notice of appeal entered nunc pro tunc at a subsequent term confers generally no jurisdiction on the appellate curt. This rule, however, does not apply in scire facias cases. Morse v. State, 39 T. Cr. R., 566, 47 S. W. R., 645; Clay v. State, 56 Id., 515, 120 S. W. R., 118, and cases cited.

But appeal can be taken from a final judgment entered nunc pro tunc at a subsequent term. Nelson v. State, 21 T. Cr. R., 351, 17 S. W. R., 466; Madison v. State, 17 Id., 479, and cases cited.

Art. 915. [883] **Appeal is taken, how.**—An appeal is taken by giving notice thereof in open court, and having the same entered of record. [O. C. 726.]

Ante, Art. 68 and notes; Teague v. State, 53 T. Cr. R., 503, 111 S. W. R., 405; Clay v. State, 56 Id., 515, 120 S. W. R., 118, and cases cited.

Art. 916. [884] **Effect of appeal.**—The effect of an appeal is to suspend and arrest all further proceedings in the case in the court in which the conviction was had, until the judgment of the appellate court is received by the court from which the appeal was taken; provided, that in cases where, after notice of appeal has been given, the record, or any portion thereof, is lost or destroyed, it may be substituted in the lower court, if said court be then in session; and, when so substituted, the transcript may be prepared and sent up as in other cases. In case the court from which the appeal was taken be not then in session, the court of appeals shall postpone the consideration of such appeal until the next term of said court from which said appeal was taken; and the said record shall be substituted at said term as in other cases. [O. C. 727.]

Ante, Art. 482, and notes.

Construed. After notice of and pending appeal, the court a quo can take no steps in the case until disposition of the appellate court, except when, in the interim, some portion of the record has been lost or destroyed, in which case such portion may be substituted. Quarles v. State, 37 T. Cr. R., 362, 39 S. W. R., 668; Hinman v. State, 54 T. Cr. R., 434, 113 S. W. R., 280; Nichols v. State, 55 Id., 211, 115 S. W. R., 1196, and cases cited.

The entry of an order nunc pro tunc by the trial court after the appeal has gone into effect, is not the substitution of a lost or destroyed record, and is void. Lewis v. State, 34 T. Cr. R., 126, 29 S. W. R., 384. But see Morse v. State, 39 Id., 566, 47 S. W. R., 645.

Defective recognizance cannot be substituted by a good one in the court a quo, pending appeal. Yungman v. State, 38 T. Cr. R., 459, 42 S. W. R., 988.

The court below has lost jurisdiction to enter judgment, when a verdict has been rendered, motion for new trial overruled, notice of appeal given, and the term of the court closed. Estes v. State, 38 T. Cr. R., 506, 43 S. W. R., 982.

And see Saragossa v. State, 40 T. Cr. R., 64, 46 S. W. R., 250; Dement v. State, 39 Id., 271, 45 S. W. R., 917.

Construed. On the overruling of the motion for new trial and notice of appeal, the jurisdiction of the trial court suspends, except that, until the term ends, or the transcript on the appeal is taken out and filed in the appellate court, it may correct any judgment or order entered in the case. Bundick v. State, 127, S. W. R., 543.

Art. 917. [885] **Appeal in felony case after sentence.**—Where the defendant in a felony case fails to appeal until after sentence has been pronounced, the appeal shall, nevertheless, be allowed, if demanded, and has the effect of superseding the execution of the sentence and all other proceedings as fully as if taken at the proper time. [O. C. 728.]

Ante, Arts. 855 and 856.

Art. 918. [886] **When defendant appeals in misdemeanor, must give recognizance.**—When the defendant appeals in any case of misdemeanor from the judgment of the district or county court, he shall, if he be in custody, be committed to jail, unless he enter into recognizance to appear as hereinafter required; and, if he be not in custody, his notice of appeal shall have no effect whatever, until he enter into recognizance. [O. C. 722.]

Recognizance on appeal must be entered at the trial term, and cannot be, at a subsequent term. Quarles v. State, 37 T. Cr. R., 362, 39 S. W. R., 668; Yungman v. State, 38 Id., 459, 42 S. W. R., 988, and cases cited.

Record on appeal in misdemeanor, must show that the appellant was either in jail or under proper recognizance. Fatheree v. State, 23 T., 202, Young v. State, 8 T. Cr. R., 81.

Art. 919. [887] **Form of recognizance.**—In appeal cases of misdemeanor, the following form of recognizance shall be sufficient, and, when complied with, shall confer jurisdiction upon the court of criminal appeals, of such appeals:

"State of Texas,
vs.
A. B.
No....."

"This day came into open court A. B., defendant in the above entitled cause, who, together with C. D. and E. F., his sureties, acknowledge themselves severally indebted to the state of Texas in the penal sum of.....dollars; conditioned, that the said A. B., who has been convicted in this cause of a misdemeanor, and his punishment assessed at ....., as more fully appears by the judgment of conviction duly entered in this cause, shall appear before this court from day to day, and from term to term of the same, and not depart, without leave of this court, in order to abide the judgment of the court of criminal appeals of the state of Texas in this case."

The amount of such recognizance, shall be fixed by the court in which the judgment was rendered, and the sufficiency of the security thereon shall be tested, and the same proceedings had, in case of forfeiture, as in other cases of recognizance. [Act 22nd Leg., S. S., ch. 16; amended, Act 1907, p. 5.]

Joint defendants appealing, must each give a separate recognizance. Hogg v. State, 40 T. Cr. R., 109, 48 S. W. R., 580, and cases cited.

To be sufficient, recognizance must state the punishment assessed. May v. State, 40 T. Cr. R., 196, 49 S. W. R., 402; Johnson v. State, 49 S. W. R., 594; Martin v. State, 89 Id., 642; Dove v. State, Id., 646; Ehlert v. State, 92 S. W. R., 40.

Art. 920. [888] **Appeal shall not be entertained without sufficient recognizance.**—The court of criminal appeals shall not entertain jurisdiction of any case in which a recognizance is required by law, unless such recognizance shall comply substantially with the form presented in the preceding article.

"Appendix," sec. 33, 31 T. Cr. R., 648.

Construed. A sufficient recognizance or actual confinement in jail is an absolute essential to the jurisdiction of the appellate court. Allison v. State, 33 T. Cr. R., 501, 26 S. W. R., 1080; Morgan v. State, 41 Id., 556, 55 S. W. R., 823.

Recognizance must be entered into by the defendant in person; no other person can represent him. Chaney v. State, 23 T., 23; Ferrill v. State, 29 Id., 489.

Under the present law, the recognizance on appeal need only recite the defendant's conviction of "a misdemeanor," without naming it, or setting out its constituent elements. Ante, Art. 919.

Record on appeal must show entry of recognizance on the final minutes of the court. Affidavit of the judge that recognizance was entered into will not suffice. Maxey v. State, 41 T. Cr. R., 556, 55 S. W. R., 823.

On appeal. Appeal bond will not answer the purpose of a recognizance. Herron v. State, 27 T., 337; Cook v. State, 8 T. Cr. R., 671.

Essentials to sufficient recognizance: Bigelow v. State, 36 T. Cr. R., 402, 37 S. W. R., 330; Cuper v. State, Id., 621, 37 S. W. R., 753; Thompson v. State, 35 Id. 505, 34 S. W. R., 134. And see Maness v. State, 20 T., 38; Howard v. State, 30 Id., 680; 18 S. W. R., 790; Freeman v. State, 36 T., 254.

Recognizance of joint appellants, must be separate and not joint. McMeans v. State, 37 T. Cr. R., 130, 38 S. W. R., 998; Hogg v. State, 40 Id., 109, 48 S. W. R., 580, and cases cited.

Insufficient unless it recites the punishment assessed against the appellant. May v. State, 40 T. Cr. R., 196, 49 S. W. R., 402.

Practice with reference to correcting clerical mistakes in the transcription of the recognizance into the record of the appeal. Craddock v. State, 15 T. Cr. R., 641; Collins v. State, 34 Id., 95, 29 S. W. R., 274; Thompson v. State, 35 Id., 505, 34 S. W. R., 134; Cryer v. State, 36 Id., 37 S. W. R., 753; Cannady v. State, 37 Id., 123, 38 S. W. R., 610.

Art. 921. [889] **Appeals from justices' and other inferior courts.**—In appeals from the judgments of justices of the peace and other inferior courts to the county court, the defendant shall, if he be in custody, be committed to jail, unless he give bond with good and sufficient security, to be approved by the court from whose judgment the appeal is taken, in an amount not less than double the amount of fine and costs adjudged against him, payable to the state of Texas; provided, said bond shall not in any case be for a less sum than fifty dollars; said bond shall describe the judgment appealed from with sufficient certainty to identify it, shall recite that in said cause the defendant was convicted on complaint, or information, charging him with a misdemeanor, and has appealed to the county court, and shall be conditioned that the defendant shall well and truly make his personal appearance before the county court of said county, at its next regular term, stating the time and place of holding the same, and there remain from day to day, and term to term, and answer in said cause on trial in said court. [Act Aug. 17, 1876, p. 167, §§ 37, 38; amended, Act 1901, p. 291.]

A statutory appeal bond, is an essential prerequisite to appeal under this article. Extra statutory conditions in the appeal bond cannot be treated as surplusage, and conditions more onerous than the law provides will nullify the bond. Watson v. State, 20 T. Cr. R., 382; Turner v. State, 14 Id., 168.

Substantial compliance with this article is all that is required in the bond. Cyechawaich v. State, 23 T. Cr. R., 430, 5 S. W. R., 119.

And see Miller v. State, 21 T. Cr. R., 275; 17 S. W. R., 429; Robinson v. State, 34 Id., 131, 29 S. W. R., 788; Taylor v. State, 16 Id., 514; Eichman v. State, 22 Id., 137, 2 S. W. R., 538; Richardson v. State, 3 Id., 69; Ward v. State, 38 Id., 545, 43 S. W. R., 985.

Appeal bond which omits the condition that the appellant will prosecute his appeal with effect, etc., is fatally defective. Bunton v. State, 52 T. Cr. R., 618, 108 S. W. R., 373.

Art. 922. **When appeal bond provided for in preceding article is filed, appeal is perfected.**—In appeals from the judgment of justices of the peace and other inferior courts, when the appeal bond provided for in article 921 of the Code of Criminal Procedure of the state of Texas, has been filed with the justice or court trying the same, the appeal in such case shall be held to be thereby perfected; and no appeal shall be dismissed on account of the failure of the defendant to give notice of appeal in open court, nor on account of any defect in the transcript. [Act 1899, p. 233.]

Notice of appeal from justice and inferior courts, since the adoption of this article, is not indispensable to appeal, and appeal will not be dismissed because of failure of such notice or far any defect in the transcript. Note the article in extenso.

Art. 923. **When appeal bond or recognizance is defective, appellate court may allow appellant to file new bond.**—When an appeal has been or shall be taken from the judgment of any of the courts of this state, by filing a bond or entering into a recognizance within the time prescribed by law in

such cases, and it shall be determined by the court to which appeal is taken that such bond or recognizance is defective in form or substance, such appellate court may allow the appellant to amend such bond or recognizance by filing a new bond, on such terms as the court may prescribe. [Act 1905, p. 224.]

Art. 924. [890] **Appeal bond shall be given within what time.**—If the defendant is not in custody, a notice of appeal shall have no effect whatever until the required appeal bond has been given and approved; and such appeal bond shall, in all cases, be given within ten days after the judgment of the court refusing a new trial has been rendered, and not afterward.

Miller v. State, 21 T. Cr. R., 275, 17 S. W. R., 429; Ward v. State, 38 Id., 545, 43 S. W. R., 985; Ivey v. State, 48 Id., 254, 87 S. W. R., 343.

Art. 925. [891] **Trial in county court shall be de novo.**—In all appeals to justices' and other inferior courts to the county court, the trial shall be de novo in the county court, the same as if the prosecution had been originally commenced in that court. [Const., Art. 5, § 16.]

Appeal to the court of criminal appeals will lie from dismissals of appealed cases by the county court, without trial de novo where the judgment appealed to the county court, without trial de novo where the judgment appealed to the county court amounted to more than twenty dollars, though not in excess of one hundred dollars. Pevito v. Rodgers, 52 T., 581; Taylor v. State, 16 T. Cr. R., 514.

The court of criminal appeals has no jurisdiction over appeal from county court in a case originating in the justice court, if judgment rendered or fine imposed does not exceed one hundred dollars, inclusive of costs. Nelson v. State, 33 T. Cr. R., 379; Johnson v. State, Id., 395.

And see McNamara v. State, 33 T. Cr. R., 363, 26 S. W. R., 506; Smith v. State, 31 Id., 315, 20 S. W. R., 707.

Art. 926. [892] **Original papers, etc., shall be sent up.**—In appeals from justices' and other inferior courts, all the original papers in the case, together with the appeal bond, if any, and together with a certified transcript of all the proceedings had in the case before such court, including a bill of the costs, shall, without delay, be delivered to the clerk of the county court of the county in which the conviction was had, who shall file the same and docket the case immediately.

Ex parte Ambrose, 32 T. Cr. R., 468, 24 S. W. R., 291; Smith v. State, 31 Id., 315, 20 S. W. R., 707.

Art. 927. [893] **Witnesses need not be again summoned, etc.**—In the cases mentioned in the preceding article, the witnesses who have been already summoned or attached to appear in the case before the court below, shall appear before the county court without further process; and, in case of their failure to do so, the same proceedings may be had as if they had been originally summoned or attached to appear before the county court.

Art. 928. [894] **Rules governing the taking, etc., of appeal bonds.**—The rules governing the taking and forfeiture of bail bonds shall govern appeal bonds, and the forfeiture and collection of such appeal bonds shall be in the county court to which such appeal is taken.

Practice. Appealing to the county court from a judgment assessing a fine only, the defendant has the right to appear for trial de novo by attorney; and it was error for the court to refuse to proceed with the trial, because he was not personally present, and to forfeit his appeal bond and order his rearrest. Page v. State, 9 T. Cr. R., 466.

Such practice, however, would be proper, where the defendant failed to appear, either in person or by consel. And in such case it would be error to dismiss appeal

for want of prosecution, as that would be dismissal of the entire case. McNamara v. State, 33 T. Cr. R., 363, 26 S. W. R., 506.

Art. 929. [895] **Clerk shall prepare transcript in all cases appealed.**—It is the duty of the clerk of a court from which an appeal is taken to prepare, as soon as practicable, a transcript in every case in which an appeal has been taken; which transcript shall contain all the proceedings had in the case, and shall conform to the rules governing transcripts in civil cases. [O. C. 729.]

Jones v. State, 38 T. Cr. R., 87, 40 S. W. R., 807; Vance v. State, 34 Id., 395, 30 S. W. R., 792.

Transcript. For directions as to the preparation of and forms of transcripts on appeal, see Rules 112, 113 and 114 for the court of criminal appeals, "Appendix," 31 T. Cr. R., 653.

What transcript should contain: Trevinio v. State, 2 T. Cr. R., 90; Lowe v. State, 11 Id., 253; McWhorter v. State, 13 Id., 523; Crockett v. State, 14 Id., 226; Pate v. State, 21 Id., 190, 17 S. W. R., 460; Ex parte Reed, 34 Id., 9, 28 S. W. R., 689; Lopez v. State, 42 T., 298.

What it should not contain: District court Rules 72a and 76; Ballinger v. State, 11 T. Cr. R., 323; Wheeler v. State, 15 Id., 607; Rainey v. State, 20 Id., 456; Ratcliff v. State, 29 Id., 248, 15 S. W. R., 596; Parker v. State, 33 Id., 111, 21 S. W. R., 604; Ex parte Isaacs, 35 Id., 80, 31 S. W. R., 641; Vance v. State, 34 Id., 395, 30 S. W. R., 792; Powell v. State, 377, 37 S. W. R., 322.

Original papers, when necessary to be sent up, should be sent with the transcript, their identity verified by the clerk's certificate, and never as part of the transcript. Kennedy v. State, 33 T. Cr. R., 183, 26 S. W. R., 78, and cases cited.

Art. 930. [896] **Transcript in felony case to be prepared first.**—The clerk shall prepare transcripts in felony cases that have been appealed in preference to cases of misdemeanor, and shall prepare transcripts in all criminal cases appealed in preference to civil cases. [O. C. 729.]

Art. 931. [897] **Transcript in felony cases, how forwarded.**—As soon as a transcript is prepared, the clerk shall forward the same by mail or other safe conveyance, charges paid, inclosed in an envelope, securely sealed, directed to the clerk of the court of criminal appeals. [Acts 22d Leg., ch. 16, § 34.]

Rules for the Court of Criminal Appeals, 116, 117, "Appendix," 31 T. Cr. R., 654; Rust v. State, 14 Id., 19; Lockwood v. State, 1 Id., 749; Pilot v. State, 38 Id., 515, 43 S. W. R., 112.

Certiorari. To perfect record on appeal is available. Brown v. State, 2 T. Cr. R., 294; Mitchell v. State, 1 Id., 725.

Certiorari, or consent of parties litigant, are the only modes by which omissions in transcripts can be supplied. Exon v. State, 33 T. Cr. R., 461, 26 S. W. R., 1088; Childs v. State, 1 Id., 27.

Art. 932. [898] **Clerk to make certified list of certain cases.**—The clerk shall, immediately after the adjournment of the court at which appeals in criminal actions may have been taken, make out a certificate under his seal of office, exhibiting a list of all such causes which have been decided, and in which the defendant has appealed. This certificate shall show the style of the cause upon the docket, the offense of which the defendant stands accused, the day on which judgment was rendered, and the day on which the appeal was taken; which certified list he shall transmit, post paid, to the clerk of the court of criminal appeals. [Id., § 35.]

Art. 933. [899] **Certificates to be filed.**—The clerk of the court of criminal appeals shall file the certificate provided for in the preceding article, and notify the attorney general that the same has been received. [Id., § 36.]

Rules for court of Criminal appeals, 35, 36 and 118, "Appendix," 31 T. Cr. R., 649 and 654.

Art. 934. [900] **Notice to clerk as to transcripts.**—When it appears, by the certificate provided for in the preceding article, that an appeal has been taken in any case in which the transcript has not been received by the clerk of the court of criminal appeals within the time required by law for filing transcripts in civil actions, the clerk of the court of criminal appeals shall immediately notify the clerk of the proper court by mail that such transcript has not been received. [Id., § 37.]

Rule 37 for the court of criminal appeals, "Appendix," 31 T. Cr. R., 649.

Art. 935. [901] **Same subject.**—The clerk receiving notification as provided in the preceding article shall, without delay, prepare and forward another transcript of the case as in the first instance, and shall notify the clerk of the court of criminal appeals, by letter sent by mail, of the fact that such transcript has been forwarded, and the day on which and the manner in which the same was forwarded. [Id., § 38.]

Rule 38, 31 T. Cr. R., 649.

Art. 936. [902] **Clerk to file and docket appeals, when.**—The clerk of the court of criminal appeals shall receive, file and docket appeals in criminal actions, under such rules as may be prescribed by the court; except in cases of felony, a transcript may be filed, and the case heard and determined at any time during the term to which the appeal is taken. [Id., § 39.]

Rule 39, 31 T. Cr. R., 649; Rust v. State, 14 Id., 19.

Art. 937. [903] **Appeals, when to be determined.**—The court of criminal appeals shall hear and determine appeals in criminal actions at the earliest time it may be done, with due regard to the rights of parties and proper administration of justice. [Id., § 40.]

Rule 40, 31 T. Cr. R., 649; Rust v. State, 14 Id., 19.

Art. 938. [904] **Judgment on appeal.**—The court of criminal appeals may affirm the judgment of the court below, or may reverse and remand for a new trial, or may reverse and dismiss the case, or may reform and correct the judgment, as the law and the nature of the case may require; but, in all cases, the court shall presume that the venue was proven in the court below; that the jury was properly impaneled and sworn; that the defendant was arraigned; that he pleaded to the indictment; that the charge of the court was certified by the judge, and filed by the clerk of the court before it was read to the jury, unless such matters were made an issue in the court below, and it affirmatively appears to the contrary by a bill of exceptions, properly signed and allowed by the judge of the court below, or proven up by by-standers, as is now provided by law, and incorporated in the transcript as required by law. In all criminal cases by it decided, the court of criminal appeals shall deliver a written opinion, setting forth the reason for such decision. [Id., § 41; amended, Act 1897, p. 11.]

Presumptions on appeal. Under this article, in the absence of bill of exception, the appellate court will presume the venue proved. McGlasson v. State, 38 T. Cr. R., 351.

Regularity of previous proceedings is presumed when not shown by the transcript. Nash v. State, 2 T. Cr. R., 362; Williams v. State, 29 Id., 14 S. W. R., 388, overruling on the point, Steagald's case, 22 Id., 464, 3 S. W. R., 771.

Presumptions in aid and support of the judgment will always be indulged. Brown v. State, 32 T. Cr. R., 119, 22 S. W. R., 596.

Defects in pleadings will not be supplied by presumption. Massie v. State, 30 T. Cr. R., 65, 16 S. W. R., 770.

Reversal and remand. The appellate court will reverse the judgment, if the guilt of appellant is not made reasonably certain. Mitchell v. State, 33 T. Cr. R., 575, 28 S. W. R., 475.

Or if he has not had a fair and impartial trial. Burt v. State, 38 Id., 397, 40 S. W. R., 1000.

Or when he has been denied any legal right to the prejudice of his case. Pridgen v. State, 31 T., 420.

Or when the court committed any radical prejudicial error in its charge. Spears v. State, 8 T. Cr. R., 467; Spradling v. State, 30 Id., 595, 17 S. W. R., 1117.

Reversal and dismissal: Ante, Art. 68 and notes; Cox v. State, 8 T. Cr. R., 254; Saine v. State, 14 Id., 144; Thompson v. State, 15 Id., 39; Lasher v. State, 30 Id., 387, 17 S. W. R., 1064; Bird v. State, 37 Id., 408, 35 S. W. R., 382.

Reversal and reform. The clause "reform and correct" has more force than if the statute contained the power merely to "correct," and, therefore, it has a larger signification, and includes the power to make anew and ratify the judgment of the trial court. McCorquodale v. State, 54 T. Cr. R., 344, 98 S. W. R., 879.

The appellate court his the power to amend and reform the judgment. Robinson v. State, 126, S. W. R., 276.

Art. 939. [905] **Cases remanded, when.**—The court of criminal appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts; but, when a cause is reversed for the reason that the verdict is contrary to the weight of evidence, the same shall in all cases be remanded for new trial. [Act 22d Leg., ch. 16, § 42.]

Sec. 42, "Appendix," 31 T. Cr. R., 649.

Art. 940. [906] **Duty of clerk after judgment.**—As soon as the judgment of the court of criminal appeals is rendered, the clerk shall make out the proper certificate of the proceedings had and judgment rendered, and transmit the same by mail to the clerk of the proper court, or deliver the mandate to the defendant or his counsel when the decision is favorable to the defendant, if requested to do so, unless he is instructed by the court to withhold the mandate to any particular time. [Id., § 43.]

Sec. 43, "Appendix," 31 T. Cr. R., 649.

Art. 941. [907] **Mandate to be filed.**—When the certificate of the judgment and proceedings in the court of criminal appeals shall be received by the proper clerk, he shall file the same with the original papers of the cause, and note the same upon the docket of the court. [Id., § 44.]

Sec. 44, "Appendix," 31 T. Cr. R., 650.

Art. 942. [908] **Sentence shall be pronounced in felony case, when.**—In cases of felony, where the judgment is affirmed, if the district court be in session when the mandate is received, that court shall proceed to pronounce sentence during the term at which the mandate is received; or, in case sentence can not then be pronounced, it may be pronounced at the next or any subsequent term of such court. [O. C. 747.]

But see ante, Arts. 856 and 859.

Under this article, the death sentence is the only one that can be pronounced after affirmance of judgment.

Art. 943. [909] **Same subject.**—If the mandate be received in vacation, and the judgment in a case of felony has been affirmed, sentence shall be pro-

nounced during the term of the court next succeeding the time at which the same was received; or, in case it can not be pronounced, at any subsequent term of the court. [O. C. 748.]

See notes to preceding article.

Art. 944. [910] **In cases of misdemeanor, when judgment has been affirmed.**—In cases of misdemeanor, where the judgment has been affirmed, no proceedings need be had after filing the mandate, except to forfeit the recognizance of the defendant, or to issue a capias for the defendant, or an execution against his property, to enforce the judgment of the court, whether of fine or imprisonment, or both, in the same manner as if no appeal had been taken. [O. C. 749.]

Thompson v. State, 37 T. Cr. R., 318; Wells v. State, 21 Id., 594, 2 S. W. R., 806; Hogg v. State, 40 Id., 109, 48 S. W. R., 580.

Art. 945. [911] **New trial.**—Where the court of criminal appeal awards a new trial to the defendant, the cause shall stand as it would have stood in case the new trial had been granted by the court below. [Acts 22d Leg., S. S., ch. 16, § 45.]

Ante, Art. 843, and notes; Beardell v. State, 9 T. Cr. R., 262; Wells v. State, 21 Id., 594, 2 S. W. R., 806; Dupree v. State, 56 Id., 562, 120 S. W. R., 871.

Art. 946. [912] **Motion in arrest of judgment.**—Where the defendant's motion in arrest of judgment was overruled, and it is decided on appeal that the same ought to have been sustained, the cause shall stand as if the motion had been sustained, unless the court of criminal appeals, in its judgment, directs the cause to be dismissed, and the defendant wholly discharged. [Id., § 46.]

Sec. 46, "Appendix," 31 T. Cr. R., 650; ante, Arts. 851, 852.

Art. 947. [913] **Defendant may be discharged, when.**—Where the court of criminal appeals reverses a judgment, and directs the cause to be dismissed, the defendant, if in custody, must be discharged; and the clerk of the court of criminal appeals shall transmit to the officer having custody of defendant an order to that effect; said order shall be transmitted by telegraph or mail, immediately upon the dismissal of the cause. [Id., § 47.]

Sec. 47, "Appendix," 31 T. Cr. R., 650.

Art. 948. [914] **When felony case is reversed, etc.**—When a felony case upon appeal is reversed and remanded for a new trial, the defendant shall be released from custody, upon his giving bail as in other cases when he is entitled to bail; and the clerk of the court of criminal appeals shall transmit to the officer having custody of the defendant an order to that effect. [Id., § 48.]

Sec. 48, "Appendix," 31 T. Cr. R., 650.

Reversal on appeal reinstates the original recognizance or bail bond, and entitles defendant to go at large. Ex parte Guffie, 8 T. Cr. R., 409; Wells v. State, 21 Id., 594, 2 S. W. R., 806.

Art. 949. [915] **May make rules.**—The court of criminal appeals may make rules of procedure as to the hearing of criminal actions upon appeals; but in every case at least two counsel for the defendant shall be heard, if they

desire it, either by brief or by oral or written argument, or both, as such counsel shall deem proper. [Id., § 49.]

Sec. 49, "Appendix," 31 T. Cr. R., 650.

As to argument and brief, see Rule 50, 48 T., 705; Gonzales v. State, 35 T. Cr. R., 33, 29 S. W. R., 1091; Sparks v. State, 47 S. W. R., 976.

Art. 950. [916] **Appeal in habeas corpus.**—When the defendant appeals from the judgment rendered on the hearing of an application under habeas corpus, a transcript of the proceedings in the cause shall be made out and certified to, together with all the testimony offered, and shall be sent up to the court of criminal appeals for revision. This transcript, when the proceedings take place before the court in session, shall be prepared and certified by the clerk thereof; but when had before a judge in vacation, the transcript may be prepared by any person, under direction of the judge, and certified by such judge. [Id., § 50.]

Habeas corpus. Appeal does not lie from refusal to grant the writ. Yarbrough v. State, 2 T., 519; Ex parte Strong, 34 T. Cr. R., 309, and cases cited.

Nor from judgment on habeas corpus releasing the relator (Dirks v. State, 33 T., 227), the respondent having no right of appeal. McFarland v. Johnson, 27 T., 105.

Appeal in habeas corpus will not be entertained unless the relator is in custody; and that he is in custody is a fact that must affirmatively appear from the record. Ex parte Snyder, 39 T. Cr. R., 120, 44 S. W. R., 1108; Ex parte Talbutt, Id., 12, 44 S. W. R., 832, and cases cited.

Statement of facts in habeas corpus appeals, must be made up and certified as in other criminal cases. Ex parte Isaacs, 35 T. Cr. R., 80, 31 S. W. R., 641, and cases cited.

Construed, in connection with ante, Arts. 211 and 212, held, that where the trial was before the judge in vacation, the evidence received constitutes no part of the "proceedings" mentioned in Art. 202, and though such proceedings, properly certified by the judge, may contain all of the evidence on the hearing, it will not be considered on appeal as a statement of facts; but such statement of facts, to be sufficient, must be prepared and authenticated as in other cases, independent of the judge's certificate to the proceedings. Henderson, J., dissenting, Ex parte Malone, 35 T. Cr. R., 297, 31 S. W. R., 665.

Transcript must contain copy of the writ under which the relator is held. Sheldon v. Boyce, 20 T., 828.

It should also disclose relator's pecuniary circumstances. Miller v. State, 42 T., 309; Ex parte Cochran, 20 T. Cr. R., 242; Ex parte Terry, Id., 486.

As to certificate, tie, seal, etc., see Ex parte Varrier, 17 T. Cr. R., 535; Ex parte Kramer, 19 Id., 123; Ex parte Overstreet, 39 Id., 468, 46 S. W. R., 929; Ex parte Calvin, 48 S. W. R., 518; citing Ex parte Malone, 35 Id., 297, 31 S. W. R., 665.

The personal presence of the relator is not necessary on the hearing of his appeal on habeas corpus. Ex parte Coupland, 26 T., 386.

Art. 951. [917] **Defendant need not be present.**—The defendant need not be personally present upon the hearing of an appeal in case of habeas corpus. [Id., § 51.]

Art. 952. [918] **Habeas corpus, when heard.**—Cases of habeas corpus, taken to the court of criminal appeals by appeal, shall be heard at the earliest practicable time. [Id., § 52.]

Ex parte Lambert, 37 T. Cr. R., 435, 36 S. W. R., 81; Ex parte Japan, 36 Id., 482, 38 S. W. R., 43; Ex parte Lynn, 19 Id., 120.

Art. 953. [919] **Shall be heard upon the record, etc.**—The appeal in a habeas corpus case shall be heard and determined upon the law and the facts arising upon record, and no incidental question which may have arisen on the hearing of the application before the court below shall be revised.

The only design of the appeal is to do substantial justice to the party appealing. [O. C. 755, 756.]

Ex parte Rothschild, 2 T. Cr. R., 560; Ex parte Foster, 5 Id., 625.

The appellate court, passing on habeas corpus appeal, will not discuss the facts nor comment on the evidence. Ex parte McKinney, 5 T. Cr. R., 500; Ex parte Moore, Id., 103.

On conflict of evidence, the appellate court will defer, ordinarily, to the judgment a quo. Drury v. State, 25 T. 45; Ex parte Moore, supra. And see Ex parte Evers, 29 Id., 539, 16 S. W. R., 343.

Art. 954. [920] **Orders in the case.**—The court of criminal appeals shall enter such judgment, and make such orders as the law and the nature of the case may require, and may make such orders relative to the costs in the case as may seem right, allowing costs and fixing the amount, or allowing no costs at all. [Acts 22d Leg., S. S., ch. 16, § 53.]

Construed. The mandates of the appellate court in habeas corpus cases, whether original or on appeal, operate directly upon the officer or person detaining the relator, and are not transmitted to inferior tribunals for enforcement as in other appeals. Ex parte Erwin, 7 T. Cr. R., 288; Ex parte Cole, 14 Id., 579.

Art. 955. [921] **Judgment conclusive.**—The judgment of the court of criminal appeals in appeals under habeas corpus shall be final and conclusive; and no further application in the same case can be made for the writ, except in cases specially provided for by law. [Id., § 54.]

Ante, Art. 219, and notes.

Practice. An appellant who secures the dismissal of his appeal cannot be accorded a second appeal from the same judgment. Ex parte Jones, 7 T. Cr. R., 365.

And on a question of practice, see Jones v. State, 33 T. Cr. R., 492, 26 S. W. R., 1082.

Art. 956. [922] **Officer failing to obey mandate.**—If an officer holding a person in custody fails to obey the mandate of the court of criminal appeals, he is guilty of an offense, and punishable according to the provisions of the penal statutes of this state. [Id., § 55.]

Penal Code, Art. 1045; State v. Sparks, 27 T., 627, s. c., Id., 705.

Art. 957. [923] **When appellant is detained by other than officer.**—If the appellant in a case of habeas corpus be detained by any person other than an officer, the sheriff shall, upon receiving the mandate of the court of criminal appeals, immediately cause the person so held to be discharged; and the mandate shall be sufficient authority therefor. [Id., § 56.]

Art. 958. [924] **Judgment to be certified, etc.**—The judgment of the court of criminal appeals shall be certified by the clerk thereof to the officer holding the defendant in custody, or when he is held by any person other than an officer, to the sheriff of the proper county. [Id., § 57.]

Art. 959. [925] **Who shall take bail bond.**—When, by the judgment of the court of criminal appeals upon cases of habeas corpus, the applicant is ordered to give bail, such judgment shall be certified to the officer holding him in custody; and, if such officer be the sheriff, the bail bond may be executed before him, if any other officer, he shall take the person detained before some magistrate, who may receive a bail bond, and shall file the same in the proper court of the proper county; and such bond shall have the same force and effect as a recognizance, and may be forfeited and enforced in the same manner. [Id., § 58.]

Art. 960. [926] **Appeal from judgment on recognizance.**—An appeal may be taken by the defendant from every final judgment rendered upon a recognizance, bail bond or bond taken for the prevention or suppression of offenses, where such judgment is for twenty dollars or more, exclusive of costs, but not otherwise; and the proceedings in such case shall be regulated by the same rules which are prescribed in other civil suits. [O. C. 738a.]

Art. 961. [927] **Defendant entitled also to writ of error.**—The state or the defendant may also have any such judgment as is mentioned in the preceding article, and which may have been renederd in the district or county court, revised upon writ of error, as in other civil suits. [O. C. 738b.]

Art. 962. [928] **Same rules govern as in civil cases.**—In the cases provided for in the two preceding articles, the proceedings shall be regulated by the same rules that govern the other civil actions where an appeal is taken or a writ of error issued out. [O. C. 738a.]

TITLE 11.

OF PROCEEDINGS IN CRIMINAL ACTIONS BEFORE JUSTICES OF THE PEACE, MAYORS AND RECORDERS.

Chapter
1. General Provisions.
2. Of the Arrest of the Defendant.
3. Of the Trial and Its Incidents.
4. The Judgment and Execution.

CHAPTER ONE.

GENERAL PROVISIONS.

Article
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Article 963. [929] **Mayors shall exercise criminal jurisdiction.**—The mayor, or the officer, by law, exercising the duties usually incumbent upon the mayors of incorporated towns and cities, and recorders thereof, shall exercise, within the corporate limits of their respective towns or cities, the same criminal jurisdiction which belongs to justices of the peace within their jurisdiction, under the provisions of this Code. [O. C. 813.]

Ante, Art. 108.

Constitutional law; statutes construed. Under the constitutional amendment of 1891 (Article 5), the legislature is given plenary power to establish such courts as the public needs, in its judgment, require. Whether such courts shall be called or determined to the state courts or corporation courts, can make no difference; within the limits of their granted authority, they may try offenses against state or municipal law, or both. Ex parte Abrams, 56 T. Cr. R., 465, 120 S. W. R., 883, following Harris county v. Stewart, 91 T., 133, 31 S. W. R., 650, and Mays v. Finley, Id., 352. 43 S. W. R., 257, citing Ex parte Wilbarger, 41 T. Cr. R., 514, 55 S. W. R., 698, and overruling Leach v. State, 36 Id., 248, 36 S. W. R., 471.

Art. 964. [930] **Mayors or recorders governed by same rules as justices of the peace.**—The proceedings before mayors or recorders shall be governed by the same rules which are prescribed for justices of the peace; and every provision of this Code with respect to a justice shall be construed to extend to mayors and recorders within the limits of their jurisdiction. [O. C. 814.]

See note to preceding article, ante, 108.

As to process, see constitution, Art. 5, Sec. 12; Leach v. State, 36 T. Cr. R., 248, 36 S. W. R., 471; Ex parte Fagg, 38 Id., 573, 44 S. W. R., 294, which cases overrule on the point Ex parte Bowland, 11 T. Cr. R., 159, and Bautsch v. Galveston, 27 Id., 342, 37 S. W. R., 414.

Art. 965. [931] **Mayors and justices of the peace have concurrent jurisdiction.**—The jurisdiction given to mayors and recorders of incorporated towns and cities shall not prevent justices of the peace from exercising the

criminal jurisdiction conferred upon them; but, in all cases where there is an incorporated town or city within the bounds of a county, the justice and the mayor or recorder shall have concurrent jurisdiction within the limits of such town or city. And no person shall be punished twice for the same act or omission, although such act or omission may be an offense against the penal laws of the state, as well as against the ordinances of such city or town; provided, that no ordinance of a city or town shall be valid which provides a less penalty for any act, omission or offense than is prescribed by the statutes, where such act or omission is an offense against the state. [Acts 1879, Extra Session, ch. 19.]

Ante, Arts, 98, 963 and 964 and notes; Ex parte Freeland, 38 T. Cr. R., 321, 42 S. W. R., 295.

Validity of municipal ordinances. Municipal corporations have only such powers as have been granted to them. These are in part conferred by special grants and in part in general terms, authorizing them to pass ordinances applicable to them and not repugnant to the constitution and laws of the state. Craddock v. State, 18 T. Cr. R., 567.

They can, in no degree, exceed the authority expressly conferred or that may not reasonably be inferred. Flood v. State, 19 T. Cr. R., 584.

Unless enacted under special legislative authority, an ordinance, to be valid, must not only not conflict with, but must conform to, the laws of the state. Flood v. State, supra; Angerhoffer v. State, 15 T. Cr. R., 613.

In a conflict with either the laws of the state or the municipal charter, a municipal ordinance must give way. McLain v. State 31 T. Cr. R., 558, 21 S. W. R., 365, and cases cited.

If consistent with each and in harmony with the constitution, a statute law and a municipal ordinance may operate concurrently. Ex parte Freeland, 38 T. Cr. R., 321, 42 S. W. R., 295.

And see generally, Hamilton v. State, 3 T. Cr. R., 643; Ex parte Boland, 11 Id., 159; Bohmy v. State, 21 Id., 597, 2 S. W. R., 886; McNeil v. State, 29 Id., 48, 14 S. W. R., 393; Ex parte Ginnochio, 30 Id., 584, 18 S. W. R., 82; Ayers v. Dallas, 32 Id., 603, 25 S. W. R., 631; Ex parte Fagg, 38 Id., 573, 44 S. W. R., 294; Hoeffling v. San Antonio, 85 T., 228.

An ordinance is invalid which prescribes a smaller penalty for an act or omission than is prescribed by the statute for the same act as an offense against the state. Mantel v. State, 55 T. Cr. R., 456, 117 S. W. R., 855, and cases cited.

Art. 966. **In towns and villages embracing territory in two counties, procedure on appeal from; and examining trials before mayors or recorders.**—In towns and villages that may be incorporated on territory in two counties, in the trial of the offense before the mayor or recorder for a violation of the laws of the state or the ordinances of the corporation, an appeal shall be to the county court of the county in which the offense may have been committed; and, in cases which said mayor or recorder have not final jurisdiction, but when sitting as an examining court, parties brought before them, on such examining court, charged with an offense against the laws of the state, shall be bound over by them to the county court of the county in which said offense is alleged to have been committed, or the district court, as the case may be. [Acts 1897, p. 193.]

Art. 967. [932] **Warrant issued by mayor, directed to whom.**—Warrants issued by a mayor or recorder are directed to the marshal or other proper officer of the town or city where the criminal proceeding is had; but, in case there be no such officer, the process issued by a mayor or recorder shall be directed to any peace officer within the city, town or county, and shall be executed by such officer.

Art. 968. [933] **Warrant issued by mayor, etc., may be executed, where.**—When the party for whose arrest a warrant is issued by a mayor or recorder is not to be found within the limits of the incorporation, the same may be

executed anywhere within the limits of the county in which such incorporation is included, by the marshal or other proper officer of such town or city, or by any peace officer of such county, and may be executed in any county in the state under the same rules governing warrants of arrest issued by a justice of the peace.

Ante, Arts. 265, et seq.

Art. 969. [934] **Justices, etc., shall keep a criminal docket, which shall show, etc.**—Each justice of the peace, mayor and recorder shall keep a docket in which he shall enter the proceedings in all examinations and trials for criminal offenses had before him, which docket shall show—

1. The style of the action.
2. The nature of the offense charged.
3. The date of the issuance of the warrant and the return made thereon.
4. The time when the examination or trial was had, and, if the same was a trial, whether it was by a jury, or by himself.
5. The verdict of the jury, if any.
6. The judgment of the court.
7. Motion for new trial, if any, and the action of the court thereon.
8. Notice of appeal, if any.
9. The time when, and the manner in which the judgment was enforced.

[O. C. 817; Act Aug. 17, 1876, p. 156, § 5.]

Art. 970. [935] **Justices, etc., shall file transcript of docket with clerk of district court, etc.**—At each term of the district court, each justice of the peace, mayor and recorder in each county shall, on the first day of the term of said court for their county, file with the clerk of said court a certified transcript of the docket kept by such justice, mayor or recorder, as required by the preceding article, of all criminal cases examined or tried before him since the last term of such district court; and the clerk of such court shall immediately deliver such transcript to the foreman of the grand jury.

Ex parte Ambrose, 32 T. Cr. R., 468, 24 S. W. R., 291.

CHAPTER TWO.

OF THE ARREST OF THE DEFENDANT.

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Article 971. [936] **Warrant may issue without complaint, when.**—Whenever a criminal offense which a justice of the peace has jurisdiction to try shall be committed within the view of such justice, he may issue his warrant for the arrest of the offender. [O. C. 819.]

Ante, Arts, 260, 265 and 267 and notes.

Art. 972. [937] **When complaint is made, shall be reduced to writing, etc.**—Upon complaint being made before any justice of the peace, or any other officer authorized by law to administer oaths, that an offense has been committed in the county which a justice of the peace has jurisdiction finally to try, the justice or other officer shall reduce the same to writing, and cause the same to be signed and sworn to by the complainant; and it shall be duly attested by such justice or other officer before whom it was made; and when made before such justice, or when returned to him made before any other officer, the same shall be filed by him. [Act Aug. 17, 1876, p. 165, § 29.]

Harris County v. Stewart, 91 T., 133, 41 S. W. R., 650.

Jurat of officer: Nieman v. State, 29 T. Cr. R., 360, 16 S. W. R., 253; Robertson v. State, 25 Id., 529, 8 S. W. R., 659; Scott v. State, 9 Id., 434, and see Jennings v. State, 30 Id., 428, 18 S. W. R., 90.

Art. 973. [938] **What the complaint must state.**—Such complaint shall state—

1. The name of the accused, if known, and, if unknown, shall describe him as accurately as practicable.

2. The offense with which he is charged shall be stated in plain and intelligible words.

3. It must appear that the offense was committed in the county in which the complaint is made.

4. It must show, from the date of the offense stated therein, that the offense is not barred by limitation. [Id.]

Ante, Art. 268 and notes.

Neither the constitutional beginning nor conclusion is essential to a complaint. Ex parte Jackson, 50 T. Cr. R., 324, 96 S. W. R., 924.

Art. 974. [939] **Warrants shall issue, when.**—Whenever the requirements of the preceding article have been complied with, the justice of the peace shall issue a warrant for the arrest of the accused and deliver the same to the proper officer to be executed. [Id., O. C. 821.]

Art. 975. [940] **Requisites of warrant of arrest.**—Said warrant shall be deemed sufficient if it contain the following requisites:

1. It shall issue in the name of "The State of Texas."

2. It shall be directed to the proper sheriff, constable, or marshal, or some other person specially named therein.

3. It shall command that the body of the accused be taken, and brought before the authority issuing the warrant, at a time and place therein named.

4. It must state the name of the person whose arrest is ordered, if it be known; and, if not known, he must be described as in the complaint.

5. It must state that the person is accused of some offense against the laws of the state, naming the offense.

6. It must be signed by the justice, and his office named in the body of the warrant, or in connection with his signature. [Id., O. C. 821.]

Ante, Arts. 265, 266 and notes.

Art. 976. [941] **Justices may summon witnesses to disclose crime.**—When a justice of the peace has good cause to believe that an offense has been, or is about to be, committed against the laws of this state, he may summon and examine any witness or witnesses in relation thereto; and, if it shall appear from the statement of any witness or witnesses that an offense has been committed, the justice shall reduce said statements to writing, and cause the same to be sworn to by the witness or witnesses making the same; and, thereupon such justice shall issue a warrant for the arrest of the offender, the same as if complaint had been made out, and filed against each offender. [Id., § 31.]

Art. 977. [942] **Witnesses may be fined, etc., for refusing to make statements, etc.**—Witnesses summoned under the preceding article who shall refuse to appear and make a statement of facts, under oath, shall be guilty of a contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned until they make such statement. [Id., § 32.]

Construed. This, nor the succeeding article, can be construed to mean that, under them, the confession of an accused before a grand jury and in possession of the state's counsel, can be made a public record. Good v. State, 57 T. Cr. R., 220, 123 S. W. R., 597.

Art. 978. [943] **How warrant is executed.**—Any peace officer into whose hands a warrant may come shall execute the same by arresting the person accused, and bringing him forthwith before the proper magistrate, or by taking bail for his appearance before such magistrate, as the case may be. [O. C. 822.]

Art. 979. [944] **Any person may be authorized to execute warrant.**—A justice of the peace may, when he deems it necessary, authorize any person other than a peace officer to execute a warrant of arrest by naming such person specially in the warrant; and, in such case, such person shall have the same powers, and shall be subject to the same rules that are conferred upon and govern peace officers in like cases. [Act Aug. 17, 1876, p. 166, § 33.]

Ante, Art. 278 and notes; O'Neal v. State, 32 T. Cr. R., 42, 22 S. W. R., 25.

Art. 980. [945] **Where an offense has been committed in another county, etc.**—Whenever complaint is made before any justice of the peace that a felony has been committed in any other than a county in which the complaint is made, it shall be the duty of such justice to issue his warrant for the arrest of the accused, directed as in other cases, commanding that the accused be arrested and taken before the county judge, or any magistrate of the county where such felony is alleged to have been committed, forthwith, for examination as in other cases. [Id., § 39.]

CHAPTER THREE.

OF THE TRIAL AND ITS INCIDENTS.

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Article 981. [946] **Justice shall try cause without delay.**—When the defendant is brought before the justice, he shall proceed to try the cause without delay, unless good ground be shown for a postponement thereof, in which case, he may postpone the trial to any time not longer than five days, and may, if he deem proper, require the defendant to give bail for his appearance; and if, when required, he fails to give bail, he shall be kept in custody until the final determination of the cause. [O. C. 823.]

Ante, Art. 109 and notes.

Art. 982. [947] **Defendant may waive trial by jury.**—The defendant, in case of misdemeanor of which a justice of the peace has jurisdiction to finally try and determine, may waive a trial by jury; and, in such case, the justice shall proceed to hear and determine the case without a jury.

Ante, Arts. 10, 22.

Art. 983. [948] **Jury shall be summoned, if defendant does not waive same.**—If the defendant does not waive a trial by jury, the justice shall issue a writ commanding the proper officer to summon forthwith a jury of six men, qualified to serve as jurors in the county; and said jurors, when so summoned, shall remain in attendance as jurors in all cases that may come up for hearing until discharged by the court. [O. C. 826; Act Aug. 17, 1876, p. 167, § 3.]

Art. 984. [949] **Juror may be fined, etc.**—Any person summoned as juror who fails to attend may be fined by the justice as for contempt not exceeding twenty dollars. [O. C. 826.]

Art. 985. [950] **Complaint, etc., shall be read to defendant.**—If the warrant has been issued upon a complaint made to the justice, the complaint and warrant shall be read to the defendant. If issued by the justice without previous complaint, he shall state to the defendant the accusation against him. [O. C. 824.]

Art. 986. [951] **Defendant shall not be discharged by reason of informality.**—A defendant shall not be discharged by reason of any informality in the complaint or warrant; and the proceeding before the justice shall be conducted without reference to technical rules. [O. C. 825.]

Art. 987. [952] **Challenge of jurors.**—In all trials by a jury, before a justice of the peace, the state and each of the defendants in the case shall be entitled to three peremptory challenges, and also to any number of chal-

lenges for cause, which cause shall be judged of by the justice. [Act Aug. 17, 1876, p. 160, § 12.]

Art. 988. [953] **Other jurors shall be summoned, when.**—If, from challenges or any other cause, a sufficient number of jurors are not in attendance, the justice shall order the proper officer to summon a sufficient number of qualified persons to form the jury. [Id., § 12.]

Art. 989. [954] **Oath to be administered to jury.**—The following oath or affirmation shall be administered by the justice of the peace to the jury in each case: "You, and each of you, do solemnly swear (or affirm, as the case may be) that you will well and truly try the cause about to be submitted to you, and a true verdict render therein, according to the law and the evidence, so help you God." [O. C. 834.]

Art. 990. [955] **Defendant shall plead, etc.**—After impaneling the jury, the defendant shall be required to plead; and he may plead "guilty" or "not guilty," or the special plea named in the succeeding article. [O. C. 829.]

Art. 991. [956] **The only special plea.**—The only special plea allowed is that of former acquittal or conviction for the same offense. [O. C. 830.]

Ante, Arts, 572 and 965 and notes.

Art. 992. [957] **Pleadings are oral.**—All pleading in the justices' courts, in criminal actions, is oral; but the justice shall note upon his docket the nature of the plea offered. [O. C. 831.]

Ante, Art. 969.

Art. 993. [958] **Proceedings upon plea of guilty.**—If the defendant plead "guilty," proof shall be heard as to the offense; and the punishment shall be assessed by the jury, or by the justice, when a jury has been waived by the defendant. [O. C. 832.]

Art. 994. [959] **When defendant refuses to plead, etc.**—If the defendant refuses to plead, the justice shall enter the plea of "not guilty," and the cause proceed accordingly. [O. C. 833.]

Art. 995. [960] **Witnesses examined by whom.**—If the state be represented by counsel, he may examine the witness, and argue the cause; if the state is not represented, the witnesses shall be examined by the justice. [O. C. 835.]

Art. 996. [961] **Defendant may appear by counsel; argument of counsel.**—The defendant has a right to appear by counsel, as in all other cases; but not more than one attorney shall conduct either the prosecution or defense; and the counsel for the state may open and conclude the argument. [O. C. 836.]

Art. 997. [962] **Rules of evidence.**—The rules of evidence which govern the trials of criminal actions in the district and county court shall apply also to such actions in justices' courts. [O. C. 837.]

Ante, Art. 783 et seq., and notes.

Art. 998. [963] **Jury shall be kept together till they agree.**—When the cause is submitted to the jury, they shall retire in charge of some officer, and be kept together until they agree to a verdict, or are discharged. [O. C. 838.]

Art. 999. [964] **If the jury fail to agree, shall be discharged.**—If a jury fail to agree upon a verdict after being kept together a reasonable time, they shall be discharged; and, if there be time left on the same day, another jury shall be impaneled to try the cause; or the justice may adjourn for not more than two days, and again impanel a jury for the trial of such cause. [O. C. 839.]

Art. 1000. [965] **When court adjourns, the defendant shall enter into bail.**—In case of an adjournment, the justice shall require the defendant to enter into bail for his appearance; and, upon the failure to give bail, the defendant may be held in custody. [O. C. 840.]

Art. 1001. [966] **When the jury have agreed upon a verdict.**—When the jury have agreed upon a verdict, they shall bring the same into court; and the justice shall see that it is in proper form. [O. C. 842.]

Art. 1002. [967] **Justice shall enter verdict.**—The justice shall enter the verdict upon his docket, and render the proper judgment thereon. [O. C. 843.]

Art. 1003. [968] **Defendant may be placed in jail, when.**—Whenever, by the provisions of this title, the peace officer is authorized to retain a defendant in custody, he may place him in jail or any other place where he can be safely kept. [O. C. 844.]

Art. 1004. [969] **New trial may be granted defendant.**—A justice may, for good cause shown, grant the defendant a new trial, whenever such justice shall consider that justice has not been done the defendant in the trial of such case. [Act Aug. 17, 1876, p, 176, § 17.]

Art. 1005. [970] **Application must be made in one day.**—An application for a new trial must be made within one day after the rendition of judgment, and not afterward; and the execution of the judgment shall not be stayed until a new trial has been granted.

Art. 1006. [971] **When new trial is granted, another trial without delay.**—When a new trial has been granted, the justice shall proceed, as soon as practicable, to try the case again.

Art. 1007. [972] **Only one new trial shall be granted.**—Not more than one new trial shall be granted the defendant in the same case.

Art. 1008. [973] **State not entitled to new trial.**—The state shall, in no case, be entitled to a new trial.

Ante, Art. 836, and notes.

Art. 1009. [974] **Notice of appeal.**—When a defendant appeals from a judgment in a criminal action, he shall give notice of such appeal in open court; and the justice shall enter such notice upon his docket.

McDougal v. State, 32 T. Cr. R., 174, 22 S. W. R., 174, 22 S. W. R., 593; Ball v. State, 31 Id., 214, 21 S. W. R., 363; Fairchild v. State, 23 T., 176; Ball v. State, Id., 214, 20 S. W. R., 363; Truss v. State, 38 Id., 291, 43 S. W. R., 92; Perryman v. State, 39 Id., 577, 47 S. W. R., 364.

Art. 1010. [975] **Effect of appeal.**—When a defendant gives notice of an appeal and files the appeal bond required by law with the justice, all further proceeding in the case in the justice's court shall cease.

Ante, Arts. 916, 921, 924 and notes.

Art. 1011. [976] **Judgments, etc., shall be in open court.**—All judgments and final orders of a justice of the peace in a criminal action shall be rendered in open court, and entered upon his docket. [Act Aug. 17, 1876, p. 162, § 17.]

Ante, Arts. 4, 23; Ex parte Quong, 34 T. Cr. R., 511, 31 S. W. R., 391.

CHAPTER FOUR.

THE JUDGMENT AND EXECUTION.

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Capias for defendant, when	1013	Peace officer bound to execute process	1016
Execution shall issue	1014		

Art. 1012. [977] **The judgment.**—The judgment, in case of conviction in a criminal action before a justice of the peace, shall be that the state of Texas recover of the defendant the fine assessed and costs, and that the defendant remain in custody of the sheriff until the fine and costs are paid; and, further, that execution issue to collect the same. [O. C. 845.]

Funderbunk v. State, 64 S. W. R., 1059.

Art. 1013. [978] **Capias for defendant, when.**—If the defendant be not in custody when judgment is rendered, or, if he escapes from custody thereafter, a capias shall issue for his arrest and confinement in jail, until the fine and costs are paid, or he is legally discharged.

Ante, Art. 867 and notes.

Art. 1014. [979] **Execution shall issue.**—In every case of conviction before a justice, and from which conviction no appeal is taken, there shall be issued an execution for the collection of the fine and costs, which shall be enforced and returned in the manner prescribed by law in civil actions before justices. [O. C. 849.]

Art. 1015. [980] **Defendant may be discharged from jail, how.**—If a defendant be placed in jail on account of failure to pay the fine and costs, he can be discharged on habeas corpus by showing—

1. That he is too poor to pay the fine and costs.
2. That he has not been afforded an opportunity by the commissioners' court of the county of discharging the fine and costs adjudged against him, as provided in the law relating to county convicts; and, further,
3. That he has remained in jail a sufficient length of time to satisfy the fine and costs, at the rate of three dollars for each day.

But the defendant shall, in no case under this article, be discharged until he has been imprisoned at least ten days; and a justice of the peace may discharge the defendant upon his showing the same cause, by written application presented to such justice; and, upon such application being granted, the justice shall note the same on his docket.

Ante, Art. 878, and notes.

Art. 1016. [981] **Peace officer bound to execute process.**—Every peace officer is bound to execute all process directed to him from a justice of the peace. [O. C. 850.]

Ante, Arts. 43, 44, 47, 364, 365.

TITLE 12.

MISCELLANEOUS PROCEEDINGS.

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2. Disposition of Stolen Property.
3. Reports of Officers Charged by Law with the Collection of Money.
4. Of Remitting Fines and Forfeitures, Reprieves, Commutations of Punishment and Pardons.

CHAPTER ONE.

OF INQUIRIES AS TO THE INSANITY OF THE DEFENDANT AFTER CONVICTION.

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Article 1017. [982] **Insanity after conviction.**—If it be made known to the court at any time after conviction, or if the court has good reason to believe that a defendant is insane, a jury shall be impaneled to try the issue. [O. C. 781.]

Ante, Art, 861; Guagando v. State, 41 T., 626; Penal Code, Art. 39.

Art. 1018. [983] **Information as to insanity of defendant.**—Information to the court as to the insanity of a defendant may be given by the written affidavit of any respectable person, setting forth that there is good reason to believe that the defendant has become insane. [O. C. 782.]

Guagando v. State, 41 T., 626.

Art. 1019. [894] **Court shall impanel jury.**—For the purpose of trying the question of insanity, the court shall impanel a jury as in the case of a criminal action. [O. C. 783.]

Ante, Art. 861.

Art. 1020. [985] **Defendant's counsel may open, etc.**—The counsel for the defendant has the right to open and conclude the argument upon the trial of an issue as to insanity. [O. C. 786.]

Shirley v. State, 37 T. Cr. R., 475, 36 S. W. R., 267.

Art. 1021. [986] **Court shall appoint counsel, when.**—If the defendant has no counsel, the court shall appoint counsel to conduct the trial for him. [O. C. 787.]

Art. 1022. [987] **No special formality required on trial.**—No special formality is necessary in conducting the proceedings authorized by this chap-

ter. The court shall see that the inquiry is conducted in such a manner as to lead to a satisfactory conclusion. [O. C. 784.]

Art. 1023. [988] **When defendant is found insane.**—When, upon the trial of an issue of insanity, the defendant is found to be insane, all further proceedings in the case against him shall be suspended until he becomes sane. [O. C. 788, 789.]

Art. 1024. [989] **Court shall commit insane defendant, etc.**—When a defendant is found to be insane, the court shall make an order, and have the same entered upon the minutes, committing the defendant to the custody of the sheriff, to be kept subject to the further order of the county judge of the county. [O. C. 793.]

Art. 1025. [990] **Shall be confined in lunatic asylum until, etc.**—When a denfendant has been committed, as provided in the preceding article, the proceedings shall forthwith be certified to the county judge, who shall take the necessary steps, at once, to have the defendant confined in the lunatic asylum, as provided in the case of other lunatics, until he becomes sane.

Art. 1026. [991] **When the defendant becomes sane.**—Should the defandant become sane, he shall be brought before the court in which he was convicted; and a jury shall again be impaneled to try the issue of his sanity; and, should he be found to be sane, the conviction shall be enforced against him in the same manner as if the proceedings had never been suspended.

Art. 1027. [992] **Affidavit of the sanity of the defendant.**—The fact that the defendant has become sane may be made known to the court in which the conviction was had by the official certificate, in writing, of the superintendent of the lunatic asylum, where he is confined, or, if not confined in the lunatic asylum, by the affidavit, in writing, of any credible person.

Art. 1028. [993] **Proceedings upon affidavit.**—When a certificate, or affidavit, such as is provided for in the preceding article, is presented to the judge or court, either in vacation or in term time, such judge or court shall issue a writ, directed to the officer having the custody of such defendant, commanding such officer to bring the defendant before the court immediately, if the court be then in session; and, if the court be not then in session, to bring the defendant before the court at its next regular term for the county in which the conviction was had; which writ shall be served and returned as in the case of the writ of habeas corpus, and under like penalties for disobedience.

Art. 1029. [994] **When defendant is again insane.**—Should the defendant again be found to be insane, he shall be remanded to the custody of the superintendent of the lunatic asylum, or other proper officer.

Art. 1030. [995] **Conviction shall be enforced, when.**—When, upon the trial of an issue of insanity, it is found that the defendant is sane, the judgment of conviction shall be enforced as if no such inquiry had been made. [O. C. 791.]

CHAPTER TWO.

DISPOSITION OF STOLEN PROPERTY.

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Requisites of the bond, etc	1036	This chapter applies to what cases	1044
Property shall be sold, when and how	1037		
Money, how disposed of	1038		

Article 1031. [996] **Subject to order of proper court.**—When any property alleged to have been stolen comes into the custody of an officer, he must hold it subject to the order of the proper court or magistrate. [O. C. 794.]

Ante, Arts. 355 to 383, inclusive.

Art. 1032. [997] **Restored on trial for theft to proper owner.**—Upon the trial of any criminal action for theft, or for any other illegal acquisition of property, which is, by law, a penal offense, the court before whom the trial takes place shall order the property to be restored to the person appearing by the proof to be the owner of the same. [O. C. 795.]

Art. 1033. [998] **Schedule of, to be filed by officer.**—When an officer seizes property alleged to have been stolen, it is his duty to immediately file a schedule of the same, and its value, with the magistrate or court having jurisdiction of the case, certifying that the property has been seized by him, and the reason therefor. [O. C. 796.]

Ante, Art. 381.

Art. 1034. [999] **May be restored to owner, etc., when.**—Upon examination of a criminal accusation before a magistrate, if it is proved to the satisfaction of such magistrate that any person is the true owner of property alleged to have been stolen, and which is in possession of a peace officer, he may, by written order, direct the property to be restored to such owner. [O. C. 797.]

Art. 1035. [1000] **When delivered, bond may be required.**—If the magistrate has any doubt as to the ownership of the property, he may require of the person claiming to be the owner a bond, with security, for the redelivery of the same, in case the property should thereafter be shown not to belong to such claimant; or he may, in his discretion, direct the property to be retained by the sheriff, until further orders respecting the possession thereof. [O. C. 798.]

Art. 1036. [1001] **Requisites of the bond, etc.**—The bond provided for in the preceding article shall be made payable to the county judge of the county in which the property is in custody, and shall be in a sum equal to the value of the property, with good and sufficient security, to be approved by such county judge. Such bond shall be filed in the office of the clerk of the county court of such county, and, in case of a breach thereof, may be sued upon in such county before any court having jurisdiction of the amount thereof, by any claimant of the property, or by the county treasurer of such county.

Art. 1037. [1002] **Property shall be sold, when and how.**—If the property be not claimed within six months from the conviction of the person accused of illegally acquiring it, the same shall be, by the sheriff, sold for cash, after advertising for ten days as under execution; and the proceeds of such sale, after deducting therefrom all expenses of keeping such property and costs

of sale, shall be paid into the treasury of the county where the defendant was convicted. [O. C. 800.]

Art. 1038. [1003] **Money, how disposed of.**—If the property stolen consists of money, the same shall be paid into the county treasury if not claimed by the proper owner within six months. [O. C. 802.]

Art. 1039. [1004] **Owner may recover proceeds of property sold, or money, etc.**—The real owner of the property or money disposed of, as provided in the two preceding articles, shall have twelve months within which to present his claim to the commissioners' court of the county for the money paid to the county treasurer of such county; and, if his claim be denied by such court, he may sue the county treasurer in any court of such county having jurisdiction of the amount, and, upon sufficient proof, recover judgment therefor against such county. [O. C. 803.]

Art. 1040. [1005] **When the property is a written instrument.**—If the property be a written instrument, the same shall be deposited with the clerk of the county court of the county where the proceedings are had, subject to the claim of any person who may establish his right thereto. [O. C. 804.]

Art. 1041. [1006] **Proceedings to recover written instrument.**—The claimant of any such written instrument shall file his claim thereto in writing and under oath before the county judge; and, if such judge be satisfied that such claimant is the real owner of the written instrument, the same shall be delivered to him. The county judge may, in his discretion, require a bond of such claimant, as in other cases of property claimed under the provisions of this chapter, and may also require the written instrument to be recorded in the minutes of his court, before delivering it to the claimant. [O. C. 804.]

Art. 1042. [1007] **Claimant shall pay charges on property.**—The claimant of property, before he shall be entitled to have the same delivered to him, shall pay all reasonable charges for the safe keeping of the same while in the custody of the law; which charges shall be verified by the affidavit of the officer claiming the same, and determined by the magistrate of a court having jurisdiction thereof; and, in case said charges are not paid, the property shall be sold, as under execution; and the proceeds of sale, after the payment of such charges and costs of sale, paid to the owner of such property.

Art. 1043. [1008] **Charges of officer where property is sold.**—When property is sold, and the proceeds of sale are ready to be paid into the county treasury, the amount of expenses for keeping the same and the costs of sale shall be determined by the county judge; and the account thereof shall be in writing and verified by the officer claiming the same, with the approval of the county judge thereto for the amount allowed; and the same shall be filed in the office of the county treasurer at the time of paying into his hands the balance of the proceeds of such sale.

Art. 1044. [1009] **Provisions of this chapter apply to what cases.**—All of the provisions of this chapter relating to stolen property apply as well to property acquired in any manner which makes the acquisition a penal offense. [O. C. 805.]

CHAPTER THREE.

REPORTS OF OFFICERS CHARGED BY LAW WITH THE COLLECTION OF MONEY.

	Article		Article
Reports of moneys collected	1045	Report to embrace all moneys except taxes	1049
What the report shall state	1046	Money collected shall be paid to county treasurer	1050
Report of moneys collected for county	1047		
What officers shall make report	1048		

Article 1045. [1010] **Reports of moneys collected shall be made, etc.**—All officers charged by law with collecting money in the name, or for the use, of the state, shall report in writing under oath to the respective district courts of their several counties, on the first day of each term, the amounts of money that may have come to their hands since the last term of their respective courts aforesaid. [Act May 1, 1874, p. 182, § 2.]

Penal Code, Art. 395.

Art. 1046. [1011] **What the report shall state.**—The report required by the preceding article shall state—

1. The amount collected.
2. When and from whom collected.
3. By virtue of what process collected.
4. The disposition that has been made of the money.
5. If no money has been collected, the report shall state that fact. [Id.]

Art. 1047. [1012] **Report of moneys collected for county.**—A report, such as is required by the two preceding articles, shall also be made of all money collected for the county, which report shall be made to each regular term of the commissioners' court for each county. [Id., § 3.]

Penal Code, Art. 396.

Art. 1048. [1013] **What officers shall make report.**—The following officers are the officers charged by law with the collection of money, within the meaning of the three preceding articles, and who are required to make reports therein mentioned, viz.: District and county attorneys, clerks of the district and county courts, sheriffs, constables, justices of the peace, mayors, recorders and marshals of incorporated cities and towns. [Id. § 1.]

Penal Code, Arts. 395, 396, 397.

Art. 1049. [1014] **Report to embrace all moneys except taxes.**—The moneys required to be reported embrace all moneys collected for the state or county other than taxes, but taxes are not included. [Id., § 2.]

Art. 1050. [1015] **Money collected shall be paid to county treasurer.**—Money collected by an officer upon recognizances, bail bonds and other obligations recovered upon in the name of the state, under the provisions of this Code, and all fines, forfeitures, judgments and jury fees, collected under any of the provisions of this Code, shall be forthwith paid over by the officers collecting the same to the county treasurer of the proper county, after first deducting therefrom the legal fees and commissions for collecting the same. [O. C., 806.]

Penal Code, Art. 1050, et seq., and notes.

CHAPTER FOUR.

OF REMITTING FINES AND FORFEITURES, AND OF REPRIEVES, COMMUTATIONS OF PUNISHMENT AND PARDONS.

	Article		Article
Governor may remit fines, etc.	1051	May commute penalty of death, etc.	1055
May remit forfeitures	1052	May delay execution of death penalty	1056
Shall file reasons for his action in office of secretary of state	1053	Governor's acts shall be under the great seal of the state, etc.	1057
May pardon treason, when	1054		

Article 1051. [1016] **Governor may remit fines, etc.**—In all criminal actions, except treason and impeachment, the governor shall have power, after conviction, to remit fines, grant reprieves, commutations of punishment and pardons. [O. C., 809; Const., Art. 4, § 11.]

Construed. A full pardon absolves the convict from the legal consequencies of his crime and his conviction, direct and collateral, including punishment of whatever nature. Such pardon, granted after the penalty has been endured, removes the convict's disability as a witness, except that, in perjury or false swearing, the pardon must specifically extend the pardon to cover such conviction. Ante, Art. 788, subd. 3.

As to all other cases see Rivers v. State, 10 T. Cr. R., 177; Carr v. State, 19 Id., 635; Hunnicutt v. State, 20 Id., 632; Easterwood v. State, 34 Id., 400, 31 S. W. R., 294.

Art. 1052. [1017] **May remit forfeitures.**—The governor shall have power to remit forfeitures of recognizances and bail bonds. [Id.]

Art. 1053. [1018] **Shall file reasons for his action.**—In all cases in which the governor remits fines or forfeitures, or grants reprieves, commutation of punishment or pardons, he shall file in the office of the secretary of state his reasons therefor. [Id.]

Art. 1054. [1019] **May pardon treason, when.**—With the advice and consent of the senate, the governor may grant pardons in cases of treason; and, to this end, he may respite a sentence therefor until the close of the succeeding session of the legislature. [Const., Art. 4, § 11.]

Art. 1055. [1020] **May commute penalty of death, etc.**—The governor shall have the authority to commute the punishment in every case of capital felony, except treason, by changing the penalty of death into that of imprisonment for life, or for a term of years, either with or without hard labor, which may be done by his warrant to the proper officer, commanding him not to execute the penalty of death, and directing him to convey the prisoner to the penitentiary, stating therein the time for which, and the manner in which, the prisoner is to be confined; which warrant shall be sufficient authority to the sheriff to deliver, and to the proper officers of the penitentiary to receive and imprison such prisoner. [O. C. 811.]

Art. 1056. [1021] **May delay execution of death penalty.**—The governor may also reprieve and delay the execution of the penalty of death to any day fixed by him in the warrant to the sheriff, and such warrant shall be executed and returned to the proper court by the sheriff in the same manner as if it had been issued from such court. [O. C. 812.]

Art. 1057. [1022] **Governor's acts shall be under great seal of the state, etc.**—All remissions of fines and forfeitures, and all reprieves, commutations of punishment and pardons, shall be signed by the governor, and certified by the secretary of state, under the great seal of state, and shall be forthwith obeyed by any officer to whom the same may be presented.

TITLE 13.

OF INQUESTS.

Chapter
1. Inquests upon Dead Bodies.
2. Fire Inquests.

CHAPTER ONE.

INQUESTS UPON DEAD BODIES.

Article
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Shall preserve all evidence 1079
Witness may be required to give bail 1080

Article 1058. [1023] **Held, by whom and in what cases.**—Any justice of the peace shall be authorized, and it shall be his duty, to hold inquests within his county, in the following cases; provided, that all inquests shall be held by the justice of the peace without a jury:

1. When a person dies in prison.

2. When any person is killed, or from any cause dies an unnatural death, except under sentence of the law, or in the absence of one or more good witnesses.

3. When the body of any human being is found, and the circumstances of his death are unknown.

4. When the circumstances of the death of any person are such as to lead to suspicion that he came to his death by unlawful means. [O. C. 851; amended by Act March 17, 1887, p. 31.]

Art. 1059. [1024] **Body may be disinterred.**—When a body upon which an inquest ought to have been held has been interred, the justice of the peace may cause it to be disinterred for the purpose of holding such inquest. [O. C. 852.]

Art. 1060. [1024a] **Physician may be called in.**—Whenever an inquest is held to ascertain the cause of death, the justice of the peace is hereby authorized, if he deems it necessary, to call in the county physician, or, if there be no county physician, or, if it be impracticable to secure his services, then some regular practicing physician, to make an autopsy in order to determine whether the death was occasioned by violence; and, if so, the nature and character of the violence used; and the county in which such inquest and autopsy is held shall pay to the physician making such autopsy a fee of not less than ten nor more than fifty dollars, the excess over ten dollars to be determined by the county commissioners' court after ascertaining the amount and nature of the work performed in making such autopsy. [Acts of 1893, p. 155.]

Art. 1061. [1024] **Chemical analysis provided for in certain cases.**—If, upon such inquest, it becomes necessary to determine whether the death has been produced by poison, it is hereby made the duty of the justice of the peace, upon request of the physican performing such autopsy, to call in to his aid, if necessary, some medical expert or chemist qualified to make an analysis of the stomach and its contents, together with such other portions of the body as may be necessary to be analyzed and tested, for the purpose of determining the presence of poison in such body; and the county commissioners' court of the county shall pay to such medical expert or chemist, as a reasonable fee for his services, a sum of money not to exceed fifty dollars.

Art. 1062. [1025] **Upon what information justice may act.**—The justice of the peace shall act in such cases upon verbal or written information given him by any credible person, or upon facts within his own knowledge. [O. C. 853.]

Art. 1063. [1026] **Duty of sheriff, etc.**—It is the duty of the sheriff, and of every keeper of any prison, to inform the justice of the peace of the death of any person confined therein. [O. C. 854.]

Art. 1064. [1027] **Justice shall issue subpoenas.**—The justice of the peace shall have power to issue subpoenas to enforce the attendance of witnesses upon an inquest; and, in case of disobedience or failure to attend, may issue attachments for such witnesses. [O. C. 860.]

Art. 1065. [1028] **Testimony of witnesses to be reduced to writing, etc.**—Witnesses shall be sworn and examined by the justice, and the testimony of each witness shall be reduced to writing by the justice, or under his direction, and subscribed by the witness. [O. C. 861.]

Ante, Art. 834 and notes; post Art. 1078.

Art. 1066. [1029] **Inquest may be held in private.**—Should the justice deem proper, the inquest may be held in private; but in all cases where a person has been arrested, charged with having caused the death of the deceased, such person and his counsel shall have the right to be present at the inquest, and to examine witnesses and introduce evidence. [O. C. 862.]

Ex parte Meyers, 33 T. Cr. R., 204, 26 S. W. R., 196.

Art. 1067. [1030] **Proceedings shall not be interfered with.**—If any other persons than the justice, and the accused and his counsel, and counsel for the state, are present at the inquest, they shall not interfere with the proceedings; and no question shall be asked a witness, except by the justice, the accused or his counsel, and the counsel for the state; and the justice of the peace may fine any person violating this article for contempt of court, not exceeding twenty dollars, and may cause such person to be placed in custody of a peace officer, and removed from the presence of the inquest. [O. C. 862.]

Art. 1068. [1031] **Justice shall keep a minute book, wherein he shall set forth, etc.**—The justice of the peace shall keep a book in which he shall make a minute of all the proceedings relating to every inquest held by him. Such minute shall set forth—

1. The nature of the information given the justice of the peace, and by whom given, unless he acts upon facts within his own knowledge.
2. The time and place, when and where, the inquest is held.
3. The name of the deceased, if known; or, if not known, as accurate a description of him as can be given.
4. The finding by the justice at the inquest.
5. If any arrest is made of a suspected person before inquest held, the name of the person and the fact of his arrest, as well as everything material

which relates thereto, shall be noted. [O. C. 864; amended by Act March 17, 1887, p. 32.]

Art. 1069. [1032] **Where the killing was the act of any person.**—When the justice has knowledge that the killing was the act of any person, or when an affidavit is made that there is reason to believe that such person has killed the deceased, a warrant may be issued for the arrest of the accused before inquest held; and the accused and his counsel shall have the right to be present when the same is held, and to examine the witnesses and introduce evidence before the jury.

Art. 1070. [1033] **Peace officer shall execute warrant of arrest.**—Any peace officer to whose hands the justice's warrant of arrest shall come is bound to execute the same without delay, and he shall detain the person arrested until his discharge is ordered by the justice or other proper authority.

Art. 1071. [1034] **Warrant shall be sufficient, if, etc.**—A warrant of arrest in such cases shall be sufficient if it issues in the name of "The State of Texas," recites the name of the accused, or describes him, when his name is unknown, sets forth the offense charged in plain language, and is signed officially by the justice.

Ante, Arts. 265, 266, 975.

Art. 1072. [1035] **If the justice find that a person killed the deceased.**—If it be found by the justice of the peace, upon evidence adduced at the inquest, that a person already arrested did in fact kill the deceased, or was an accomplice or accessory to the death, the justice may, according to the facts of the case, commit him to jail or require him to execute a bail bond with security for his appearance before the proper court to answer for the offense. [Amended by Act March 17, 1887, p. 32.]

Art. 1073. [1036] **Bail bond shall be sufficient, if, etc.**—A bail bond taken before a justice shall be sufficient if it recites the offense of which the party is accused, be payable to the state of Texas, be dated and signed by the principal and his surety; and such bond may be forfeited, and judgment recovered thereon, and the same collected as in the case of any other bail bond.

Art. 1074. [1037] **Warrant of arrest, when.**—When, by the evidence adduced before a justice of the peace holding an inquest, it is found that any person not in custody killed the deceased, or was an accomplice or accessory to the death, the justice shall forthwith issue his warrant of arrest to the sheriff or other peace officer, commanding him to arrest the person accused, and bring him before such justice, or before some other magistrate named in the writ. [O. C. 872; amended by Act March 17, 1887, p. 32.]

Art. 1075. [1038] **Requisites of warrent.**—The warrant mentioned in the preceding article shall be sufficient if it run in the name of the state of Texas, give the name of the accused, or describe him, when his name is unknown, recite the offense with which he is charged in plain language, and be dated and signed officially by the justice. [O. C. 873.]

Art. 1076. [1039] **Peace officer shall execute warrant.**—The peace officer into whose hands such warrant may come shall forthwith execute the same by arresting the defendant and taking him before the magistrate named in the warrant; and the magistrate shall proceed to examine the accusation; and the same proceedings shall be had thereon as in other cases where persons accused of offenses are brought before him. [O. C. 874.]

Ante, Arts. 292, et seq.

Art. 1077. [1040] **Accused may be arrested, etc., pending inquest.**—Nothing contained in this title shall prevent proceedings from being had for the arrest and examination of an accused person before a magistrate, pending the holding of an inquest. But, when a person accused of an offense has been al-

ready arrested under a warrant from the justice, he shall not be taken from the hands of the peace officer by a warrant from any other magistrate. [O. C. 877.]

Ex parte Meyers, 33 T. Cr. R., 26 S. W. R., 196.

Art. 1078. [1041] **Justice shall certify proceedings to district court.**—When an inquest has been held, the justice before whom the same was held shall certify to the proceedings, and shall inclose in an envelope the testimony taken, the finding of the justice, the bail bonds, if any, and all other papers connected with the inquest, and shall seal up such envelope and deliver it, properly indorsed, to the clerk of the district court without delay, who shall safely keep the same in his office subject to the order of the court. [O. C. 870; amended by Act March 17, 1887, p. 32.]

Art. 1079. [1042] **Shall preserve all evidence.**—It shall also be the duty of the justice to carefully preserve all evidence whatsoever that may come to his knowledge and possession which might, in his opinion, tend to show the real cause of the death, or the person, if any one, who caused such death, and shall deliver all such evidence to the clerk of the district court, who shall keep the same safely, subject to the order of the court.

Art. 1080. [1043] **Witnesses may be required to give bail.**—The justice may, should he deem it proper, require bail of witnesses examined before the inquest to appear and testify before the next grand jury, or before an examining or other proper court, as in other cases.

CHAPTER TWO.

FIRE INQUESTS.

	Article.		Article.
Investigation shall be had upon complaint, etc.	1081	Warrant shall issue for person charged, when	1085
Proceedings in such case	1082	Testimony of witnesses shall be reduced to writing, etc.	1086
Verdict of jury	1083	Compensation of officers, etc.	1087
Witness shall be bound over, when	1084		

Article 1081. [1044] **Investigation shall be had upon complaint, etc.**—Whenever complaint in writing, under oath, is made by any credible person before any justice of the peace that there is ground to believe that any building has been unlawfully set on fire, or attempted to be set on fire, such justice of the peace shall, without delay, cause the truth of such complaint to be investigated. [Act June 2, 1873, p. 171, § 1.]

Art. 1082. [1045] **Proceedings in such case.**—The proceedings in such case shall be governed by the same rules as are provided in the preceding chapter of this title concerning inquests upon dead bodies, and the officer conducting such investigation shall have the same powers as are conferred upon justices of the peace in the preceding chapter. [Id., § 2.]

Art. 1083. [1046] **Verdict of jury.**—The jury, after inspecting the place where the fire was, or was attempted, and after hearing the testimony, shall deliver to the justice of the peace holding such inquest their verdict in writing, signed by them, in which they shall find and certify how and in what manner such fire happened, or was attempted, and all the circumstances attending the same, and who were guilty thereof, either as principal or accessory, and in what manner. But if such jury be unable to ascertain the origin and circumstances of such fire they shall find, and certify accordingly. [Id., § 3.]

Art. 1084. [1047] **Witnesses shall be bound over, when.**—If the jury find that any building has been unlawfully set on fire, or has been attempted so to be, the justice of the peace holding such inquest shall bind over the witnesses to appear and testify before the next grand jury of the county in which such offense was committed. [Id., § 4.]

Art. 1085. [1048] **Warrant shall issue for person charged, when.**—If the person charged with the offense, if there be any person so charged, be not in custody, the justice of the peace shall issue a warrant for his arrest; and, when arrested, such person shall be dealt with as in other like cases. [Id., § 4.]

Art. 1086. [1049] **Testimony of witnesses shall be reduced to writing, etc.**—In all investigations had under this chapter, the testimony of all witnesses examined before the jury shall be reduced to writing by the justice of the peace, or under his direction, and signed by the witnesses; and such testimony, together with the verdict of the jury and all bail bonds taken in the case, shall be certified to and returned by the justice of the peace to the next district or criminal court of his county. [Id., § 6.]

Art. 1087. [1050] **Compensation of officers, etc.**—The compensation of the officers and jury making the investigation provided for in this chapter shall be the same as that allowed for holding an inquest upon a dead body, so far as applicable, and shall be paid in the same manner. [Id., § 5.]

TITLE 14.

OF FUGITIVES FROM JUSTICE.

	Article
Fugitive from justice delivered up, when	1088
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Person arrested shall not be committed, or, etc	1095
Magistrate shall notify secretary of state	1096
Shall also notify district or county attorney, who shall notify, etc	1097
Secretary of state shall communicate information, etc	1098
Accused shall be discharged, when	1099
Shall not be arrested a second time, except, etc	1100
Governor of the state can demand fugitive from justice, how	1101
Reasonable pay to persons commissioned, etc.	1102
Governor may offer a reward, when	1103
Shall be published, how	1104
Reward shall be paid by state	1105

Article 1088. [1051] **Fugitive from justice delivered up, when.**—A person charged in any other state or territory of the United States with treason, felony or other crime, who shall flee from justice and be found in this state, shall, on demand of the executive authority of the state or territory from which he fled, be delivered up, to be removed to the state or territory having jurisdiction of the crime. [O. C. 878.]

Extradition. For essentials of an executive warrant of extradition, based on requisition of the governor of another state, see Ex parte Thornton, 9 T., 635.

Same; fugitive from justice. The requisition made by the demanding governor for the arrest of one claimed as a "fugitive from justice," is sufficient authority for the issuance of an order by the governor for an arrest; and a person so arrested could only obtain relief on habeas corpus by showing that the presumption on which the governor of Texas acted was unfounded in fact. See in extenso, Hebler v State, 43 T., 197.

As to cetificate to the requisition of the demanding governor, see Ex parte Stanley, 25 T. Cr. R., 372, S. W. R., 645.

It is only required under the federal statutes for extradition that the accused is a fugitive from justice from the state in which the indictment is lodged against him, and that the requisition is in due form. Ex parte Denning, 50 T. Cr. R., 628, 100 S. W. R., 401.

It reasonably appearing on habeas corpus that the relator was charged by indictment in the demanding state, the validity of the copy of indictment exhibited against him will not be inquired into either by the trial court or an appeal. Ex parte Pearce, 32 T. Cr. R., 301, 23 S. W. R., 15.

Same. Habeas corpus. See generally, ex parte Erwin, 7 T. Cr. R., 288; Ex parte Hobbs, 32 Id., 312, 22 S. W. R., 1035; Ex parte Rowland, 35 Id., 108, 31 S. W. R., 651; Ex parte Lake, 37 Id., 656, 40 S. W. R., 727; Ex parte White, 39 Id., 497, 46 S. W. R., 639.

Art. 1089. [1052] **Judicial and peace officers shall aid in the arrest of.**—It is declared to be the duty of all judicial and peace officers of the state to give aid in the arrest and detention of a fugitive from any other state or territory, that he may be held subject to a requisition by the governor of the state or territory from which he may have escaped. [O. C. 879.]

Art. 1090. [1053] **Magistrate shall issue warrant for arrest of fugitive, when.**—Whenever a complaint, on oath, is made to a magistrate that any person, within his jurisdiction, is a fugitive from justice from another state or territory, it is his duty to issue a warrant of arrest for the apprehenson of the person accused. [O. C. 882.]

Ex parte Lake, 37 T. Cr. R., 656, 40 S. W. R., 727.

Art. 1091. [1054] **Complaint shall be sufficient, if it recites, etc.**—The complaint shall be sufficient if it recites—

1. The name of the person accused.
2. The state or territory from which he has fled.
3. The offense committed by the accused.
4. That he has fled to this state from the state or territory where the offense was committed.
5. That the act alleged to have been committed by the accused is a violation of the penal law of the state or territory from which he fled. [O. C. 883.]

Art. 1092. [1055] **Warrant of arrest from magistrate.**—The warrant of a magistrate to arrest a fugitive from justice shall direct a peace officer to apprehend the person accused, and bring him before such magistrate.

Ante, Arts. 256, 266, and notes; Ex parte Lake, 37 T. Cr. R., 656, 40 S. W. R., 727.

Art. 1093. [1056] **Shall require bail or commit accused, when.**—When the person accused is brought before the magistrate, he shall hear proof, and, if satisfied that the defendant is charged in another state or territory with the offense named in the complaint, he shall require of him bail, with good and sufficient security, in such amount as such magistrate may deem reasonable, to appear before such magistrate at a specified time; and, in default of such bail, he may commit the defendant to jail, to await a requisition from the governor of the state or territory from which he fled. [O. C. 885.]

Art. 1094. [1057] **Certified transcript of indictment, evidence.**—A properly certified transcript of an indictment against the accused shall be evidence to show that he is charged with the crime alleged. [O. C. 886.]

Art. 1095. [1058] **Person arrested shall not be committed, or, etc.**—A person arrested under the provisions of this title shall not be committed or held to bail for a longer time than ninety days. [O. C. 887.]

Art. 1096. [1059] **Magistrate shall notify secretary of state, etc.**—The magistrate by whose authority a fugitive from justice has been held to bail or committed shall immediately notify the secretary of state of the fact, stating in such notice the name of such fugitive, the state or territory from which he is a fugitive, the crime with which he is charged, and the date when he was committed or held to bail. Such notice may be forwarded, either through the mail or by telegraph. [O. C. 888.]

Art. 1097. [1060] **Shall also notify district or county attorney, who shall notify, etc.**—The magistrate shall also immediately notify the district or county attorney of his county of the facts of the case, who shall forthwith give notice of such facts to the executive authority of the state or territory from which the accused is charged to have fled.

Art. 1098. [1061] **Secretary of state shall communicate information, etc.**—The secretary of state, upon receiving information as provided in article 1096, shall forthwith communicate such information by telegraph, when practicable, or, if not practicable, by mail, to the executive authority of the proper state or territory.

Art. 1099. [1062] **Accused shall be discharged, when.**—If the accused is not arrested under a warrant from the governor of this state before the expiration of ninety days from the day of his commitment or the date of the bail bond, he shall be discharged. [O. C. 889.]

Art. 1100. [1063] **Shall not be arrested a second time, except, etc.**—A person who shall have once been arrested under the provisions of the preceding article, or by habeas corpus, shall not be again arrested upon a charge of the same offense, except by a warrant from the governor of this state. [O. C. 890.]

1101. [1064] **Governor of this state can demand fugitive from justice, how.**—Whenever the governor of this state may think proper to demand a person who has committed an offense in this state and has fled to another state or territory, he may commission any suitable person to take such requisition; and the accused person, if brought back to the state, shall be delivered up to the sheriff of the county in which it is alleged he has committed the offense. [O. C. 881.]

International extradition. One extradited from a foreign country can be tried in this state, only for the offense for which he was extradited, and not for one which is not extraditable under treaties between the government of the United States and such foreign country. Blandford v. State, 10 T. Cr. R., 627; Kelley v State, 13 Id., 158. And see Underwood v State, 38 Id., 193, 41 S. W. R., 618.

Even in such cases, jurisdiction over the person is a matter subject to the objection or waiver only of the person over whom it is sought to be exercised; and, if such person submits, without objection to the jurisdiction and trial, his action amounts to waiver. Cordway v State, 25 T. Cr. R., 405, S. W. R., 670.

Objection that defendant could not be tried for another than the offense for which he was extradited comes too late when first mooted on motion for new trial. Underwood v State, 38 T. Cr. R., 193, 41 S. W. R., 618.

Interstate extradition. The rule is different to interstate extradition, and one extradited from another state or territory can be tried for another than the offense for which he was brought back. Ham v State, 4 T. Cr. R., 645.

And a person accused of crime in this state may be tried for it in this state, though he was kidnaped in the other state, and brought back against his will, and without lawful authority. Brookin v State, 26 T. Cr. R., 121, 9 S. W. R., 735.

Art. 1102. [1065] **Reasonable pay to person commissioned, etc.**—The person commissioned by the governor to bear a requisition for a fugitive from justice to another state or territory shall be paid out of the state treasury a reasonable compensation for his services, to be paid upon the certificate of the governor, specifying the services rendered and the amount allowed therefor. [O. C. 881.]

Art. 1103. [1066] **Governor may offer a reward, when.**—The governor may, whenever he deems it proper, offer a reward for the apprehension of any person accused of a felony in this state, and who is evading an arrest.

Art. 1104. [1067] **Shall be published, how.**—When the governor offers a reward, he shall cause the same to be published in such manner as, in his judgment, will be most likely to effect the arrest of the accused.

Art. 1105. [1068] **Reward shall be paid by state.**—The person who may become entitled to such reward shall be paid the same out of the state treasury upon the certificate of the governor, stating the amount thereof, and that such person is entitled to receive the same, and the facts which so entitle such person to receive it.

TITLE 15

OF COSTS IN CRIMINAL ACTIONS.

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2. Of Costs Paid by the State.
3. Of Costs Paid by Counties.
4. Of Costs Paid by Defendant.
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CHAPTER ONE.

TAXATION OF COSTS.

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Article 1106. [1069] **Certain officers shall keep fee books.**—Each clerk of a court, county judge, sheriff, justice of the peace, constable, mayor, recorder and marshal, in this state, shall keep a fee book, and shall enter therein all fees charged for service rendered in any criminal action or proceeding; which book shall be subject to the inspection of any person interested in such costs. [Act Aug. 23, 1876, p. 203, § 22.]

Art. 1107. [1070] **Fee book shall show what.**—The fee book shall show the number and style of the action or proceeding in which the costs are charged; and each item of costs shall be stated separately; and it shall further name the officer or person to whom such costs are due.

Art. 1108. [1071] **No costs not provided for by law.**—No item of costs in a criminal action or proceeding shall be taxed that is not expressly provided for by law.

Boon v. State, 12 T. Cr. R., 100; Arbuthnot v State, 38 Id., 509, 34 S. W. R., 269.

Art. 1109. [1072] **Costs payable in lawful currency.**—All costs in criminal actions or proceedings shall be due and payable in the lawful currency of the United States. [Act, Aug. 23, 1876, p. 284, § 1.]

Art. 1110. [1073] **No costs payable until, etc.**—No costs shall be payable by any person whatsoever until there be produced, or ready to be produced, unto the person owing or chargeable with the same, a bill or account, in writing, containing the particulars of such costs, signed by the officer to whom such costs are due, or by whom the same are charged. [Id., p. 293, § 23.]

Art. 1111. [1074] **Bill of costs shall accompany case, when.**—Whenever a criminal action or proceeding is taken by appeal from one court to another, or whenever the same is in any other way transferred from one court to another, it shall be accompanied by a full and complete bill or account of all costs that have accrued in such action or proceeding; which bill or account shall be certified to, and signed by the the proper officer of the court from which the same is forwarded.

Art. 1112. [1075] **Costs shall not be taxed after defendant has paid.**—No further costs shall be taxed against a defendant or collected from him in a criminal case, after he has paid the amount of costs taxed against him at the time of such payment, unless otherwise adjudged by the court upon a proper motion filed for that purpose.

Art. 1113. [1076] **Costs may be retaxed, when and how.**—Whenever costs have been erroneously taxed against a defendant, he may have the error corrected, and the costs properly taxed, upon filing a motion, in writing, for that purpose, in the court in which the case is then pending, or was last pending. Such motion may be made at any time within one year after the final disposition of the case in which the costs were taxed, and not afterward; and notice of such motion shall be given to the party or parties to be affected thereby, as in the case of a similar motion in a civil action; and the court hearing the same shall render such judgment therein as the facts and the law may require.

Art. 1114. [1077] **Fee book evidence, etc.**—The items of costs taxed in an officer's fee book shall be prima facie evidence of the correctness of such items, and the same shall be considered correct until shown by satisfactory evidence to be otherwise.

Practice. The object being to retax costs with regard to witness fees, the motion must be served on the witness to be affected. Stewart v State, 38 T. Cr. R., 627, 44 S. W. R., 505.

CHAPTER TWO.

OF COSTS PAID BY THE STATE.

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Article 1115. [1078] **Fees paid to attorney general.**—The attorney general shall receive from the state the following fees:

1. In each case of felony appealed to the court of criminal appeals, where the appeal is dismissed or where the judgment of the court below is affirmed, the sum of twenty dollars.

2. In the case of habeas corpus heard before the court of criminal appeals when the applicant is charged with a felony, the sum of twenty dollars. [Act 22d Leg., S. S., ch. 16, § 59.]

Art. 1116. [1079] **Fees to clerk of court of criminal appeals.**—The clerk of the court of criminal appeals, in every case of felony brought before such court by appeal, shall receive from the state the sum of ten dollars. [Id., § 60.]

Art. 1117. [1080] **Fees to be audited.**—The fees allowed the attorney general and the clerk of the court of criminal appeals by the two preceding sections shall be audited and paid out of the state treasury upon the certificate of the court of criminal appeals, or of any one of the judges thereof, that the same is correct. [Id., § 61.]

Art. 1118. [1081] **Fees to district and county attorneys.**—The district or county attorneys shall receive the following fees:

For all convictions in cases of felonious homicide, when the defendant does not appeal, or dies, or escapes after appeal and before final judgment of the court of criminal appeals, or, when upon appeal, the judgment is affirmed, the sum of forty dollars.

For all convictions of felony when the defendant does not appeal, or dies, or escapes after appealing and before final judgment of the court of criminal appeals, or, when upon appeal, the judgment is affirmed, the sum of twenty-four dollars; provided, that in all convictions of felony where the verdict and judgment is confinement in the state institution for the training of juveniles, the fees of the district or county attorney shall be twelve dollars.

For representing the state in each case of habeas corpus, where the defendant is charged with felony, the sum of sixteen dollars

For every conviction obtained under the provisions of the anti-trust law, the state shall pay to the county or district attorney in such prosecution the sum of two hundred and fifty dollars; and, if both the county and district attorney shall serve together in such prosecution, such fee shall be divided between them as follows: One hundred dollars to the county attorney, and one hundred and fifty dollars to the district attorney. [Id., § 62; amended, Act 1897, 1st S. S., p. 5.]

Art. 1119. **Same.**—District and county attorneys, for attending and prosecuting any felony case before an examining court, shall be entitled to a fee of five dollars to be paid by the state for each case prosecuted by him before such court; provided, such fee shall not be paid, except in cases where the testimony of the material witnesses to the transaction shall be reduced to writing, subscribed and sworn to by said witness.

The fees mentioned in this article shall become due and payable only after the indictment of the defendant for the offense of which he was charged in the examining court, and upon an itemized account sworn to by the officers claiming such fees, approved by the judge of the district court.

Only one fee shall be allowed for an examining trial, though more than one defendant is joined in the complaint; and when defendants are proceeded against separately, who could have been proceeded against jointly, but one fee shall be allowed in all cases that could have been so joined; and the account of the officer and the approval of the judge must show that the provisions of this article are complied with. [Act 1907, p. 466.]

Art. 1120. **Fees allowed district attorneys of districts composed of two counties, or more.**—In addition to the five hundred dollars now allowed them by law, district attorneys, in all judicial districts in this state composed of two counties or more, shall receive from the state as compensation for their services the sum of fifteen dollars for each day they attend the session of the district court in their respective districts in the necessary discharge of their official duty, and fifteen dollars per day for each day they represent the state at examining trials, inquest proceedings and habeas corpus proceedings in vacation; said fifteen dollars per day to be paid to the district attorneys, upon the sworn account of the district attorney, approved by the district judge, who shall certify that the attendance of said district attorney for the number of days mentioned in his account was necessary, after which. said account shall be recorded in the minutes of the district

court; provided, that the maximum number of days for such attendance and service for which the said compensation is allowed shall not exceed one hundred and thirty-three days in any one year; and provided, further, that all fees in misdemeanor cases, and commissions and fees heretofore allowed district attorneys, under the provisions of article 1118 of the Code of Criminal Procedure, and in chapter 5 of the general laws passed at the special session of the Twenty-fifth Legislature, in districts composed of two or more counties, shall, when collected, be paid to the clerk of the district court, who shall pay over the same to the state treasurer; provided, the provisions of this bill shall not apply to district attorneys whose last preceding annual report of himself or his predecessor shows that he or his predecessor making such report received in fees, under the criminal laws, over two thousand four hundred and ninety-five dollars. [Act 1909, p. 238.]

Art. 1121. [1082] **Where there are several defendants.**—If there be more than one defendant in a case, and they are tried jointly, but one fee shall be allowed the district or county attorney. If the defendants sever, and are tried separately, a fee shall be allowed for each trial in accordance with the provisions of the preceding article, except in habeas corpus cases, in which cases only one fee shall be allowed, without regard to the number of defendants or whether they are tried jointly or separately.

Art. 1122. [1083] **Fees to sheriff or constable.**—The sheriffs and constables in this state shall receive the following fees:

1. For executing each warrant of arrest or capias, for making arrest without warrant, when so authorized by law, the sum of one dollar, and in all cases, five cents per mile for each mile actually and necessarily traveled in going to the place of arrest; and, for conveying the prisoner or prisoners to jail, he shall receive the mileage provided in subdivision five of this act.

2. For summoning or attaching each witness, fifty cents.

3. For summoning a jury in each case, where a jury is actually sworn in, two dollars.

4. For executing death warrant, fifty dollars.

5. For removing or conveying prisoners, for each mile going and coming, including guards, and all other necessary expenses when traveling by railroad, ten cents. When traveling otherwise than by railroad, fourteen cents; provided, that where more than one prisoner is so conveyed or removed at the same time, in addition to the foregoing, he shall only be allowed eight cents per mile for each additional prisoner; provided, that when an officer goes beyond the limits of this state after a fugitive on requisition of the governor, he shall receive such compensation only as the governor shall allow for such services.

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 neighborhood or vicinity during the same trip, he shall not charge mileage for serving such witness to or from the county seat, but shall charge only one mileage, and for such additional only as are actually and necessarily traveled in summoning and attaching each additional. 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 services, and miles actually traveled in accordance with this subdivision; and his account shall show the facts.

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 rule prescribed in subdivision 6 shall apply.

8. For conveying witnesses attached by him to any court, or in habeas corpus proceedings out of his county, or when directed by the judge from any other county to the court where the case is pending, one dollar and fifty cents per day, for each day actually and necessarily consumed in going to, and returning from, such courts, and his actual and necessary expenses by the nearest practical route, or nearest practical public conveyance, the amount to be stated by him in an account which shall show the place where the witness was attached, the distance to the nearest railroad station, and miles actually traveled to each court; if horses or vehicles are used, from whom hired and price paid, and length of time consumed, and amount paid out for feeding horses, and to whom; if meals and lodging were provided, from whom and when, and price paid; provided, that officers shall not be entitled to receive exceeding fifty cents per meal, and thirty-five cents per night for lodging for any witness; and, provided, further, that no item or items for expenses shall be allowed, unless the officer present with his account to the officer whose duty it is to approve the same a receipt in writing for each item of said account, except as to such items as are furnished by the officer himself. And when meals and lodging are furnished by the officer in person conveying the witnesses, he shall be allowed to receive not exceeding twenty-five cents per meal, and twenty-five cents per night for lodging. All of the said receipts shall be filed with the clerk of the court approving such accounts. Said accounts shall also show, before said officer shall be entitled to compensation for expenses of attached witnesses, that, before starting with said witnesses to the foreign court, he carried each of them before the magistrate nearest the place of serving the attachment, giving his name and residence, and that said witness made oath in writing before said magistrate, certified copies of which shall be attached to the account, that they were unable to give bond for their appearance at court, or refused to give bond after having been advised by said officer of their right to do so. And the officer shall also present to the court the affidavit of the witness to the same effect, or shall show that the witness refused to make the affidavit; and, should it appear to the court that the witness was willing and able to give bond, the sheriff shall not be entitled to any compensation for conveying such witness. And all accounts for fees in criminal cases by sheriffs shall be sworn to by the officer, before any officer authorized to administer oaths, and shall state that said account is true, just and correct in every particular, and be presented to the judge, who shall, during such term of court, carefully examine such account, and, if found to be correct, in whole or in part, shall so certify, and allow the same for such amount as he may find to be correct. And, if allowed by him, in whole or in part, he shall so certify; and such account, with the affidavit of the sheriff, and certificate of the judge, shall be recorded by the clerk of the district court in a book kept by him for that purpose, which shall constitute a part of the proceedings or minutes of the court. And the clerk shall certify to the original account, and shall show that the same has been recorded; and said account shall then become due; and the same shall constitute a voucher on which the comptroller is authorized to issue a warrant, if such account, when presented to the comptroller, shall be accompanied by a certified copy under the hand and seal of the district clerk, of the returns made on the process for which such officer is claiming fees, corresponding to the amount so claimed in his account. The minutes of the court above provided for, or a certified copy thereof, may be used in evidence

against the officer making the affidavit for perjury in case said affidavit shall be wilfully false. When the officer receiving the writ for the attachment of such witness shall take a bond for the appearance of such witness, he shall be entitled to receive from the state one dollar for each bond so taken; but he shall be responsible to the court issuing said writ, that said bond is in proper form, and has been executed by the witness, with one or more good and solvent sureties; and said bond shall, in no case, be less than one hundred dollars; provided, the comptroller may require from such officer a certified copy of all such process before auditing any account; provided, that when no inquest or examining trial has been held, at which sufficient evidence was taken upon which to find an indictment, which fact shall be certified by the grand jury, or, when the grand jury shall state to the district judge that an indictment cannot be procured, except upon the testimony of non-resident witnesses, the district judge may have attachments issued to other counties for witnesses not to exceed the number for which the sheriff may receive pay as provided for by law, to testify before the grand juries; provided, however, that the judge shall not approve the accounts of any sheriff for more than one witness to any one fact, nor more than three witnesses to any one case pending before the grand jury, in which case the sheriff shall receive the same compensation as he does for conveying attached witnesses before the court. Subdivision 8 of this article shall apply to the officers affected thereby in all counties in Texas.

9. For attending a prisoner on habeas corpus, for each day, one dollar and sixty cents, together with mileage as provided in subdivision 5, when removing such prisoner out of the county under an order issued by a district or appellate judge. [Act 22nd Leg., S. S., ch. 93, 1895, p. 146; amended Act 1909, 1st S. S., p. 21.]

Art. 1123. **Fees are due at close of each term of district court.**—All fees accruing under this act shall be due and payable at the close of each term of the district court after approval, except as provided for in subdivisions 8 and 9 of the preceding article, 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 or constable shall be required to pay back to the state treasurer a sum of money equal to the amount he may have received from the state in such cases; and the said sheriff or constable and their bondsmen shall be responsible to the state for such sums. [Act 1897, 1st S. S., p. 5.]

Art. 1124. **No costs shall be paid by state when.**—In cases where the defendant is indicted for a felony, and is convicted of an offense less than a felony, no cost shall be paid by the state to any officer. [Id., p. 5.]

Art. 1125. [1084] **When services are rendered by peace officer other than sheriff.**—When services have been rendered by any peace officer other than a sheriff, such as are enumerated in the preceding article, such officer shall receive the same fees therefor as are allowed the sheriff; and the same shall be taxed in the sheriff's bill of costs, and noted therein as costs due such peace officer; and, when received by such sheriff, he shall pay the same to such peace officer. [O. C. 953, 954.]

Art. 1126. [1085] **Sheriff shall not charge fees or mileage, when.**—A sheriff shall not charge fees for arrests made by rangers, or mileage for prisoners transported by rangers, or mileage or other fees for transporting a witness under attachment issued from another county, unless such witness refuses to give bail for his appearance, or files an affidavit with such sheriff of his inability to give bail; and a witness who refuses to give bail, or make affidavit of his inability to give bail, shall not be entitled to fees, mileage or expenses. [Act March 31, 1885, p. 76.]

Art. 1127. [1086] **Fees of district clerk in felony cases.**—The clerks of

the district courts shall receive, for each felony case tried in such courts by jury, whether the defendant be convicted or acquitted, the sum of eight dollars; for each transcript on appeal or change of venue, eight cents for each one hundred words; for each felony case finally disposed of without trial, or dismissed or nolle prosequi entered, eight dollars; for recording each account of sheriff, the sum of fifty cents; for entering judgment in habeas corpus cases, eighty cents; and for taking down testimony and preparing transcript in habeas corpus cases, eight cents for each one hundred words; but the fees in habeas corpus cases shall, in no event, exceed eight dollars in any one case. [Acts 21st Leg., ch. 45; amended, Act 1897, 1st S. S., p. 5.]

Art. 1128. **When fees are not affected by provisions of preceding articles.**—In those counties where there shall have been cast at the next preceding presidential election less than three thousand votes, the clerks of the district courts, district attorneys, county attorneys, sheriffs and constables shall receive from the state the fees and compensation in felony cases allowed as follows, and are not intended to be affected by the foregoing provisions of this chapter. [Id., p. 5.]

Art. 1129. **Fees of district clerk in felony cases in certain counties.**—The clerk of the district court shall receive, for each felony case tried in such court by jury, whether the defendant be convicted or acquitted, the sum of ten dollars; for each transcript on appeal or change of venue, ten cents for each one hundred words; for each felony case finally disposed of without trial, or dismissed, or nolle prosequi entered, ten dollars; for recording each account of sheriffs, as provided for in article 1132, the sum of fifty cents.

In habeas corpus proceedings in felony cases, the clerks of the district courts shall be paid by the state, upon the certificate of the judge, the following fees, not to exceed ten dollars in any one case: For taking down the evidence, ten cents for every one hundred words; for entering the judgment of the court, one dollar; for making out transcript in case of appeal, ten cents for every one hundred words. [Act 21st Leg., ch. 45; amended Act 1903, p. 231.]

Art. 1130 **Same; sheriff and constable.**—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:

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, shall be allowed.

2. For summoning or attaching each witness, fifty cents.

3. For summoning jury in each case where jury is actually sworn in, two dollars.

4. For executing death warrant, fifty dollars.

5. For removing a prisoner, for each mile going and coming, including guards and all other expenses when traveling by railroad, ten cents; when traveling otherwise than by railroad, fifteen cents; provided, that when more than one prisoner is removed at the same time, in addition to the

foregoing, he shall only be allowed ten cents a mile for each additional prisoner; provided, further, that when an officer goes beyond the limits of the state after a fugitive, on requisition of the governor, he shall receive such compensation as the governor shall allow for such services.

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 travelel 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 subdivision; and his accounts shall show the facts.

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 rule prescribed in subdivision 6 shall apply.

8. For conveying a witness attached by him to any court or grand jury, or in a habeas corpus proceeding out of his county, or when directed by the judge from any other county, to the court where the case is pending, one dollar per day for each day actually and necessarily consumed in going and returning from such court, and his actual necessary expenses, by the nearest practicable route or nearest practicable public conveyance, the amount to be stated by him in an account which shall show the place at which the witness was attached, the distance to nearest railroad station, and miles actually traveled to reach the court; if horses or vehicles were used, from whom hired, and price paid, and length of time consumed, and amount paid out for feeding horses, and to whom; if meals and lodgings were provided, from whom and when and price paid; provided, that officers shall not be entitled to receive exceeding fifty cents per meal and thirty-five cents per night for lodging for any witness. Said account shall also show, before said officer shall be entitled to compensation for expenses of attached witnesses, that, before starting with said witnesses to the foreign court, he carried each of them before the magistrate nearest the place of serving the attachment, giving his name and residence, and that said witness made oath in writing before such magistrate, certified copies of which shall be attached to the account, that they were unable to give bond for their appearance at court, or refused to give bond after having been advised by said officer of their right to do so. And the officer shall also present to the court the affidavit of the witness to the same effect, or shall show that the witness refused to make the affidavit; and, should it appear to the court that the witness was able and willing to give bond, the sheriff shall not be entitled to any compensation for conveying such witness; and said accounts shall be sworn to by the officer, before any officer authorized to administer oaths, and shall state that said account is true, just, and correct in every particular, and present same to the judge, who shall, during such term of court, carefully examine such account, and, if found to be correct, in whole or in part, shall so certify, and allow the same for such an amount as he may find to be correct; and, if by him allowed, in whole or in part, he shall so certify; and such account, with the affidavit of the sheriff and certificate of the judge, shall be recorded by the clerk of the district court in a book to be kept by him for that purpose, which shall constitute a part of

the proceedings or minutes of the court; and the clerk shall certify to the original account, and shall show that the same has been so recorded; and said account shall then become due, and the same shall constitute a voucher, on which the comptroller is authorized to issue a warrant; and such minutes of the court, or a certified copy thereof, may be used in evidence against the officer making the affidavit, for perjury, in case said affidavit shall be wilfully false. When the officer receiving a writ for the attachment of such witness shall take a bond for the appearance of any such witness, he shall be entitled to receive from the state one dollar for each bond so taken; but he shall be responsible to the court issuing said writ that said bond is in proper form and has been executed by the witness with one or more good or solvent securities; and said bond shall, in no case, be less than one hundred dollars; provided, the comptroller may require from such officer a certified copy of all such process before auditing any account.

9. For attending a prisoner on habeas corpus, for each day, two dollars, together with mileage as hereinbefore provided in subdivision 5, when removing such prisoner out of the county under an order issued by a district or appellate judge. [Id.]

Art. 1131. **Same; district and county attorneys.**—The district or county attorney shall be allowed the following fees:

1. For all convictions in case of felonious homicide, when the defendant does not appeal, or dies, or escapes after appeal, and before final judgment of the court of criminal appeals, or when, upon appeal, the judgment is affirmed, the sum of fifty dollars.

2. For all other convictions of felony, when the defendant does not appeal, or dies, or escapes after appealing, and before final judgment of the court of criminal appeals, or when, upon appeal, the judgment is affirmed, the sum of thirty dollars; provided, that in all convictions of felony whereby the verdict and judgment, the defendant is confined in the state institution for the training of juveniles, the fee of the district or county attorney shall be fifteen dollars.

3. For representing the state in each case of habeas corpus, where the defendant is charged with a felony, the sum of twenty dollars. [Id., § 62; amended 1895, p. 148.]

Art. 1132. [1087] **Officer shall make out cost bill, and what it shall show.**—Before the close of each term of the district court, the district or county attorney, sheriff and clerk of said court shall each make out a bill or account of the costs claimed to be due them by the state, respectively, in the felony cases tried at that term; the bill or account shall show—

1. The style and number of cases in which the costs are claimed to have accrued.

2. The offense charged against the defendant.

3. The term of the court at which the case was disposed of.

4. The disposition of the case, and that the case was finally disposed of, and no appeal taken.

5. The name and number of defendants; and, if more than one, whether they were tried jointly or separately.

6. Where each defendant was arrested or witness served, stating the county in which the service was made, giving distance and direction from county seat of county in which the process is served; and mileage shall be charged for distance by the most direct and practicable route from the court whence such process issued to the place of service.

7. In allowing mileage, the judge shall ascertain whether the process was served on one or more of the parties named therein on the same tour, and shall allow mileage, only for the number of miles actually traveled, and then only for the journey made at the time the service was perfected.

8. The court shall inquire whether there have been several prosecutions for an offense or transactions that is but one offense in law; and, if there is more than one prosecution for the same transaction, or a portion thereof, that could have been combined in one indictment against the same defendant, the judge shall allow fees to sheriffs, clerks and district and county attorneys in but one prosecution.

9. Where the defendants in a case have served on the trial, the judge shall not allow the charges for service of process and mileage to be duplicated in each case as tried; but only such additional fees shall be allowed as are caused by the severance. [Acts of 1879, Ex. Ses., ch. 46.]

Art. 1133. [1088] **Duty of judge to examine bill, etc.**—It shall be the duty of the district judge, when any such bill is presented to him, to examine the same carefully, and to inquire into the correctness thereof, and approve the same, in whole or in part, or to disapprove the entire bill, as the facts and law may require; and such bill, with the action of the judge thereon, shall be entered on the minutes of said court; and immediately on the rising of said court, it shall be the duty of the clerk thereof to make a certified copy from the minutes of said court of said bill, and the action of the judge thereon, and transmit the same by mail, in registered letter, to the comptroller of public accounts.

All fees due district clerks for recording all sheriff's accounts shall be paid at the end of said term; and all fees due district clerks for making transcripts on change of venue and on appeal shall be paid as soon as the service is performed; and the clerk's bill for such fees shall not be required to show that the case has been finally disposed of.

Bills for fees for such transcripts shall be approved by the district judge, and, when approved, shall be recorded as part of the minutes of the last preceding term of the court.

In all cases where the defendant charged with a felony is convicted of a misdemeanor, all fees received by the district clerk shall be refunded by him to the state. [Id.; amended, Act 1903, p. 112.]

Art. 1134. [1089] **Duty of comptroller on receipt of copy of bill.**—It shall be the duty of the comptroller, upon the receipt of such claim, and said certified copy of the minutes of said court, to closely and carefully examine the same, and, if correct, to draw his warrant on the state treasurer for the amount due, and in favor of the officer entitled to the same; provided, that if the appropriation for paying such accounts is exhausted, the comptroller shall file the same away, if correct, and issue a certificate in the name of the officer entitled to the same, stating therein the amount of the claim and character of the services performed. And all such claims or accounts not transmitted to or placed on file in the office of the comptroller of public accounts, within twelve months from the date of the final disposition of the case in which the services were rendered, shall be forever barred; provided, further, that the owners of the claims or accounts that have been barred by the provisions of this article, requiring the same to be transmitted to or placed on file in the office of the comptroller of public accounts, in six months from the date of the final disposition of the case in which the services were rendered, shall have six months from and after the time this act shall take effect to present said claims; and all claims or accounts so presented shall be taken and considered by the comptroller as claims presented within the time allowed by law. [Id.; amended by Act April 11, 1883, p. 75.]

Art. 1135. [1090] **No costs paid by state, when.**—In cases where the defendant is indicated for a felony, and is convicted of an offense less than felony, no costs shall be paid by the state to any officer. [O. C. 952d.]

Art. 1136. [1091] **Costs paid by state, a charge against defendant, except.**—The costs and fees paid by the state under this title shall be a charge

against the defendants in cases where they are convicted, except in cases of capital punishment or of sentence to the penitentiary for life, and, when collected, shall be paid into the treasury of the state. [O. C. 956.]

No judgment for costs should be entered where there is a capital conviction. Lanham v State, 7 T Cr. R., 126; Jackson v State, 25 Id., 314, 7 S. W. R., 872.

Art. 1137. [1092] **Fees in examining courts, etc.**—County judges, justices of the peace, sheriffs, constables, district and county attorneys and district clerks shall be allowed the following fees:

In all cases where county judges and justices of the peace shall sit as examining courts in felony cases, they shall be entitled to the same fees allowed by law for similar services in misdemeanor cases to justices of the peace, and ten cents for each one hundred words for writing down testimony, to be paid by the state, not to exceed three dollars for all his services in any one case.

Sheriffs and constables serving process and attending any examining court in the examination of any felony case, shall be entitled to such fees as are fixed by law for similar services in misdemeanor cases, to be paid by the state, not to exceed four dollars in any one case. [Act March 3, 1883, p. 23; amended, Act 1907, p. 466.]

Art. 1138. [1093] **Fees of subpoenaed or attached witness in felony cases out of the county of his residence.**—1. Any witness who may have been recognized, subpoenaed or attached, and given bond for his appearance before any court, or before any grand jury, out of the county of his residence, to give testimony in a felony case, and who shall appear in compliance with the obligations of such recognizance or bond, shall be allowed his actual traveling expenses, not exceeding three cents per mile going to and returning from the court or grand jury, by the nearest practicable conveyance, and one dollar per day for each day he may necessarily be absent from home as a witness in such case.

Witnesses shall receive from the state, for attendance upon district courts and grand juries in counties other than that of their residence, in obedience to subpoenas issued under the provisions of this act, their actual traveling expenses, not exceeding three cents per mile, going to and returning from the court or grand jury, by the nearest practicable conveyance, and one dollar per day for each day they may necessarily be absent from home as a witness, to be paid as now provided by law; and the foreman of the grand jury, or clerk of the district court, shall issue to such witness certificates therefor, after deducting therefrom the amounts advanced by the officers serving said subpoenas, as shown by the returns on said subpoenas; which certificates shall be approved by the district judge, and recorded by the clerk in a well-bound book kept for that purpose; provided, that when an indictment can be found from the evidence taken before an inquest or examining trial, no subpoena or attachment shall issue for a witness who resides out of the county in which the prosecution is pending to appear before a grand jury; and provided, further, that when the grand jury shall certify to the district judge that sufficient evidence cannot be secured upon which to find an indictment, except upon the testimony of non-resident witnesses, the district judge may have subpoenas issued as provided for in this law to other counties for witnesses to testify before the grand jury, not to exceed one witness to any one fact, nor more than three witnesses to any one case pending before the grand jury.

2. Witness fees shall be allowed to such state witnesses only as the district or county attorney shall state in writing are material for the state, and to witness for defendant, after he has made affidavit that the testimony of the witness is material to his defense, stating the facts which are ex-

pected to be proved by the witness; which certificate and affidavit must be made at the time of procuring the attachment for, or taking the recognizance of, the witness; provided, that the judge to whom an application for attachment is made may, in his discretion, grant or refuse such application, when presented in term time. No attachment shall be issued in a felony case until the state's attorney shall have first made the statement in writing, or the defendant shall have made the affidavit which will authorize the payment of the witness to be attached.

3. Before the close of each term of the district court, the witness shall make affidavit in writing, stating the number of miles he will have traveled going to and returning from the court, by the nearest practicable conveyance, and the number of days he will have been necessarily absent going to and returning from the place of trial, which affidavit shall be filed with papers of the case; provided, no witness shall receive pay for his services as a witness in more than one case at any one term of the court; provided, further, that fees shall not be allowed to more than two witnesses to the same fact, unless the judge of the court before whom the cause is tried shall, after such case shall have been disposed of, certify that such witnesses, claiming fees as herein provided, were necessary in the cause; nor shall any witness, recognized or attached for the purpose of proving the general character of the defendant, be entitled to the benefits hereof.

4. It shall be the duty of the district or criminal judge, when any such bill is presented to him, to examine the same carefully, and to inquire into the correctness thereof and to approve the same, in whole or in part, or to disapprove the entire bill, as the facts and law may require; and said bill, with the action of the judge thereon, shall be entered on the minutes of said court; and, immediately on the rising of said court, it shall be the duty of the clerk thereof to make a certified copy from the minutes of said court of said bill, and the action of the judge thereon, and transmit the same by mail, in registered letter, to the comptroller of public accounts; for which service the clerk shall be entitled to a fee of twenty-five cents, to be paid by the witness.

5. It shall be the duty of the comptroller, upon the receipt of such claim and said certified copy of the minutes of said court, to carefully examine the same, and, if correct, to draw his warrant on the state treasurer for the amount due, and in favor of the witness entitled to the same; provided, if the appropriation for paying such accounts is exhausted, the comptroller shall file the same away, if correct, and issue a certificate in the name of the witness entitled to the same, stating therein the amount of the claim; and all such claims or accounts not transmitted to, or placed on file in, the office of the comptroller of public accounts within twelve months from the date of the final disposition of the case in which the witness was attached or recognized to testify, shall be forever barred; and all laws and parts of laws in conflict with the provisions of this bill are hereby repealed. [Act 1903, p. 230; Act 1905, p. 375.]

CHAPTER THREE.

OF COSTS PAID BY COUNTIES.

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Article 1139. [1094] **County shall be liable for what costs.**—Each county shall be liable for all the expenses incurred on account of the safe keeping of prisoners confined in their respective jails, or kept under guard, except prisoners brought from another county for safe keeping, or from another county on habeas corpus or change of venue; in which cases, the county from which the prisoner is brought shall be liable for the expense of his safe keeping. [O. C. 957.]

Art. 1140. [1095] **Shall be responsible for food and lodging of jurors.**—Each county shall be liable for the expenses of food and lodging for jurors impaneled in a case of felony; but, in such cases, no scrip shall be issued or money paid to the jurors whose expenses are so paid. [O. C. 958.]

Art. 1141. [1096] **Juror may pay his own expenses and draw scrip.**—A juror may pay his own expenses and draw his scrip; but the county is responsible in the first place for all the expenses incurred by the sheriff in providing suitable food and lodging for the jury, not to exceed, however, one dollar and twenty-five cents a day. [O. C. 959.]

Art. 1142. [1097] **Allowance to sheriff for prisoners.**—For the safe keeping, support and maintenance of prisoners confined in jail or under guard, the sheriff shall be allowed the following charges:

1. For any number of prisoners not exceeding four, he shall be paid for each prisoner, for each day, not exceeding forty-five cents.
2. For any number of prisoners exceeding four, for each prisoner, for each day, not exceeding thirty cents.
3. For necessary medical bill and reasonable extra compensation for attention to a prisoner during sickness, such an amount as the commissioners' court of the county where the prisoner is confined may determine to be just and proper.
4. The reasonable funeral expenses in case of death. [Act Aug. 23, 1876, p. 290, § 11.]

See Howard v Lamar County, 44 S. W. R., 179.

Art. 1143. [1098] **Allowance for guards.**—The sheriff shall be allowed for each guard necessarily employed in the safe keeping of prisoners one dollar and fifty cents for each day; and there shall not be any allowance made for board of such guard, nor shall any allowance be made for jailer or turnkey, except in counties having fifty thousand population or more. In such counties of fifty thousand population or more, the commissioners' court

may allow each jail guard two dollars and fifty cents per day. [Id.; amended Act 1909, p. 98.]

Art. 1144. [1099] **Sheriff shall pay what expensess, to be reimbursed by county.**—It is the duty of the sheriff to pay the expenses of jurors impaneled in cases of felony (except when they are paid by the juror himself), the expense of employing and maintaining a guard, and to support and take care of all prisoners, for all of which, he shall be reimbursed by the proper county according to the rates fixed in the two preceding articles. [O. C. 961.]

Art. 1145. [1100] **Sheriff shall present account to district judge.**—At each term of the district court of his county, the sheriff may present to the district judge presiding his accounts for all expenses incurred by him for food and lodging of jurors, in cases of trials for felony during the term at which his account is presented. Such account shall state the number and style of the case or cases in which the jurors were impaneled, and specify by name each juror's expenses paid by such sheriff, and the number of days the same were paid, and shall be verified by the affidavit of such sheriff. [O. C. 962.]

Art. 1146. [1101] **Judge shall examine account, etc.**—The account provided for in the preceding article shall be carefully examined by the district judge; and he shall approve the same, or so much thereof as he finds to be correct. He shall write his approval on said account, specifying the amount for which the same is approved, and shall date and sign the same officially, and cause the same to be filed in the office of the clerk of the district court of the county liable therefor. [O. C. 983.]

Art. 1147. [1102] **Judge shall give sheriff draft upon county treasurer.**—The district judge shall give to the sheriff a draft upon the county treasurer of the proper county for the amount of each account allowed by him; and the same, when presented to the county treasurer, shall be paid out of any moneys in his hands, not otherwise legally appropriated, in the same manner as jury certificates are paid. [O. C. 964.]

Art. 1148. [1103] **Account for keeping prisoners.**—At each regular term of the commissioners' court, the sheriff shall present his account to such court for the expenses incurred by him since the last account presented for the safe keeping, support and maintenance of prisoners, including guards employed, if any. Such account shall state the name of each prisoner, and each item of expense incurred on account of such prisoner, and the date of each item, the name of each guard employed, the length of time employed, and the purpose of such employment, and shall be verified by the affidavit of the sheriff.

Art. 1149. [1104] **Commissioners' court shall examine account, and order draft, etc.**—The commissioners' court shall examine the account named in the preceding article, and allow the same, or so much thereof as may be reasonable and in accordance with law, and shall order a draft to be issued to the sheriff for the amount so allowed, upon the treasurer of the county; and such account shall be filed and safely kept in the office of the clerk of such court.

See Fayette County v Faires, 44 S. W. R., 514.

Art. 1150. [1105] **Expenses, etc., of prisoner from another county.**—If the expenses incurred are for the safe keeping, support and maintenance of a prisoner from another county, the sheriff shall make out a separate account therefor, such as is provided for in article 1108, and submit the same to the county judge of his county, who shall carefully examine the same, and write thereon his approval therefor for such amount as he finds to be

correct, stating the amount so approved by him, and shall date and sign such approval officially and return the same to the sheriff.

Art. 1151. [1106] **Same subject.**—The account mentioned in the preceding article shall then be presented to the commissioners' court of the county liable for the same, at a regular term of such court; and such court shall, if the charges therein be in accordance with law, order a draft to issue upon the treasurer of such county in favor of the sheriff to whom the same is due for the amount allowed.

Art. 1152. [1107] **Same in case of change of venue.**—In all causes where indictments have been presented against persons in one county charging them with any offense against the Penal Code, and such causes have been removed by change of venue to another county, and tried therein, the county from which such cause is removed shall be liable for all expenses incurred for pay of jurors in trying such causes. [Act March 18, 1881, p. 52.]

Art. 1153. [1108] **Same subject.**—It shall be the duty of the county commissioners of each county in the state, at each regular meeting, to ascertain whether, since the last regular meeting, any person has been tried for crime upon a change of venue from any other county; and, if they shall find such to be the case, it shall be their duty to make out an account against such county from which such cause was removed, showing the number of days the jury in such case was employed therein, and setting forth the amount paid for such jury service; such account shall then be certified to as correct by the county judge of such county, under his hand and seal, and be, by him, forwarded to the county judge of the county court of the county from which the said cause was removed; which account shall be paid in the same manner as accounts for the safe keeping of prisoners in article 1151 of this Code. [Id.]

Art. 1154. [1109] **Fees of county judge.**—There shall be paid to the county judge by the county, the sum of three dollars for each criminal action tried and finally disposed of before him. [Acts of 1879, Ex. Ses., ch. 44.]

Art. 1155. [1110] **How collected.**—The county judge shall present to the commissioners' court of his county, at a regular term thereof, an account, in writing, specifying each criminal action in which he claims the fee allowed by the preceding article; which account shall be certified to be correct by such judge, and the same shall be filed with the clerk of the county court. The commissioners' court shall approve such account for such amount as they may find to be correct, and order a draft to be issued upon the county treasurer in favor of such judge for the amount so approved. [Id.]

Art. 1156. [1111] **Fee of justice for holding an inquest.**—A justice of the peace shall be entitled, for business connected with an inquest on a dead body, including certifying and returning the proceeding to the proper court, the sum of five dollars, to be paid by the county; provided, that when an inquest is held over the dead body of a state penitentiary convict, the state shall pay the inquest fees allowed by law of all officers, upon the approval of the account therefor by the county commissioners' court of the county in which the inquest may be held and the superintendent of penitentiaries; and provided, further, that no inquest shall be held on the dead body of a state penitentiary convict if said convict died from disease and was attended by a regular physician, and a certificate by said physician showing said facts be filed in the office of the county judge of the county in which said convict died and in the office of the superintendent of penitentiaries. [Act Aug. 23, 1876, p. 291, § 12; amended by Act March 31, 1883, p. 39.]

Art. 1157. [1112] **Commissioners' court shall act upon account.**—The officer or officers claiming pay for services mentioned in the preceding article

shall present to the commissioners' court of the county, at a regular term of such court, an account therefor, verified by the affidavit of such claimant; and, if such account be found correct, the court shall order a draft to issue upon the county treasurer in favor of such claimant for the amount due him; and such account shall be filed and safely kept in the office of the clerk of the county court.

Art. 1158. [1113] **Pay of petit jurors.**—Each juror who serves in the trial of any criminal case in any court having criminal jurisdiction, or who has been sworn as a juror for the term or week, shall receive two dollars for each day and for each fraction of a day he may serve or attend as such juror; provided, that this provision shall not extend to mayors' and recorders' courts taking cognizance of offenses against municipal ordinances; provided, further, that jurors in justices' courts who serve in the trial of criminal cases in such courts shall receive fifty cents in each case they may sit as jurors; provided, that no juror in such courts shall receive more than one dollar for each day or fraction of a day he may serve as such juror. [Act Feb. 21, 1879; amended by Act March 15, 1881, p. 32.]

Art. 1159. [1114] **If not sworn, not entitled to pay.**—A person who has been summoned and who attends as a juror, but who has not been sworn as such in a case, or for the term or week, shall not receive pay as a juror.

Art. 1160. [1115] **Pay of grand jurors.**—Grand jurors shall each receive two dollars per day for each day, and for each fraction of a day that they may serve as such. [Act Feb. 16, 1883, p. 11, amending Revised Code.]

Art. 1161. [1116] **Pay of bailiffs.**—Bailiffs for the grand jury shall receive such pay for their services as may be determined by the district court of the county where the service is rendered; and the order of the court in relation thereto shall be entered upon the minutes, stating the name of the bailiff, the service rendered by him, and the amount of pay allowed therefor; provided, the pay shall not exceed two dollars and fifty cents per day for riding bailiffs during the time they ride, and not exceed one dollar and fifty cents per day for other bailiffs; and provided, further, that the deputy sheriff shall not receive pay as bailiff.

Art. 1162. [1117] **Certificates for pay of jurors and bailiffs.**—The amount due jorors and bailiffs shall be paid by the county treasurer, upon the certificate of the clerk of the court in which such service was rendered, or of the justice of the peace, mayor or recorder in which such service was rendered; which certificate shall state the service, when rendered, by whom rendered, and the amount due therefor.

Art. 1163. [1118] **Drafts and certificates receivable for county taxes.**—Drafts drawn and certificates issued under the provisions of this chapter shall, without further action or acceptance by any authority, except registration by the county treasurer, be receivable at par for all county taxes. The same may be transferred by delivery; and no ordinance, rule or regulation made by the commissioners' court or other officer or officers of a county shall defeat the right of a holder of any such draft or certificate to pay county taxes therewith. [O. C. 968.]

CHAPTER FOUR.

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1. IN THE COURT OF CRIMINAL APPEALS.

Article 1164. [1119] **Fees of attorney general in misdemeanor cases.**—The attorney general shall, in every conviction of offenses against the penal laws in cases of misdemeanors, when the judgment of the court below is affirmed by the court of criminal appeals, or the appeal is dismissed by said court, receive the sum of ten dollars. [Acts 22d Leg., ch. 16, § 63.]

Construed. The attorney general is entitled to his fee of ten dollars for each defendant whose conviction is affirmed though they were convicted jointly. Hogg v State, 40 T. Cr. R., 109, 48 S. W. R., 580; Arbuthnot v State. 38 Id., 509, 34 S. W. R., 629.

Art. 1165. [1120] **Clerk allowed fees not to exceed $2500 per annum.**—The clerk of the court of criminal appeals shall, in every case where the judgment is affirmed, receive the sum of ten dollars; provided, the entire sum such clerk shall receive as compensation for his services shall not exceed two thousand and five hundred dollars per annum; and any sum over and above that shall be paid by him to the treasury of the state, under such rules as may be prescribed by the comptroller, to be approved by the judges of the criminal court of appeals. [Id., § 64.]

Construed. The clerk of the court of criminal appeals is entitled to his fee for each defendant whose sentence is affirmed, though the same judgment included fines against several defendants. Hogg v State, 40 T. Cr. R., 109, 48 S. W. R., 580; Benson v. State, 39 Id., 56, 44 S. W. R., 167, citing Arbuthnot v. State, 33 Id., 509, 34 S. W. R., 629.

Art. 1166. [1121] **Shall be taxed against defendant.**—The fees named in the preceding sections shall be taxed against the defendant and collected as in other cases.

Arbuthnot v State, 38 T. Cr. R., 509, 34 S. W. R., 629.

Art. 1167. [1122] **Costs when taxed against defendants.**—In every state case of a less grade than felony, in which an appeal is taken to the court of criminal appeals, and the judgment of the court below is affirmed against

the defendant, all fees due the clerk of said court in such case shall be adjudged against the defendant, for which execution shall issue as in other cases of appeal to the court of criminal appeals. Should such case be reversed by the court of criminal appeals, and a new trial be had in the court below, and the defendant convicted, then the costs aforesaid in favor of the clerk of the court of criminal appeals shall be taxed by the court below against the defendant; and a certified copy of said bill of costs by the clerk of the court of criminal appeals filed in the court below shall be sufficient to require said costs to be taxed and collected as other costs against the defendant in the court below. [Id., § 21.]

Benson v State, 39 T. Cr. R., 56, 44 S. W. R., 167, citing Arbuthnot v State, 38 Id., 509, 34 S. W. R., 629.

2. IN THE DISTRICT AND COUNTY COURTS.

Art. 1168. [1123] **Fees of district and county attorneys.**—District and county attorneys shall be allowed the following fees, to be taxed against the defendant:

For every conviction under the laws against gaming when no appeal is taken, or when, on appeal, the judgment is affirmed, fifteen dollars.

For every other conviction in cases of misdemeanor, where no appeal is taken, or where, on appeal, the judgment is affirmed, ten dollars. [Act Aug. 23, 1876, p. 284, § 7.]

Art. 1169. **Fee of county attorney in local option cases.**—In all prosecutions for violation of the local option laws of this state, the county attorney shall receive a fee of twenty dollars in each case in which a plea of not guilty is entered, and final conviction had; and, in all cases where plea of guilty is entered by defendant, the county attorney shall receive a fee of ten dollars in each case, all such fees to be taxed as costs and paid by the defendant. [Act 1903, p. 110.]

Art. 1170. [1124] **In case of joint defendants.**—Where there are several defendants in a case, and they are tried together, but one fee shall be allowed and taxed in the case for the district or county attorney; but, where the defendants sever and are tried separately, a fee shall be allowed and taxed for each trial.

Art. 1171. [1125] **Attorney appointed entitled to the fee.**—When an attorney is appointed by the court to represent the state in the absence of the district or county attorney, the attorney so appointed shall be entitled to the fee allowed by law to the district or county attorney.

Art. 1172. [1126] **Fees of district and county clerks.**—The following fees shall be allowed the clerks of the district and county courts:

1. For issuing each capias or other original writ, seventy-five cents.
2. For entering each appearance, fifteen cents.
3. For docketing cause, to be charged but once, twenty-five cents.
4. For swearing and impaneling a jury, and receiving and recording the verdict, fifty cents.
5. For swearing each witness, ten cents.
6. For issuing each subpoena, twenty-five cents.
7. For each additional name inserted therein, fifteen cents.
8. For issuing each attachment, fifty cents.
9. For entering each order not otherwise provided for, fifty cents.
10. For filing each paper, ten cents.
11. For entering judgment, fifty cents.
12. For entering each continuance, twenty-five cents.
13. For entering each motion or rule, ten cents.

14. For entering each recognizance, fifty cents.
15. For entering each indictment or information, ten cents.
16. For each commitment, one dollar.
17. For each transcript on appeal, for each one hundred words, ten cents.

[Act Aug. 23, 1876, p. 289, § 10.]

Art. 1173. [1127] **Fees of sheriff and other peace officers.**—The following fees shall be allowed the sheriff, or other peace officer performing the same services, in misdemeanor cases, to be taxed against the defendant on conviction:

1. For executing each warrant of arrest or capias, or making arrest without warrant, one dollar.
2. For summoning each witness, fifty cents.
3. For serving any writ not otherwise provided for, one dollar.
4. For taking and approving each bond and returning the same to the court house, when necessary, one dollar.
5. For each commitment or release, one dollar.
6. Jury fee in each case actually tried by jury, fifty cents.
7. For attending a prisoner on habeas corpus, when such prisoner, upon a hearing, has been remanded to custody or held to bail, for each day's attendance, two dollars.
8. For conveying a witness attached by him to any court out of his county, his actual necessary expenses by the nearest practicable public conveyance, the amount to be stated by said officer, under oath, and approved by the judge of the court from which the attachment issued.
9. For conveying a prisoner after conviction to the county jail, for each mile, going and coming, by the nearest practicable route, by private conveyance, ten cents a mile, or by railway, seven and one-half cents a mile.
10. For conveying a prisoner arrested on a warrant or capias issued from another county to the court or jail of the county from which the process was issued, for each mile traveled, going and coming, by the nearest practicable route, twelve and a half cents.
11. For each mile he may be compelled to travel in executing criminal process and summoning or attaching witnesses, five cents. For traveling in the service of process not otherwise provided for, the sum of five cents for each mile going and returning. If two or more persons are mentioned in the same writ, or two or more writs in the same case, he shall charge for the distance actually and necessarily traveled in the execution of the same.

[Id., § 11; amend. 1895, p. 182.]

Art. 1174. **Fees of sheriff and other officers in lunacy cases.**—In judicial proceedings in cases of lunacy, in each case, the sheriff and county clerk shall be allowed the same fees as are now allowed said officers for similar services in misdemeanor criminal cases; the county attorney shall be allowed a fee of five dollars; provided, that such fees shall be allowed only when a conviction is obtained, said costs to be paid out of the estate of the defendant, if he shall have an estate sufficient therefor; otherwise said costs shall be paid out of the county treasury; and the jurors in such cases shall be allowed fifty cents each, to be paid out of the county treasury. Justices of the peace who may take complaints, issue warrants and subpoenas in such lunacy cases, shall receive the same fees as are now allowed them by law for taking complaints, issuing warrants and subpoenas in criminal misdemeanor cases. Constables shall receive, for executing warrants and serving subpoenas in lunacy cases, the same fees as are now allowed them by law for similar services in criminal misdemeanor cases; such fees to be paid, upon conviction, out of the estate of the defendant, if he shall have an estate sufficient therefor; otherwise the same shall be paid by the county, upon an account approved by the county judge. [Act 1903, p. 110.]

3. IN JUSTICES', MAYORS' AND RECORDERS' COURTS.

Art. 1175. [1128] **Fees of justices, mayors and recorders.**—Justices of the the peace, mayors and recorders shall receive the following fees in criminal actions tried before them, to be collected of the defendant in case of his conviction:

1. For each warrant, seventy-five cents.
2. For each bond taken, fifty cents.
3. For each subpoena for one witness, twenty-five cents.
4. For each additional name inserted therein, ten cents.
5. For docketing each case, ten cents.
6. For each continuance, twenty cents.
7. For swearing each witness in court, ten cents.
8. For administering any other oath or affirmation without a certificate, ten cents.
9. For administering an oath or affirmation with a certificate thereof, twenty-five cents.
10. Jury fee where a case is tried by jury, fifty cents.
11. For each order in a case, twenty-five cents.
12. For each final judgment, fifty cents.
13. For each application for a new trial with the final judgment thereon, fifty cents.
14. For each commitment, one dollar.
15. For each execution, one dollar.
16. For making out and certifying the entries on his docket, and filing the same with the original papers of the cause, in each case of appeal, one dollar and fifty cents.
17. For taxing costs, including copy thereof, ten cents.
18. For taking down the testimony of witnesses, swearing them, taking the voluntary statement of the accused, certifying and returning the same to the proper court in examination for offenses, for each one hundred words, twenty cents. [Id., § 12.]

Art. 1176. [1129] **Fees of constables and other peace officers.**—Constables, marshals or other peace officers who execute process, and perform services for justices, mayors and recorders, in criminal actions, shall receive the same fees allowed to sheriffs for the same services.

Art. 1177. [1130] **Fees of state's attorney.**—The attorney who represents the state in a criminal action in a justice's, mayor's or recorder's court shall receive, for each conviction where no appeal is taken, or where, upon appeal, the judgment is affirmed, ten dollars, unless otherwise provided by the ordinance of any incorporated city or town.

Art. 1178. **Fees of county attorneys representing state in corporation courts.**—That county attorneys who, in cities of over thirty thousand and under forty thousand population, according to last United States census, represent the state in misdemeanor cases in the corporation courts thereof, shall receive for such services the same fees as are now provided for by law for similar services in justice courts; and in no case shall there be charged more than one fee, as provided by law. [Act 1907, p. 177.]

Constitutional law. When a statute can be sustained as a local or special law, the court will not inquire whether such a statute, treated as a general law, is constitutional, upholding this article. Cravens v. State, 57 T. Cr. R., 135, 122 S. W. R., 29.

Art. 1179. [1131] **In case of several defendants, and where defendant pleads guilty.**—Where several defendants are prosecuted jointly, and do not sever on trial, but one attorney's fee shall be allowed; and where a de-

fendant pleads guilty to a charge before a justice, mayor or recorder, the fee allowed the attorney representing the state shall be five dollars.

Art. 1180. [1132] **No fee allowed attorney, etc.**—No fee shall be allowed a district or county attorney in any case where he is not present and representing the state, upon the trial thereof, unless he has taken some action therein for the state, or is present and ready to represent the state at each regular term of the court in which such criminal action is pending; provided, however, that when pleas of guilty are entertained and accepted in any justice court, at any other time than the regular term thereof, the county attorney shall receive the sum of five dollars; and in no case shall the county attorney, in consideration of a plea of guilty, remit any part of his lawful fee. [Amended, Act 1903, p. 219.]

Art. 1181. **Fees of justice of the peace sitting as examining court in misdemeanor case.**—That in all cases where justices of the peace shall sit as an examining court in misdemeanor cases, they shall be entitled to the same fees allowed by law for similar services in the trial of misdemeanor cases, to justices of the peace, to be paid by the defendant in case of final conviction; provided, he shall never receive more than three dollars in any one case. [Act 1907, p. 215.]

Art. 1182. **Fees of sheriff and other officers in such examining court.**—Sheriffs and constables serving process and attending any examining court in the examination of any misdemeanor case, shall be entitled to such fees as are allowed by law for similar services in the trial of misdemeanor cases, to be paid by the defendant in case of final conviction; provided, he shall never receive more than three dollars in any one case. [Id., p. 215.]

4. JURY AND TRIAL FEES.

Art. 1183. [1133] **In district and county courts.**—In each criminal action tried by a jury in the district or county court, when the defendant is convicted, there shall be taxed in the bill of costs against him a jury fee of five dollars.

Art. 1184. [1134] **Trial fee in county courts.**—In each case of conviction in a criminal action tried in the county court, whether tried by a jury or by the judge, there shall be taxed in the bill of costs against the defendant, or against all defendants where several are tried jointly, a trial fee of five dollars, the same to be collected and paid into the county treasury in the same manner as is provided in the case of a jury fee.

Art. 1185. [1135] **Jury fees in justices', mayors' and recorders' courts.**—In each criminal action tried by a jury in a justice's, mayor's or recorder's court, when the defendant is convicted, there shall be taxed in the bill of costs against him a jury fee of three dollars, unless otherwise provided by the ordinances of any incorporated city or town.

Art. 1186. [1136] **Where there are several defendants.**—Where there are several defendants tried jointly, only one jury fee shall be taxed against them; but, where they sever and are tried separately, a jury fee shall be taxed in each trial.

Art. 1187. [1137] **Jury fees collected as other costs, etc.**—Jury fees shall be collected as other costs in a case, and the officer collecting the same shall forthwith pay the amount collected to the county treasurer of the county where the conviction was had.

5. WITNESS FEES.

Art. 1188. [1138] **Fees of witnesses in criminal cases.**—Witnesses in criminal cases shall be allowed one dollar and fifty cents a day for each day

they are in attendance upon the court, and six cents for each mile they may travel in going to or returning from the place of trial. [O. C. 454.]

Art. 1189. [1139] **Shall be taxed against defendant, upon, etc.**—Upon conviction, in all cases, the costs accruing from the attendance of witnesses shall be taxed against the defendant, upon the affidavit in writing of such witness, or of some credible person, stating the number of days that such witness has attended upon the court in the case, and the number of miles he has traveled in going to and returning from the place of trial; which affidavit shall be filed among the papers in the case. [O. C. 457.]

Construed. To recover his fees as part of the costs in the case, the witness must have been subpoenaed or attached in the case, and he must prove up his attendance by an affidavit in writing. Stewart v. State, 38 T. Cr. R., 627, 44 S. W. R., 505.

Art. 1190. [1140] **No fees allowed, unless, etc.**—No fees shall be allowed to a person as witness fees, unless such person has been subpoenaed, attached or recognized as a witness in the case.

Art. 1191. [1141] **Clerk, etc., shall keep book in which shall be entered, etc.**—Each clerk of the district and county court, and each justice of the peace, mayor and recorder, shall keep a book, in which shall be entered the number and style of each criminal action in their respective courts, and the name of each witness subpoenaed, attached or recognized to testify therein, showing whether on the part of the state or the defendant.

Art. 1192. [1142] **Witness liable for costs, when.**—In all criminal cases where a witness has been subpoenaed and fails to attend, he shall be liable for the costs of an attachment, unless good cause be shown to the court or magistrate why he failed to obey the subpoena. [O. C. 979.]

TITLE 16.

COMMISSIONS ON MONEY COLLECTED.

Commissions allowed district and county attorneys ..... Article 1193
Commissions allowed sheriff or other officer ..... Article 1194

Article 1193. [1143] **Commissions allowed district and county attorneys.**—The district or county attorney shall be entitled to ten per cent on all fines, forfeitures or moneys collected for the state or county, upon judgments recovered by him; and the clerk of the court in which such judgments are rendered shall be entitled to five per cent of the amount of said judgments, to be paid out of the amount when collected. [Acts of 1879, ch. 126, p. 133.]

Construed. Interpreting the words "judgments recovered," held, this article applies to scire facias cases on forfeited bail bonds or recognizances; it does not apply to or provide for, clerks in civil cases. State v. Norrell, 53 T., 427.

Unless collections are made on adjudged forfeitures, no right to commissions accrue to district or county attorneys, nor is the attorney entitled to commissions when the governor remits the forfeiture. State v. Dyches, 28 T., 536; Smith v. State, 26 T. Cr. R., 49, 9 S. W. R., 274.

Art. 1194. [1144] **Commissions allowed sheriff or other officer.**—The sheriff or other officer who collects money for the state or county, under any of the provisions of this Code, except jury fees, shall be entitled to retain five per cent thereof when collected. [Act Aug. 23, 1876, p. 287, § 7; Acts 21st Leg., April 2, 1889, ch. 85, p. 95, § 12; Id., § 14.]

TITLE 17.

STATE INSTITUTION FOR THE TRAINING OF JUVENILES.—DELINQUENT CHILD.

Article
Male juveniles under the age of sixteen when indicted for felony, proceedings under; when convicted sentenced to state institution for the training of juveniles 1195
Escape from state institution for the training of juveniles, duty of sheriff or peace officer 1196
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STATE INSTITUTION FOR THE TRAINING OF JUVENILES.

Article 1195. **Male juvenile under the age of sixteen when indicted for felony, proceedings under; when convicted, sentenced to state institution for the training of juveniles.**—When an indictment is returned by the grand jury of any county charging any male juvenile under age of sixteen years with a felony, the parent, guardian, attorney or next friend of said juvenile, or said juvenile himself, may file a sworn statement in court, setting forth the age of such juvenile, at any time before announcement of ready for trial is made in the case. When such statement is filed, the judge of said court shall hear evidence on the question of the age of the defendant; and, if he be satisfied from the evidence that said juvenile is less than sixteen years of age, said judge shall have authority to order such prosecution dismissed, and to order such juvenile turned over to the juvenile court of said county, if there be any such court in said county in which cases arising under the juvenile court laws are tried, through agreement of the judges of the district and county courts of said county, to be tried in said juvenile court in the manner prescribed by law for the trial of such juveniles in such cases; or the judge of the district court may, in his discretion, proceed to try said cause as provided by law. If said juvenile be convicted, and the verdict of conviction is for confinement for five years or less, the judgment and sentence of the court shall be that the defendant be confined in the state institution for the training of juveniles, instead of the penitentiary, for the term of his sentence, and that such defendant be conveyed to the state institution for the training of juveniles by the sheriff or any peace officer designated by the court, and there confined for the period of his sentence; provided, that such conviction and serving of sentence shall not deprive such defendant of any of his rights of citizenship when he shall become of legal age. If the verdict of the jury be for confinement for a longer period than five years, the defendant shall be confined in the penitentiary as now provided by law for persons convicted of a felony. Provided, that the age of the defendant shall not be admitted by the attorney representing the state, but shall be proved to the satisfaction of the court by full and sufficient evidence that the defendant is less than sixteen years of age, before the judgment of commitment to said institution shall be entered. The officer conveying any defendant to said institution shall be paid by the county in which said conviction is rendered the actual traveling expenses of said officer and defendant, and five dollars additional; provided, further, that nothing in this act shall be held to affect, modify or vitiate

any judgment heretofore entered confining any defendant to the house of correction and reformatory; but the unexpired portion of any such judgment shall be fulfilled by the confinement of any such defendant in the state institution for the training of juveniles. [Act 1909, p. 100.]

Construed. Under this article, a felony convict, if over sixteen years old, would not be entitled to confinement in the state institution for the training of juveniles, but must be confined in the penitentiary. Munger v. State, 57 T. Cr. R., 384, 122 S. W. R., 874.

Art. 1196. [1146] **Escape from state institution for the training of juveniles, duty of sheriff or peace officer.**—If any person confined in the state institution for the training of juveniles, after judgment of conviction for a felony, shall escape therefrom, it shall be the duty of any sheriff or peace officer to apprehend and detain him, and report the same to the superintendent of said institution; and they shall be returned by said sheriff or other peace officer to said institution, and the cost of said return shall be paid by the state on warrant of the comptroller, based upon the sworn itemized account of such officer, approved by the superintendent of said institution; said costs to be paid out of any fund appropriated by the legislature, from time to time, for the apprehension and return of escaped convicts. [Id., p. 101.]

DELINQUENT CHILD, TO REGULATE THE CONTROL AND TREATMENT OF SAME.

Art. 1197. **"Delinquent child" defined.**—The words, "delinquent child," shall include any child under sixteen years of age, who violates any laws of this state, or any city ordinance, or who is incorrigible, or who knowingly associates with thieves, vicious or immoral persons, or who knowingly visits a house of ill repute, or who knowingly patronizes or visits any place where any gambling device is or shall be operated, or who patronizes any saloon or place where any intoxicating liquors are sold, or who wanders about the streets in the night time without being on any business or occupation, or who habitually wanders about any railroad yards or tracks, or who habitually jumps on or off of any moving train or enters any car or engine without lawful authority, or who habitually uses vile, obscene, vulgar, profane or indecent language, or who is guilty of immoral conduct in any public place. Any child committing any of the acts herein mentioned shall be deemed a "delinquent child," and shall be proceeded against as such, in the manner hereinafter provided. A disposition of any child under this law, or any evidence given in such case, shall not, in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases against the same child under this law. [Act 1907, p. 137.]

Art. 1198. **County and district courts; jurisdiction of; called juvenile courts.**—The county and district courts of the several counties of this state shall have jurisdiction in all cases coming within the terms and provisions of this law. In all trials under this act, any person interested therein may demand a jury, or the judge, of his own motion, may order a jury to try the case. The findings of the court shall be entered in a book to be kept for that purpose, known as the "juvenile record;" and the court, when disposing of cases under this law, may for convenience be called the "juvenile court." [Id., p. 138.]

Art. 1199. **Proceedings commenced by sworn complaint.**—All proceedings under this act shall be begun by sworn complaint and information filed by the county attorney as in other cases under the laws of this state. In any such complaint and information filed under this act, the act or acts claimed to have been committed by the child proceeded against shall, in a general way, be stated therein as constituting such child a "delinquent child." [Id., p. 138.]

Art. 1200. **Upon filing of complaint, proceedings under.**—Upon filing of

complaint under this law, warrant or capias may issue as in other cases, but no incarceration of the child proceeded against thereunder shall be made or had, unless, in the opinion of the judge of the court, or, in the absence of the judge, then, in the opinion of the sheriff or other officer executing the writ, it shall be necessary to insure the attendance of such child in court at such time as shall be required. In order to avoid such incarceration, it shall be the duty of the sheriff or officer executing the process to serve notice of the proceedings upon the parent or parents of the child, if living and known, or upon the child's legal guardian, or upon any person with whom the child at the time may be living; and the sheriff or officer executing the process may accept the verbal or written promise of such person so notified, or of any other proper person, to be responsible for the presence of such child at the hearing of such case, or at any other time to which the same may be adjourned or continued by the court. In case such child shall fail to appear at such time or times as the court may require, the person or persons responsible for its appearance, as herein provided for, unless, in the opinion of the court, there shall be reasonable cause for such child to fail to appear as herein provided for, may be proceeded against as in cases in contempt of court, and punished accordingly; and, where any such child shall have so failed to appear, any warrant, capias or alias capias issued in such case may be executed as in other cases; provided, however, that no child within the provisions of this law shall be incarcerated in any compartment of a jail or lock-up in which persons over sixteen years of age are being kept or detained. Any such child shall also have the right to give bond or other security for its appearance at such trial of such case; and the court may appoint counsel to appear and defend on behalf of such child. [Id., p. 138.]

Art. 1201. **Courts shall, at all times, be deemed in session.**—The county and district courts of the various counties of this state shall, at all times, be deemed in session for the purpose of disposing of cases under this act; and, when any child sixteen years of age or under is arrested on any charge, with or without warrant, such child, instead of being taken before a justice of the peace or any police court, shall be taken directly before the county or district court; or, if the child should be taken before a justice of the peace or a police court, upon a complaint sworn out in such court, or for any other reason, it shall be the duty of such justice of the peace or city judge to transfer the case to said county or district court; and in any such case the court may hear and proceed to dispose of the case in the same manner as if such child had been brought before the court, upon information originally filed, as herein provided. [Id., p. 139.]

Art. 1202. **Appointment of probation officer, duty of.**—The county judges of the several counties of this state shall have authority to appoint one or more discreet persons of good moral character, who are willing to perform the services as such, to serve as probation officer during the pleasure of the court. Such probation officer or officers shall serve without compensation. If practicable, the court, or the clerk of the court, shall notify such probation officer or officers when any child is to be brought before the court; such probation officer shall have the authority, and it shall be his duty, to make investigation of all cases referred to him as such officer by the court, to be present in court, and to represent the interests of the child when the case is heard, to furnish to the court such information and assistance as the court 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. [Id., p. 139.]

Art. 1203. **In any case of delinquent child, court may do what.**—In any case of "delinquent child," coming under the provisions of this law, the court may continue the hearing from time to time, and may commit the child to the care of a probation officer or to the care or custody of any other proper per-

son, and may allow said child to remain in its own home subject to the visitation of the probation officer, or other person designated by the court, or under any other conditions that may seem proper, and be imposed by the court; or the court may cause the child to be placed in the home of a suitable family, under such conditions as may be imposed by the court, or it may authorize the child to be boarded out in some suitable family, in case provision is made by voluntary contribution or otherwise for the payment of the board of such child, until suitable provision may be made in a home without such payment; or the court may commit it to any institution in the county that may care for children, that is willing to receive it or which may be provided for by the state or county, suitable for the care of such children, willing to receive it, or of any state institution which may now or hereafter be established for boys or girls, willing to receive such child, or to any other institution in the state of Texas, for the care of such children, willing to receive it. In no case shall a child, proceeded against under the provisions of this law, be committed beyond the age of twenty-one. The order of the court committing such child to the care and custody of any person hereinbefore set out shall prescribe the length of time and the conditions of such commitment; and such order shall be, at all times, subject to change by further orders of the court with reference to said child; and the court shall have the power to change the custody of such child or to entirely discharge it from custody, whenever, in the judgment of the court, it is to the best interest of the child so to do. [Id., p. 139.]

Art. 1204. **Same subject.**—The court or judge thereof may, at any time, require any institution, association or person, to whose care any such child is committed, to make a complete report of the care, condition and progress of such child. And such court may also require of any institution or association, receiving or desiring to receive children under the provisions of this law, such reports, information and statements as the court shall deem proper for its action; and the court shall, in no case, commit a child or children to any association or institution whose standing, conduct or care of children, or ability to care for children, is not satisfactory to the court. [Id., p. 140.]

Art. 1205. **When male child under sixteen years shall commit an offense, how proceeded against.**—When any male juvenile under the age of sixteen years shall commit any offense under the laws of this state of the grade of a misdemeanor, he shall be tried in the county or district court having jurisdiction of such offense under the laws of this state. The information or indictment shall be docketed on the "juvenile record" of the "juvenile court" as provided in this law; and said trial shall be conducted in the manner and under the conditions prescribed in this law.

If said male juvenile shall be convicted, he shall be committed to the state institution for the training of juveniles for an indeterminate period of not less than two years nor more than five years. After a confinement of one year in said institution, he may be granted a leave of probation, or parole, or release, as may be determined by the superintendent of said institution and the board of trustees, under the law and the by-laws, rules and regulations governing said institution; or the judge of said court, after sentence of commitment and before its execution, if the circumstances surrounding the case warrant, may enter an order, and shall have full power to stay the execution of any such judgment, and release such juvenile on good behavior, provided in this law. Said judge shall also have full power to annul said stay of execution at any time within one year from the date of its entry, and commit such juvenile to the state institution for the training of juveniles, for the period of time, as if no stay of execution had been made.

When any district judge shall order any cause, charging any juvenile under the age of sixteen years with a felony, to be dismissed, and shall order said juvenile to be tried in any juvenile court, a copy of said indictment certified

under the seal of the district court shall be filed in said juvenile court, together with the names of all witnesses, if some other tribunal be selected to exercise such jurisdiction, as provided in this law; otherwise said district court, exercising the jurisdiction of a juvenile court, may transfer said cause to its own juvenile docket, and dispose of same as provided by law.

The judge of said juvenile court shall have a jury summoned, unless same be waived, and shall proceed forthwith to try said cause upon said certified copy of said indictment. If the defendant be adjudged guilty of the charge set forth in the indictment, said defendant shall be deemed guilty of being a delinquent child; and the judgment of the court shall be confinement in the state institution for the training of juveniles for a period of not less than two nor more than five years; and, for the purpose of such trials, jurisdiction is hereby conferred upon the county and district courts of the county in which said offense is committed, setting as juvenile courts. Provided, that the county and district judge of any county may, by agreement, select one of said courts, either district or county, in which all cases arising under the juvenile court laws of this state may be tried, and may transfer to said court all such cases arising from time to time in either of said courts to the court so selected; and, when any such court is so selected, it shall have jurisdiction to try and decide all such cases; otherwise each court, as provided in this law, may exercise such jurisdiction. In all such cases, it shall be the duty of the county attorney, under the direction of the judge of said juvenile court, to prosecute such cases without fee. [Act 1909, p. 101.]

Art. 1206. **When incorrigible boy under the age of sixteen may be committed to state institution for the training of juveniles.**—Any parent or guardian of any incorrigible boy, under the age of sixteen years, may present a petition to the judge of the juvenile court of the county of his residence, setting forth under oath the age and habits of any such boy, and praying that said boy be committed to the state institution for the training of juveniles. The court shall set the case down for hearing and will take testimony, and, if, in his judgment, the child should be committed, said judge may enter an order committing said child to said institution; provided, that the parent or guardian shall pay all necessary expenses of carrying said child to said institution, and, in addition, shall pay at least one quarter, in advance, the amount necessary for the maintenance of said child at said institution, as estimated by the superintendent of said institution. Said parent or guardian shall also deposit with the superintendent of said institution an amount sufficient to pay the fare of said child from said institution to its home; and, in event that said parent or guardian shall fail or refuse to make any subsequent quarterly payment for maintenance, in advance, said commitment shall terminate; and the superintendent of said institution shall discharge such boy, and return him to his home.

The expense of conveying all boys committed to said institution shall be paid by the county from which said commitment is made; and it shall be the duty of the sheriff, probation or any peace officer, as the court may direct, to convey all boys committed to said institution, to the said state institution for the training of juveniles; provided, that the court may send the boy to the institution without escort, if he deemed it prudent. [Id., p. 102.]

Art. 1207. **No costs or other expenses to be paid by state.**—This act shall be liberally construed, to the end that its purposes may be carried out; that is, that the interests of the child and its reformation shall at all times be the object in view of proceeding against it; provided, that no costs or expenses incurred in the enforcement of this act shall be paid by the state. [Act 1907, p. 140.]

Sec. 3. *It is provided, however, that the annotations under the several articles of the Penal Code and Code of Criminal Procedure shall not be construed to be any part of either of said Codes.*

Sec. 4. *Nothing in this act shall be construed or held to repeal, or in anywise affect, the validity of any law or act passed by this legislature in its regular session.*

THE STATE OF TEXAS,
DEPARTMENT OF STATE.

I, C. C. McDonald, Secretary of State of the State of Texas, do hereby certify that the foregoing Act entitled: "An Act to adopt and establish the 'Penal Code' and 'Code of Criminal Procedure' for the State of Texas" was presented to the Governor for his approval on March the 11th, 1911, and approved on March the 31st, 1911, and filed in the Department of State on March the 31st. 1911, and became a law ninety days after adjournment.

I further certify that I have carefully compared the foregoing with the original copy now on file in this department and the same is true and correct.

IN TESTIMONY WHEREOF I have hereunto signed my name officially and caused to be impressed hereon the seal of State at my office in the City of Austin, Texas, this the 2nd day of December, A. D. 1911.

[SEAL]

C. C. McDONALD,
Secretary of State.

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